Volume III January - December 2017

HNLU JOURNAL OF LAW & SOCIAL SCIENCES

HNLU PRESS

ABOUT HNLU PRESS

Hidayatullah National Law University is all set to launch its publications division – **'HNLU PRESS'** on Sunday 4th October, 2020. The 'HNLU PRESS' is first of its kind publication division among the law schools in the country which is dedicated to bring out Journals, Monographs, Case Law Compendiums, Audio books, Multimedia content on law, social sciences and other subjects interfacing with law. The platform will stabilize existing publications of **HNLU** and will foray into other avenues of dissemination of research materials. The **HNLU PRESS** will connect with veteran contributors as well as young talents from across the country and abroad for content. The publications will have 'Faculty Edited' and 'Student Scholar Edited' content and HNLU will be forming 'peer review editorial board' to scale up the quality and rigour of the content.

Speaking on the launch HNLU PRESS - **Prof. V. C. Vivekanandan, Vice Chancellor of HNLU** remarked, *"The research front of law schools in India require innovative invigoration to disseminate the fast-emerging Indian Jurisprudence in various branches of Law. **HNLU PRESS** is an innovative platform which will open up an avenue for young faculty, student scholars for their expressions with a professional approach and a dedicated financial outlay."*

The launch of "HNLU PRESS" will take place on Sunday, 4th October 2020 with a panel discussion titled **"Cartographing the future of Research Publication of Indian Law Schools"** to be addressed by **Honourable Justice Shri G Raghuram**, **Director of National Judicial Academy, Bhopal, Prof.(Dr.) C. Rajkumar, Vice Chancellor, Jindal Global University and Shri Sumain Malik, Founder & CEO of SCC Online and Executive Director of EBC** with **Prof. V. C Vivekanandan, Vice Chancellor of HNLU as the Discussant**. The HNLU Journal of Law and Social Sciences (HNLU JLSS) IVth and Vth edition will be launched as electronic edition during the programme.

HNLU JOURNAL OF LAW & SOCIAL SCIENCES

(HNLU JLSS)

An Annual Journal Published by

HNLU PRESS

(A Media Division of Hidayatullah National Law University)

(A UGC Approved Journal)

HIDAYATULLAH NATIONAL LAW UNIVERSITY

Raipur, Chhattisgarh

January – December, 2017 Volume: III

Mode of Citation: HNLU JLSS 2017 (III) <Page No.>

HNLU JOURNAL OF LAW & SOCIAL SCIENCES (HNLU JLSS)

The HNLU JLSS is published by Hidayatullah National Law University, Raipur, Chhattisgarh. The Journal is in the UGC Approved Journal with serial no. 41107. This journal is being published with the objective to provide a platform to judges, jurists, academicians and legal practitioners to express their views on topics of contemporary significance in law and social sciences. We solicit contributions in the form of articles, notes and case-comments on emerging areas in law and social sciences. The call for papers will be advertised in the website. However submissions received after the due date will be considered for the subsequent issues of the journal.

Rate of Subscription

Category	**Single Copy**	**Annual (2 Nos.)**
Institution	Rs. 300	Rs. 600
Individual	Rs. 250	Rs. 500
Foreign Institution	15$	30$
Individual	10$	20$

Payment for subscription should be sent by a Demand Draft issued by a Nationalized Bank drawn in favour of **"Registrar, Hidayatullah National Law University, Raipur"** and payable at Raipur.

All correspondence should be addressed to:
Registrar
Hidayatullah National Law University
Atal Nagar, Raipur, Chhattisgarh – 492002
Email: jlss@hnlu.ac.in

Printed by: THE PRINT HOUSE
H. No. 1-8-677/E/1, Padma Colony,
Nallakunta, Hyderabad-500044, India.
Tel: 040-27620747 Mobile: 9246585350
Website : www.theprintthouse.com

Printed in India

HNLU JOURNAL OF LAW AND SOCIAL SCIENCES (HNLU JLSS)

An Annual Journal Published by

HNLU PRESS

(A Media Division of Hidayatullah National Law University)
(A UGC Approved Journal)

HNLU PRESS

HIDAYATULLAH NATIONAL LAW UNIVERSITY
Raipur, Chhattisgarh
January – December, 2017 Volume: III
Mode of Citation: HNLU JLSS 2017 (III)

VICE-CHANCELLOR'S MESSAGE

It is a matter of immense pleasure to present the third volume of HNLU Journal of Law and Social Sciences (HNLUJLSS) 2017, published by Hidayatullah National Law University, Atal Nagar, Raipur, Chhattisgarh. The HNLU Journal of Law and Social Sciences is published by efficient Editorial Board comprising of dedicated faculty members of HNLU under the able guidance of renowned advisory board members.

Recently the inter-section between law and social sciences increased up to such an extent that socio-legal issues are the need of the hour. The present journal caters the same need in the form of the contributions from the academicians, advocates, research-scholars and students, not only in the field of pure law but from inter-connected academic discipline as well.

I would like to specially congratulate the authors who have contributed their research papers for this issue of 2017 and had patience for getting it published. I am sure that all the readers would surely find these articles interesting and enlighten themselves in socio-legal aspects in diversified fields. Finally, I wish the Editorial Board of the Journal all the success and hope that this Journal and other issues will satisfy the need of academic pursuits in contemporary environment.

Hon'ble Shri Justice Chandra Bhushan Bajpai
(Former Judge of the High Court of Chhattisgarh)
Vice-Chancellor
Hidayatullah National Law University
Atal Nagar, Raipur, Chhattisgarh

EDITORIAL MESSAGE

EDITORIAL MESSAGE

It is a matter of great pleasure for the Editorial Board of HNLU JLSS to introduce the third volume of the HNLU Journal of Law and Social Sciences. This issues of HNLU JLSS deals with various topics from diverse fields of law and social science field like Theories of punishment, Prison Reforms, Conjugal rights of Prisoners, Empowerment of Women, Reservation policies, Triple Talaq, Assignment of Copyright, Liability of Intermediaries, Oppression and mismanagement of Companies etc.... Such wide range of thought-provoking articles would provide a very enriching experience to readers.

The author, **Ms. Archana Chawla**, in her article titled *"Woman Empowerment*" discusses the various laws relating to rights of women in India like Hindu Succession Act 1956, Hindu Marriage Act, 1955, Domestic Violence Act, Maintenance Act, etc. and the separate personal laws exist for Hindu, Muslim , Christian, etc... She has discussed on the capability of law to bring social affirmative change in the position of women in Indian society and how these laws are an important tool for safeguards against exploitation. However, the author concludes, laws by itself cannot bring about social change and has to be accompanied by a change in the social attitude and awareness among women of the existing laws.

The author **Ms. Akansha Marwah** in her article "*Shifting of Penological Trends Towards Rehabilitation of Offender*" analyzed the various theories of punishment and the various alternatives to punishment that do not treat the criminals as nuisance and in barbaric manner but focuses on reforming them through behavioral correction. The author has focused on the judicial trend in India regarding rehabilitation and concludes on the possible correctional techniques that can be employed in making a criminal a better human being.

Ms. Anuja Misra, in her article "*Issues pertaining to Assignment of Future Works under Copyright"* has explored into the issues concerning assignment of future work. She has discussed the basic concepts of assignment and then delved into the limitations, if any, to assignment of future copyrightable works.

The author **Mr. Arvind Singh Kushwaha** in his article "*Reservation or Discrimination: The Principle of Equality*" has discussed the original intention of the Constituent Assembly in providing reservation to backward classes on Indian Society was idea to uplift the backward

classes. However, it is unknown to many that it was intended primarily for ten years only and has been amended for extension for several years. The author has argued in his article why extending the principle of reservation is leading to a direct harm to other parts of societies with help of case laws and examples from Indian scenario.

Ms. Kahkashan Jabin and co-author **Mr. Shreet Raj Jaiswal** in their article titled *"Changing Trends in Institution of Hindu Marriage -Door Towards Separation"* highlights the eternal sanctity of Hindu Marriages to preserve the rich culture and heritage which according to the authors is being deteriorating due to various reasons such as modernization, urbanization, impact of western culture etc. The authors talk about also highlights the recent emergence of certain practices which are according to authors absolutely against the antique culture and custom of Hindu Marriages i.e. Live-in- relationships and Pre-nuptial agreements which ultimately strikes the marital bond that has been given unique place in Hindu society. The views of the authors are personal but the article is an interesting perspective from the authors side.

The essay "*Position of Transgenders in India Before Recent 377 Judgment*" focuses on the position of transgenders in India before the recent 377 judgment where the SC read down Section 377 and held that consensual sexual intercourse done in private between two consenting adults is not punishable. The author of the article **Ms. Tanya Sagar** focuses on the trauma faced by the transgenders because of Section 377 before this judgment and also throws light on the need to identify them as third gender and provide them with equal rights as any other citizen of India. It also focuses on the lacuna in law as to how Section 377 is violative of fundamental right to life (Article 21).

The article "*Love-making in Confinement: A (Necessary) Right of the Incarcerated? – An Analysis of the Conjugal Rights of the Prisoners in India*" casts light on the growing awareness on the rights of the prisoners which have caused the systems of prison administration to undergo a positive change i.e. a punitive approach to a more scientific and societal approach. The author of the article, **Ms. Nimisha Priyadarshi,** observes that such an approach has brought a positive difference in the way the criminals have been treated. In the similar line, the author observes the recent trends that have culminated to such a point where a relatively new concept such as the conjugal rights of the prisoners are being debated as 'fundamental' rights. In a capsule, this paper attempts to weigh

the prospects of granting conjugal rights of the prisoners in India from a close prism.

Ms. Mehak Nayak, in her paper *"Reforms Needed in the Prisons of India*", underscores the lack of the very rudimentary necessities in Indian prisons that a convict/under-trial needs to live as s/he rehabilitates. The paper reviews laws and practices detrimental for a safe or reform-oriented ambience. The author highlights the vehement violation of the fundamental rights of the inmates, with no recourse in sight. This research thus identifies the most prevalent problems faced by Indian prisoners and proposes practical suggestions to the prison administrators so as to eventuate prospective changes for their betterment. The concluding observation of the paper is that the solutions proposed in this research article would be highly instrumental in overcoming the plights of the inmates.

Mr. Somesh Sharma and **Ms. Divya Awasthi** in their research article titled "*Gender Inequality and Personal Laws: An Unscrupulous Politics of Religion*" calls our attention to the fact that India as a socially diverse country with different religions have their own personal laws relating to marriage, divorce, adoption, succession and guardianship. The article further maintains that for centuries, women have enjoyed fewer rights than men and have been reduced to a tragic shadow of themselves. However, with the changing landscape of social, educational and political dimensions of our society, women have started questioning the status quo due to which the issue of gender justice has garnered the attention of legal and social fraternity. As a whole the paper attempts to provide some comparative glimpses of the status of women in Hindu and Muslim personal laws vis-a-vis the ongoing hubbub of unification of Personal laws.

The article *"Public Participation in the Enforcement of Environmental Laws: Issues and challenges in the light of the legal and regulatory framework with emphasis on EIAs in India"* deals with public participation in regulatory decision-making and its role in making environmental governance more robust and better informed. The author, **Ms. Priyanshi Jain**, asserts ample reasons for advocating the participatory mechanisms in environmental governance which include emphasis on participation as furthering justice and equity, ambitions to make participative or deliberative measures as supplements or alternatives to representative democracy, and enhancement of legitimacy of controversial environmental decisions that are frequently delegated to unelected experts. The paper concludes at the note calling for improvement in public

participation in Indian EIA legislation and certain issues such as the cost issue, public consultation methods, the starting time of public participation in the EIA process stages, the timeline for the public to make comments, and appeal issue to be made clear.

Dr. Deepak Kumar Srivastava and Mr. Rana Navneet Roy in their article "*The Law on Privacy in Indian Scenario*" analyze the law on privacy in Indian scenario. In the article the authors have traced the origin of law on privacy from case laws perspective in a chronological order for Indian scenario. The authors have highlighted cases specifically in relation to Domiciliary visits, Surveillance. Health information, Informed consent and Prisoners' interview vis a vis Privacy and finally concludes quoting the Supreme Court on Justice K. S. Puttaswamy case and the need for legislative intervention for ensuring privacy against State as well as non-State actors.

The article "*Understanding laws of divorce in India and Islam: The Triple Talaq*" is an analytical study of the much debated 'Triple Talaq' and its repercussions. Giving a historical introduction of the issue, the author **Dr. Ayan Hazra** and **Mr. Abhishek Bhardwaj** weave a relation among 'The Muslim Women (Protection of Right on Divorce) Act, 1986', 'The Shariat Act', 'The Muslim Women (Protection of Rights On Marriage) Bill, 2017' and 'Uniform Civil Code'. The article discusses the abuse and misuse of 'Triple Talaq' in the patriarchal social weaving, the vulnerability and triple jeopardy of divorced women and the consequent social injustice and inequality. The paper concludes with some potential prescriptions and suggestions.

In the case analysis titled "*Cyrus investments Pvt. Ltd. v. Tata Sons Case Analysis*" the author **Dr. Y. Papa Rao** deliberates the issues involved, legal framework, case laws and judgement. Starting with a brief historical backdrop and juxtaposing the arguments of both the sides, the author critically states some potential questions such as Whether Cyrus Mistry's removal as Executive Chairman of the Group Holding Company is justified?/Whether there is Oppression and Mismanagement?/Whether there is a violation of Principles of Corporate Governance? The author brings Section 169 of the Companies Act, 2013 ("2013 Act") and other allied sections and their provisions. Discussing the related case laws, he concludes with the judgement.

Dr. Kaumudhi Challa
Executive Editor
HNLU Journal of Law and Social Sciences
Atal Nagar, Raipur, Chhattisgarh

HNLU JOURNAL OF LAW AND SOCIAL SCIENCES
HNLU JLSS
Vol. III January-December 2017

CONTENTS

ARTICLES

Women Empowerment

*Archana Chawla

I. Introduction

Gender equality was accepted in principle by the framers of Indian Constitution. In 1950, the Constitution of India not only granted equal rights and opportunities to men and women in the political, economic and social spheres, but also empowered the State to adopt positive steps in favour of women. This was done to uplift the status of women and neytralise the cumulative socio-economic, educational and political disadvantages faced by women as a result of centuries of discrimination and exploitation. Women need intervention from all possible corners to get empowered. Legal intervention is one such strategy for women's-empowerment. In this paper we shall discuss some of the important, aspects of this strategy.[1]

II. Measures for Gender Equality: Global Initiatives in India

Globally the period between 1952 and 1979 can be treated as a period when several legal provisions were made to benefit women. In 1957, through Convention, nationality of a married woman irrespective of celebration or dissolution of marriage between a national and an alien, or, a change of nationality by the husband during marriage was given stability. By the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, women were empowered to give free and full consent of partner and for registration of marriage. Legislative actions were taken by various member states of United Nations to specify minimum age of marriage. Through several conventions women were empowered with rights equal to men to enjoy economic, social, cultural, civil and political rights.[2]

The Convention on the Elimination of All Forms of Discrimination Against women - [CEDAW] was adopted by the United Nation General Assembly Resolution of 18th December, 1979. This was a Comprehensive Bill of Rights for women. In brief, since 1948 / till 1979 virtually all human rights instruments have reinforced and extended protections against women's discrimination. Perhaps, the most important conceptual advance in the international law for women's empowerment is the CEDAW 1981 which provides that women be given rights equal to those of man on equal terms.[3]

---

*Research Scholar, Department of Laws, Guru Nanak Dev University, Amritsar

1 Verma, S.K. (1995) 'Gender Equality: Theory and Practise in India' in J.L. Kaul (ed.) Human Rights. Regency Publications: New Delhi, p. 11.

2 See Article 3 of International Covenant on Economic, Social and Cultural Rights, 1966.

3 Chanana, K. (ed.) 1988. Socialisation, Education and Women. New Delhi: Orient Longman, p. 21.

The Fourth World Conference on Women, held in 1995 at Beijing, reaffirmed gender equality as a fundamental prerequisite for social justice. The platform for Action at the Beijing Conference addressed 11 substantive areas of concern, viz., poverty, education, health, violence, armed conflict, economic structures and policies, decision making, mechanisms for the achievements of women's human rights, mass media and the environment. The Conference also attempted to strike a balance between local customs, traditions and cultures of the society.[4]

III. Measures of Legal Intervention

The Preamble of the Constitution of India proclaims that 'WE THE PEOPLE' gave to ourselves a Constitution which guarantees Justice, Social, Economic and Political, Liberty, Equality, Fraternity to all its citizens. Men and women are treated as citizens of our Country.

1. The Constitutional Guarantees

Our Constitution, under Article 14, confers on all men and women equality before law, or equal protection of laws by way of equal rights and opportunities in every sphere. Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Article I 5[3] makers a special provision enabling the State to make affirmative discrimination in favour of women. Article 16 also provides equality of opportunity for all citizens in matters of public appointments. Similarly Article 19,21,32, and 38 contribute equal rights to men and women both in matters of freedom of speech, protection of life and personal liberty, remedies for enforcement of fundamental rights, to secure a social order for the promotion of welfare of people respectively. Further Article 39 (A) lays down that the state shall direct its policy towards securing all citizen, men and women, equally, the right to means of livelihood; while Article 39 (d) advocates for equal pay for equal work for both men and women. Article 42 directs the state to make provisions for securing just and human conditions of work and maternity relief. Above all, the constitution imposes a fundamental duty on every citizen through Article 51 (A) (e) to renounce the practices derogatory to the dignity of women. Despite the fact that several provisions are made under the constitution for women's empowerment, there has not been much of a change in the status of women in India. The question after arises as to whether women have been able to reap the said benefits? The answer unfortunately is not heartening. There is still a long way to go to achieve the goals.[5]

---

4 Bhasin, Kamla. 1992. Education for Women's Empowerment: Some Reflections. Adult Educational Development, March, Number 38, p. 40.

5 Preamble, Article 14, 15, 16, 19, 21, 32, 38, 39 (Q), 39(d) and Article 51(A) (e) of the Constitutional Law of India.

Within the framework of Constitution, the Parliament and State legislatures have enacted many women specific and women related legislation to protect women against social discrimination, violence, atrocities and have tried to make them powerful to fight their own battle. Within the periphery of the Constitution, regal system has tried to strengthen the women and to provide them adequate civil and criminal remedies against the cruelty and violence of all kinds.[6]

2. Criminal Laws

There are several criminal laws in India. In this section we shall discuss only a few of them.

2.1 IPC Dealing with Crime Relating to Birth

In our society being a girl is still a stigma on the family and on the girl herself. Through sex determination test female foetus is aborted, sometimes even without taking the consent of the mother. Certain civil and criminal laws have been framed to combat this. Section 312 to Section 318 of Indian Penal Code (IPC) deal with offences affecting the woman's body. Voluntary causing a woman with child to miscarry, causing death by act done with intent to cause miscarriage; any act done with intent to prevent child being born alive or to cause it to die after birth; exposure and abandonment of child under 12 years by parent or person having care of it and concealment of birth by secret disposal of dead body, with or without the consent of women, are criminal offences punishable by three years imprisonment to life imprisonment with the fine depending upon the nature of the crime.[7]

2.2 **Medical Termination of Pregnancy Act, 1971**, has been framed to avoid wastage of mother's health, strength, and some times, life. Similarly the Pre-natal Diagnostic Techniques Regulation and Prevention of Misuse] Act 1994 has been framed to regulate the use of pre-natal diagnostic techniques and for the prevention of misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide.[8]

2.3 Indecent Representation of Women

The legislature vide sections 292, 292A, 293 and 294 in IPC has tried to save a women's delicacy, purity and decency by putting restrictions on sale, distribution, etc. of obscene books, papers, drawings, etc. These offences are cognizable and non-bailable offences

---

6 Mathew, P.D. and P.M. Bakshi (1998) Women and the Constitution. Legal Education Series. Indian Social Institute: New Delhi, pp. 32-33.

7 See 312 - Sec. 318 of Indian Penal Code, 1860.

8 Saxena, Shobha (1995) Crime Against Women and Protection Laws. Deep and Deep Publications: New Delhi, p. 31.

followed by imprisonment and fines. An act to this effect, that is, Indecent Representation of Women, (Prohibition) Act, 1986 has also been enacted to prohibit indecent representation of women.[9]

2.4 Sexual Offences

Indian Penal Code intervenes for women's empowerment by dealing with sexual offences in sections 375,376 and 377 of IPC. Under section 375 IPC, a man is said to have committed rape when he has sexual intercourse with a women against her will or without her consent or with her consent by putting her in fear of death or with consent with a man who knows that he is not her husband or if she is below 16 years of age or with her consent but when she was of unsound mind or intoxicated. In **Bodhi Sattwa Gautam Vs. Subhra Chakraborty**[10], the apex court has held that rape is a crime against the entire society It destroys the entire psychology bf a woman and pushes her into deep emotional crisis. Burden of proof is on the accused. Though the concept of marital rape does not exist in a sense, Section 376-A, 376-B and 376-C deals with it and says that a intercourse by a man with his wife who is below fifteen years of age would amount to rape. It would also amount to rape if during the separation from his wife a man has done intercourse with the wife without her consent. Similarly custodial rapes or in a remand home where the woman was in custody are also covered by the aforesaid sections of IPC. Intercourse by any member of the management or staff of a hospital with any woman. in that hospital is dealt with under section 376-D of IPC. Initially the scope of Section 376-D (D) IPC was very narrow as it was confined to sexual intercourse in the hospital only. In **Vishaka-Vs- State of Rajasthan**[11], the Supreme Court has held that women have rights to gender equality to work with dignity and to a working environment safe and protected from sexual harassment or abuse. The scope of these sections has been widened to the extent that in the absence of enacted laws to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse more particularly at work places, the apex court has framed guidelines and norms to strict observance at all work places or other institutions until a legislation is enacted for that purposes. In **Delhi Domestic Working Women's Forum Vs. Union of India and other**[12], the Supreme Court has held that Courts have power to grant compensation in addition to the main penalty in cases where loss, injury or damage has resulted.

9 Sec 292, 292A, 293 and Sec 294 of Indian Penal Code,1860.

10 (1996) 1 SCC 490.

11 (1977) 6 SCC 24.

12 J.T. (1994) 7 SCC 183.

2.5 Outraging the Modesty of Women

The female child is vulnerable to abuse especially in her own home. The IPC, under section 354, makes assault or abuses of criminal force to any women intending to outrage her modesty to be a crime and awards punishment with imprisonment of either description, for a term which may extend to two years or fine or both. The term woman in section 354 would include a female human being of any age. In the **State of Punjab Vs. Major Singh,**[13] where a seven and a half months old female child was sexually abused, the court observed that the essence of a woman's modesty is her sex. The modesty of an adult female is on her body. Whatever a woman may be, she possesses a modesty capable of being outraged and whosoever criminal forces used by a person on her with intent to outrage her modesty, he commits an offence punishable under section.

2.6 Dowry Death

In the last few years dowry death escalated to a large number to the extent that the earlier laws were not sufficient to check dowry deaths. That is why the legislature in 1996 introduced stringent law viz. Section 304-8 IPC and Section 113-B by amending IPC and The Evidence, Act in 1986. These provisions were introduced so that the person committing such inhuman crimes on married women cannot escape liability in the absence of any evidence. Because in this kind of crime the evidence ofa direct nature is not available. In **Sham Lal Vs. State of Haryana**[14] Court has held that primary requirements for finding the accused guilty of an offence under section 304-B IPC are that the death of the deceased was caused by burns or bodily injuries which occurred otherwise than under normal circumstances within seven years of her marriage and that soon before her death she was subjected to cruelty or harassment by the accused for or in connection with a demand for money. In the absence of any dowry demand Section 304-B cannot be attracted.

The concept of demand of dowry was introduced by an amendment to this Act in 1983. In order to invoke the legal presumption under section 113B of the Evidence Act it has to be proved that the deceased was subjected to cruelty or harassment and the offence has taken place within 7 years of marriage. As dowry death occur within four wall of the house there can be no direct evidence available for the offence of dowry death. Therefore, the courts must rely upon circumstantial evidence and infer from the material available before them. The Court in **C.V. Govindappa Vs. State of Karnataka**[15] held that conduct of husband in not trying to put o flames and not taking bet to al will be taken as

13 Air 1967, Supreme Court 63

14 (1998) 3 SCC 310

15 (1998) Case of Supreme Court

circumstances against him. The motive for murder may not exist but in dowry deaths it is inherent. It is also necessary to establish that the cruelty or harassment meted out the woman was on account of the failure on her parts to meet with the dowry demands.

In the section 498-A the legislature has tried to strengthen their hands. Now the women cat fight against the torture, cruelty, harassment, etc. faced by them earlier. The only need is to make the women educated and aware of their rights. The term cruelty includes both mental and physical cruelty. Cruelty means any willful conduct that is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb, health or to harass or coerce her or any person related to her to meet such a demand.

In the section 498-A the legislature has tried to strengthen their hands. Now the women cat fight against the torture, cruelty, harassment, etc. faced by them earlier. The only need is to make the women educated and aware of their rights. The term cruelty includes both mental and physical cruelty. Cruelty means any willful conduct that is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb, health or to harass or coerce her or any person related to her to meet such a demand.

3. Civil Laws

Civil Laws form important corner stones for the protection of ones' interest in the society. En this section we shall be dealing with some of the important civil laws focussing on the issues of women in Indian society.

3.1 The Hindu Succession Act, 1956

After independence the Indian Parliament enacted the Hindu Succession Act in 1956 'which brought a revolutionary change in the law of succession among Hindus which include Buddhists, Jams and Sikhs. Prior to this enactment a Hindu woman had no right of succession. She was the owner of her 'Stridhan' property only. The properties gifted to a Hindu woman before marriage, at the time of marriage or at the time of giving farewell or thereafter is her Stridhan properties and she is the absolute owner of that property. Protecting her absolute ownership of Stridhan properties the Succession Act, 1956 gave the Hindu woman equal rights of succession to the properties of her father and mother. She is now the absolute owner of such properties. But according to! section 6 of the Act a daughter is not a Coparcenar i.e. joint owner of the joint ancestral property. She has the right to succeed only in the share of her father in the Coparcenary property unlike the son who has the equal share by birth, i.e. equal to his father in the Coparcenary property. But two Indian States i.e. Andhra Pradesh and Tamilnadu

have already enacted the law by which the daughter also becomes Coparcenar by birth and she is the joint heir now like her brother in the joint ancestral property. The Law Commission has sent a draft bill to the Union Government to enact the law to make the daughter also a Coparcenar by birth. It is hoped that the evil of dowry may be cured to some extent after the daughter becomes a Coparcenar.[16]

3.2 The Hindu Marriage Act, 1955

The Hindu Marriage Act of 1955 codifies the law governing marriage and divorce. Before, the enactment of this Act laws and regulations regarding marriages were, based on customs and usage. There was not uniformity. There were several disputes and unanswered questions. This Act introduces the concept of monogamy. The grounds for the relief of divorce, annulment or judicial separation are the same for either spouse. A woman unable to maintain herself can sue for maintenance either under the Hindu Marriage Act or under the Hindu Adoption and Maintenance act which provide for maintenance not only of wife but also for a widowed daughter-in-law, children and aged parents.[17]

3.3 Cruelty

Cruelty interalia among others is a ground which has been developed and has been given a wide meaning by the judiciary. Most matrimonial statutes recognize cruelty as a ground for judicial separation or divorce. However, the concept of cruelty has not been defined in the matrimonial statues except the Dissolution of Muslim Marriage Act, 1939. In Parsi Marriage and Divorce Act, though cruelty has been defined and causing grievous, hurt is a ground for divorce. Cruelty simply is not sufficient as a ground for divorce ad it is necessary for the woman to prove adultery in addition to cruelty. Further, the meaning of cruelty differs in various personal laws depending upon the religion of the parties.[18] But over the year, various acts have been held to amount to cruelty over the years. Some of them are as follows:

i. Refusal of the spouse to have sexual intercourse with the other;

ii. Insistence on sexual practice which are repugnant to other spouse;

iii. Demand by a wife for separate residence;

iv. Beating, kicking, slapping or punching of a spouse;

---

16 See 6 of Hindu Succession Act, 1956.

17 Abraham Ammu, 1990 "Personal Law in India", Women's Liberation and Politics of Religious Personal Laws in India. C.O. Shah Memorial Trust Publication (16) Bombay, p. 23.

18 Saxena, Shobha, 1995 Crime Against Women and Protection Laws. New Delhi. Deep and Deep Publications, p. 51.

v. Constant quarrelling and nagging;

vi. Adultery;

vii. Dowry demands after marriage; and

viii. Irretrievable marriage.

3.4 Domestic Violence

The concept of Domestic Violence is emerging and taking its shape to strengthen and empower the women. The need to recognize 'domestic' violence and to enact a bill against domestic violence had been felt from all corners of the society, national or international. It claims victims from diverse social, economic, cultural, ethnic and religious backgrounds including children and elders. Moreover majority of persons aggrieved by domestic violence are women and they are assaulted in their own home not only by their husbands but also by other family members, parents, brothers and relatives, etc. Further, domestic violence is one of the greatest obstacles to gender equality and securing for women their fundamental rights to equal protection of the laws and the right to life and liberty.[19]

The difference between cruelty and domestic violence is that the concept of domestic violence is wider than cruelty to the extent that domestic violence includes cruelty. A draft bill namely Domestic Violence against Women [Prevention] Bill has been drafted and number of efforts are being done to develop this branch of law to strengthen the women.

3.5 Maintenance

Section 24 of the Hindu Marriage Act provides for maintenance for either of the parties seeking a decree of divorce or judicial separation under the said Act. However, this remedy is only available during the pendency of any proceeding under the Act and is a summary remedy. Section 25 of the Hindu Marriage Act provides for maintenance and alimony. Under section 9 of the Hindu Marriage Act, in a petition for restitution for conjugal rights, the court can make interim orders directing the husband to bear legal expenses of the wife and to pay interim maintenance. Section 125 Cr. P.C. also confers a right of maintenance to wives, children and parents but under this section the amount of maintenance cannot exceed Rs. 500/- in the whole of today.[20]

---

19 Agnes, Flavia, "Protecting Women Against Violence: Review of a Decade of Legislation, 1980-89", Economic and Political Weekly Vol. XXVII. No. 17, 25 April, 1992, pp. 30-31.

20 Sec 9, Sec. 24 and Sec 25 of Hindu Marriage Act, 1955.

3.6 Hindu Adoption and Maintenance Act, 1956

The Act provides for maintenance to be provided by a Hindu Husband to his wife in cases of desertion, cruelty, etc. The facts and circumstances which has to be taken into consideration while granting and determining the amount of maintenance have also been discussed in the Act.[21]

3.7 Hindu Minority and Guardianship Act

The provisions giving the father precedence over the mother in matters of guardianship has been whittled down by the Supreme Court in **Githa Hariharan Vs. R. B. 1. And Anr**.,[22] whereby the Supreme Court has held that the mother can also act as natural guardian of the minor during the life time of the father. When the domestic situation is not conductive to the physical or mental health of the child, a woman can act as natural guardian of the minor child.

3.8 Muslim s Women [Protection of Rights on Divorce] Act, 1986

This act enables a divorced wife to claim maintenance. But her right to claim maintenance from the husband is limited to three months after the divorce. The children are also entitled to maintenance under this Act. But the Constitutional validity of this Act is subjudice before the Supreme Court of India.[23]

3.9 Parsi Marriage and Divorce Act, 1936

This Act applies to Parsis. The grounds for divorce [S32] and judicial separation [S34] are same under this Act. Under section 32-[e], grievous hurt is also a ground for divorce. There are special Court for the purpose-of hearing suits under this Act. This Act also deals with bigamy and provides Alimony pendente-lite under section 39 and Permanent alimony under section 40. The Act provides under section 49 for the maintenance and also for the welfare of children.[24]

3.10 Special Marriage Act

Persons belonging to any community can opt to get married under this Act. Section 30 of this Act provides for divorce and cruelty that has been recognised as a ground for divorce. Section 36 and section 37 provide for maintenance pendente-lite and permanent alimony in the proceedings for restitution of conjugal rights and divorce respectively.[25]

---

21 Sec. 18 of Hindu Adoption and Maintenance Act, 1956.

22 (1999) 2 SCC 228.

23 Sec. 44 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

24 Sec. 32(3), Sec. 34, Sec. 39 and Sec. 40 of Parsi Marriage and Divorce Act, 1936.

25 Sec. 30, Sec. 36 and Sec. 37 of Special Marriage Act.

4. LAWS RELATING TO WOMEN IN EMPLOYMENT

Another important area where law could be an important tool of safeguard against exploitation of women are the laws relating to women worker.

4.1 Factories Act, 1948

The Factories Act, 1948, is also a part of this topic as it deals with health and safety aspects, welfare and working hours. Considering health aspects, the Act prohibits the employment of women near cotton openers: Section 48 speaks about the mandatory requirement of creches in a factory wherein more than 30 woman are employed. In general all the facilities given to the male are provided to female also.[26]

4.2 The Employment State Insurance Act, 1948

This Act, vide sections 49, 50 and S I strengthens women by providing certain benefits to them in case of sickness, maternity, disability and dependency.[27]

4.3 Contract Labour [Regulation and Abolition Act, 1970]

The Act also maintains equality among man and women before law without making any discrimination on basis of sex, caste, etc. and takes care of welfare, health and wages, etc. of the women.[28]

Similarly by enacting Beedi and cigar workers [Conditions of Employment] Act, 1966; Equal Remuneration Act, 1976; Plantation Labour Act, 1951; Minimum Wages Act, 1948; Maternity Benefit Act, 1961; Bonded Labour System [Abolition] Act, 1976; Interstate Migrant Workmen [Regulation of Employment and Conditions of Service] Act, 1979, the legislature has tried to strengthen the status of women.

The Commission of Sati [Prevention] Act, 1987; The Mental Health Act, 1987; and The Protection of Human Rights Act, 1993. have also been passed for the protection of dignity of a women and prevent violence against them as well as exploitation.

IV. Conclusion and Suggestions

Legal intervention is an important strategy for women empowerment. Various modes of 'Teal interventions are available for the purpose. The Constitution of India confers equality of opportunities and rights to men and women. This principle of equality is endorsed in several articles of the Constitution. The legal system has tried to strengthen women and provided them with adequate civil and criminal remedies

26 Sec. 48 of the Factories Act, 1948

27 Sec. 49, 50 and 51 of the Employment State Insurance Act, 1948.

28 Banerjee, 1985. Women Workers in the Unorganized Sector, Sanyan Books, Hyderabad, p. 35.

against cruelty and violence of all kinds. The Indian Penal Code (IPC) intervenes for women's empowerment by dealing with sexual offences against women, indecent representation of women, outraging the modesty of women, dowry death, etc. Also, several civil laws related to women exist. Some of most prominent ones are Hindu Succession Act 1956, Hindu Marriage Act, 1955, Domestic Violence, Maintenance Act, etc. Separate personal laws exist for Hindu, Muslim , Christian, etc.

Laws related to women workers become an important tool for safeguards against exploitation. However laws by itself do not bring about social change. It has to be accompanied by a change in the social attitude. Further there is a need to educate and make women aware of the existing laws pertaining to them as majority of women in India are ignorant about these laws.

Even after half a century there is discrimination in legal rights between Indian women of different faith and between male and female in important areas such as inheritance, divorce and child custody. This is because instead of common civil rights based on constitutional principle as envisaged by the visionary leaders of the pre-independence period, political vested interest in the post-Independence period resulted in the continuance of the separate 'personal laws' system of the colonial period. Thus though Hindu women have the benefit of constitutional legislation such as the Hindu Marriage Act, 1955, the Hindu succession Act, 1956, Muslim women remain governed by Shariat Act, 1937, Dissolution of Muslim Marriage Act, 1939 and Christians by Indian Divorce Act at 1869, Indian Christian Marriage Act, 1872, and Indian Succession Act, 1925, etc.

While recognizing that legislation is an important instrument towards social change, experience has shown that statutory change is inadequate. Social activists as well as women's movement insist on the need for much more executive action to support the translation of constitutional rights into reality. The judiciary in India is also becoming supportive in interpreting women's rights than in earlier times.

Shifting of Penological Trends towards Rehabilitation of Offender

***Akanksha Marwah**

"Every saint has a past, every sinner has a future."

-Oscar Wilde

Introduction

Jawaharlal Nehru, when India attained independence, remarked that only the political revolution has ended, a much long social and economic revolution was still to be undertaken. Through the Preamble to the Constitution of India, we the people have given ourselves a Sovereign Socialist Secular Democratic Republic and a security to all the citizens for Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship and Equality of status and opportunity.[1]

Article 21 of the Constitution of India forbids the state to curtail the life and liberty of any person except in accordance with the procedure established by law.[2] After the landmark judgment of *Maneka Gandhi v. Union of India*[3], the concept of 'procedure established by law' was equated with the 'due process of law'. Before the Maneka Gandhi judgment, the Supreme Court of India in *A.K. Gopalan v. State of Madras*[4] said that 'procedure established by law' only requires a legally laid down procedure according to which the life and liberty of the person could be trimmed. But in the Maneka Gandhi, it changed its stance and mandated justness, reasonableness and fairness in the law depriving life and liberty.

Chandrachud, J., while considering *Satwant Singh Sawhney's*[5] case said, "*The mere prescription of some kind of procedure cannot even meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.*" Thus, the Constitution mandates that the law that takes away the life and liberty of the person should satisfy all the requirements of fairness, reasonableness and justice even if that law is meant to be in the nature of punishment imposed for any act in breach of law.

---

*Final Year LL.M, Faculty of Law, Jamia Millia Islamia University

1 Preamble to the Constitution of India.

2 Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

3 1978 AIR 597, 1978 SCR (2) 621.

4 [1950] SCR 88.

5 [1967] 3 SCR 525.

Under Article 39A[6], the state is directed to secure that operation of legal system promotes justice. Also, the preamble to the constitution talks about securing justice, social, political and economic, to everyone. Justice is that virtue that is difficult to put into words. It is understood as fairness, equality, reasonableness, liberty and rule against arbitrariness. It forms the basis of every social, economic and political relation. It is subjective, as what may be justice for one may not be for other, which calls for balancing the rights of millions with two hands. It can, thus, mean righteousness based on ethics, rationality, law, natural law, religion or equity. All the societies recognize the concept of justice that influence their emergence.

That being said, the question is what happens to the rights of the person who commits an act that outrages the law or the norms of the society to which he is subject to and the delivery of justice to him. What if that person does something that forfeits another person's right to life. Does he then subject himself to the treatment which denies him the right to be a human? Should he not be given another chance to improve himself and be a part of the society again?

The answers to these questions involve a study of concept of crime and the notion as understood in different times since they influence the kind of punishment meted out to the person found guilty.

Crime in the society

'Crime' is an inevitable phenomenon. It exists everywhere. No society has ever been free from this evil. However, the method of dealing with them changed over the period of time. In the primitive ages, the people took their own revenge for any harm done to them. But when individuals started living together in a society, which is also claimed by the social contract theory, the crime became an act against society and the state started punishing the offender on the behalf of the victim, which is also the scenario together. From retribution to rehabilitation, the theories of punishment have taken a complete different path.

Before stepping into the understanding of concept of punishment as understood in different eras, it is quintessential to understand what punishment is and what penology is. Penology is the understanding and study of punishment. The word penology is derived from the latin word 'poena' meaning punishment. It is the redress that state obtains

6 39A. Equal justice and free legal aid- The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities., Inserted by the Constitution (Forty-second Amendment) Act, 1976, section 8 (w.e.f. 3-1-1977)

against the offender to make him pay off for his wrong. Its object is to eradicate self help and private sanctions.

The concept of punishment is as old as human civilization. Whenever any wrong is committed, there is an infliction of injury upon the wrongdoer. This injury is the legal harm which administered by the state under its authority to maintain law and order in the society.

Theories of punishment

There are different theories of punishment and what theory is to be applied upon the offender depends upon the object of punishing the offender. It is believed that if the punishment only seeks to inflict pain upon the offender, then only little purpose is solved. However, if the punishment seeks to inculcate the feeling of guilt within the wrong-doers, the desired effect is achieved. The theories of punishment can be broadly classified as utilitarian and non-utilitarian. Utilitarian theories are forward looking and consider future consequences of the punishment. Therefore, it is consequentialist in nature and believes that punishment has consequences for both, the offender as well as the society. It also holds that total good of punishment should not exceed the total evil produced by the act it follows.

Non-utilitarian on the other hand is backward looking and is interested in past acts and mental states. Utility theories include preventive theory, deterrent theory, satisfactory theory and reformative theory. Emmanuel Kant rejected the utility theory and presented the retributive theory. According to them, punishment isn't a means towards an end but an end in itself. There was always a tug of war between Hegel and Kant on one side and Jeremy Bentham on the other.[7]

Great jurist Bentham, who was instrumental behind the utility theory, said, "*The principal end of punishment is to prevent like offences. What is past is but one act: the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made to out-weight it.*"[8]

Retributive theory

Retributive theory is the reflection of vengeance theory which prevailed in the primitive society. According to this theory, injury is

7 S.G.Goudappanava, Critical Analysis of Theories of Punishment. ISSN 2321-4171.

8 Jeremy Bentham, The Theory of Legislation, (Bombay: N.M. Tripathi Private Ltd, 1995). p. 118.

inflicted by way of retaliation by the victim of crime on the actor of crime. Modern day legal system treats this theory as barbaric, heinous and uncivilized and has therefore given up on this.

Under the retributive theory, the offender is held deserving to get punished. There is no moral consideration for him. It replaces the private vengeance by institutionalizing punishment. Immanuel Kant believed that whenever a man interferes with the rights of another, he gives up his own and subjects his rights to the interference by others. This theory demands that wrongdoer must pay for his wrongdoings and since the person who has been wronged would like to take the revenge and state does that on his behalf.

While the other theories look at punishment as a means towards an end, this retribution is an end in itself. It believes that evil to be returned with evil. For this theory, rule of natural justice is eye for an eye and tooth for a tooth. It focuses on what has been done and not what has to be done in future. It looks at reformation theory as promoting crime.

Supporting the theory of retribution Emmanuel Kant observed that, *"Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, instead, it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else."*[9] Retributive theory believes the wrongdoer has to suffer punishment to pay a debt due to the law that has been violated. It is debt to victim and when punishment is endured, the debt is paid. The equation of this theory is guilt plus punishment equals to innocence. It ignores that two wrongs do not make a right.

This theory found the support of Lord Denning, who appearing before the Royal Commission in 1949 on 'capital punishment', expressed the following view: "*the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizen for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else … the ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all namely the death penalty.*"[10]

---

9 N.V. Paranjape, Criminology & Penology with Victimology, Central Law Publications.

10 W Friedman, Law in a Changing Society, (2nd Ed.) (Delhi: Universal Law Publishing Co. Pv.t. Ltd. 2008).p.225.

Deterrent theory

The founder of this theory, Jeremy Bentham, based his theory of hedonism which means that a man is deterred from committing a crime if the punishment applied was swift, certain and severe. Idea behind this theory is to prevent further crime by inflicting exemplary penalty upon the wrong-doer, by developing fear in the mind of public. It is two-folded, specific and general. Specific deterrence in two ways, the offender through incapacitation is precluded from repeating his criminal acts or similar wrong acts and he is made to learn the lesson of not repeating it again. General deterrence on the other hand sends message to the society regarding the repercussions of the criminal acts.

Death penalty falls in this category and not in reformative or retributive. Its only value is by the way of deterrence. This theory gives a temporary relief to the society by keeping the offender away from the society. It is believed that it would deter the offenders but in contrast to that it hardens the criminals and thus, this theory fails in the case of hardened criminals. It also fails to deter criminals who commit crime in the spur of the moment.

Bentham, however, also believed that offenders must be given an opportunity to reform by the process of rehabilitation. From this point of view, his theory may be considered forward looking as it was more concerned with the consequences of punishment rather than the wrong done, which being a post, cannot be altered.[11]

Preventive theory

This theory aims at preventing crime by disabling the prisoner from repeating his acts, for example suspending driving license or sending him behind the bars him. Main object of this theory is to disable the physical power of offender to commit crime.

Fichte observed that, "*the end of all penal laws is that they are not to be applied*". He continued with an example and said, "*when a land owner puts up a notice 'trespassers will be prosecuted'; he doesn't want an actual trespasser and to have the trouble and expense of setting the law into motion against him. He hopes that the threat will render any such action unnecessary, his aim is to not punish the trespass but to prevent it. If trespass still takes place, he undertakes prosecution. Thus, the instrument or deterrence which he devised originally consisted in the general threat and not in particular convictions*."

Preventing theory works in three ways, vis-a-vis, Inspiring all the wrong doers with the fear of punishment, disabling wrong doers from

11 KC Chaturvedi, Penology and Correctional Administration, (2006) p. 216.

further committing any crime and, transforming the offender through reformation and re-education.

While deterrent theory gives warning to the society at large that crime doesn't pay and anyone who commits crime shall not be spared and sets a lesson for others that ultimately punishment shall be inflicted upon wrong doers, preventive theory is sometimes the best theory because it serves as effective deterrent as well as a preventive measure.

Compensatory theory

The major drawback of the criminal justice administration is that it ignores the delivery of justice to the victims. The entire focus of the system is upon awarding punishment to the offender or to look after his rehabilitation. President Gerald R. Ford sent the following message to the American Congress in 1975,

"*For too long, the law has centered its attention more on the rights of the criminal than on the victims of the crime. It is high time we reversed this trend and put the highest priority on the victims and potential victims.*"[12]

The United Nation General Assembly in 1985 adopted the Declaration known as "Basic Principles of Justice for Victims of Crime and Abuse of Power" which is called as Magna Carta of rights of victims.[13] Principle 9 of the declaration provides "government should review their practices regulations and laws to consider restitution as an available sentencing option in criminal cases in addition to other criminal sanctions." Such a duty of state towards victims is more explicitly stated under the European Convention on the Compensation of Victims of violent crimes.[14] Article 2 of the Convention says, "When compensation is not fully available from other sources the state shall contribute to compensate". Such compensation is to be awarded even if the offender cannot be prosecuted or punished. Jeremy Bentham also recognized that compensatory remedies should be object of criminal justice, which he called it as satisfactory remedies. Potential offender pays compensation along with ill-gotten gain that would variably kill the motive of committing crime. Compensation therefore is of the essence of true deterrent, reformation and a necessary condition of retribution.

---

12 Ahmad Siddique, Criminology, (5th Ed.), (S.M.A Qadri, Ed.), (Lucknow: Eastern Book Company, 2005).p.544.

13 The UN General Assembly Resolution no 40/34 of 1985.

14 Opened for signature at Strasbourg on 24 November 1983, and put into force on 1 February 1988.

In India, Section 357[15] of the Code of Criminal Procedure, 1973[16] (hereinafter called CrPC) empowers the court to grant compensation to the victim. The Supreme Court in *Sarwan Singh v. State of Punjab*[17] observed that if the accused is in a position to pay the compensation to the injured, there could be no reason for the court not directing such compensation.

Justice Thomas held that restorative and reparative theories deserve serious consideration, victim of crime or his family members should be compensated from the wages earned in prison by the perpetrator. The court suggested the state to enact a comprehensive legislation in respect of compensation payable to victim of crime. Section 357 of CrPC has not proved to be much effective. Many persons who are sentenced to long-term imprisonment do not pay compensation and instead they choose to continue in jail in default thereof. Justice Wadhwa said, "*criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honor which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace*".[18]

Reformative theory

This theory emphasizes on the reformation of offender through individualized treatment. It is based upon the humanistic principle that even after committing a crime; the offender doesn't cease to be human. It believes that crime is committed due to the conflict between character of the offender and his motive. If the motive is stronger than the character then it overpasses the latter and the person would be forced to commit the crime. It, thus, aims at strengthening the character of a man so that he doesn't become the victim of his crime. It doesn't treat offenders in inhumane manner and focuses on changing their approach towards society. It punishes the offender by making him feel guilty for his acts and making him change.

It works best in the cases of victims of circumstances, who either are young offenders or first time offender committing crime in necessity or duress. Strict punishment without any focus on changing their perspective towards life and fellow human beings can have serious damage to the character of the offender. Labeling them as offenders

15 Order to pay Compensation.

16 Act No. 2 of 1974.

17 (1978) 3 SCC 799.

18 State of Gujarat And Anr v. Hon'ble High Court Of Gujarat, (1998) 7 SCC 392 at p.399.

can increase their level of bitterness towards society and make them strike back to it after they get out. They may also develop caution and unusual skill to protect themselves from apprehension, conviction and punishment.

Rehabilitation and reformation

While the retributive theory says, 'let the punishment fit the crime', the reformative theory says, 'let the punishment fit the criminal'. It is based upon the thoughts of Mahatma Gandhi, "An eye for an eye will make the whole world blind".

It treats crime as a disease and punishment as medicine that can transform the offender through re-education and re-shaping his personality. This is the ultimate aim of the reformative theory to make the offender a useful part of the society and a law-abiding citizen. It supports a punishment that is not degrading.

It believes that a criminal is not born but made by the environment surrounding him in the society. It is therefore the duty of the society to reform him and make him a part of the society again, based upon the idea that criminal is to be 'cured' and not 'killed', because every person has something good or bad within himself. There is a point in time when he/she thinks of committing really bad but if he doesn't commit, it is the good behavior that superimposes itself on the bad one and prevents something mishap. But if the bad one is heavier, some delinquent acts happen.[19] The object of punishment is to bring out the good side and eliminate the bad one.

United Nations Standard Minimum Rules for the treatment of prisoners[20] under Rule 58 provide that:

> "*The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.*"

Reformative theory is the extension of deterrence in the sense that offender is punished to make him realize his guilt. Punishment is thus seen as educating the criminal.

---

19 Shyokaran and Ors. v. State of Rajasthan and Ors; 2008 CriLJ 1265.

20 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Downloaded from https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

"Every saint has a past, every sinner has a future."- this quote of Oscar Wilde is the bedrock of this theory. This was also referred to by Justice Krishna Iyer in his book 'Death Sentence on Death Sentence' wherein he said, "*Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism.*"

Reformative theory stresses the need to transform the offenders into law abiding citizens to lead a normal life through peno-correctional institutions. It condemns all forms of corporal punishments.[21]

Reformative theory aims at strengthening the character of the man. According to this theory, crime is like a disease that is to be cured whose medicine is reformation. It believes in the saying, "hate the sin, but not the sinner." This theory maintains that you cannot cure by killing.

Correctional homes treat offenders as humans and release them as soon as they are ready to mix up in the society. There are different measures to deal with offenders under this theory, for instance, parole, probation. Seclusion is a way of reforming them and preventing them from social ostracism. The amount of punishment must be something that is sufficient to transform the offender. It works well for juveniles and first time offenders but may not be effective in case of hardened criminals.[22] For them retribution and deterrence theory is more effective.

The major difficulty in implementation of theory is that the behavior of society towards them doesn't change.[23] They are still differently treated. Even if they try to change to change themselves, the society blames them for everything, doubt their character and put them under suspicion.

This theory has also been criticized in various judgments. Justice A.P. Sen[24] in a case said that, "*When a man commits a crime against society by committing a diabolical, coldblooded, pre-planned murder of one innocent person the brutality of which shocks the conscience of the court, he must face the consequence of his act. Such a person forfeits his right to life.*"

---

21 Ratan Lal v. State of Rajasthan and Ors; 2007 CriLJ 2467.

22 Bishnu Dayal v. State of West Bengal; 1979 AIR 964.

23 Ranka Sahu v. State of Orissa; 1995 II OLR 1.

24 Immanuel Kant, the Philosophy of Law (W. Hastie trans., 1887) (1797).; Rajendra Prasad v.. State of Uttar Pradesh, 1979 INDLAW SC 277.

Thus, judiciary always confused between the different lines of thought and it always depends on the facts and circumstances of each case to decide what punishment has to be awarded.

Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life all-together. Reformative techniques are much close to the deterrent techniques.[25]

Judicial approach towards rehabilitation theory

Looking at the condition of the prisons in India, Justice Krishnaswamy Iyer, in *Rakesh Kaushik v. Superintendent Central Jail*[26], questioned, "*Is a prison term in Tihar Jail a post graduate course in crime?*"

In *Sunil Batra (II) v. Delhi Administration,*[27] he said:

> "*The rule of law meets with its waterloo when the state's minions become law-breakers and so the court, as the sentinel of the nation and the voice of the constitution, runs down the violators with its writ and secures compliance with human rights even behind iron bars and by prison warders.*"

In *Ravji v State of Rajasthan,*[28] a division bench observed that, "*it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal* trial". However, today not only this, but the nature of criminal is also considered. For examples, in the case of imposing death penalty, special reasons are necessary that not only relate to the crime but also to the criminal and in spite of the crime being chocking in a particular instance, the criminal may not deserve death penalty.

In Narotam Singh v. State of Punjab,[29] the Supreme Court has taken the following view-

"Reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice."

Despite having humanistic approach, this theory is criticized for being too liberal. The proponents of the other theories of crime believe that the reformative aspect of the punishment should not be far-stretched to an extent that the faith of common man in justice

---

25 Jerome Hall, 'General Principles of Criminal Law', Indianapolis

26 (1980) Supp. S.C.C. 183

27 (1980) 3 SCC 488

28 (1996) 2 SCC 175

29 AIR 1978 SC 1542

is diminished. If the criminals are treated leniently, the object of punishment might not get fulfilled. Therefore, it should not be given undue importance.

The Apex Court in the case of *Ramdeo Chauhan alias Rajnath Chauhan v State of Assam,*[30] explicitly relied upon the theories of punishment and expressed that: "*Though an eye for an eye, a tooth for a tooth and death for death is not true in civilized society but it is equally true that when a man becomes beast and a menace to society he can be deprived of his life according to the procedure established by law.*"

Some arguments advanced against this theory are that it does not involve any sort of pain and therefore, cannot be regarded as punishment in true sense of the term.

This theory works well in the case of young offenders and first time offenders. But in the case of habitual offenders there are higher chances of this theory getting failed. Salmond remarked that there are men in this world who are incurably bad. For them this theory doesn't work.

Correctional techniques for rehabilitation

Sir Godfrey Lushington, who was Permanent Secretary at the Home Office in England for the decade 1885 to 1895, while giving evidence to a government committee on the penal system he said:

> "*I regard as unfavourable to reformation the status of a prisoner throughout his whole career; the crushing of self-respect, the starving of all moral instinct he may possess, the absence of all opportunity to do or receive a kindness, the continual association with none but criminal…I believe the true mode of reforming a man or restoring him to society is exactly in the opposite direction of all these; but, of course, this is a mere idea. It is quite impracticable in a prison. In fact the unfavourable features I have mentioned are inseparable from prison life.*"[31]

Prison is also a place with great potential for human rights abuses. Article 10 of the International Covenant on Civil and Political Rights[32] says:

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

---

30 2000 INDLAW SC 390.

31 Rutherford, Andrew, Growing out of Crime, London, Penguin Books, 1986.

32 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 4.

Prison is a penalty with many disadvantages. In developing countries these disadvantages are compounded. For many in prisons with bad sewerage problems, infestation, no doctors, no medicines, little water and acute overcrowding a prison sentence can be a death sentence. Corruption amongst poorly paid prison staff is widespread.

With so many negative vibes attached with a place like prison, it is believed that behavioral changes can be made only in specific conditions and not in place. Therefore, various modes of non-custodial sentences have been devised by legislature and judiciary to practically give effect to reformative theory of punishment. Non-custodial sentences can include:[33] *unpaid work (this can be called community payback or community service), house arrest, curfew, suspended sentence (that means that breaking the law during a sentence may lead to imprisonment), wearing an electronic tag, mandatory treatments and programs (drug or alcohol treatment, psychological help, back to work programs), apology to the victim, specific court orders and injunctions (not to drink alcohol, not to go to certain pubs, meet certain people), regular reporting to someone (offender manager, probation), and judicial corporal punishment.*

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)[34] provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards of persons subject to alternatives to imprisonment. These rules aim at greater involvement of community in the management of criminal justice and the treatment of offenders and promotion of sense of responsibility towards the society. It mandates the member states to develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment and observance of human rights, social justice and rehabilitation needs of the offender. It provides for non-custodial measures at all the stages of the criminal justice administration, i.e. pre trial, trial and sentencing stage, and post sentencing stage.

Everything comes around to one basic point that it is not the punishment that can help reduce the crime but the effective implementation. The stricter enforcement is the only thing where Indian criminal justice administration is lacking behind because otherwise there are of ample of laws taking care of every act that harms the society.

---

33 Larson, Aaron. "Sentencing in Criminal Cases- Fines, Probation and Jail". ExpertLaw. Retrieved 7 September 2017

34 Adopted by General Assembly resolution 45/110 of 14 December 1990, read at https://www.ohchr.org/EN/ProfessionalInterest/Pages/TokyoRules.aspx.

Conclusion

With the ample of negativity around the world, rate of crime being on the constant rise, the punishment is losing to deliver its promise. It is unable to assure that once the convict is out after serving its sentence, he would restrain himself from indulging into wrongs again. According to a NRCB report, the rate of recidivism is on rise in India. They do not also assure that society would accept them and they would then be able to start over from a cleaner slate.

Rehabilitation on the other hand, aims at transforming the behaviour and eliminating the criminal mind from the society. The punishment here does not mean being cruel to the offender but treating him with all the compassion to make him a part of society again. Keeping in mind the humanitarian models, the rehabilitative theory is the most superior to all. But it is to be kept in mind that this cannot alone work unless all the organs of criminal justice system follow the principles of the rehabilitative theory and society lends a helping hand too.

Issues pertaining to Assignment of Future Works under Copyright

*Anuja Misra

Introduction

The significance of copyright as a part of intellectual property protection came to be known after the invention of the printing press. With the printing press came the effortless duplication of the work and hence a greater need for copyright protection was felt. Our Indian copyright act was largely borrowed from the United Kingdom Copyright Act, 1911. With the advancements in technologies, and the mode of communications like broadcasting, photography, the transfer of works protected under copyright was made easy. To prevent such illicit transfer, came the copyright law which protected original literary, dramatic, musical, artistic works and extending protection to cinematograph films, sound recordings and computer software[1].

In this regard, the copyright act grants certain ownership right to the author of the copyrighted work. Right to assignment and licensing of the work are examples of such exclusive rights. There is significant difference between the two rights. When the work has been assigned to another person, the author transfers all his rights in the property to the other person, who in turn becomes the owner of that work whereas in license the author, who is the first owner also, retains his right in the property licensing either part of the property or full for a specified duration of time and geographical limits transferring him some rights concerning the property; for e.g. the right to sub-license in a non-exclusive license.

Talking about assignments of copyright, we are all aware that the author of the work is taken to be the first owner of the copyright subject to certain exceptions[2] given in the act. In cases where he assigns his work to somebody else, the latter shall be the owner of the copyright in the work. The method and procedure of assignment of the copyright is contained in Section 19 of the Act while defining what assignment is and how it shall be effectuated is given under Section 18. However, this paper shall discuss the issues related to only a part of assignment of copyright, which is, ***assignment of future works under copyright and related aspects.***

The concept of assignment of future work under copyright has not been much debated. However, only recently there have been raised some issues that do not provide a clear meaning as to the future assignment

---

* LL.M IPR, National Law University, Jodhpur

1 Indian C opyright Act 1957, s 14.

2 Indian Copyright Act 1957, s 17.

of work under copyright. What is a future work, when shall a work be taken to be complete, when does a work come into existence are some of the basic questions that is probably left to the interpretation of the judge in deciding cases against copyright infringement. But do these questions require a universal determinative standard for adoption? Due to constant technological developments new modes of commercial exploitation of a work have come up. To what extent can these rights over future work be assigned?

Assignment of Copyright Under Section 18

Section 18 of the Copyright Act states, "The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof. "

..prospective owner of the copyright in a future work

The section gives the right to the owner of the copyright work to assign his rights in a work that are existing at the time the assignment is made to any other person. In addition to this right, the prospective owner of a future work may also assign the copyright in that work to another. The first thing to be noted here is that the section talks about the **owner** of the work and not the author, because an owner supposedly "owns the rights" in that work. It may be the author himself, as Section 17 says that notwithstanding the exceptions, the author of a work shall be considered to be the first owner, but it may also be any other person, i.e. the second owner, to whom the entire rights in that work have been transferred by the author or who is the owner of the work considering instances of provisions (a) to (e) of Section 17. Only the **owner of a work** can either assign or license his rights in the work to another.

Coming to the "prospective owner of the copyright in a future work" phraseology, a prospective owner of a future work would be considered to be a person who is likely to be the owner of a work in future, and in the case of a future work, the owner of the work when it comes into existence. For e.g. notwithstanding any exceptions and following the general rule an heir is deemed to be the prospective owner of the ancestral property. Here, the property is existing at the time of the father's death, would imply that till the time of the father's death, the heir is likely to be the prospective owner and will inherit only after the former's death, but if the father decides to get a house constructed for himself, which is under construction and if the father dies, then the son would be the owner of the house only when the house is complete. Here in this case the son is the prospective owner of a future work.

Juxtaposing this with cases of protectable subject matter of copyright, the section makes clear that the assignment of this future work, be it literary, dramatic, musical or artistic, by the prospective owner can only happen on paper which will act as an assignment deed till the work comes into existence and the prospective owner becomes the owner, but provision gives the authority to that prospective owner **to make this decision of assigning the future work to another person, beforehand.**

The last part of the section makes clear that the assignment of the work can be done for the whole of the rights in that work or partial rights. It can be assigned exclusively or with certain conditions or limitations and it can be assigned with regard to the entire copyright term or just a part of it.

First provision to Section 18

The provision to Section 18 claims, "that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence."

The proviso aids the idea of providing and effectuating the assignment of a future work which shall take place only when the future work comes into existence. For assignment to take place the work should be existing at the time of assignment but one can provide for the assignment to take place at a future date but on that future date the deed shall be executed when the work exists finally.

This provision raises an important issue.

When shall the work be taken to have come into existence?

To this question, there are three views that come to the mind. The work shall be deemed to have come into existence

- the moment it is made; or
- when the work is completed; or
- on publication of the work.

a. Trust, that there is a difference in all these three opinions. In the first instance, the moment the work is made, the work is recognised and protected by common law copyright. Common law copyright is another branch of common law and equity and is a legal doctrine acknowledged in all common law jurisdictions which recognises copyright as a natural right rather than a statutory right. A natural right is a right that a person is supposedly born with and which are protected against any violation even though they may not be expressly provided by the statute but rest on the pretext that they should be just, fair and reasonable. This is what makes copyright different from the other assets of Intellectual Property as it does not require or

mandate registration of copyright. However, registration is helpful and appreciated for evidentiary purposes and for invoking the provisions of the Copyright Act, 1957.

The judgment given in *Millar v. Taylor*[3] affirmed the fact that common law copyright exists till perpetuity in unpublished works and would run parallel to the statutory protection given to published works. Shortly thereafter, the case of *Donaldson v. Beckett*[4] asserted that common law copyright protection would not exist till perpetuity and would come to an end where statutory protection starts with regard to published works. Hence common law copyright protects all unpublished works, whether complete or in process considering copyright a natural and an automatic right that subsists in the original work of the author, the moment it is made (comes into existence).

b. The second view is that a work comes into existence when the work is complete. This would be easily understood with the help of an example. If an author B who is writing a book, wants to assign his copyright to his son whom he wishes to make the prospective owner of the work, it shall be deemed that the son is the actual owner of the work as soon as A finishes to write his book. Another example, where A has already written a book in the past and wants to make a movie on the book that he has written for which he funds from his production house and wants to assign rights in that movie to his son in the future. The assignment deed would be effectuated or the son would be considered to be the owner of the work (here in this case, the film) only when it comes into existence, meaning thereby when the film is complete. This is the general understanding that the work will come into existence when it is complete. This notion brings into light two more diverging issues.

- Who shall judge whether the work is a complete work?
- Do ownership rights vest on making the complete work? If yes, what about partial works? What about publication of partial works?

1) Technically, a work is deemed to be complete when the aim or intention with which it was commenced is fulfilled. If an author of a literary work begins his work, he would call his work complete only when his ideas find expression in the pages to the extent that the basic intention that he aimed to convey, which is the purpose of writing the book is achieved. An author of a musical work would call his work complete when he composes the music for the entire lyrics of the song. The author of a cinematograph film would consider his film complete when it completely showcases the script for which it was written.

3 [1769] 4 Burr. 2303, 98 ER 201.

4 [1774] 17 Parl Hist Eng 953, 2 Brown's Parl. Cases 129.

Hence in all these cases we do see that we deem a work complete when the idea behind making the work is fully conveyed before it is given for publication for the public. Now, how do we judge whether the idea behind creating the work is successfully conveyed or not? This is something that only the person creating or making a work can even effectively decide. He will declare his work complete to his satisfaction when the purpose for creating the work has been fulfilled according to him. He might make this decision keeping in mind the expectation of the public or how the public will react on seeing the work, but public definitely cannot be the deciding jury on whether the work conveys completeness or not. That is totally subjective. However, given the repute that the creator or the author has at stake, he will only give his work for publication when "he" deems it as complete. Here the complete work exists, but again under common law copyright.

c. This leads us directly to the third view that a work comes into existence on publication. This view stands true when we talk about the applicability of statutory protection to a work. A work shall be deemed to be existing in the eyes of law only when it has been published. The meaning of publication[5] under the copyright act is "making the work available to the public by:

- Issue of copies; or
- Communicating the work to the public

One of the above conditions, i.e. issuance of copies of the work to the public or communication of the work anyhow shall prove publication of the work. The rationale or the importance of publication of the work in copyright is linked to two issues. One is the commercial exploitation of the work for which the work is being communicated to the public and because the work is being communicated to the public, the need for protection of that work against anyone who can manipulate or infringe the work has to be ensured.

The second is intention to publish. So that the author can utilise his work commercially, he must have intention to publish his work and this was affirmed in the case of *American Tobacco v. Werekmaster* in which the court held, "The test is one of intention. It is a fundamental rule to constitute publication. There shall be such a dissemination of the work among the public as to justify the belief that it took place with the intention of rendering such work common property."

Why does a person desire statutory protection for his work when he knows that even without registration of the work, his work is protected under common law copyright? Statutory recognition of the work not just entitles the author to a wide spectrum of rights including exclusive

---

5 Copyright Act 1957, s 3.

economic rights but also provides for civil and criminal remedies against infringement as opposed to civil remedies against copying in common law. To claim this statutory protection under the statute the work has to be published as only then it can invoke a term of protection[6]. This is made clear in Section 22 of the Act that talks about term of copyright vesting in **published** works implying that a term of protection (which is life of the author until sixty years from the beginning of the next year in which a work is published) is only attached to the work once it is published and only when the term of protection is applied to the work can the work have statutory protection under the act, exclusive rights under section 14 and the remedies available for infringement of the work. Unpublished works are protected under common law copyright with the presumption that a person would want to have statutory protection for his work which is published in the sense that it is communicated to the public and thus so that nobody from the public can infringe his work, he can institute a suit of infringement against such an act. Common law copyright, in no way, runs contrary to any of the provisions of the act. It does not supplant, but supplement the law of copyright in force. Common law protection ends where statutory right begins.

2) The second issue to be addressed which emanates from both the points of completion of the work and its publication for it to come into existence is the issue of partial works. A partial work is a work that is in the making or in the process of completion but not complete. Again, as discussed above, the liberty to decide whether a work has been completed or not should ideally rest with the author who decides the purpose for making a particular work. In this regard, trailers of movies, extracts from a future book released on the blog of the author, a said volume of a book series are all deemed to be complete works because as regards the particular work, for e.g. here volume 1 of a book series, or season 1 of an episode series, trailers, they are in that sense complete when viewed individually as a work. Season 1 of a web series might not convey the entire story or idea of the show, but concerning season 1, the purpose of which is deemed to give an insight to the public into what the show might be about or with the purpose of intriguing the public about the work and creating publicity, the aim or intention of the author rests fulfilled in making that particular work. Hence, viewed individually, they all shall be regarded as complete works over which the author shall have full copyright protection once it is published. J.K Rowling could successfully bring a suit for infringement against a

6 Copyright Act 1957, s 22. **Term of copyright in published literary, dramatic, musical and artistic works.**

fan made "Harry Potter lexicon", a free guide and an encyclopaedia to the Harry Potter fiction, which was published for profit[7]. The lexicon containing parts of the book quotes was found to be infringing and the last book of the series was again published in 2009 after the court gave its decision. Every book of the series was found to be a complete work in itself. However, even if part of the work is published, it shall qualify for statutory protection of copyright keeping in mind the importance of publication as a necessary element for protection under the Act. Hence going by the understanding that unpublished works are protected under common law copyright, they can't be assigned as it is only the statute that provides for the right to assign. Thus, assignment can only happen of a published work. If it is a future work, the work shall be published after coming into existence and only then can it be assigned.

But what about works of architecture? An issue that comes to the mind is whether buildings in their incomplete stage that are constructed in public should be protected under copyright or not? Why this as an example is different from the instances of partial works of others, for e.g. partial literary or dramatic works (which have been discussed above) is because the element of publication is present throughout the construction of the building. Sec 2(b)[8] states that "works of architecture means any building or structure having an artistic character or design, or any model for such building or structure." Thus an original building having an artistic character qualifies for copyright protection under the act. However the act also conveys that for this protection the work should be published. Considering the fact that publication means communication of the work to the public and that once a building is constructed in public domain it shall be deemed as sufficient publication of the same, hence even if the construction of the building is stopped midway due to reasons unknown, should the partial work succeed for statutory copyright protection?

There is no definite answer to the query which can be inferred. The first reasoning that comes to the mind on hearing the question, is that authors should in fact be granted copyright protection for this partial building bearing in mind that it fulfils all the requirements for protection under the act and to avoid others from replicating the author's work, the author should be given some rights over his incomplete work to refrain them. However, on completely analyzing the situation, in my opinion, the reason why this is not provided for anywhere in the act can be justified.

Firstly, comparing this with the other partial works where the partial works were abstracts of a book or volumes of the entire series, the work

7 Warner Brothers v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

8 Indian Copyright Act 1957.

was taken to be a complete work in itself even though the entire story might not have been disclosed in that particular volume; but in the example discussed above, a partially constructed building, requiring modifications, alterations everyday till its complete construction, not showcasing the final outer details or probably not even finished till the stage it is constructed, cannot in that sense taken to be complete. It might so happen that sometimes the building even after reaching a particular stage of construction has to be substantially modified to make important changes in the beginning so that it does not affect the final structure. If the partial facade is granted copyright and the next day it is reconstructed to incorporate certain necessary changes which the architect might have overlooked, the prior protection would be futile and the author would again have to ask for protection of the entire structure after its completion.

Second, section 13(5) expressly excludes processes or methods of construction of works of architecture and extends protection only to the artistic character and design. Hence, it is convenient to judge the artistic character and design of the building when it is complete. An artistic character might not be inferred easily from a partial work. If it be considered so that partial buildings are in fact being granted copyright protection, then this would also lead to the lowering of the threshold for judging artistic character element in works of architecture. It would disrupt the status quo standard.

Third, for an infringement of a building to take place, infringement of the drawing or plan on which the building is based has to happen. This can be acknowledged keeping in mind that it is extremely difficult for anyone to replicate the building by just seeing the building. Construction requires every minute details and for the other architect to effectively replicate the three dimensional work, he may demand to have a look at the drawing or plan first otherwise the replication might result in faulty construction and may require modifications.

Fourth, a first look at section 59 would lead any person to think that the act provides for weak rights of authors of works of architecture. Consider the fact that in cases of works of architecture there are two players in the issue. One is the architect who is the author of the drawing of the building and has the exclusive rights to depict the two dimensional work into three dimensional by making a building based on that work. Till the time there are no purchasers of that building he shall be the only author and the owner of the works. Once the building is sold or transferred to another person, the latter shall be the owner of the building. Now if a third party infringes the author's work and makes a duplication of the building and enforcing strict rights against

infringement of author's work, if demolition of the building be allowed against the claims of Section 59, then the innocent owner who may have invested a huge sum of money in purchasing the building, shall be wronged.

Section 58 states a general rule that all infringing copies of the genuine and original works of the author shall be deemed to be the author's property who may take proceeding for recovery of the same. However, Section 59 is an exception to the rule considering the innocent owner's loss involved. This however does not mean that the original author shall not have any rights against such infringement. He is, as a civil remedy, entitled to compensation from the infringing author.

Thus, considering these factors I agree with the supposed rationale behind absence of provisions on protection of partial works of architecture in the statute.

Issue of Ownership Rights over Assigned Future Work

As discussed, for assignment to take place, the work should be recognised in the eyes of law because it is only the statute that provides for the right to assign a work and so as to assign a work; the person should be the lawful owner of the work. There is no assignment under common law copyright. This brings us to another important point that **ownership rights vest on publishing the work and not merely making it**. He shall be deemed to be the owner of the work under the law after successful publication.

Consider a case where A assigns rights to B over a future work (intended to be published), and B after the work is completed, publishes it. Can B be regarded as the owner of the work? Is it a successful assignment?

The answer to this is No. The right to issue copies of the work to the public not being copies already in circulation and to communicate the work to the public by any means, which essentially constitutes the right to publication, rests with the author (who is the first owner) of the work by the grace of section 14 of the Act. Thus, this right to publish the work does not rest with B, until and unless he becomes the owner of the work. He, being the prospective owner, shall become the actual owner the moment the work comes into existence in the eyes of law and that shall happen only upon publication, the right of which at that time rests with A. Hence, this right to publish the work so that B can become the owner, can only be lawfully exercised by A and not by B. B shall be entitled to all rights under section 14 after the assignment takes place and as per the proviso to Section 18, the assignment shall take effect only when the work comes into existence.

Conclusion

"Works of architecture" remains a disputed area as per the Indian copyright act because of the vague and all-inclusive definition of "works of architecture" given in the act according to which "works of architecture means any building or structure having an artistic character or design, or any model for such building or structure[9]."

The definition covers absolutely "any" and "every" structure having an artistic design which is exactly the reason behind multitude of arguments arising on whether partial buildings should be granted protection. However the law in the U.S is quite sorted in this regard. The definition of "building" given in the U.S Copyright Act simplifies this situation. It states, "Buildings are humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions[10]." Hence, the U.S law stands clear on the point of buildings being "humanly habitable structures" whereas no such hint is given in the Indian Act. A building cannot be deemed to be habitable when it is partially complete. Thus the question of protection of partial architectural works does not arise at all. The UK CDPA (Copyright, Designs and Patents Act), provides for a way broader definition of building wherein it even considers part of a building as building. It states, "building includes any fixed structure, and a part of a building or fixed structure". Here also the discrepancy about protection of partial architectural work (part of a building) can very well arise. The abovementioned suggestions which provide for the lacuna in the Indian law can be deemed applicable for the UK Act. However, the concept of publication stands on the same and firm grounds. The term of protection might differ in different jurisdictions but in order to have protection in the eyes of law the work should be published; and why not? If we go by the basic understanding of the word publication meaning to make the work known to the public, it goes hand in glove with the author's intention. Till the time an author wants to keep the work to himself the idea of seeking copyright protection over the work does not come into picture because there is no fear of infringement. Infringement can happen only when the work comes to the knowledge of a third person and it is then that the author might want to desire statutory copyright protection.

---

9 (n 8) at 9.

10 37 CFR § 202.11(b)(2).

The issues in respect of assignment of future works under the copyright act might still be debated for quite some time. The paper proposes to reach those far-fetched untouched areas of assignments by proposing solutions to that effect. These solutions might not be universally applicable but seem to fit in the puzzle as of now. Till the time, a better answer to the question is not available, we seem to work on what suits the present scenario best. Not to forget that assignment of a work is one of the most important rights that are accorded to the owner of the copyright.

Reservation or Discrimination: The Principle of Equality

***Arvind Singh Kushwaha**

1. Introduction

India being a developing nation is currently facing many challenges and the reservation system being one of them. The issue of reservation is one of the debatable topics among the constitutional scholars. Also, seeing from a layman view it is an arbitrary exercise of power and violative to the right to equality. It was intended to realize by promise of equality enshrined in the Constitution under Part III. The primary objective of the present-day Indian reservation system is to enhance the social and educational status of underprivileged communities and thus improve their lives. Also, law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.

Under Chapter III of the Constitution, guarantees the *Right to Equality i.e. Article 14,15,16,17 and 18 and it can be said that right to equality is the cornerstone of the Indian democracy.*[1] Also, the expression of the preamble of Constitution, "…EQUALITY of status and opportunity…"[2] clearly aims the purpose of assembly in order to maintain a bar of equality in the society.[3]

But, in the recent trends, this principle riddles the idea of Constitution where all the citizens are entitled to be treated equally, irrespective of their caste, race, religion, sex, place of birth and residence.[4] The exceptions to this principle are made in favour of women and children, the backward classes, the Scheduled Castes and the Scheduled Tribes, and the weaker sections.[5]

2. Constituent Assembly

The Constituent Assembly worked for about three years in framing the largest Constitution of the world. The ideals, about which the Freedom Movement had spoken, were to be translated into Constitutional

---

* B.A. LL.B., National University of Study and Research in Law (NUSRL), Ranchi

1 *Pushpa* v. *Government, NCT of Delhi* 2009 SCC OnLine Del 281.

2 The Preamble, Constitution of India.

3 *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1.

4 *Ramesh Chandra Pal v. Lieutenant Governor* 2011 SCC OnLine CAT 4132.

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714; *Poonam v. Government, NCT of Delhi* (2009) 157 DLT.

provisions.[6] One of them was the protection of the socially backward communities.[7] The sixth item in the objective resolution moved by Nehru in the Constituent Assembly read: "*Wherein adequate safeguards shall be provided for minorities, backward and tribal areas; and depressed and other backward classes...*"[8]

Even though majority of the members wholeheartedly supported the resolution Ambedkar had his own apprehensions. He said:

> "*...I must confess that, coming as the Resolution does for Pandit Jawaharlal Nehru who is reported to be a socialist, this Resolution, although non-controversial is to my mind very disappointing... but also in our country which is so orthodox, so archaic in its thought and its social structure hardly anyone can be found to deny its validity. To repeat it now as a Resolution does, is to say the least, pure pedantry... The Resolution suffers from certain other lacuna. I find that this part of the Resolution, although it enunciates certain right, does not speak of remedies...*"[9]

Leaders of the Congress party were very articulate in upholding the rights of the Depressed Classes and offer them adequate safeguards for exercising those rights. But doubts were also expressed regarding the effectiveness of these measures.[10]

Unlike Scheduled Caste representatives, the Scheduled Tribes representatives expressed their voice of dissent by asserting that they being the original inhabitants need to be treated with dignity. Jaipal Singh from Bihar said:

> "*We want to be treated like every other Indian... the whole history of my people is one of continued exploitation and dispossession by the non-aboriginals of India punctuated by rebellions and disorder, and yet I take Pundit Jawaharlal Nehru at his word: I take you all at your word that now we are going to start a new chapter, a new chapter of Independent India where there is equality of opportunity, where no one will be neglected.*"[11]

---

6 M. Lakshmikanth, Indian Polity for Civil Services Examinations, 3rd ed., (New Delhi: Tata McGraw Hill Education Private Limited, 2011).

7 Chaube S.K.: Constituent Assembly of India (Calcutta 1986).

8 Constituent Assembly Debates on 13 December, 1946; Also referred in *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

9 Saksena H.S., Safeguards for scheduled castes and scheduled tribes: founding father's view, New Delhi, 1981.

10 Id., pp. 173-174.

11 CONSTITUENT ASSEMBLY OF INDIA - Volume I, Thursday, the 19th December 1946.

The discussion went on to the question of representation in the legislature and many expressed hope that the proposed Constitution would guarantee equality and at the same time protect the rights of the Depressed Classes.

But there are also voices of frustration. For instance H.J. Kandekar came with his own experience. He said: "*I remind you of the Poona Pact. I place before you the example of my own province. In Central Provinces where we constitute 25 per cent of the population and we are entitled to 28 seats, we are given only 20 seats in pursuance of Poona Pact. Where have our eights seats gone?... Harijans cannot tolerate such injustice. They should be given representation according to their numerical strength.*"[12]

Provision regarding 'untouchability' in the draft Constitution was generally welcomed. Hence Ambedkar was able to intervene effectively for the emancipation of Dalits. According to one member the inclusion of Ambedkar in the cabinet showed that there was a change of heart on the part of the caste Hindus.[13] The relevant question is whether Ambedkar could or did exercise any real power.[14] It would be safer to say that his skill as a lawyer was utilized by the then Congress Government.

Sardar Vallabhbhai Patel, who presented the Report on the Minority Rights said in conclusion:"*One thing I wish to point out. Apart from representation in the Legislature and the reservation of seats according to population, a provision has been made allowing the minorities to contest any general seats also.*"[15]

Speaking on the Report, P.S. Deshmukh said that the report was highly satisfactory; but at the same time he voiced the fear that the socalled majority might be marginalized. He said:

> "*...I, therefore, urge that at least when the Minorities are content to have only their fair share of power in the Cabinets and a reasonable proportion in Government Services, our rulers will pay some more attention to the oppressed and neglected rural population which has even under the sacred name of the Congress has been more undone than assisted...Let this be borne*

12 CONSTITUENT ASSEMBLY OF INDIA - VOLUME II, Tuesday, the 21st January, 1947.

13 Rao K.V.: *Parliamentary Democracy of India: A critical commentary* (New Delhi 2nd ed.) p. 12.

14 Saksena H.S.,Safeguards for scheduled castes and scheduled tribes: founding father's view, New Delhi, 1981, pp. 148.

15 THE CONSTITUENT ASSEMBLY OF INDIA - VOLUME V, Wednesday, the 27th August 1947.

> *in mind in distributing power and posts among the various Hindu Communities and let the policy of the 'Devil-take-the hindmost' cease, at least from now."*[16]

On the other hand other members like Jaipal Singh, S. Nagappa, demanded for the representation in proportion to their population and representation in cabinets too. With regard to reservation of seats in parliament and state legislatures, ***originally the Constitution proposed a time limit of ten years***. Supporting it, R. K. Sidhwa said:

> "*…I am of opinion that the ten years that have been given to them is a sufficiently long period. Within that period, I would appeal to the small minorities to adjust themselves so that at the end of ten years, they should not have to go…they will have no grievance, they will have no complaint to make against the majority community. It is only the heart that is wanted on behalf of the minority to, adjust themselves."*[17]

But speaking on the minority report, Mahavir Tyagi was highly critical. He observed that giving reservation would not benefit even the so-called Scheduled Castes. He argued that "*…The idea of accommodating the minorities for even ten years is not exactly in accord with our principles. I think, we have compromised and compromised enough*." Adding to it, T. Prakasam said that "*Within ten years it is stated all these things will disappear. I have no doubt they would disappear within ten years or even less than that*." Whereby ultimately concluded as *"Provided further that such reservation shall be for 10 years, the position to be reconsidered at the end of the period."*

3. Amendments and Later Changes

However, the Parliament considered the later question and from time to time, extended the period of reservation through amendments legislature.[18] In addition with Article 15, Article 46 introduced that the State should promote the educational and economic interests of the weaker sections of the people and protect them from social injustice. For these special provision, the State was empowered to make for the educational, economic or social advancement of any backward class of citizens and such can't be challenged on the ground of being

---

16 Ibid. Volume V (27th August 1947).

17 Ibid.

18 Art.15 Clause 4 was added by the Constituent (First Amendment) Act 1951 (dt. June 18, 1951). Amendment of article 15.-To article 15 of the Constitution, the following clause shall be added:- "(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

discriminatory, it was proposed that article 15(3) shall be appropriately amplified. [19]

For better efficacy the sessions of Parliament have been found necessary and are also incorporated in this Bill, thereby, also a few minor amendments in Articles 341, 342, 372 and 376 of the Constitution.[20]

In response to *State of Madras v. Champakam Dorairajan*[21], *Jawaharlal Nehru encouraged the Parliament of India to pass the first amendment*, where the petition was made to challenge the state's Order, which established caste quotas in medical and engineering schools, on the grounds that it denied her equality under the law; the Hon'ble Apex court had upheld her petition.[22] The Apex Court declare that Communal Award's caste based reservations violates Article 15(1). As an implementation, the amendment was introduced to make judgment invalid. Aside from Nehru, this contention was also supported by B. R. Ambedkar also spoke in support of the proposed amendment.[23]

The first commission to overlook the aspect of reservation was Kalekar Commission which was setup by a Presidential Order under **Article 340** of the Constitution on 29 January 1953 under the chairmanship of Kaka Kalelkar for classifying the Backward classes, whose report was submitted in 1955.

Article 334 of the Constitution was introduced in the first place for the reservation of election seats and supposed to be ceased by 1960, but as there was to be completion of ten years period as discussed in the assembly[24], it somehow kept on revising as:

S No.	Amendment Year	Amendment No.	Extended Upto
1.	1960	8th	1970
2.	1969	23rd	1980
3.	1980	45th	1990
4.	1989	62nd	2000
5.	2000	79th	2010
6.	2010	95th	2020

19 Text (*Statements of Objects and Reason*) of the Constituent (First Amendment) Act 1951 (dt. June 18, 1951).

20 Ibid.

21 1951 SCR 525 : AIR 1951 SC 226.

22 Hasan, Zoya; Sridharan, Eswaran; Sudarshan, R. (2005), *India's living constitution: ideas, practices, controversies*, Anthem South Asian studies, Anthem Press, p. 321.

23 Khanna, Hans Raj (2008), *Making of India's Constitution* (2nd ed.), Eastern Book Company, p. 224.

24 C.L. Anand. *Equality Justice and Reverse Discrimination*. Mittal Publications. p. 17.

Reserved Sectors: These reservations were being provided in elected bodies, employment, education etc. whereby the beneficiary groups of such reservation system were on the basis of caste, gender, religion and on other grounds such as Migrants from the state of Jammu and Kashmir, descendants of Freedom Fighters, Physically handicapped, Sports personalities etc. In addition to this, a separate state basis reservation is also present which is governed by the state government, whereby a caste can be the sole criteria for determining the question whether a particular class was backward or not.[25]

Mere educational backwardness or inadequate representation in the services of the State is not enough to give protection under Article 15(4).[26] The criterion for determining backwardness should be social circumstances and education similar to the backwardness from which the SCs and STs suffered.[27]

The *Mandal Commission*, or the Socially Backward Classes Commission (SEBC), was established in India on 1 January 1979 by the Janata Party government under Prime Minister Morarji Desai with purpose to "*identify the socially or educationally backward classes*".[28] It was headed by the late B.P. Mandal, to consider the question of reservations for people to redress caste discrimination, and to determine backwardness.

4. JUDICIAL TREND

The equal protection of laws is corollary of the first and it is difficult to imagine a situation of any violation of equality before law, without violation of equal protection if laws.[29] Thus, what is meant by two principles is that like should be treated alike, recognizing the fact that ***absolute equality might lead to inequality***.[30] This principle is both criticized and supported; there are always different views with regard to it. It is obvious that being principle enshrined under Fundamental rights and in conflict with anything, would be adjudged by the Hon'ble Apex and High Courts. Some of which, prominent judicial precedents are:

- In *K.C. Vasanth Kumar v. State of Karnataka,*[31] the Supreme Court clearly laid down that the test of economic backwardness ought to be applicable to SCs and STs. The backward classes should

25 *M. R. Balaji And Others vs State of Mysore*, AIR 1963 SC 649: 1963 Supp (I) SCR 439.

26 *Triloki Nath Tiku v. State of J&K*, AIR 1967 SC 1283.

27 *State of A.P. v. P. Sagar*, AIR 1968 SC 1379.

28 Gehlot, N. S. (1998). Current Trends in Indian Politics. Deep & Deep Publications. pp. 264–265.

29 *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75: 1952 SCR 284.

30 *Kedar Nath Bajoria v. State of W.B.*, AIR 1953 SC 404: 1954 SCR 30 .

31 1985 Supp SCC 714.

be comparable to SCs and STs in their backwardness and should satisfy the "means test" in the context of economic conditions.

- In *Indira Sawhney v. Union of India (Mandal Case)*[32]the Supreme Court was of the opinion that the sub-classification of backward classes and more backward classes can be done legally. National Commission for Backward Classes, a constitutional body was the outcome of this judgment. It laid down the limits of the state's powers: it upheld the ceiling of 50 per cent quotas, emphasised the concept of "social backwardness", and prescribed 11 indicators to ascertain backwardness.
- The above judgment also established the concept of qualitative exclusion, such as "*creamy layer*" The creamy layer applies only to OBCs. The creamy layer criteria was introduced at Rs 1 lakh in 1993, and revised to Rs 2.5 lakh in 2004, Rs 4.5 lakh in 2008 and Rs 6 lakh in 2013, but now the ceiling has been raised to Rs 8 lakh *(in Sep., 2017)*.
- In the case of *M. Nagraj & Ors v. Union of India and Ors.*[33] , the Apex Court held the 85th Constitution amendment constitutional. Also, *Jagdish Lal and others v. State of Haryana and Ors*[34], it was held that the date of continuous officiating has to be taken into account and if so, the roster- point promotees were entitled to the benefit of continuous officiating.
- In *Preeti Srivastava v. State of M.P.*[35] holding that reservation for the SCs and STs, consideration of national interest and interest of the community or the society as a whole, cannot be ignoredin determining the reasonableness of a special provision under Article 15(4).
- In *Akhil Bhartia Sohit Karamchari Sangh (Railway) v. Union of India*[36], following the decision in the *N.M. Thomas's case*[37], it was held that under Article 16(1), the state may classify groups or classes based on **intelligible differentia.**

5. Criticism

In recent years, several people from community of Gujjar, Jatts etc. demanded reservation by rooting out railway tracks, closing national highways, pelting stones on law enforcements and threatening other

32 AIR 1993 SC 477.

33 AIR 2007 SC 71.

34 1997) 6 SCC 538.

35 AIR 1999 SC 2894.

36 (1981) 1 SCC 246.

37 *State of Kerala & Anr vs N. M. Thomas & Ors*, 1976 SCR (1) 906.

people. Many people belonging to these castes protested across India. There were also incidents involving arson, vandalism and gunfire. *How could such protests justify the idea of reservation?* Subsequently, to reduce the pace of increasing in false SC/ST cases, the Hon'ble Supreme Court shall take recourse to Atrocities Act. According to National Crime Records Bureau, as in 2016, the conviction rate was 25.7% and 20.8% in cases of atrocities against SC and ST respectively. *What about those falsely accused persons under these cases? Should there be justice for them?*

First of all, it *violates the very spirit of democracy*. This policy is opposite to the principle of equality. Equality presupposes equal treatment to all and equal protection of all people. But these granted special privileges and extra protection to certain class of people is against the policy of equality.

It seems as a fact that reserving seats in the Legislature has not carried off the social ill and economic inequality cannot be solved with political changes. What the Members of the Assembly fundamentally wanted was to provide some form of equality. Identifying people on the basis of income level or standard of living, and providing them with education, land, employment or subsidies, as many contemporary programs do, offer more empowerment to individuals than does political representation. Providing backward castes with "*functional capabilities*", as Amartya Sen defines them, brings about a more sustainable approach to real progress and equality.

But, the system favours *reservation in favour of `classes', and not individuals*. And for obtain such privilege, individuals had to qualify for them, *they must belong to those listed classes*. Each and every class as well as social group has economically backward individuals. It is clearly unjust to accord people with special favours and privileges on the basis of caste, even in order to redress traditional caste discrimination. Those deserve the seat through merit will be at a disadvantage.

On the other hand, the policy of reservation has given rise to the politics of *casteism in Indian political system*. The caste identity and its over awareness is hindering the very process of national consolidation. Moreover, castes have been used as *instruments for maintaining the vote* banks of different political parties. A great example of such could be the election for the President post in India (2017). Another example could be the participation of opposite ruling party in the recent April 2017 protests.

This policy in aspect of reservation of jobs is also violating the efficacy of recruitment persons. While *talented and meritorious individuals are being deprived of their due share of appointment*, the authority is forced to make compromise with quality. For eg. Consider A, who get

78/100 but not selected, on the other hand B belonging from reserved category, who get 45/100 and got selected. What could be efficacy of such department recruiting those persons?

And ultimately, "*the policy of reservation was planned as an adhoc policy for a period of ten years to resolve socio-economic difference*." *But it is kept on extending and getting stretch after the end of every ten years*. The main sufferers in this policy are those people, who don't belong to any category.

6. CONCLUSION

Being the supreme Law of land, its sanctity has to be maintained. Our Constitution is one of the best and largest written Constitution of the world, among such enshrined principles, Article 14 of our Constitution is itself soul of Indian Constitution. As per discussed above, even though our reservation system is an outcome of vast amount of research by commissions and Government agencies like Mandal, Kalelkar Commission etc but even then our system is lacking on the pertinence part also some fault are there in identification of the Backward Classes because despite of giving so many years of reservation their position have not been developed to that extent as it should have been.

Going beyond it or extending the principle of reservation is leading a direct harm to other part of societies. As the intended purpose behind such scheme was to bring the societal level at equal basis, the same can be seen. Also, there are certain numbers of people who are drawing undue influence power from the concept and intend to use it without knowing the purpose. These people are attracted by the benefits granted in various aspects of daily life and wouldn't likely to get it removed from the legal aspect. Also, this prospect is being taken into consideration from political view also. On the name of caste and reservation, the politically minded people making and using vote banks.

There has to be different criteria to provide reservation each and every individual of this country who is backward socially as well as economically will get equal chance to develop. Among such grounds, economic condition basis could be one as many people are now economically backward and socially backward. We need some new methods other than caste based reservations in order to narrow this gap and to increase them socially, as intended by the constituent assembly while forming it.

Changing Trends in Institution of Hindu Marriage -Door towards Separation

[*]**Kahkashan Jabin**
[*]**Shreet Raj Jaiswal**

I. Introduction

The institution of marriage has been idealized by the Hindus and probably no other people other than Hindus have endeavored to idealize it. Even in the patriarchal society of the Rig Vedic Hindus, marriage was considered as a sacramental union. It is only the unique culture of Hinduism that they give prime importance to the institution of marriage since the time immemorial. Even the law relating to Hindu Marriages has been crystallized basing the traditions, culture and customs of Hinduism as its source. Among the dense diversity of traditions and culture in Indian society, it is only the concept of Hindu Marriages that are considered to be so sacred otherwise such sanctity and unconditional respect for the institution of marriage finds no place in other religions, cultures, traditions and customs of Indian society. The basic purpose of marriage is more or less same among all the communities. But the status of marriage differs from one community to another. Hindus consider marriage as a sacred union between a man and a woman for spiritual, social and physical purposes. Marriage is considered as a sacrament among Hindus. It is believed that the purpose of marriage is to enable a man to become a householder and procreate sons for performance of sacrifices which leads to salvation. Among Muslim s marriage is considered as a contract. Basic elements of a contract such as offer, consent for marriage, provision for witness, and terms of marriage contract are found. *Mehr* forms the consideration for marriage. In the Muslim social system, marriage is governed basically by *Shariat* or the personal law. The norms of *Shariat* are widely followed. Christians consider marriage as a sacred institution. The aim of Christian marriage is procreation and healthy development of one's personality. It also aims at establishment of family. But the Hindus notion of sacrament marriages differs from the Christians and the Muslim s in as much as the Hindus regard their marriage not merely a sacrosanct, inviolable union and contract, but also an eternal union- a union which subsist not merely during this life but for all lives to come.

II. Significance of marriages in *Hindus*

Hindus have, perhaps, from the very beginning of the civilizations, regarded marriage as a sacrament, which once tied cannot be untied. DERETT puts it succinctly that: "*the intention of the sacrament is to*

---

*X Semester LL.B. (Hons) – Faculty Of Law, University Of Lucknow
** VII Semester LL.B. (Hons) – Faculty Of Law, University Of Lucknow

make the husband and wife one, physically and psychically, for secular and spiritual purposes, for this life and for after lives."[1] The husband is declared to be one with the wife. Neither by sale nor by repudiation is a wife released from her husband. Once only a maiden is given in marriage.[2] The injunction is: "*May mutual fidelity continues till death."*[3] Marriage is an essential *sanskar* for all Hindus. Every Hindu is enjoined to marry, to enter the grihasta-ashrama.[4] Manu declared: "*To be mothers were women created and to be father men, the Vedas ordain that dharma must be practiced by man together his wife. He only is a perfect man who consists of his wife, himself and of his offerings. Husband and wife are enjoined to live in perpetual love, bliss and happiness.*"[5] The *Atharva Veda* enjoins that the husband and wife should live in love just as the birds *chakva-chakvi's* life. (According to Hindu mythology this species of birds is an ideal in life. The male and female birds live together, and if one dies other also die of heartbreak).[6]

At the time of ceremony of marriage, when the bridegroom holds the hands of the bride, he says to her, "*I hold your hand for saubhagya (good luck), that you may grow old with me, your husband, you are given to me by the just, the creator, the wise, and by these learned persons.*"[7] The wife is enjoined to be *punarvarte*, i.e. she must follow the same principles as does her husband. On taking the seventh step of marriage (*saptapadi* i.e. taking seven steps *viz.* an essential ceremony for Hindu Marriage), the husband tells his wife, inter alia, "*Be, thou my life-mate as we walk up seven steps together, thus thou go together with me forever and forever.*" The wife is just not *patni* (wife) but *dharampatni* (partner) in the performances of duties, spiritual, religious and other. Among the Hindus there are many *yagnas* (religious and spiritual sacrifices,

---

1 J. Duncan and M. Derett, *A Critique of Modern Hindu Laws*, N. M. Tripathi, Bombay (1970), p. 287

2 Manu Smriti, V. 160-1661; cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn- 2005), p. 547

3 Manu, ix, 101, 102; cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn- 2005), p. 546

4 Hindus have divided their lives into four *ashrama* or stages, first is the *brahmacharya ashrama* (studentship), the second the *grihasta ashrama* (life of householder), the third the *vanapurusha ashrama* (the life of recluse), and the last is *sanyasa ashrama* (the life in renunciation).

5 Manusmriti, ix, 96, cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn- 2005), p. 547

6 Atharvaveda, xvi, 2.64; (According to Hindu mythology, this species of birds is an ideal in life. The male and female live together and if one dies, the other also dies of heart break) cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn- 2005), p. 532

7 ManuSmriti, viii.227;cf.Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn- 2005), p. 545

rites and ceremonies) which a man without a wife cannot perform. That is why she is called *dharampatni.* The Manu declared that the due performance of the religious rites, faithful worships, performances of yagnas, the highest conjugal happiness, and the heavenly bliss for ancestors and oneself- all depend upon the wife. [8] Wife is *ardhangini,* i.e. half of her husband. Also according to the *Sathapatha Brahaman-"The wife is verily the half of the husband".*[9] Even in the great Mahabharata in its Chapter Anu Parva denotes that a wife is half part of the man and she is called as "Ardhangini", and the wife is medicine to a grievance husband.[10]

The concept of the unity of the personality in Hindu Laws is the higher plane, because a wife is not merely the source of *artha* and *kama* but also of *dharma* and *moksha.* The Vedas has ordained that *dharma* must be practiced by man together with his wife.[11] According to the *Vedas* marriage is a union of "*bones with bones, flesh with flesh and skin with skin, the husband and wife becomes as if they were one person."*[12]

Therefore it could be easily observed that marriage is a sacrament union, as a holy union, and not a contract. For a Hindu, marriage is mandatory so that he can discharge his debt to his ancestor, the debt of beginning offspring. Marriage is also obligatory because without a wife a husband cannot perform his religious and spiritual duties. In sum, for a Hindu, the wife is not just *patni* or *grihpatni* but a *dharmapatni* and *sahadhamini.* In the words of DERETT,"*in fact, in no other respect are the feelings of Hindus as acutely sensitive as when their concept of, and belief in, the importance of marriage as an institution are questioned or attacked. This is the largely the work of Dharamashastras, which*

---

8 Manu Smriti, ix,64-68, cf. Dr. Paras Diwan, *Hindu Law*,Orient Publishing Company, Allahabad, (2nd Edn-2005), p. 532

9 Manu Smriti, ix. 95; Vishnu, XXX, 17; Parasara, IV, 26, Satapatha Brahman 1, 610, cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad, (2nd Edn-2005), p. 545

10 Nori Srinadha Venkata Somayajulu, *Mana Vivaha Vyavastha*, Kranthi Press, Madras, (1990), p. 3

11 The *Grihyasutras* lay down that marriage is a spiritual union, a holy bond and therefore after *saptpadi* the man says to his wife "*Into my will I take my heart, thy mind shall follow mine*." It is furthers aid that those who have wives can fulfill due obligations in the world, those that have wives truly have family; those that have wives can lead a full life.

12 Shyama charam sarkar; vyavastha chandrika, vol.ii, 480; cf. Dr. Paras Diwan, *Hindu Law*, Orient Publishing Company, Allahabad (2nd Edn- 2005), p. 532

after more than two millennia of relentless propaganda, have produced an effect which the western world unhesitatingly labels puritanical."[13] Therefore we see that the sanctity and purity of Hindu marriages finds its roots in the unique traditions of Hinduism regarding the institution of marriage. The tradition binds the two unknown people in a unique tie to make them understand the true meaning of life and make it worth living. But the religious values will help the couple to make their rest life simpler only when they follow it with high sense of morality. Changes are good as it is the law of the nature. But the question is what sorts of changes should be accepted and to what extent they should be amalgamated with our prestigious heritage, culture and obviously the present scenario. The changes in the antique traditions cannot be accepted as it is and especially when the only door of such changes leads to deterioration. Here we are concerned with the changes in the trends of Hindu Marriages. The changes are drastic to the eternal religious and moral values of the Hindu society. These changes have totally changed the definition and meaning of the institution of Hindu Marriage. These have carved the new kind of bonding between husband and wife which is completely against the traditional, cultural, and moral values of Hinduism and somewhere they seem to enchant the practices of Western culture which definitely not has appreciating effects. Entire system of Hindu Marriages are based on their customs, culture and traditions; now, if the undesirables changes influenced by westerns practices attack the very base of Hinduism then the structure standing on those belief is definitely going to break down. The things happening in today's time is exactly the same. Miserably, the judiciary is accepting those undesirable changes that attack the very base of Hindu concept of marriages. The law that paves path to follow the western practices, regarding the institution of marriage, dilutes the rich culture of Hindu Marriages.

III. The Changing Trends

It is *fact accompli* that Hindu marriage is an important institution and it is based on religion, religious rites and for the pursuit of religion, but now we see that changes have occurred in the institution of Hindu marriage, because of several factors such as urbanization, industrialization, secularization, modern education, impact of Western culture, economic prosperity, the Internet revolution and marriage legislations; changes are taking place in Hindu ideals, forms and values of marriage. The way people perceive marriage, organize ceremonies, take vows and build relationships are changing in tandem leading to a new face of the Indian society. There had been Change in the process

13 J. Duncan M. Derrett, *Hindu Law, Past and Present : Being an Account of the Controversy which preceded the enactment of the Hindu Code, The text of the Code as enacted, and some Comments thereon*, A. Mukherjee, Kolkata (1957), p. 82.

of Mate Selection, Changes in the Rites of Marriage, and Changes in the Stability of Marriage etc. As far as the selection of the bride and bridegroom is concerned it was the prerogative of the parents or the guardians. This tradition of selecting the marriage partner for sons and daughters continued till the end of 19th century when the ideas of liberalism and industrialism were being incorporating into Indian society due to the impact of Western culture. As a result of this, some cases of individual's choice of mate was found. In the post independent India, the tendency of selecting one's own partner has remarkably increased. Now-a-days the younger generation is not very much in favor of parental choice in matter of selection of marriage partners. It is true that there is an increase in number of such marriages now-a-days and it is also true that these marriages are less durable than the former one.[14] Such marriages are adversely affecting Hindu values, culture and customs. The control of the parents over their children is day by day vanishing and such a marriage is an example of the same.

IV. Some Instances Of Change

Traditionally, Hindu marriage is a religious sacrament and the Hindu marriage can take place only through the performance of certain rights and rituals. Some of the most important rites and rituals connected with Hindu marriage are *Kanya Dana*, *Vivaha Home*, *Panigrahana* and *Saptapadi* etc. But today, the situation is that some changes have taken place regarding the rites and rituals of marriage. On the one hand, we find that due to shortage of time the rites and rituals connected with Hindu marriage have been cut down. Generally, it is observed that people sometimes ask the priest to hasten the ceremonies of the marriage. On the other hand, some marriages are performed in civil courts. As a result of this, the sacred nature of rites and rituals has been diminished to a considerable extent. Another factor responsible for the decline in the religiosity of marriage is that Indian society as a whole is moving from *sacred to secular nature* and as a result of this; the traditional values are undergoing vast changes. Also, divorce was not easily granted and permitted in Hindu society. In India, in the latter part of 19th century, divorce was introduced by statute for two classes of persons:

---

14 *See* Apoorva Dutt, *How and why number of young Indian couples getting divorced has risen sharply***,** Available at http://www.hindustantimes.com/sex-and-relationships/how-and-why-number-of-young-indian-couples-getting-divorced-has-risen-sharply/story-mEuaEoviW40d6slLZbGu6J.html, Last visited on 25.07.2017; Shreejit Gangadharan, *Why do arranged marriages seem more successful than love marriages in India?*, Available at https://www.quora.com/Why-do-arranged-marriages-seem-more-successful-than-love-marriages-in-India, Last visited on 25.07.2017; Rosy Sequeira, *Divorce rate high in love marriages: HC*, TIMES Available at http://timesofindia.indiatimes.com/city/mumbai/Divorce-rate-high-in-love-marriages-HC/articleshow/13042372.cms, Last visited on 25.07.2017

(i) Those who converted to Christianity and consequent thereof their spouses refused to live with them,[15]

(ii) Those who were Christians and performed Christian marriages[16]

The hindrance on divorce made the institution of family and marriage stable and enduring. Due to the enactment of marriage and family legislations and many other factors the divorce rate in India has been steadily increasing. The incidence of divorce is a clear indication of the fact that the institution of marriage is undergoing changes. The stability of married life is gradually being affected. Marital instability is gradually increasing. There was a time when a wife could not think of divorce. But now, women have started taking resort to dissolution of marital bond. But divorce was not yet available to the high caste Hindus; unfortunately, some of whom, under the impact of western education and contract, had enlightened views and preached social reforms, including enactment of divorce laws. Sometimes parties do not want to snap the tie of wedlock, but still do not want to cohabit. Thus some new trends in Hindu marriages are emerging in this direction such as separation agreements and judicial separation. These remedies are much easier and faster to get the divorce.

Another trend which is though not directly affecting the sacred Hindu marriages but is indirectly standing parallel to marriage is live-in relationships. This relationship style is the outcome of modernization and westernization. Law protects and indirectly legalizes them. This fact can be depicted in the application of Section 125 of the Cr.P.C. 1973 and 'Protection of Women from Domestic Violence Act, 2005' and within it, in the provision of alimony. As explained in Section 125 of Cr.P.C., wife means a legally wedded wife but when we see the era since year 2005 the Supreme Court gave judgments justifying live-in relationship and held it could be wrong morally but not legally. Moreover, if a live-in relationship woman does not get compensation U/S 125 of Cr.P.C. then she can claim the same under Protection of Women from Domestic Violence Act, 2005. In *S.P.S. Balasubramanyam v. Suruttayan Andalli Padayachi & Ors*[17], the Supreme Court allowed presumption of marriage U/S 114 of Evidence Act out of live-in relations and presumed that their children were legitimate. Hence, they are rightfully entitled to receive a share in ancestral property. After independence the first case that can be reviewed is *Badri Prasad v. Dy. Director of Consolidation*[18] wherein the Supreme Court recognized live-in relationship as valid marriage, putting a stop to questions raised by

15 The Converts' Marriage Dissolution Act, 1866.

16 Indian Divorce Act, 1869.

17 AIR 1992 SC 756.

18 AIR 1978 SC 1557.

authorities on the 50 years of life in relationship of a couple. In *Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others*[19] the Allahabad High Court ruled out that "a lady of about 21 years of age being a major, has right to go anywhere and that anyone –man and woman even without getting married can live together if they wish". In *Patel and others case* [20] the apex court observed that live- in –relation between two adult without formal marriage cannot be construed as an offence. In *Radhika v. State of M.P.*[21] the SC observed that a man and woman are involved in live in relationship for a long period, they will treat as a married couple and their child would be called legitimate. In *Abhijit Bhikaseth Auti v. State Of Maharashtra and Other*[22] on 16.09.2009, the SC also observed that it is not necessary for woman to strictly establish the marriage to claim maintenance U/S 125 of Cr.P.C., a woman living in relationship may also claim maintenance U/S.125 Cr.P.C.

Last but not the least there are provisions being made to introduce *pre-nuptial pact*. For the uninitiated and probably for the unmarried and divorcees too, a 'prenuptial agreement' or more commonly called 'prenup' or 'prenupt' is a contract or agreement entered between two people about to wed. This contract clearly lays down the procedure of how assets and personal liabilities will be shared or distributed or spousal support in the unfortunate event of divorce or death.[23] The terms and conditions in the prenuptial agreement can vary but most prenupt agreements carry two most common points: *division of assets and liabilities* and *spousal support*. Sometimes a prenupt can include something like forfeiture of assets if a divorce is being sought on the grounds of adultery or certain conditions about guardianship of the wealth.[24] Just like a pre-nuptial agreement there is something called a post-nuptial agreement that is entered by couples who are already married. Then there is the cohabitation agreement for couples who are not married or live-in couples.[25]

Lately, things have begun to change and there is social acceptance for pre-nuptial agreements over the past five years. Prenuptial agreements have been increasing in some metros and in Mumbai in particular,

---

19 AIR 2001 All 254.

20 (2006) 8 SCC 726.

21 AIR 1966 MP 134, (1969) ILLJ 623 MP.

22 AIR 2009 (NOC) 808 (Bom).

23 ***See*** *Getting married? How a prenuptial pact can help*, Available at http://www.rediff.com/money/report/perfin-getting-married-how-a-prenuptial-pact-can-help/20091112.htm, Last visited on 25.07.2017.

24 Ibid.

25 Ibid.

probably because it is the financial capital of India. According to a survey among top divorce lawyers in the country, 10 percent of the affluent socio-economic groups have pre-nuptial agreement in place before they say, 'I do'[26]. It's a steep rise; experts believe and attribute this changing trend largely to the ambitious, educated and financially independent individuals of today's world.[27] With many more such cases, city advocates are looking forward to the Ministry of Women and Child Development's plan to introduce the concept of pre-nuptial agreement, which is already accepted in many countries.[28] According to this concept, spearheaded by union cabinet minister MANEKA GANDHI, "a detailed fair agreement stating- each spouse's assets and debts, agreements between them, history of the relationship and property split up; must be signed by the couple before marriage. This document should be reviewed by separate lawyers and needs to have attorney certification from both."[29] Advocate PRAKASH GEHANI, a renowned family court lawyer, said, "*This concept is already accepted in many countries, and much needed in ours. We see numerous cases daily wherein couples get married and end up having conflicts over numerous things. This boils down to divorces with either a woman, unaware of her rights, left with nothing, or a man taken for all that he has. While reconciliation between the two is always desired, especially if there is a child involved, a pre-nuptial agreement would cut down on many reasons of conflicts.*"[30]

It must be noted that this pact is just opposite to the beliefs of Hindu marriage system. Where Hindus consider marriage as an unbreakable relationship, the rationale behind such a pact infers that marriage will definitely break one day.

V. Conclusion

Thus from the aforementioned trends it can be inferred that Hindu marriage which was so called as '*saat janamo ka saath*' is now going through a drastic change. In the light of above changes it can be frankly said that leave the seven lives, such relationship could not go on for an entire single life. When we analyze the changes one by one it becomes clear that in today's Hindu marriage firstly the spouses do not want advice of their parents in choosing their partners then due to some reasons (lack of time, financial problems etc.) people are also

26 ibid.

27 ibid.

28 ***See*** Freny Fernandes, *Prenuptial pact may end conflicts among couples*, Available at http://timesofindia.indiatimes.com/city/thane/Rs-56L-payout-for-kin-of-banker-who-died-in-accident/articleshow/49213536.cms, Last visited on 25.07.2017.

29 ibid.

30 ibid.

not performing the entire ceremonies of marriage then it can also be said that these sort of marriages lack durability and ultimately results in divorce or judicial separation in a very short period of time. Some people even don't care about marriage; they live in a relationship like marriage *viz.* live-in relationships. It can be strongly said that these are not the characteristics of the traditional Hindu culture. India is known for its rich culture and heritage. The Indian culture is known not only because of its diversity in culture and traditions but also because the depth of feelings and logics behind those various traditions and cultures. The development and progress in any society catches its pace through the ideas, thoughts and mindset of people consisting in that society and their ideas, thoughts and mindset are governed by their culture, tradition, morals and religious values. *In presenti,* people have diverted from all those attributes which bring sobriety and sincerity in their attitude and mindset and this ultimately affects the whole nation. As there is a well-known maxim that '*when there is any wrong done, it is considered to be done against the society at large*'. People are avoiding their religious values and averring to follow the steps of their rituals that strengthen the marital bond between two people. Unfortunately, the present scenario does not present a good picture. There have been a number of problems being faced by married couples and live-in-relationship couples that finds its solution only in divorce or separation. Somewhere the breaking of bonds not only affects the two mates involved but their children, family, society and then nation at large. These lacunae in the institution of marriage have hollowed the belief system which is the essence of our society. These problems have devoid the nation of its rich culture and traditions. Instead of adopting western culture we should preserve and promote our rich heritage and culture. Moreover, there is also likely introduction of pre-nuptial pact which will completely ruin the essence of Hindu marriage i.e. if such a pact is legalized then the so called Hindu marriage as '*janm janmantar ka sath*' will be inferred as- one day or the other, marriage will be broken in this lifetime only and will definitely not run for the entire life span, leave the other lives and continuity of marriage between the same partners. The system of marriage is considered as significant to such an extent that if a couple lives together without undergoing the ceremony of marriage, such a relation is considered as illegal relation.

In the nutshell, it can be opined that in a country where Secularism is preached at national level and has been made a part of the preamble of the constitution then questions of traditions, culture, custom and religion should be decided within the domain of their belief system. In other words, we can say that there should be minimum interference of law in such issues. The changing trends should not be followed with blindfold eyes. Before accommodating those changes with the traditional and cultural values and religious institutions they should

be viewed with the eyes of the morality and religious values and not under the impact of casual practices of some other western culture or society. Further it is not only the duty of limbs of our governing system to preserve the rich culture and heritage but it is also the responsibility of the people to preserve the same.[31] They should respect their religious values, culture, traditions and customs; and act in compliance with these only.

> "*The once so called Hindu Undivided Family is now fragmenting and if this is to be stopped then the stakeholders of society shall intervene to stop these fragmentations. Judiciary cannot just follow the concept of go with the flow. It has to set up such series of precedents that can help the institution of Hindu Marriage to stand again on the same belief system with its all attributes of sanctity and eternity. The changing trends have become a door of separation and before India losses its identity of rich culture, the limbs of the government have to divert the routes from the one that leads to the door of separation to the one that could lead Indian society to regain its rich culture and heritage.*"
>
> -Personal opinion of Authors

31 The Constitution Of India, 1950 Art. 51A (f)

Position of Transgenders in India before Recent 377 Judgment

*Tanya Sagar

Who is a transgender?

Transgender people are the one who feel sexually opposite according to their body structure or genitals. It means someone whose gender differs from the one they were given when they were born, they may identify them as male or female, or they may feel that neither label fits them. Assigning someone's sex is based on biology - chromosomes, anatomy, and hormones. But a person's gender identity - the inner sense of being male, female, or both, doesn't always match their biology. Transgender people say they were assigned a sex that isn't true to who they are. "Justice Sikri" defined transgender in his concurring judgement as follows that the term 'transgender' is derived from two words, namely, "trans" and "gender". Former is a Latin word which means "across" or "beyond". The grammatical meaning of transgender, therefore, is across or beyond gender.[1] The term transgender also refers to a person whose gender identity or expression does not conform to the social expectations for their sex assigned at their birth and because of which are looked down by the society. They understand themselves as belonging to the opposite sex from what their genitals would suggest.

The United States Supreme Court has defined transgender as: "a rare psychiatrist disorder in which a person feels persistent uncomfortable about his or her anatomical sex and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[2] There is often confusion between certain terms that is sexual orientation and gender identity describing a transgender, so clear out this difference "Justice Radhakrishnan" has expressed his views under the head of Article 14 while giving right to transgender as third gender and laid down that "Gender Identity" refers to an individual's self-identification as a man, woman, transgender or any other identified category whereas sexual orientation on the other hand, refers to an individual enduring physical, romantic and/or emotional attraction to some other person, sexual orientation includes transgender and their sexual orientation may or may not during or after gender transmission.[3]

---

*3rd Year, B.A.LL.B (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow

1 National Legal Services Authority v Union of India and others (2014) 5 SCC 438.

2 Chrisner, Meghan, "Transgender Marriage: Which Came First, The Marriage or the Transition?" *Law School Student Scholarship* 1,6 (2012).

3 National Legal Services Authority v Union of India and others (2014) 5 SCC 438.

In India, the transgender community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv- Shakthis, etc with their different culture and identities. To add more of detail to these types, Hijras are biological males who reject their masculine identity in due course of time to identify either as women or not men; and the other different types of transgender in different parts of the country.[4]

Need of recognition as a "Third Gender"

As discussed earlier transgender is an umbrella term and covers many types of people including gay, lesbian, bisexual, transsexual, intersexed, hijras, kothis and many others. Now because of technology advancement many transgender people reassign their sex and change their physical body and take steps to live their lives as the sex they desire to be and change their physical body from male-to-female or from female-to-male as they desire through Sexual Reassignment Surgery (SRS) to alter their body to reflect their gender identity. Thus, the apex court broadens the term transgender to include 'pre-operative', 'post-operative' and 'non-operative' transsexuals who strongly identify with persons of the opposite sex.[5]

Tripathy says that non-recognition of the identities of Hijras, a TG community as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.[6] The need to identify transgenders as a third gender arose because of the stigma in the society relating to their orientation and they were forced to recognize themselves as either male or female because of only two genders in existence, they were not only looked down by what we call the right thinking members of the state but were also deprived of all their fundamental rights and to live with dignity as a citizen of the country. Even though the hijras are in existence since the ancient times they are still not accepted a part of the society. They follow their own tradition and culture and have strong social ties with their communities.[7] The hijras or eunuchs are feared, looked down upon, and sexually exploited they have always lived on the fringe of the society and have never integrated into it. They have always lived in the fringe of the society and have never integrated into it. They have been subjected to social segregation, stigma, ridicule, harassment, apathy and exploitation for centuries just because they do not identify as either of the sexes and are considered as queers,

4 Ibid, at 116.

5 Anoop Swaroop Das, NALSA Versus Union of India: The Supreme Court has Started the Ball Rolling , 5 Chankaya National Law University Law Journal 140, 142 (2015).

6 National Legal Services Authority v Union of India and others (2014) 5 SCC 438.

7 Ibid, at 140.

a situation of their natural beingness and gender dysphoria, over which they have no control.[8] Even after this condition few people have fought against this and only a few state governments like Tamil Nadu, Karnataka and Gujarat have done some efforts for the benefit of transgenders. Since transgender community are neither treated as male or female nor given the status of a third gender they are being deprived of many of the rights and privileges which other persons enjoy as a citizen of this country.

Despite the fact that the term Transgender is an umbrella term and covers many types still people only talk about the rights of hijras and no other community because they have a history of cultural acceptance. For instance, politicians are more likely to speak up for the rights of hijras than the rights of gay and lesbian persons.[9] Transgenders were facing blatant violence of every kind and were discriminated badly but situations changed after "The Hijra and Kothi movement in Bangalore an initiative of Sangama, a local NGO"[10] One of the main issues of the movement was the fact that the law failed to recognize Hijras and Kothis as individuals and were legally invisible and were not given any legal status. Arrest without warrant and physical torture was part of their lives. Through this movement there was decrease in the no. of crimes and they started to live their lives peacefully.

Another major legal problem for transgenders is Sec 377 of IPC which criminally penalizes unnatural sex because of which transgenders have to face blatant torture and abuse in the past years. Some instances which illustrate the range and magnitude of exploitation under Sec 377 is "The Bangalore Incident, 2004". The victim of the torture was a hijra from Bangalore who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligand. Later he was taken to a police station where he was stripped naked, handcuffed to a window, grossly abused and torured because of his sexual identity.[11]

Another major problem faced by the community is of education, employment and health care services, because of their orientation they are usually excluded from their families at young age because of which they don't have access to education which leads to unemployment and they have to work as sex workers. They are often rejected by hospitals

8 Ibid, at 141.

9 Siddharth Narrain, Gender Identity, Citizenship and State Recognition, 8(2) The Socio-Legal Review 106, 108 (2012).

10 Prathima R Appaji, The Hijra and Kothi Movement; a struggle for respect , available at http://www.mindtext.org/view/118/The_Hijra_and_Kothi_Movement;_a_struggle_for_respect/, last visited on 6/05/2017.

11 Naz Foundation v Govt of NCT of Delhi and others 2009 (111) DRJ 1.

and sometimes remain uncured which result to their frequent death. These problems have been decreased to a huge extent in the past years.

Recognition of Transgenders in India

The harassment faced by transgender people is blatant and they suffer physical and mental agony every day. The administration as well as the society treats them as unequal and therefore there is a need to identify them as a third gender and give them equal rights as any other person. Earliest UK case after which there was a need to recognize rights of transgenders as any other citizen because it laid down the ground for discrimination in the case of *Corbett v Corbett* in which the court held that that the sex of a person is determined at birth in accordance with stated biological criteria and without any considerations of the person's psychological sex.

The essential problem here is that law recognizes sexual identity purely on the basis of the biological definition of the sex that we are born in.[12] Similarly civil laws too are in need of urgent reform. If hijras are to have the same rights as other citizens, there is a need for their recognition either as women or as a third gender identity. This change in civil law will entitle hijras to an entire gamut of rights available to all other citizens based simply on the fact that they belong either to the sex called male or to the sex called female.[13] It was also argued in NALSA case that various International Forums and U.N Bodies have recognized their gender identity and referred to the Yogyakarta Principles and pointed out that those principles have been recognized by various countries around the world.[14] Many countries have already recognized transgender as third gender and India was in need of this development.

Earliest settled case in this context is the *Naz Foundation* judgement where the constitutional validity of Section 377 of *Indian Penal Code, 1860* has been challenged, which criminally penalizes what is described as "unnatural sex", to the extent the said provision criminalizes consensual acts between adult in private. **Section 377** of IPC reads out:

Whoever voluntarily has carnal intercourse against the order of nature with nay man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

12 PUCL- Karnataka (PUCL-K), September 2003 report, A study of Kothi and Hijra sex workers in Bangalore India, available at https://www.scribd.com/document/92993431/PUCL-Report-Kothi-and-Hijra-Sex-Workers-in-Bangalore, last visited on 7/05/2017.

13 Ibid, at 72.

14 National Legal Services Authority v Union of India and others (2014) 5 SCC 438.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

At the core of the controversy involved here is the penal provision Section 377 IPC which criminalizes sex other than heterosexual penile-vaginal. Since this section was based upon traditional moral standards and the IPC was formed in 1861 in British India thus this section is outdated acc to modern times and should be decriminalized. Moreover Section 377 serves as the weapon for police abuse; detaining and questioning, extortion, harassment, forced sex and negative and discriminatory beliefs towards same sex relations and sexuality minorities which affect transgender people physically and psychologically.[15] In Naz Foundation, it was held that Section 377 will not be repealed but 'Doctrine of Severability' applies in a sense that Section 377 IPC is only applicable to cases involving non-consensual sex. It was also declared that Sec 377 IPC violates Article 14, 15 and 21. The right to equality as defined in **The Declaration of Principles on Equality** states equality as- the right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on all equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.[16] Since Sec 377 is violative of Article 14 thus it means to give equal treatment to transgender community and recognize them as equals.

But this decision was soon overruled by the SC in *S.K Koushal v Naz Foundation*[17] where it was argued that the HC committed serious error in declaring Sec 377 as unconstitutional because there were no tangible materials placed before the HC to show that Sec 377 had been used for prosecution of homosexuals as a class. The SC declared that the Sec 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by division bench of High Court is legally unsustainable.[18]

The most important case regarding the recognition of Third gender is *NALSA case*. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights.[19] It was also held in this judgement that values such as privacy, self-identity, autonomy and personal integrity

15 Ibid, at 6.

16 Ibid, at 42.

17 (2014) 1 SCC 1.

18 S.K Koushal and another v Naz Foundation and others (2014) 1 SCC 1.

19 National Legal Services Authority v Union of India and others (2014) 5 SCC 438.

are fundamental rights guaranteed to members of transgenders community. The right of transgender to identify their gender comes under Article 21. The court held that TG have a right to identify them as any gender they like and is evident from the judgement in which the court said- "recognition of one's gender identity lies at the heart of the fundamental right to dignity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our constitution."[20] Transgenders were finally given their own recognition and they were not forced to show their gender identity as male or female in NALSA case. The court held "Hijras are identified as persons of third gender and are not identified either as male or female. The distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a 'third gender' Hijras, therefore, belong to a distinct socio-religious and cultural group and have, therefore, to be considered as a "third gender", apart from male and female."[21] Many states in India have recognized TG as third gender like Tamil Nadu, Bihar, Kerala, and Tripura and have taken many welfare measures to safeguard their rights and to make them equals with the citizens of the country.

It is the effort of NGOs like Sangama that raised the issue of harassment faced by transgender that now they are given similar rights as any other citizen of India. For instance, the Ministry of External Affairs which is in charge of both passport applications and online visa forms provides for transgender option in the category "sex" and the Election Commission of India and UID enrollment have a similar option. At the state level, the Tamil Nadu and Karnataka government have enacted orders that provide for socio-economic benefits to transgender persons.[22] Similarly Bangalore University has announced a reservation in its post-graduate courses for transgender persons.[23] Moreover it was clearly stated by the court in NALSA[24] judgement that the shall should take necessary measures to adopt transgenders as a third gender It was laid down that the state should take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex - including birth certificates, passports, electoral records and other documents - reflect the person's profound self-defined gender identity.[25]

---

20 Ibid, at 80.

21 Ibid, at 81.

22 Siddharth Narrain, Gender Identity, Citizenship and State Recognition, 8(2) The Socio-Legal Review 106, 107 (2012).

23 Ibid, at 108.

24 (2014) 5 SCC 438.

25 Ibid, at 24.

Transgender Persons Bill, 2016

Transgenders have been clearly accepted as a legal entity in Transgender Persons Bill, 2016[26] whose preamble clearly states- "A bill to provide for protection of transgender persons and their welfare and for matters connected therewith and incidental thereto." Section 4 of the bill states about Recognition of identity of transgender person-

(1) A transgender person shall have a right to be recognized as such, in accordance with the provisions of this Act.

(2) A person recognized as transgender under sub-section (i) shall have a right to self-perceived identity.

After this bill and NALSA judgement there was quite upliftment in the status of TG as they were recognized as a legal identity and were not deprived of any fundamental rights. Some of the recommendations that find a place in the final draft include the rescue, protection, and rehabilitation of transgenders. Educational institutions have been directed to adopt an inclusive approach that is gender-neutral. The government has also formulated welfare schemes especially targeted at transgenders such as basic medical facilities including sex reassignment surgery. Vocational training programmes are also in the pipeline. However the ambiguity in the bill about the definition of "third gender" has posed a serious problem as Sec. 377 draws them into its net. Therefore, the 2016 bill is to be re-introduced in winter session of Parliament.

Many states have worked towards the upliftment of Transgenders and even Central Government has adopted various laws and measures which have helped them to be at an equal footing with others. However, there is a need to change the mindset of society and till the time this narrow mindset of the society is not changed and it is not willing to accept them as a part of it no laws or measures adopted by the government can be effectively implemented.

26 Transgender Persons (Protection of Rights) Bill, 2016.

Love-Making in Confinement: A (necessary) Right of the Incarcerated? - An Analysis of the Conjugal Rights of the Prisoners in India

[*]**Nimisha Priyadarshi**
[**]**Mohit Shukla**

Introduction

The prison administration of a country rests upon several variables that pertain to the socio-economic structure of a country and other practical considerations.[1] However, what has remained a static concept in modern times in almost all the prison systems of different countries are the element of human consideration and the continuous efforts to achieve better reformatory measures. In earlier times, jail was mainly considered to be a torturous form of punishment where the inmates were stripped of all forms of their personhood and humanity. However, with growing awareness of human rights, the conditions of the prisons started improving. Due emphasis was given to the human rights of the prisoners and several reformatory measures were introduced in the norms of the prisons. The expansion of such an ideology has been stretched to such an extent that, today, crime is considered to be a social disease and criminals as its victims.[2] The punitive measures to prevent crime is supplanted by a scientific and societal approach in which the "*criminal is treated rather than punished.*"[3] The Indian jails, too, have undergone a sea change in treating its inmates. The development started, prominently, from the case of *Sunil Batra* v. *Delhi Administration*[4] where several rights of the prisoners were granted. Today, the deliberations on the rights of the prisoners have reached to such an extent that a relatively new concept, as that of the conjugal rights of the prisoners, is mooted in the case of *Jasvir Singh* v. *State of Punjab.*[5] In fact, the need for debating on such a right arises because there is no alternate remedy within the existing provisions to allow conjugal visitation. The concept of parole, also, does not seem to have the same effect since the same is granted to selected inmates and

* 3rd Year, B.A. LL. B. , Rajiv Gandhi National University of Law, Punjab
**5th Year, B.A. LL. B. , Rajiv Gandhi National University of Law, Punjab

1 Jaytilak Guha Roy, *Prisons and Society: A Study of the Indian Jail Systems,* Gian Publishing House, New Delhi (1st Edn-, 1989), p. 1.

2 Jaytilak Guha Roy, *Prisons and Society: A Study of the Indian Jail Systems,* Gian Publishing House, New Delhi (1st Edn-, 1989), p. 1.

3 Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology*, 2nd Indian Reprint (6th edn- 1968) p. 310.

4 *Sunil Batra* v. *Delhi Administration* (1978) 4 S.C.C. 494.

5 *Jasvir Singh* v. *State of Punjab*, 2015 (1) R.C.R. (Criminal) 509.

for reasons other than the reason of having conjugal ties. Hence, the scope of debate- whether there is a need to have a separate provision of conjugal rights or not?

The paper analyses the feasibility of granting the conjugal rights of the prisoners by weighing the benefits and the setbacks of the conjugal visitation by keeping the stakeholders of such a right, such as, the prisoners, the victims, the State and the officials, intact. The paper also discusses the world-wide perspective of conjugal rights of the prisoners with the purpose of assimilating the consensus that has been unfolded on the international platform.

Evolving Jurisprudence

"No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest one."

-Nelson Mandela

Man is a social animal. The man needs both the family as well as the society to share his emotions and feelings. Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because they are termed as prisoners, their right to dignity should not be curtailed. The Right of Conjugal visit leads to strong family bonds and keeps the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact. This right is recognised at least in few countries of the world. The state cannot curb conjugal rights by giving the reason that it will lead to overcrowding prisons, it is the duty of the state to find the proper solution regarding this problem. Today, conjugal visits are termed as family visits. The main reason for promoting these family visits is threefold: To continue the relationship between the prisoner and the family members, to reduce recidivism, and to provide an incentive for the good behaviour.

Imprisonment involves denial of liberty of the individual which is a symbol of societal disapproval towards him. Since it has some punitive content and thus it is expected that the prisoner suffers some disabilities including his freedom of movement. Hence one cannot expect the state of life in prison to be the same as in the free world. Restrictions on freedom are inevitable. Despite this position the system cannot ignore the fact that a prisoner is also a human being. Basic necessities of a human being should not be denied to him. Public interest in punishing him must be served. Indeed it is also in public interest that the individual is treated in dignity. So the law should strive to strike a balance between these equally competing interests.

Recently the Punjab and Haryana High Court in the case of *Jasvir Singh and Another* v. *State of Punjab and Others*[6] has given a very novel judgment recognizing conjugal rights of the prisoners within the jail premises considering it as part and parcel of right to life under Article 21. In this case, the petitioners, husband and wife, were tried for the offences under Section 302, 364A, 201 and120-B of the Indian Penal Code[7], for kidnapping and brutally murdering a 16 year old minor for ransom. The trial court awarded them death sentence. The honourable Supreme Court dismissed their criminal appeal but commuted the death sentence to life imprisonment for the wife. The petitioners then sought enforcement of their perceived right to have conjugal life and procreate within the jail premises. They sought for a direction to be given to the jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. They were also open to "artificial insemination".

Incarceration does not take away the right of procreation as it falls within the scope of Article 21 of the Constitution of India read with Universal Declaration of Human Rights. It should be the concern of the state to allow the right to procreation during imprisonment as there is no inborn conflict between the right to procreate and incarceration. The right to have the conjugal visits and artificial insemination provided for the convicts or jail inmates should be regulated by the procedure established by law as guaranteed under Article 21 of the Constitution. The Right of conjugal visit is not the absolute right as it should be provided to all the convicts during incarceration if it is not reasonably classified. Finally, the court ordered the jail reforms committee to suggest that how the implementation of conjugal visitation takes place and also suggest other methods while granting such rights to the prisoners.

The directions of the Punjab and Haryana High Court given in the case are:

1. State of Punjab was directed to constitute a Jail Reforms Committee, headed by a former High Court Judge, along with other members.
2. The Jail Reforms Committee shall formulate a license for creation of conjugal and family visits of jail inmates and shall identify the prisoners entitled to do so.
3. It shall evaluate the scope of allowing their families to stay for long and the necessary infrastructure needed for the same.
4. It shall make recommendations to facilitate the process of visiting,

6 *Jasvir Singh and Another* v. *State of Punjab and Others*, 2015 Cri LJ, 2282.

7 Indian Penal Code, 1860; §§ 302, 364A, 201, 120-B.

by those which are followed across different jurisdictions with special emphasis on rehabilitation.

5. Suggest ways of enhancing connectivity between the convict and family members.

6. Prepare a long term plan for the upgradation of the infrastructure of the jails.

7. Recommend prospective amendments to be made to the rules for the grant of parole, furlough etc.

8. Also classify the inmates who are and who are not entitled to enjoy the conjugal visits, keeping in view the perspective of security and social impact.

Various radical changes were brought in case titled as *Sunil Batra* v. *Delhi Administration*[8] as to how the working under the prison takes place to:

i. That the convicts should be separated from the under-trials in jails;

ii. Their right to invoke Article 21 of the Constitution of India;

iii. The adults should not be kept with the young inmates;

iv. The time should be specified for the visitation of the family and friends in prison;

v. There should be total ban on confinement in irons;

vi. It has become the obligation rather the duty of the court to provide facilities to the prisoners and the right to the parents, fellow-men and the family members should not be denied as per Article 19 of the Indian Constitution[9].

The Andhra Pradesh High Court in case titled as *G. Bhargavi, Hyderabad* v. *Secy., Home Dept., Hyderabad and Others*[10] dealt with an issue that whether the conjugal visits should be allowed to spouses of prisoners in jails across the State of Andhra Pradesh. The court rejected the claim that if conjugal visits are to be allowed considering good behaviour of the prisoners then it will have an adverse impact on the other inmates of the jail who have not been selected for such benefit and the chances of disturbance of the environment in the jail cannot be ruled out. It was also said that, "No provision shall bar in the Rules to release the prisoners to enable them to lead family life with their spouses when they are granted furlough/leave of course for a limited period."

---

8 *Sunil Batra* v. *Delhi Administration* (1978) 4 S.C.C. 494.

9 Constitution of India, 1950, art.19.

10 *G. Bhargavi, Hyderabad* v. *Secy., Home Dept.*, 2012 (5) A.L.D. 432.

Right to life which is one of the basic human rights is available to all human beings irrespective whether they are convict, detenu or undertrials.[11]

The court in the famous case of *D. Bhuvan Mohan Patnaik and Others* v. *State of Andhra Pradesh and Others*[12] said that the fundamental rights should not be denied to the convicts merely because of their conviction. Even though the convicts live in the confinement then also they will continue to enjoy the right guaranteed by Article 21 of the Constitution.[13]

The issue of the basic rights of the convicts was taken up in the case of *Sunil Batra* v. *Delhi Administration*[14] where J. Krishna Iyer opined that in the case of the confinement of a person to a prison, his or her human rights could never be sent for a holiday, by locking out the judicial process from the jail gates. It was held by the Apex Court that prisoners like that of Batra were entitled to basic amenities likes games, books, newspapers, good food, clothing, bedding etc. along with the right to expression and should not be made to work like prisoners who have been sentenced to rigorous imprisonment. It was stated that such rights could not be infringed in any way unless otherwise expressly provided.

The case dealt with the aspect of re-humanization of the prisoners which according to the Court would include opportunities of meditation, music, games, festivals, work with wages, arts of self-expression, visit by and to families among others, as provided to prisoners.

It was also held in the context of Section 30(2) of the Prison Act[15] that such prisoners are not to be completely segregated except in cases where it is extremely necessary to do so.

The court observed that the rights provided under Article 21 i.e. right to 'create life' and 'procreate' does not get suspended when a person is sentenced and awarded punishment thereby restraining him to stay in the jail. Article 21 does not as such bar or takes away the right of the petitioners to procreate with their spouse, not only this there is no such another provision or penal law so as to restrict the prisoners from exercising their basic rights under any such circumstances. The petitioners seeking these fundamental right to 'life and procreate'thus ought not to be denied. Even in the case of *Jasvir Singh,* awarding

11 *State of Andhra Pradesh* v. *Chalaram Krishna Reddy*, (2000) 5 S.C.C. 712.

12 *D. Bhuvan Mohan Patnaik and Others* v. *State of Andhra Pradesh and Others* (1975) 3 S.C.C. 185.

13 Constitution of India, 1950, art. 21.

14 *Sunil Batra* v. *Delhi Administration* (1978) 4 S.C.C. 494.

15 Prison Act, 1894; §30(2).

death sentence to the husband does not bar his basic "right to life" till the execution takes place. This right to life provides with all such rights except the freedom to move which has been taken away by way of punishment of law.[16]

International Jurisprudence

The purpose of diving into the international stance on the conjugal rights of the prisoners is to come to a concrete reasoning behind allowing or disallowing conjugal rights. The world-wide outlook on the issue is divided and each has been backed by a strong justification of serving the larger interests of the society and its members.

In European countries, such as, England, Ireland, Switzerland, Denmark, Germany, Greece Scotland, Sweden and Wales, the prisoners are classified and the selected ones are allowed short home leaves that serve the purpose of conjugal visitations.[17] In fact, in Denmark, besides granting conjugal visitations, it also provides apartment facilities for the prisoners who have been in jail for more than eight years where they can occasionally spend private times with their spouses. Also, in Spain, the prisoners and their spouses are provided condoms and showering facilities for a three-hour conjugal visit. Islamic countries like Saudi Arabia and Israel allows bigamous men to have two conjugal visits per month and in case of a homosexual partner, the same right is allowed in a fair manner, respectively.

Germany allows conjugal visits after a thorough strip search of the prisoners and their partners. In Russia, after 2001, the prisoners are granted extended onsite family visits for approximately once per month.[18] In U.S.A., states like, California, New York, Connecticut, and Washington D.C. allows conjugal visits. However, the conditions for allowing such visits differ with every state.[19] Latin American nations such as Chile, Puerto Rico, Mexico and Argentina allow conjugal rights of the prisoners. In fact, Mexico, Brazil and Belgium take one progressive step by allowing even the homosexual prisoners the right to have some private time with their same-sex partners.

---

16 Ruth S. Cavan & Eugene S. Zemans, "Marital Relationships of Prisoners in Twenty-Eight Countries", 49(2) JCLCPS 135 (1958).

17 Ruth S. Cavan & Eugene S. Zemans, "Marital Relationships of Prisoners in Twenty-Eight Countries", 49(2) JCLCPS 185 (1958).

18 Giles Whittell, "After the Gulag conjugal visits computers and a hint of violence", *The Times*, Jun. 2, 2006.

19 Arefa Johari, "Even Saudi Arabia Allows Prisoners to Receive Conjugal Visits", Scroll.in Jan 08, 2015 https://scroll.in/article/699205/even-saudi-arabia-allows-prisoners-to-receive-conjugal-visits.

Rationale behind Conjugal Visitations

Human Rights approach

Incarceration does not snatch away the basic desire for sexual intimacy or sexual expression. Despite being put behind bars, the prisoners retain their personhood and humanity.[20] As Judge Posner has quoted, *"We must not exaggerate the distance between "us" the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."*[21] Even the Indian judiciary on the rights of the prisoners has regarded that in spite of being stripped off certain fundamental rights, they are entitled to those rights so as to be defined under Article 21.[22] The United Nations' *Basic Principles for the Treatment of Prisoners, 1990*[23] states that:

> *Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.*

Further, Articles 8 and 12 of the European Convention, *inter alia*, provides that *(i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of that right.*[24] In *Griswold* v. *Connecticut*, the Supreme Court showed reverence to the rights of marriage and procreation[25] as both were considered to be fundamental to the existence of the human race.[26] In *R* v. *Secretary of State for Home Department,*[27] the Supreme Court of

---

20 Anamica Singh and Anupal Dasgupta, "Prisoner's Conjugal Visitation Rights in India: Changing Perspectives", 4 CULJ. 78 (2015).

21 *Johnson* v. *Phelan*, 69 F.3d 144, 152 (1995).

22 *D. Bhuvan Mohan Patnaik & Ors* v. *State of Andhra Pradesh & Ors*. (1975) 3 S.C.C. 185.

23 UN General Assembly, *Basic Principles for the Treatment of Prisoners: resolution / adopted by the General Assembly*, A/RES/45/111, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx.

24 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, available at http://www.refworld.org/docid/3ae6b3b04.html, last visited on 08.06.2017.

25 *Griswold* v. *Connecticut*, 381 U.S. 486, 495 (1965).

26 *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

Judicature (Civil Division), United Kingdom viewed that interference with human rights needs to be done in a proportionate manner, while considering a case of allowing a convict to start a family with his legal wife. In consonance with these, curbing sexual desires of a person is denial of their basic human instincts, and consequentially, their human rights.

From the standpoint of the prisoners' spouse,[28] it is both an abrogation of civil and human rights. It cannot be denied that the family of the prisoner suffers to a considerable extent. Thus, where a legal conflict arises, law should try to minimise the hardships faced by the spouse. A prisoner may be denied such rights, *in arguendo,* on the basis of due process and due procedure of law. However, denying the rights of an innocent spouse by the same due process of law is illegal and unlawful.[29]

Reduction of Sexual Assaults in Jail

The idea behind providing conjugal visits to the jail inmates is not only to grant them the basic human rights; but also as a method to curb sexual assaults within the jail premises. The proposition is drawn from the various studies on the psychology of perpetrators of sexual assault where it was found out that sexual assaults are not *only* about the drive to achieve power but *also* about sex.[30]

Sex is considered to be one of the most important needs of the human race. It is the driving force behind the survival of *Homo sapiens* as well as satisfaction of their hormonal needs. The American psychologist, Abraham Maslow, in his *A Theory of Human Motivation* has placed sex as a physiological desire that finds its place in the basic needs in the hierarchical structure towards which a man advances to secure a meaningful life.[31] In fact, the importance of sex is also acknowledged legally, such as under the Hindu law, which considers impotency as a valid ground for divorce.[32]

---

27 *R* v. *Secretary of State for Home Department,* [2001] E.W.C.A. Civ. 472.

28 Donald P. Schenller, "Conjugal Visitation - Prisoners's Privilege or Spouse's Right?", 2(2) NELPL, 165 (1975).

29 Anamica Singh and Anupal Dasgupta, "Prisoner's Conjugal Visitation Rights in India: Changing Perspectives", 4 CULJ. 78 (2015).

30 Noam Shpancer, "Rape is Not (Only) About Power; It's (Also) About Sex", Psychology Today, Feb. 1, 2016, https://www.psychologytoday.com/blog/insight-therapy/201602/rape-is-not-only-about-power-it-s-also-about-sex.

31 Abraham Maslow, "A Theory of Human Motivation", PR (1943).

32 *Siraj Mohd Khan* v. *Hajizu Nissa*, AIR 1981 SC 1972.

Denying such a basic need to a person- irrespective of whether he is a prisoner or a free person- is not only a violation of his basic human rights, but also a deprivation of his sexual right with a person he is legally married to. Such deprivation gives rise to occurrences of sexual assaults and rapes within the prison premises as supported by the findings of psychologists. The proponents of evolutionary perspective of rapes have propounded the theory that where there are dismal chances of sexual intercourse, men are more motivated to take risks "*in all domains, with one domain being sexual assertiveness, which might lead to rape."*[33] This theory is generally referred to as sexual gratification theory, and its proponents believe sexual assaults to be an "*alternate mating strategy employed by individuals when opportunities for consensual sex are lacking"*[34] or *"when the sexual offence provides the offender with a relatively low expedient and low cost means to achieve sexual gratification."*[35] In fact, in Diagnostic and Statistical Manual, 4th edition (DSM-IV), paraphilia, that is, the abnormal sexual desire, is defined in the following terms: "*(a) At least a 6-month period of recurrent, intense, sexually arousing fantasies, or sexual urges involving specific paraphilic behaviour, and that the fantasies, sexual urges, or behaviours; (b) cause clinically significant distress or impairment in social, occupational, or other important areas of functioning."*[36] DSM-IV-TR in the year 2000 added that this diagnosis could be made even in certain cases where individuals, *even though not personally distressed or impaired in their functioning*, had acted out the urge and carried out the *behaviours with a nonconsenting party.*[37] Further, in International Classification of Diseases, 10th revision (ICD-10), paraphilia is being described as being carried out to gain sexual excitement and gratification.[38]

33 William F. McKibbin, Todd K. Shackelford, et al, "Why Do Men Rape? An Evolutionary Psychological Perspective, 12 RGP, 86 (2008).

34 Stewart J. D'Alessio, Jamie Flexon, et al, "The Effect of Conjugal Visitation on Sexual Violence in Prison AJCJ available at https://www.researchgate.net/publication/257769959_The_Effect_of_Conjugal_Visitation_on_Sexual_Violence_in_Prison, last visited on 07.05.2017.

35 William F. McKibbin, Todd K. Shackelford, et al, "Why Do Men Rape? An Evolutionary Psychological Perspective, 12 RGP, 86 (2008).

36 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorder, DSM-IV,* 4th ed. (1994).

37 Jackie Craissati, J. Probat, "Sexual Violence against Women: A Psychological Approach to the Assessment and Management of Rapists in the Community", 3 IJP 235(2013).

38 World Health Organisation, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic guidelines* (1992), available at http://www.who.int/classifications/icd/en/bluebook.pdf, last visited on 10.05.2017.

Prison tensions which involve sexual assaults, rapes, and riots have been acknowledged to be motivated by the sexual urge.[39] In prison cells, where there are no chances of having consensual sex, the prisoners are impaired to exercise their sexual urge. The inmates have to make the most difficult adjustment by giving up their sexual life in jails.[40] They become sexually frustrated to such an extent that in order to give vent to their sexual urge, they resort to non-consensual sex with their fellow inmates.

In Indian jails, sexual assaults and rape are very rampant. In 1981, the People's Union of Civil Liberty conducted a research in which it stated that other prisoners trade in price with each other for every new boy who enters the jail premise as a prisoner in the form of 'bidis', soap or charas *"on the issue of who shall have the new entrant."*[41] Sources from Tihar jail also highlight the plight of prisoners where they become the subjects of the prying eyes of their rapists.[42]

In such a scenario, allowing the prisoners to gratify their sexual needs with their legal partners seems apt to reduce the rate of sexual assaults in prison. Clinton T. Duffy has also supported the idea of allowing conjugal visits that will help reduce the prison riots.[43]

Curbing Homosexuality and AIDS Menace

The theory that conjugal visits would reduce the homosexuality and its possible chance of causing AIDS to the inmates has been very less frequently discussed in India. Nevertheless, the Bombay High Court while hearing a Public Interest Litigation in 2010, acknowledged the possible benefits of conjugal visitation to curb the AIDS issue in prisons. Justice Majumdar, in this regards, directed the state government to look into this matter and suggested:

---

39 Richard D.Knudten, 48(1) Criminological Controversies 33 (1969).

40 M.C. Valson, *Rights of the Prisoners: A Jurisprudential Analysis,* Unpublished dissertation, Department of Law Cochin University of Science and Technology (1994).

41 G. Pramod Kumar, **"**Ram Singh's Death: Rape and Ugly Sexual Violence in Indian Jails**"**, *Firstpost* (Mar. 12, 2013), available at http://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html, last visited on 15.05.2017**.**

42 Raj Shekar, "Rampant sexual abuse is a real nightmare in Tihar", *The Times of India* (Jun. 11, 2015), available at https://timesofindia.indiatimes.com/city/delhi/Rampant-sexual-abuse-is-a-real-nightmare-in-Tihar/articleshow/47621742.cms, last visited on 14.05.2017.

43 C.T. Duffy, "A Frank Discussion of the Prison Problem Nobody Talks About", *This Week Magazine* (Oct. 21, 1962).

> *"There may be physical needs. See whether a separate place can be given to a prisoner and his wife for a day or two. The government is spending crores of rupees to curb the AIDS menace in jails. Instead why don't you take preventive steps?"*[44]

Prison cells become the breeding grounds for AIDS which is caused as a result of unprotected sex whether consensual or non-consensual through sodomy.[45] One of the reasons of contracting AIDS in prison is considered to be the sexual activity with fellow inmates.[46] The tension in prison is high and in order to get rid of this tension and boredom, inmates indulge in sex. The non-availability of legal partners to satisfy one's sexual urge leads to giving vent to it through homosexuality.

> "*Most homosexual acts in prison are done by inmates whose former and primary orientation was heterosexual. However, due to the imposed unisexual atmosphere, homosexual desires and acts developed.... Conjugal visits would help . . . maintain a heterosexual orientation for those who are concerned about homosexuality. It would also help to alleviate general tensions because sexual tensions turn into fights among the men, in order to find some release."*[47]

Along these lines, it is found that homosexual activities tend to increase in jails; however, that is changed to heterosexual activities when the inmate is released and contact with women increases.[48] Indian Journal of Medical Research article in 2010 quoted figures from Arthur Road jail in Mumbai in which 72 per cent of the inmates interviewed said sex between men was so common. About 11 percent said, they have had sex with other men.[49]

---

44 Press Trust of India, "Why can't Prisoners have Sex in jails, Court asks Maharashtra Govt." *The Times of India*, (Jan. 14, 2014), available at http://timesofindia.indiatimes.com/india/Why-cant-prisoners-have-sex-in-jails-court-asks-Maharashtra-govt/articleshow/5445590.cms, last visited on 12.05.2017.

45 Ram Ahuja, *Social Problems in India*, Rawat Publications , Jaipur *(*, 3rd edn.- 2016) p.343.

46 Paola Biolini, "HIV in Prison", World Health Organization Regional Office for Europe, available at http://www.euro.who.int/ data/assets/pdf_file/0008/78551/E77016.pdf, last visited on 10.06.2017.

47 Norman Eliot Kent, "Legal and Sociological Dimensions of Conjugal Visitation in Prisons", 2(47) NEJPL, 58 (1975).

48 C. Hensley, R. Tewksbury, et al, "Exploring the Dynamics of Masturbation and Consensual Same-Sex Activity within a Male Maximum Security Prison", 10 JMS 59 (2001).

49 G. Pramod Kumar, "Ram Singh's Death: Rape and Ugly Sexual Violence in Indian Jails", *Firstpost* (Mar. 12, 2013), available at http://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html, last visited on 15.06.2017.

In such situations, even though the sexual activity is consensual, such a thing is considered to be a taboo and hence, it becomes against the prison rules. The, condoms, therefore, are never used. This denial-based approach[50] promotes unprotected sex and the prisoners are exposed to a greater risk of contracting HIV/AIDS. The risk is considered to be even higher when lubricants are not used; in cases of non- consensual sodomy, the risk becomes not less than inevitable.

The conjugal visits would not only reduce the rate of homosexuality but it would also serve as an effective solution for it[51] and this, in turn would further curb the AIDS menace. A research in Mexico was conducted by the researchers in which it was found that allowing conjugal visits in Mexican jails reduced the homosexuality rate.[52] The benefit of conjugal rights on reducing homosexuality is also advocated by Columbus Hopper in his study.[53] Thus, the positive impact of granting conjugal rights to the prisoners would serve the purpose of reducing AIDS cases by curbing homosexuality as the prisoners would be able to satisfy their sexual urge through regulated sex.

Speeds Up the Rehabilitation Process

Indian model of punishment is inclined towards the jurisprudence of rehabilitation theory. However, rehabilitation should be done not just for the sake of complying with the modern norms but it must also seem to be done. While the Indian prisons have come a long way from the earlier repressive model to a modern approach of reformatory model, a lot of issues still remain untouched- one of the most important one is the conjugal rights of the prisoners.

Myriad rights have been guaranteed to the inmates but curbing the basic natural instinct is clearly a denial of his natural rights. To give up one's sexual life is a much more than what the system is asking. It is not only inhuman but also negatively impacts the psychology of the inmate. A man who was a prison officer for 21 years blogged:

> *"The general closed, masculine, aggressive, hierarchical and network-like social setting makes the prisoners: closed (introversion, keeping personal feelings in secret), masculine (more active, more dominant, not caring, not*

50 Editorial "A Warning about AIDS in Prison", *The New York Times* (July 24, 2006) available at http://www.nytimes.com/2006/07/24/opinion/24mon4.html, last visited on 10.06.2017.

51 Sir Leon Radzinowicz, Joan King, *The Growth of Crime: the International Experience*, chapter- "Prisons in the Pillory".

52 J.M. Olivero, A. Clark, et al, "A comparative view of aids in prisons: Mexico and the United States", 2 ICJR 105 (1992).

53 C. Hopper, "The Conjugal Visit at Mississippi State Penitentiary", 53 JCLCPS 342 (1962).

> *passive), aggressive (violent, intolerant, sometimes bestial, brutal, burned out, cynic etc.), dependent (hospitalized, hyper-vigilant, tranquilizer and body shape addict etc.) and builds up a gang identity and destroys the pre-incarceration identity."*[54]

Thus, the system of rehabilitation is reduced to an authoritarian one rather than the humanistic one. Edgardo Rotman, in his work,[55] distinguishes between the two systems when he writes:

> *"Rehabilitation in this [authoritarian] sense is essentially a technical device to mould the offender and ensure conformity to a predesigned pattern of thought and behaviour...The anthropocentric or humanistic model of rehabilitation, on the other hand, grants primacy to the actual human being rather than metaphysical fixations or ideologies, which long served to justify the oppressive intervention of the state. Client centred and basically voluntary, such rehabilitation is conceived more as a right of the citizen than as a privilege of the state. A humanistic public policy regarding crime implies the idea of human perfectibility, which at the level of rehabilitation includes not only the offenders themselves, but also the society that bred them and the institutions and persons involved in their treatment"*

Granting of conjugal rights to the prisoners is based on the humanistic model of rehabilitation where there is not only a fulfilment of his basic needs but also maintenance of regular contact with his dear ones that will ultimately speed up his rehabilitation. In the words of Hon'ble Justice Krishna Iyer, "*fair treatment will enhance the chance of rehabilitation."*[56]

Donald Clemmer,[57] in his study of the prison community, has reiterated the positive impact on rehabilitation by having contact with the law abiding people while being in prison. Further, it is also believed by many prison administrators that conjugal visits would serve to be as an incentive that would not only serve the prisoner's interest but

---

54 G. Pramod Kumar, "Ram Singh's Death: Rape and Ugly Sexual Violence in Indian Jails", *Firstpost* (Mar.12.2013), available at http://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html, last visited on 15.06.2017.

55 Rotman, E., "Beyond Punishment", Oxford University Press, Oxford (1994) p.205.

56 *Sunil Batra* v. *Delhi Administration* (1978) 4 S.C.C. 494.

57 D. Clemmer, "Observations on Imprisonment as a Source of Criminality", 41 JCLC 311 (1950).

also improve prison discipline.[58] This, in turn, would create a positive environment in the prison and would encouragingly speed up the rehabilitation process. Some of the studies advocating the conjugal rights of the prisoners believe in the fact that regular contact with one's spouse would have potential rehabilitative values. Further, they also acknowledge that integration of the prisoner, especially, a non-professional one, would be easier if the emotional ties are not faded away between him and his spouse that can be maintained by allowing conjugal visitations.[59]

Possible Repercussions of Conjugal Visitations

The moral consideration of allowing such visits needs to be taken into account. Since, the judiciary has raised a considerably appropriate question on whether such rights must be granted to the prisoners or not, it is pertinent to weigh the mooted point from both sides of the argument. Also, the social structure and dynamics of Indian society and Indian laws must be taken into loop in order to understand the implications of conjugal visitations.

There is enough reason to fear that prison cells might turn into prostitution cells and that too at the cost of state finance, considering the fact the prisons in India are overcrowded as against the insufficient number of jail officials to keep a check on it. Further, the single prisoners might feel frustrated when they see their similarly placed married inmates being granted the conjugal rights, leading to tension and unavoidable violence. Also, the underpaid prison staffs might be lured by such prisoners to arrange prostitutes within the jail premises and may even go to the extent of "renting" their own family members to other prisoners in order to earn favours from them. Thus, a question of morality arises at this level. Also, whether is it right to have sex within a public domain as that of a prison cell or not is under the scanner. It is considered by some critics that sex is a matter of privacy and must be done within the four walls of the house and not in a prison cell.[60] Thus, the greater question arises that- is the Indian society ready for such an acceptance?

The negative implications of conjugal rights are also premised on the lack of implementation mechanism that floods the Indian laws. Limited funds, insufficient space in the prison campus, understaffed jails and other administrative glitch make it difficult for the government to arrange such conjugal visitation.

58 Anamica Singh and Anupal Dasgupta, "Prisoner's Conjugal Visitation Rights in India: Changing Perspectives", 4 CULJ. 78 (2015).

59 Ruth S. Cavan & Eugene S. Zemans, "Marital Relationships of Prisoners in Twenty-Eight Countries", 49(2) JCLCPS 185 (1958).

60 Joseph K. Balough, "Conjugal Visitations in Prisons: A Sociological Perspective", 28 FPJ 57 (1964).

It is also pertinent to note that while putting too much emphasis on the rights of the prisoners, the interests of the victims, must also be taken into an account. The criminal justice system is made for the victims and when too much relaxation is given to a prisoner, it undermines the justice being delivered to the victims. According to some researchers, prison cell is not a vacation home where the inmates are able to lead a normal family life or *"has come to spend his vacation".*[61] While the human rights of prisoners are taken care of, law becomes duty bound to take care of the rights of the victims too. The very idea of punishment should not be diluted at the garb of human rights, or reformation. While it is true that incarceration does not take away the human rights of the prisoners; on the other hand, it is also true to say that when the same right is stretched to a limitless extent, it tends to disturb the equilibrium between the interests of the victim and the prisoners.

Recommendations

If the prisoners are granted the conjugal rights, it should be granted cautiously so as not to infringe the justice delivered to the victims, or waste the state resources and the taxpayers' money.

1. Prisoners can be separated into groups on the basis of their gravity of offences and conjugal visitation should be allowed to those prisoners who have been convicted for petty offences and whose term of sentencing does not exceed the cap as determined by a state committee subject to the conditions of a national committee, which are formed by the respective state and the central governments.
2. In case of hardened criminals, the rights of conjugal visitation should be granted on the basis of "good conduct" which should be duly assessed by the jail officials subject to the conditions laid by the respective state and national committees.
3. A small rest house can be established outside the premises of the jail where the prisoners can be allowed to avail their conjugal rights.

Conclusion

The issue of conjugal rights of the prisoners in India has been at a very nascent stage in the human rights jurisprudence. While it is true that in some countries, conjugal rights have been allowed and provisions have been made for its successful implementation; it is also true that in other parts, the rights have been denied to the prisoners. In India, since the issue is relatively new, there is a lack of mechanism and separate legislature for governing the same. However, it is also to be borne in mind that prisoners do not lose their humanity when

61 Sunaina, "Judicial Introspection", 1 IJIL 32 (2015).

being imprisoned and hence, the issue needs to be acknowledged and deliberated upon in serving the needs of the prisoner as well as the society. Ergo, the conjugal rights have been a concern for scholars and judges in India.

The issue, being at an inchoate stage, therefore, needs to be analysed in the light of various crucial stakeholders such as the rights of the prisoners, the rights of the victims, the society in which it is purported to be introduced and so on. However, the deciding factor of granting the conjugal rights ultimately boils down to the society in which such rights is being mooted. It is attempted to enforce the benefits of granting the conjugal rights to the prisoners but the cardinal issue that still remains unsolved is that- is the Indian society ready for such an acceptance?; and even more precisely- is there even a need for this right in a country where prisoners are considered to occupy the lowermost strata of the social structure and also, when they flood the jails in sufficiently strong numbers as against the understaffed officials to control them?

Reforms Needed In the Prisons of India

[*]**Mehak Nayak**
[**]**Vanshika Arora**

Introduction

The prison authorities in India have failed their inmates at various levels, be it administrative or humanitarian, with a few exceptions; and the inmates haven't been very kind to each other as well. Indian prisons lack the basic facilities that one needs to live peacefully during rehabilitation, and little has been done to amend it in years. That, coupled with the nonchalance of the administration, makes for a very rudimentary prison lifestyle which no human deserves to be put through. This article deals with some of the aforementioned problem, vis-a-vis, undertrials, over-occupancy, hygiene, under-staffing, prison fights, unnatural deaths, custodial rapes and lack of productivity. While addressing these issues, we aimed at understanding and evaluating the actuality and the reasons behind them. Following that, we also fabricated prospective solutions for them, which are ostensibly easy for the prison authorities to incorporate in their penitentiaries. Our main objective is to shed light on the injustices faced by Indian prisoners and give correctional proposals to overcome these wrongs, in order to preserve their basic human rights.

My research has adhered to the secondary method of data collection. The facts, figures and findings mentioned hereafter have been amassed from secondary sources, inclusive of articles, reports and editorials et cetera.

Issues

1. Presence of Under-trials

Under-trials are people who have been detained for alleged crimes but remain in custody as they await trial – a process that can sometimes takes years. More than two-thirds of the inmates are under trials. In absolute numbers, Uttar Pradesh had the highest number of under trials (62,669), followed by Bihar (23,424) and Maharashtra (21,667), as of 2017. In Bihar, 82% of prisoners were under trials, the highest among states[1]. These numbers are constantly increasing at an alarming rate.

* II Year BBA LLB, Symbiosis Law School, NOIDA

** II Year BBA LLB, Symbiosis Law School, NOIDA

1 Basant Rath, "Why We Need to Talk About the Condition of India's Prisons", The Wire, July 26, 2017.

With the growing strength of number of pending cases in the Indian courts, the problem of under-trials is a concern that needs to be addressed promptly to reform the Indian Prison System. The issue has lead to several under-trials being in the prison for more time than the actual time they would have been convicted for. There are several reasons for this problem,[2] like:

- Rarely produced in courts: these under trials are at times not even produced in the court due to lack of a police escort. The lack of personnel employed in this department has led to delay in producing the under trials. This further led to a violation of arrested person's Right to be produced in court within 24 hours of arrest. In some situations, some courts started to adopt the method of video-conferencing to hear the cases of under-trials. This was started off as an exception but police authorities, of some states, started taking it as a substitute and were later reprimanded by the court.
- Inadequate Legal Aid: the lack of legal aid lawyers further leads to a delay in cases of under trials. This insufficiency is because at times the inmates are not even aware about their entitlement for legal aid lawyers. These lawyers are paid meagre amounts and are over burdened with cases. There is also a shortage of public prosecutors and they are mostly appointed on ad hoc basis.
- Wrongly released: at times these under trials inmates are wrongly released by the prison authorities due to lack of knowledge of law. According to Section 436A of Code of Criminal Procedure, an under trial inmate is allowed to be released on personal bond, if held for a period equal to half their potential sentence. But in case of death penalties, they cannot be released. Even under such cases, prison authorities have released such prisoners.

In the light of these circumstances, several counteractive measures should be taken to improve the situation of the present prison system, like:

- The Legal Aid lawyers should be paid at a standardised rate across the country with just number of cases.
- There should be awareness programmes conducted by authorities such as NALSA, SLSA, etc. to aware the inmates about their legal rights.

---

2 Vinita Govindarajan, Six charts explain how undertrial prisoners in India are denied the right to fair trial. Available at https://scroll.in/article/843539/six-charts-show-how-undertrial-prisoners-in-india-are-denied-the-right-to-fair-trial, Last visited at 18.7.2017.

- As per the recommendation of Bombay High Court, Police personnel should be employed in prisons and to escort the inmates rather than with the VIPs and their relatives.
- The prison authorities too should be given basic knowledge of the law and their duties to maintain harmony in prisons.
- Taking inspiration from the legal assistance cell in Goa, where under trials can interact with their counsels through video conferencing and the litigants can know about the status of their case through a toll-free number; reforms should be adopted in every prison of the country.

2. Over-occupancy

According to the Prison Statistics India 2015 report by the National Crime Records Bureau, India's prisons are overcrowded with an occupancy ratio of 14% more than the capacity. More than two-thirds of the inmates are under trials. Chhattisgarh and Delhi are among the top three in the list with an occupancy ratio of more than double the capacity. The prisons are overcrowded by 77.9% in Meghalaya, by 68.8% in Uttar Pradesh and by 39.8% in Madhya Pradesh.

This over-occupancy in the jails has led to inhuman treatment of the inmates. From cells with occupancy of about 356,561 people, accommodate 418,536 inmates. This has further led to several problems for the inmates like breach of privacy, constant fear of the threats of bodily violations, poor standards of hygiene, etc. The comfort inside a cell is determined by the money one has or the kind of authoritative backing. Prisons in India lack to follow basic norms as set by the UN's Standard Minimum Rules for the Treatment of Prisoners[3]. The norms call for a minimum floor space, lighting, heating and ventilation. But this is still a far cry.

The problem of overcrowding is also affecting the limited prison resources. Due to shortage of facilities, people have to live in a congested environment and suffer. There is only 1 washroom per 100 inmates. During winters, 6 people have to share blankets meant for 2 people. More is the number of people in the prison, poorer is the quality of food for them. Due to severe staff crunch and overcrowding, the prisons constantly witness internal conflicts, fights and riots. With limited resources to manage and contain these incidents, the functioning of prisons also becomes order-oriented, there is limited attention on correctional facilities, reform and need for privacy.

The prison administration reforms are the need of the hour. The

3 Editorial, "Indian Jails are massively overcrowded, some of them by 500 percent", The News Minute, August 13, 2017

prisons are governed by 123 years old - The Prison Act. The prisons are as old as the act. Most Indian prisons were built in the colonial era and are in constant need of repair and renovation. The prime focus of the government should be to build new prisons with just and proper space and then work on the old and worn out prisons. The new developments should be completely in adherence with the UN's Standards. Prompt actions should be taken to divide the under trials and prisoners to protect the former's interests. The under trial cases should be taken on fast track basis to grant them justice and protect them from unwanted imprisonment. The cells should not over-accommodate people and everyone's Right to live with dignity should be protected.

3. Hygiene

The prisons are meant to primarily reform people. Instilling a sense of hygiene and sanitation is a very vital step towards ensuring that these reformed individuals are also healthy citizens, as a healthy body leads to a healthy mind. But due to problems of rampant overcrowding and shortage of staff, Indian jails are not able to provide basic hygienic facilities to the inmates.

The lack of duty is not only from the prison staff but the higher authorities are to be blamed equally. The fact that the prisons were constructed more than a hundred years ago and are followed on an equally old Prison Act, has been a major drawback of the system. The cells are really small to accommodate such huge population and basic facilities of lavatories and a clean kitchen are a far sighted dream.

There are about 8 lavatories for about 400-600 prisoners. Due to such conditions, they are forced to defecate in open or in the drains, making it extremely uncomfortable for them. The cooking standards are also mediocre. The food quality is awfully poor and for vegetables, they are mostly fed wild grass and roots. A glass of water has no less than one inch of mud at the bottom. There are no separate cells for prisoners with chronic communicable diseases. The prisoners with mental health issue are not given any proper supervision; these things time and again lead to several bullying issues.

These conditions often lead to revolts by the prisoners and also cause prison riots. There have been cases where under trials have refused to go to the courts as an act of protest against the violation of their basic human rights. They shouted slogans against the administration and created a chaos for the authorities. In such situations, police is helpless and are at times forced to open lathi charge on the prisoners to control the situation.

A healthy mind resides in a healthy body and a healthy body can develop only under healthy living conditions. Therefore, to reform the prisoners, it is necessary that they get a clean environment to live in. Several corrective measures should be taken to ensure the betterment of the prison system and a healthy lifestyle for the prisoners. These measures can be, for example:-

- Taking ideas from the reforms suggested by the All India Prison Reforms Committee,[4] also known as the Mulla Committee, the system work on the root cause of the problem, i.e., the poor conditions of the cells.
- More lavatories should be constructed to make sure that the ratio of number of toilets to people using it is reduced and there is zero open defecation.
- The new developed prisons should ensure water based flush type toilets to ensure that there is no foul smell and the lavatories remain clean and thus bacteria-free.
- A proper set of norms should be set for the kitchens to ensure clean and good quality food for the inmates.
- There should be proper installation of water purifiers in large quantity to avoid conflicts and fights among the inmates.
- A medical officer should be appointed to keep a check on the food quality and conduct regular health check-ups.
- The inmates with chronic diseases or who require special supervision should have separate cells from the other inmates.
- There should be regular counselling of the inmates with the competitively employed psychiatrists and psychiatric social workers.

4. Under-staffing

While 33% of the total requirement of prison officials still lies vacant, almost 36% of vacancy for supervising officers is still unfulfilled. Delhi's Tihar jail ranks third in terms of a severe staff crunch. The manpower recruited inside this prison is almost 50% short of its actual requirement. As the nation's capital, Delhi has the most over-crowded jails and suffers from acute shortage of prison guards and senior supervisory staff. States like Uttar Pradesh, Bihar and Jharkhand have the most scantily guarded jails, seeing over 65% staff vacancies among jailers, prison guards and supervisory levels.

4 Editorial, "State of Hygiene in Indian Prisons", Inba Tv, May 18, 2016.

In separate incidents, 32 prisoners escaped in Punjab in 2015, while in Rajasthan, the number of such cases has risen to 18. Maharashtra witnessed the escape of 18 prisoners. In 2015, on an average, four prisoners died every day. A total of 1,584 prisoners died in jails, 1,469 of which were natural deaths and the remaining 115 were attributed to unnatural causes. Two-thirds of all unnatural deaths (77) were reported to be suicides, while fellow inmates murdered 11, nine of which were in jails in Delhi. About 12,727 people are reported to have died in prisons between 2001 and 2010.[5]

In the absence of adequate prison staff, overcrowding of prisons leads to rampant violence and other criminal activities inside the jails. The problem of lack of staff in the prisons has led to several clashes among the prisoners and between prisoners and officials. There have been cases where the imprisoned gangsters have planned their several activities from inside the prison and created havoc in the society. Several incidents have been reported in the state of Uttar Pradesh where these inmates have smuggled arms inside the prison to plan their escapes or as an act of vengeance.

The problem of understaffing can be solved only when the police officials will be appointed in a systematic manner. The country has sufficient staff but lacks their proper relocation. The need of the hour is to recruit and transfer the police personnel in the jails. As per the orders of Bombay High Court, the police are more required in the prison to control the criminals rather than escorting the VIPs and their relatives. The prison authorities should be given just and reasonable powers to control such kind of nuisance creators of the prison as well as the society.

5. Prison Fights and Unnatural Deaths

In Indian prisons, fights are a very common place scenario. Fights break out owing to a varying number of things from gang rivalry to something as plain as seeing things someone else did not want you to witness. It could be due to personal vendettas or simply for the sake of it, sometimes. As discussed above, the administration of prisons in our country is surprisingly poor, and thus, oftentimes, these fights are turned a blind eye to, or they are not brought into notice at all.

There are also times when the guards do or say something that irks the inmates, thereby leading to rebellion in the form of fights. It should be noted that, prisons house convicted criminals and under-trials from all walks of life, as a result of which, violence is rendered a usual way of life inadvertently. There's no telling what may trigger an

5 Editorial "Why We Need to Talk About the Condition of India's Prisons", The Wire, July 26, 2017

angry reaction, however trivial, and result in an altercation. It has been observed that more often than not, the inmates that are serving very long sentences are the ones who instigate and initiate such fights; on the other hand, under-trials and convicts who are set to be free soon do not indulge in gory fights.

One of the most important factors that come under the spotlight is the vehement ignorance of the prison administration of India (inclusive of the staff as well as the people at the top of the authority's pyramid).

For instance, in 2013, in order to avenge the murder of Sarabjit Singh, an Indian convicted of terrorism in Pakistan, in a Pakistani prison, an Indian prisoner in Jammu attacked a fellow Pakistani prisoner, rendering him comatose.[6] Eventually, Sanaullah Ranjay succumbed to his injuries.

Riots and fights in Indian prisons are so routine that they rarely make the news. However, sometimes the prison authority comes into flames and is faced with scrutiny, when such fights lead to deaths. Unfortunately for the inmates, prison deaths are also widespread in today's state of affairs. Prison deaths stem from both the actions of prisoner, as well as the prison staff. In order to understand the situation of only prisons, vis-a-vis death, we shall not discuss custodial death in this article.

In the year 2015, at 1584 deaths in prisons during the year, there has been a death in prisons every 5.5 hours.[7] States like Punjab and Uttar Pradesh are the leading states with the highest number of prison deaths. About 12,727 people are reported to have died in prisons between 2001 and 2010.[8]

In 2017, a brutal sexual assault sparked row, when female guards beat a female inmate, and then inserted a stick inside her vagina, which turned out to be fatal for the victim.[9]

Another major reason behind the aforementioned deaths is suicide, something prevalent in today's day and time. In 2015, two third of all unnatural deaths were reported to be suicides. There was one suicide in Indian prisons every five days.[10]

---

6 Dean Nelson, "Pakistan prisoner fights for life after being beaten in Indian jail", The Telegraph, May 3, 2013

7 Commonwealth Human Rights Initiative's Comments On Prison Statistics India (PSI) 2015 Report

8 Basant Rath, "Why We Need to Talk About the Condition of India's Prisons", The Wire, July 26, 2017

9 Vidhi Doshi, "A brutal sexual assault sparked riots in an Indian prison. Reports focused on a celebrity inmate instead.", The Washington Post, June 28, 2017

10 Findings of Prison Statistics India (PSI) 2015 Report

Ergo, in order to curb these fights and deaths, the following suggestions are made:

- Keeping the violent inmates, or the ones known to initiate fights, in solitary confinement. This need not be permanent, and can help cool down the stance of the inmates while keeping trouble at bay.
- Augmenting the size of prisons, because Indian jails are exclusively infamous for overcrowding, and this overcrowding is why often there is discomfort and tension among the prisoners. Increasing the space will give some relief to them.
- Introducing manual work in the prisons (like Tihar Jail), so that it is mandatory for the inmates to invest their times in doing something productive, in lieu of whiling away their time by fighting and creating rivalries. It will act as a distraction.
- Reducing the severe staff crunch by hiring employees to look after the activities of the prisoners. Indian prisons suffer from a serious lack of staff, and addressing this problem alone, can make the prison life smoother and a lot less danger prone, as there will be a significant number of people to monitor the arena at all times and revert any untowardly incident while they can.
- Improvising the quantity and the quality of food provided to the inmates, in order to eradicate deaths by food poisoning or starving.
- Supervising the health of the prisoner, because lately a lot of prison deaths are being reported as natural deaths. Such deaths need further scrutiny, because an inmate's liberty is fettered in judicial custody, and thus they are dependent on the prison authority for maintaining their health. Any carelessness in this area resulting in someone's death cannot be termed 'natural'.
- Following preventive measures in every prison department as a key responsibility, because a majority of unnatural deaths are allegedly suicide.

6. Custodial Rape

Custodial rape is a kind of rape that takes place while the victim is "in custody" and constrained from leaving, and the rapist or rapists are an agent of the power that is keeping the victim in custody. Also, when it happens in prison, it is known as prison rape. Custodial rape is an endemic problem in certain nations, especially India, and that is the fraction this research shall curtail to. Rape is a form of gender-based violence against women. With the authoritarian Executive, like that in India, problem of women in custody and detention is significant.

Rape in custody is a part of a broader pattern of custodial abuse. For years, Non-governmental Organisations have asserted that rape by police, including custodial rape, is far more common than National Human Rights Commission's figures indicate. According to the findings of Department of State, 2001, a higher incidence of abuse appears credible, given other evidence of abusive behaviour by police, and the likelihood that many sexual assaults go unreported due to the victims' shame and fear of retribution. However, legal limits placed on the arrest, search, and police custody of women have ostensibly brought down the frequency of rape in custody.

According to the National Crime Records Bureau, in 2002 courts tried 132 policemen for custodial rape, but only 4 were convicted. The Ministry of Defence reported that it filed a total of 17 rape cases and 10 murder cases against army personnel from 2003-2004. To date, one rape case and five murder cases ended in guilty verdicts. In the remaining cases, the investigations remained ongoing or the charges were proved false. According to The Times of India[11], a tribal woman alleged that she was raped by three Special Task Force personnel in October, 2007. Then in November, a High Court ordered an inquiry into an alleged custodial gang rape of a girl who had been arrested in connection with militancy, and then was raped by three policemen. This tally is the highest in Uttar Pradesh out of all the 29 states of India.[12] The aforementioned are just two of the countless episodes. However, many more cases go unreported because women either lose faith in the police, or lose their sanity, or their mouths are forced shut by the authority that crippled them.

In order to bring this ordeal to light, there exists Section 376(2) of the Indian Penal Code, which defines custodial rape in details and the punishments imposed under Section 376(2) are severe and graver than the punishment imposed under Section 376(1) which entails rape by a superior authority. It is because of the incorporation of amendment to that Section by Criminal Law (Amendment) Act, 1983.

Section 376-C lays down that, "whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished

11 Angelfire, Custodial Rape, Available at http://www.angelfire.com/space2/light11/women/index30.html, last visited on 12.07.2017.

12 Moushumi Das Gupta, "Uttar Pradesh tops in custodial rape cases, says parliamentary panel report", The Hindustan Times, December 24, 2017.

with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

With regards to this, the drive to make the state answerable for violence against women is part of the common struggle for human rights and democratization. In pursuing this, it is important to work with NGOs and other such groups as these women's issue cannot be seen in isolation.

However, following are a few schemes that the State can adhere to immediately, in order to start a wave of change:

- Training for Gender-sensitization: For a long time, the Indian police have lacked the tact required to deal with the victims of sexual assault, which vary across all genders and age groups. But in recent times, sensitivity is being shown towards this vulnerable group, owing to the efforts by certain organisations. For instance, a gender-sensitization drive was conducted across the country by the Centre for Social Research, whereas Amnesty International launched "Ready to Report" to encourage women to engage positively with the police.
- Raising the number of women police officers: A very tiny fraction of the police force constitutes women, and a large part of these women is involved in just the ancillary and administrative work, with minimum field duty. Increasing the presence of women in police stations can significantly bring down custodial rape.
- Lack of legal provisions: While the Criminal Law Act, 2013, mentions that public servants, who commit rape, shall be punished with a rigorous life imprisonment which shall not be less than ten years but which may extend to life imprisonment, the Indian laws oversee the fact that victims of custodial rape include men, transgender, children etc. They hold little to no power as the pre-existing laws are female-specific. So, drafting better and more inclusive laws will help curb custodial rapes.

7. Lack of Productivity

Prisons in India have been faced with a lot of issues, when it comes to management of the existing prisoners. The jailed pupils more often than not, are rendered workless, thereby wasting a huge potential they hold. The significant quantity of workload that can be addressed, in any manual field whatsoever, with the help of this workforce, has only recently started garnering the concerned attention.

In the past decade, in order to bring about reform vis-a-vis prisoners, some prison administrations have started providing correctional measures. The ten prisons that are a part of this initiation (nine in Tihar Complex and one District Jail in Rohini), have undertaken certain

activities vide factory production, educations, counselling, vocational training et cetera. As a part of this project, affiliations with NGOs, Indira Gandhi National Open University, National Open School, retired Generals, psychiatrists, psychologists, teachers and the likes, have been made.[13]

For instance, to harvest the most out of the prisoners, a jail factory has been erected in Tihar, New Delhi, with state-of-the-art machinery. Tihar Jail is an exceptional brand with a wide range of products which are manufactured by the prison inmates, like bakery products, textile, clothes, furniture et cetera.

Apart from this, in Himachal Pradesh, an open-air cafeteria and a book cafe are being run as restaurants by inmates of the prison in Shimla. This is in order to give them a chance for reform and rehabilitation, on account of their good conduct, in order to supplement their incomes and give them recognition.[14]

Thus, to propagate this scheme and mitigate the problem of lack of productivity in jails, the following suggestions can be effectively put into place:

- Upgrading the prison infrastructure, to accommodate the prisoners properly by decongesting them and give them enough space to carry out work for the inmate-run businesses. It must be inclusive of better electricity, drinking water, sewer lines, construction of roads and barricades. This is also a step against the manifestation of overcrowding.
- Setting up control rooms and CCTV cameras, as well as investing in the IT infrastructure, in order to smoothly monitor the things going on throughout the prison and to have a safer place for people to work in. This should also include installation of scanners and metal detectors to make sure that nothing illicit is supplied to the inmates.
- Employing additional staff to strengthen the administration and improve the management efficiency. Indian jails are grossly understaffed, and need more people to facilitate the work of the prisoners and teach them the how-to for every business or manual work that they are capable of indulging in.

13 Government of India, Annual Plan 2014-15 (Volume - II) – Jail, Available at http://delhi.gov.in, last visited 17.07.2017

14 Kanwar Yogendra, "In Shimla, a café is run by prisoners", The Hindu, October 28, 2017

Result

The basic purpose of our research was to find out the conditions of the Indian prisons and how they can be improved to ensure that the inmates get proper humane treatment. The research brought us to a conclusion that all the problems prevailing in the prisons are completely inter-related and can be cured only when the authorities decide to work on the core of them all, i.e., the development of more prisons in the country. The new prisons should incorporate all the facilities which ensure a healthy and respectful life of the inmates. Apart from their basic human rights, their safety and the Right to Justice should be ensured. To make sure that the inmates get what they deserve, we should ensure that the people who provide them services are also getting just treatment. The police officials and the legal aid lawyers should get proper remuneration and incentives to help them serve the society better, and with increased fervour. Moreover, acts dating back to the British-ruled era vis-a-vis Indian prisons are another major hindrance in the process of prison development and their immediate amendment is the pressing need of the hour.

Conclusion

In the absence of robust laws and proper execution of existing law and order, the prisoners in the country will continue to suffer the same. The problems of under-trials, over-crowding, under-staffing, poor hygienic conditions, custodial rapes and murders and lack of productivity are to name a few. There are still a lot of problems prevailing in the prisons of our country. To improve the system of law and order in the country, we need to improve the prisons before the courts. To ensure that both the under-trial suspects as well as the convicts live a life of integrity in proper hygienic and safe conditions with proper utilisation of them as a human resource, we need to work on the basic prison system. The policemen should be educated about their duties and regulations. The inmates should be aware of their rights. They should be helped to recover from their deeds and improve themselves to face the society and live a healthy and respectful life, after they have served their term. To ensure this, we need stringent laws to protect the whistle-blowers and the prisoners; their Right to Life and Liberty shall not be undermined. It is high time to revise the hundred year old acts and work towards furthering our system. Let us put in an effort to give justice to the victims and a justified environment to the convicts.

Gender Inequality and Personal Laws: An Unscrupulous Politics of Religion

[*]**Somesh Sharma**
[**]**Divya Awasthi**

Introduction

"Woman? Very simple, say those who like simple answers: She is a womb, an ovary; she is a female: this word is enough to define her."[1]

Since the time of Aryans India has been a pluralistic society and has espoused the principle of *Sarva dharma sambhava,* which postulates equal reverence to all religions in the public sphere due to which different personal laws thrived in this country to govern the social life. India is a secular nation where freedom to practice, profess and propagate one's religion is a constitutional mandate to which people have conceded.[2]

The State by preserving personal laws of different religions has been trying to uphold the heterogeneity of the nation however in a path to establish a heterogeneous society it has neglected the rights of women who for an eternity have been sidelined in nearly every culture and context without their rights being safeguarded by any scheme of law.

Though the Indian Constitution bestows women with equal rights which help them to live dignified life but at the same time they are the ones who bear the brunt of legal pluralism in family matters which has led to the denial of their rights. These laws are extremely regressive, unfair and a reflection of deep-rooted patriarchal forces of our society. Although some attempt has been made to reform personal laws in order to attain gender justice, however, the attempts remain in the form of piecemeal offerings.

Flavia Agnes in her book[3] suggests that in every religious scripture there exist positive spaces for women to negotiate their rights. For instance, Kautilya's Arthashastra gave equal rights to wife to divorce her husband, Narada laid down five situations in which a woman can remarry and both husband and wife had the right to dissolve their marriage.[4]

* B.A. LL.B (Hons.) 4th Year, National Law University Odisha, Cuttack
** B.A. LL.B (Hons.) 4th Year, National Law University Odisha, Cuttack

1 Simone de Beauvoir, *Second* Sex, Vintage Books, New York, (2010), p.41.

2 The Constitution of India, 1950, art. 25.

3 Flavia Agnes, *Law and Gender Inequality* : *The Politics of Women's Rights in India*, Oxford University Publications, (1999), p.14.

4 Flavia Agnes, *Law and Gender Inequality* : *The Politics of Women's Rights in India*, Oxford University Publications, (1999), p.14.

The problem lies not in the religion but in the selective picking of its dictates to give it a color of religious practices benefitting men to the complete suppression of women into all walks of life.

The paper deals with the tussle between the Rights of women and perpetuation of patriarchy through personal laws which have thwarted the attainment of desired level of gender equality. Through the course of this paper, the authors have focused on legal disabilities suffered by women in matters related to marriage, divorce, adoption, succession and guardianship. It examines the attempts of Judiciary to bring about the social reforms to promote the enactment of gender just laws. Finally, the paper discusses the probable consequences of implementation of Uniform Civil Code.

Women's Matrimonial Rights and the Dark Side of Personal Laws

There are various personal laws in India which govern Hindu, Muslim , Sikh, Christian, Parsi, Buddhist, Jews and Jains' personal affairs. Sikh, Buddhist and Jains follow Hindu personal laws as they do not have their separate personal laws.[5] The personal laws provide a framework which perpetuates patriarchy and makes women susceptible to discrimination. The Working Group for Women's Rights (WGWR) held that "in a debate revolving around dichotomies of nation vs. community, individual vs. collective, and majority vs. minorities, women as a category are rendered invisible".[6] Prejudicial practices against women which were prevalent in earlier society are still flourishing behind the veil of personal laws.

I. Status of Women under Hindu Law

Though arduous efforts have been made in the Hindu Personal laws to make them gender neutral, despite such efforts, certain provisions still exist which are antithesis to gender equality. For instance, the woman is considered to be the most adorable and caring guardian to the child but in the matter of deciding the natural guardianship, men are given preference over women.[7] To further highlight problematic practices, sections 8 & 15 of The Hindu Succession Act, 1956[8] which provide for devolving of male Hindu dying intestate and female Hindu dying intestate respectively are gender bias in nature as they give preference to the agnates over the cognates. These sections are indicative of gender discriminatory practices prevalent in the Indian legal system.

---

5 Parul Chaudhary, "Gender Inequality in Hindu and Muslim Personal Laws in India", 1 *IJHS,* 34, 35-36 (2015).

6 WGWR, "Reversing the option: civil codes and personal laws", 31 *EPW* 1180-3 (1996).

7 The Hindu Minority and Guardianship Act, 1956, §§ 6 (a),7

8 The Hindu Succession Act, 1956, §§ 8, 15

II. Status of Women under Muslim Law

According to Flavia Agnes, "Islam means peace and submission".[9] The Quran, which is said to be a divine revelation (the word of God), is considered to be the primary source of Islamic Law. The gender equality can be conspicuously found in the pronouncements of Quran but Shariat Law which forms the basis of Muslim Personal Laws is a result of the limited understanding of the preachers and the followers of those holy pronouncements.[10] According to Zoya Hasan, "Muslim women are triply disadvantaged-as members of a minority, as women, and most of all as poor women". [11] Muslim women in India are keeping their loyalties to their religion alive after sacrificing their commitment to emancipation and gender justice. Muslim women are still subject to a separate code of personal law which governs their conduct, even after being codified several years ago, has never been reformed and is obsolete. Muslim women continue to be at disadvantaged position under this code.[12]

Muslim Personal Law contains provisions that propagate the practices which are prima facie discriminatory in nature.[13] Muslim personal law gives unfettered power to husband to divorce the wife while she has such right only under certain specific contingencies.[14] Muslim men can have more than one wife, in this way Muslim Law gives legal sanction to polygyny.[15] Furthermore, Muslim divorced wives can re-marry her previous husband only after marrying someone else, consummating the second marriage and then getting a divorce which itself questions the dignity of Muslim women.[16] Though such practice (*Nikah Halala*) is in itself arbitrary, it is also discriminatory in nature as no such requirement is laid down for men. With regard to maintenance, the husband is not entitled to maintain his wife after the expiry of *iddat* period (three lunar months period which is observed to

---

9 Flavia Agnes, "Constitutional Challenges, Communal Hues and Reforms within Personal Laws", *Combat Law* 4-10 (2004).

10 Flavia Agnes, *Family Laws and Constitutional Claims*, Oxford University Publications, (2011), p.41

11 Zoya hasan & Ritu menon, *The diversity of Muslim women's lives*, Rutgers University Press, (2005), p.6-7

12 Indira Jaising, "Gender Justice and the Supreme Court", B.N. Kirpal, *Supreme but Not infallible: Essays in honor of the Supreme Court in India*, Oxford University Press, (2000) pp. 288, 298-99

13 The Muslim Personal Law (Shariat) Application Act, 1937, § 2

14 Cyra Akila Choudhury, "(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India", 17 *Colum. J. Gender & L.* 45, 68-70 (2008).

15 Tanja Herklotz, "Dead Letters? The uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court", 6 *South Asia Chronicle* 61, 69-70 (2016).

16 Ahmad, Athar, "The Women who Sleep with a Stranger to Save their Marriage", *BBC*, April 5, 2017.

ascertain whether the wife is pregnant after the cessation of marriage), or period after delivery and suckling of the child.[17] Not only in marriage and divorce, patriarchy subsists in the whole gamut of family matters. For instance, woman's share of inheritance is half than that of what a male counterpart gets.[18]

Muslim women have incessantly struggled for their emancipation against these dogmatic provisions but such laws continue to prevail as they are treated as holy proclamations, which as per authors understanding is the misinterpretation of what they actually mean to profess. The Muslim Women (Protection of Rights on Divorce) Act of 1986 which was enacted to make the *Shah Bano's* judgment inoperative shows the extent to which women's rights are susceptible to unscrupulous religious politics. In 1994, the petitioners in *Maharshi Avadhesh v. Union of India*[19] approached the court challenging the constitutionality of Muslim Women Act but the writ petition was dismissed on the ground that "these are all matters for the legislature and the Court cannot legislate in these matters". Subsequently, in the case of *Ahmedabad Women Action Group*[20], petitioners challenged the several provisions of Muslim personal law. The Supreme Court rejected their concern noting their "incapacitation to encroach the power of the legislature to legislate."

Justice K. Rama Swamy while expressing his views on the vulnerable condition of women in India said that, "Half of the Indian populations too are woman. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all equities indignities, inequality and discrimination"[21]

Now, it is high time for the legislature to come out from its cloak of vote bank, party politics, and unpragmatic policies and should implement gender-neutral laws to take out women from the shackles of subservience, torture and objectification in order to escalate them to the heights of reverence, dignity and self-identity.

III. Indian Constitution: A Guide to Gender Justice

"Father protects when she is young, husband protects during her youth, and children protect her in old age. Woman is never fit for freedom".

---

17 The Muslim Women (Protection of Right on Divorce) Act, 1986; see S.A Kader, *Muslim Law of Marriage and Succession in India*, Eastern Law House, Kolkata, (1998), p.45.

18 Flavia Agnes, *Family Laws and Constitutional Claims*, Oxford University Publications, (2011), p.64.

19 *Maharshi Avadhesh v. Union of India*, 1994 SCC Supl. (1) 713.

20 *Ahmedabad Women's Action Group v. Union of India,* 1997 (3) SCC 573.

21 Chawla M., *Gender justice: Women and law in India*, Deep and Deep Publications, New Delhi, (2006), p.33.

Women have been historically suffering discrimination in silence and were subjected to all inequities, indignities and inequality. It is rightly said by famous German philosopher Fredric Engeles in one of his classics *"Origin of the Family, Private Property and the State"* that "Woman was the first human being that tasted bondage. Woman was a slave before slave existed". In India, gender-based discrimination has continued since later Vedic period. During Pre-constitutional era women had almost no freedom and were at the mercy of their menfolk— father, husband or son for their happiness.[22] The beginning of independent India is an important landmark in elevating women's position in the country. The enactment of Constitution is the watershed in the lives of women.

The Constitution in its Preamble provides equality of status and opportunity to all the citizens.[23] It assures "dignity of individuals" which also includes the dignity of women. Indian Constitution under Articles 14 and 15 not only bestows equality on women but also authorizes the State to adopt measures of affirmative action in favor of women for counterweighing the social, economic, educational and political disabilities suffered by them.[24] Propagating the similar objective, Articles 23 and 24, which prohibit trafficking of human beings and forced labour, and employment of any child below the age of fourteen respectively without any kind of discrimination between man and woman can be considered undoubtedly as provisions that are positive and progressive towards women. These provisions apart from having color of gender neutrality themselves also inspired many laws including those for the prevention of traffic in girls and women, and the Indecent Representation of Women (Prohibition) Act, 1986.

In addition to the Fundamental Rights, various provisions of Directive Principles of State Policy under Part IV of the Constitution supplement the approach towards gender justice within the Indian society. For instance, the directive principles enshrined under Article 39 of the Constitution of India directs the State to make its policies promoting equality among all its citizens with regard to remuneration (equal pay for equal work irrespective of sex.).[25] The provision of equal pay for equal work gets it color from the Articles 14 and 16 of the Constitution which further leads to enactments of several laws regarding labour and wages. Article 44[26] provide for the formulation of a uniform civil code which aims at replacing the existing personal laws of different religious communities, most of which discriminate against

22 Leila Seth, "A Uniform Civil Code: Towards Gender Justice", 31 *iiC QuarTerLy* 40-42 (2005).

23 The Constitution of India, 1950, The Preamble.

24 The Constitution of India, 1950, art. 14, 15.

25 The Constitution of India, 1950, art. 39.

26 The Constitution of India, 1950, art. 44.

women and hamper their freedom, with uniform code and bring all the citizens of India under a single umbrella of legal frame work, the wording of this provision find its trait in the Preamble[27] of the Indian Constitution which contains the enlightening concepts like 'equality' and 'brotherhood'.

The Concept of Dharma postulates that if everyone starts performing their duties, the rights of an individual will eventually be taken care of. Our Constitution is in line with this Dharma as it enumerates certain duties which every citizen of this country should follow diligently. The Article 51-A (e) of the Constitution provides a fundamental duty for every citizen to forsake derogatory practices which are offensive to the dignity of women.[28]

After almost seven decades of enactment of Constitution, it is unfortunate that there still exists a considerable discrimination against women by unequal personal laws. Judicial precedents proved to be a panacea for women. It has been dealing with the issue of gender justice in consonance with the ideals and values given in the Preamble of our Constitution.

IV. Judicial Activism in the Domain of Personal Laws

"Laws are a dead letter without courts to expound and define their true meaning and operation." - Alexander Hamilton

For centuries, women have been reduced to a subservient, docile and passive class whose duty is to conform not to confront the indiscriminate behaviour meted out to them. It is to be noted that the Legislature has enacted numerous laws to empower women but enactment of laws is not enough, they can be made prolific only when implemented in true spirits. In a democracy, Judiciary has a significant role to play because people look up to it as the ultimate guardian of their human rights and the last recourse for the administration of justice.[29]

Judiciary has the ability to infuse life into a dead skeleton presented by the Legislature by using a tool of judicial activism. The courts have tried to bridge a gap between the spirit of law and its impact on society by going beyond its normal interpretive role to protect the rights and liberties of women. They have followed a case by case approach to deal with the issues like discriminatory grounds of divorce,[30] restitution of conjugal rights[31], rights of maintenance upon divorce[32] etc. to prevent the patriarchal mindset from encroaching upon the preserves of women's rights.

27 The Constitution of India, 1950, The Preamble.

28 The Constitution of India, 1950, art. 51-A (e).

29 Abdul Kalam, "Scope of Judiciary- Towards Speedy Dispensation of Justice", *Sunday Tribune*, November.19,2006.

30 *Ammini E. J. v. Union of India*, AIR1995 Ker. 252.

31 *T. Sareetha v. T. Venkataubbiah*, AIR 1985 AP 356

As far back as, 1885, an extraordinary judgment to liberate a woman from shackles of patriarchy was given by Justice Pinhey of the Bombay High Court. The case dealt with the right of Ms Rukhamabai who was married off at the age of 11 to Dadaji Bhikaji but they never lived together. When she turned 22 she refused to cohabit with her husband. Dadaji filed a suit for restitution of conjugal rights which led to *Dadaji Bhikaji vs Rukhmabai*[33] case. Justice Pinhey in his judgment "declined to allow the law to be made an instrument of torture" and ruled in favour of Rukhmabai.[34] He stated that there was "nothing more barbarous than to compel a young lady to go to a person whom she disliked".[35] Though the decision was overturned by the House of Justice but Justice Pinhey's judgment was the first instance where the importance of equal rights to women was recognized by the Judiciary.

The landmark case that ushered in the new era of judicial review was *Shah Bano Begum's* [36]case which was on setting of the dawn of judicial scrutiny of personal laws. In this case, the Court ruled against the canons of Muslim personal law by providing maintenance claim to a Muslim divorced woman under Section 125 of Cr.P.C. despite prohibition under Muslim personal law.[37] Even before *Shah Bano's* case the Supreme Court in *Bal Tahira*[38]and *Fazlunbi*[39] twice upheld the rights of divorced Muslim women to receive maintenance beyond *iddat* period.[40] Nearly a decade later, the equality to Christian's women in terms of equal grounds of divorce was clarified by the Supreme Court in *Amminni's*[41] case. In this case, Section 10 of Indian Divorce Act which requires the Christian wives to prove adultery along with cruelty and desertion, held to be violative of Articles 14, 15 and 21 of the Constitution.

Subsequently, in 1996, the position of women was strengthened by the verdict in *C. Masilamani Mudailar*[42] where the court stated that the conferment of inferior status on women by personal laws is anathema

32 *Mohammad Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945

33 *Dadaji Bhikaji v. Rukhmabai*, (1885) ILR 9 Bom 529

34 Sudhir Chandra, "Rukhmabai: Debate over Woman's Right to Her Person", 31 *EPW* 2937-2939 (1996).

35 *Dadaji Bhikaji v. Rukhmabai*, (1885) ILR 9 Bom 529

36 *Dadaji Bhikaji v. Rukhmabai*, (1885) ILR 9 Bom 529

37 *Dadaji Bhikaji v. Rukhmabai*, (1885) ILR 9 Bom 529

38 *Bal Tahira v. Ali Hussain*, AIR 1979 SC 362

39 *Fazlunbi v. K. Khader Vali*, AIR 1980 SC 1730

40 Gerald James Larson (ed.), *Religion and Personal Law in Secular India: A Call to Judgment*, Indiana University Press, (2001), p.276.

41 *Ammini E. J. v. Union of India*, AIR 1995 Ker 252

42 *C. Masilamani Mudailar v. Idol of Sri Swaminathaswami Thirukoil*, (1996) 8 SCC 525

to equality. The judgment also brought personal laws within the ambit of 'laws in force' under Article 13 which made them subject to judicial review on the ground of violation of fundamental rights.

The patriarchal system sustains itself through the institution of family. The family is a bastion of traditional practices and a prison for women. Supreme Court while interpreting section 6(a) of Hindu Minority and Guardianship Act, 1956 and section 19 (b) of the Guardians and Wards Act, 1890 on the touchstone of Articles 14 and 15 opined that the mother is entitled to be the natural guardian of her child even during the lifetime of the father regardless of the fact that the concerned Acts had relegated the mother to a secondary position.[43]

Similarly, in catena of cases the courts have responded favourably to the women aggrieved by the discriminatory and draconian provisions of personal laws. The Courts in India have time and again tried to uplift women from the manacles of orthodoxy deep-rooted through religious practices and strengthened the notions of justice, equality, equity, right to life, personal liberty and non-discrimination.[44]

V. Uniform Civil Code: A Panacea for Gender Inequality

The founding fathers of India's Constitution with a view to achieve uniformity of law and to purport the principle of Sarva Dharma Sambhava i.e. "all religions are equal", incorporated an aspirational provision that runs as follows: "The State shall endeavor to secure for all citizens a uniform civil code throughout the territory of India".[45]

The enactment of Uniform Civil Code (UCC) will replace the existing personal law system framework which covers four broad areas of family and property matters: Marriage, Divorce, Maintenance and Succession of Hindus, Muslim s, Christians, Parsis and Jews.[46] From Indian socio- legal perspective, there is a close nexus between the enactment of Uniform Civil Code and issue of gender justice. Martha Nussbaum observes: "It is less than ideal for India to guarantee women all sorts of rights in the Constitution and then turn the all-important sphere of family law over to codes that explicitly deny women the equal protection of the laws".[47] Thus, Uniform civil code could play a significant role to impinge upon all the gender-based discriminatory practices flourishing through personal law system which are the continuous assault on women's position in the society.[48]

43 *Geeta Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149

44 Flavia Agnes, *Family Laws and Constitutional Claims*, Oxford University Publications, (2011), p.148

45 The Constitution of India, 1950, art. 44

46 Parashar Archana, "Religious Personal Laws as Non-State Laws: Implications for Gender Justice" 45 *JILP* 22-23 (2013).

47 Martha Nussbaum, *Sex and Social Justice*, Oxford University Press, (1999), p.56

The "rulers of the day", the court bemoans, were apparently "not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949".[49] While looking back at the history of personal laws and common code, it can be construed that religious politics gradually hijacking the issue of implementation of the draft code. The British rulers were politically motivated to not to replace Hindu and Muslim personal laws and customs with English liberal, Universalist legal norms as, *firstly*, they feared the rebellion inspired by religious dogma and *secondly*, they were propagating their policy of divide and rule by advocating different personal laws in the country.[50]

In the post-independence era, when the demand of UCC arose, the Muslim Personal Law Board, which has projected itself as the supreme authority on Muslim law in India opposed it vehemently on two grounds; *Firstly*, it is a politically motivated step by which the right wing or Hindu Fundamentalists want to implement Hindu Code in the name of UCC and *secondly*, Personal law is an intrinsic element of Muslim identity, any attempt to eradicate it would be considered a threat to the community.[51] In this way, this issue lost its primary objective of liberating women from continued exploitation based on religion and took the political shape.

From the constitutional perspective, Article 25[52] guarantees, "the freedom of religion while reserving the rights of the state to regulate secular activities associated with religious practice and to provide for social welfare and reform." And Article 15[53] provided for, "equality and non-discrimination on the basis of religion, race, caste, sex, or place of birth, but reserve the right of the state to make special provisions with regard to women, children, and the backward classes." A perusal of these articles justifies the enactment of UCC which is also supported by the judiciary in a catena of cases. In the *Shah Bano's*[54] case, Justice Y.V. Chandrachud observed that "A common civil code will help the cause of national integration by removing disparate loyalties to the law which have conflicting ideologies and it is a matter of regret that Article 44 of our Constitution has remained a dead letter." And as far as the

48 Cyra Akila Choudhury, "(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India", 17 *Colum. J. Gender & L.* 73-70 (2008).

49 *Sarla Mudgal v. Union of India*, 1995 (3) SCC 635

50 Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*, Sage Publications, (1992), p.71

51 Partha S.Ghosh, *The Politics of Personal Law in South Asia*, Routledge, (2007), p.91, see Rina Verma Williams, *Post-Colonial Politics and Personal Laws*, Oxford University Press, (2006), p.165

52 The Constitution of India, 1950 art. 25

53 The Constitution of India, 1950 art. 15

54 *Mohammad Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945

sanctity of religious practices pertaining to personal laws is concerned, Justice Kuldeep Singh, in his leading judgment in *Sarala Mudgal's*[55] case, rightly observed that "Article 44 is based on the concept that there is no necessary connection between religion and personal laws".

The demand of UCC is not only echoed from domestic actors but India's obligation to implement gender-just laws can also be traced from International conventions. India has ratified International Covenant on Civil and Political Rights, (ICCPR), 1966 and International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, which make it obligatory for it to enforce the relevant provisions and ensure gender equality in its national laws.[56]

But at the same time, the feasibility of UCC and its way of implementation needs to be examined carefully. Werner Menski describes the call for a UCC, if understood as an abolition of the personal laws and the complete restructuring of the Indian legal system, as "asking for the moon, totally unrealistic and simply not feasible."[57] The Apex Court pursued the same line in *Lily Thomas etc. v. Union of India*[58] and held that "The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when social climate is properly built up by the elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."

According to Parashar, gender-just UCC can be built on three distinct pillars: *firstly*, "the best pro-women elements from the existing personal law systems", *secondly*, "desirable features from the civil laws of other countries", and *thirdly*, provisions of "international conventions and agreements".[59] Therefore, the Uniform Civil Code should not be based on a completely new legal regime instead it should take reference from the existing provisions of personal laws which are gender just in nature and thus, formulate accordingly which will make its enactment efficient and purposeful. If implemented efficiently and in true spirit, then these three words are sufficient enough to reform the country politically, religiously and socially. It must never be forgotten that all this is a slow process and any undue haste would only result in failure rather than the desired outcome. "Raw haste, half-sister to delay"- Lord Alfred Tennyson.

---

55 *Sarla Mudgal v. Union of India*, 1995 (3) SCC 635.

56 Mrs. Prabhavati K.S. Baskey, "Uniform Civil Code vis a vis Gender Justice in India", 3 *ijirmF* 23, 25-26 (2017).

57 Menski, Werner, "The Uniform Civil Code Debate In Indian Law: New Developments And Changing Agenda", 9 *GLj* 211-213 (2008).

58 *Lily Thomas v. Union of India*, AIR 2000 SC 1650.

59 Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*, Sage Publications, (1992), p.71, see Kiran Deshta, *Uniform Civil Code In Retrospect and Prospect*, Deep and Deep Publications, New Delhi, (2002), p.120.

VI. Conclusion

Though the Indian Constitution contains many provisions which provide for equal rights to both men and women but the existence of patriarchal practices in the garb of personal laws negate this aspect of Constitution to a large extent. India is a country which is known for its diverse culture and it also signifies its beauty but the discriminatory practices against women vitiating its image worldwide. Indian Judiciary is playing a very significant role in combating discriminatory practices and bringing gender equality in the society by which it is trying to keep alive the aspirations of the framers of the Constitution and the goals enshrined in the Preamble.

The implementation of Uniform Civil Code can be a panacea to impinge upon gender-based discriminatory practices which continuously assault on women's position in the society, but, India has moved farther away from the goal of a uniform civil code because of continued politicization. Religious personal laws tend to favor men over women in the society. Thus, there should be common uniform laws for all religions so that the position of women can be improved.

Therefore, in the light of the above arguments and critical observations made in the paper, the authors seek to propose that till the enactment of Uniform Civil Code suitable reforms must be made in the personal laws as upon the terms of the ideals envisaged in the Constitution to establish an egalitarian society.

To conclude, we would like to put forth following words which are depicting the real objective of religion, need of secular laws and helplessness of Indian Parliament:-

"Religion is a matter of belief; belief is a matter of conscience, and freedom of conscience is the bedrock of modern civilization. In a multi-religious country like India which has opted to be a secular State, it is the right of every citizen to be governed by secular laws in personal matters and it is the duty of the State to provide a secular code of family laws without getting influenced from political compulsions". Let the women escape the shackles of patriarchal mindset and fly in the sky with wings of liberty, new dreams, aims and aspirations.

Public Participation in the Enforcement of Environmental Laws: Issues and challenges in the light of the legal and regulatory framework with emphasis on EIAs in India

*Priyanshi Jain

Introduction

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[1]"

Public participation in regulatory decision-making is increasingly recognized as crucial in making environmental governance more robust and better informed in the liberal regulatory theory.

Participatory mechanisms in environmental governance are advocated for a variety of reasons, including an implied emphasis on participation as furthering justice and equity, ambitions to make participative or deliberative measures as supplements or alternatives to representative democracy, and enhancement of legitimacy of controversial environmental decisions that are frequently delegated to unelected experts.

Organization of public hearing has been argued as a check on arbitrary exercise of powers, especially since it seeks to hear those who could be affected by an industrial activity and thereby, embodies the fundamental rule of fair procedure of audi alteram partem.[2]

The normative advantages for representative democratic systems accruing from these participatory policies are well established in democratic literature by now, since they appear to improve

* Student, BA LL.B., Department of Law , Prestige Institute of Management and Research, Indore, M.P.

1 Report of the United Nations Conference on Environment and Development ,Rio de Janeiro, 3-14 June 1992)

2 Justice A. R. Lakshmanan, Thoughts on Environmental Public Hearings 17 Student Bar Review 1, 3 (2005). See also, M.P. Industries v. Union of India, AIR 1975 SC 865, North Bihar Agency v State of Bihar, AIR 1982 SC 1758.

transparency, accountability and implementabilty of public decision-making, and prompt a wider range of democratic deliberation.[3]

The involvement of the lay publics through public interest litigation in India, in instances like the *Taj Trapezium zone case, the Kanpur Tanneries case, Delhi Vehicular Pollution case*, and *Vellore Citizens Forum case*, demonstrates the desirability of the involvement of lay citizens regarding grant of environmental clearances.[4]

Within this participatory paradigm, a number of international legal instruments underline the general importance of public participation and the specific need to institutionalize a regulatory framework that allows effective participation in public decision-making regarding the protection of environment and appropriate use of natural resources.

Reputedly, India has one of the best legal regimes facilitating right to information in the world, one that recognizes the citizens right to access a reasonably large cache of relevant information, including through the institution of bureaucratic organizations and hierarchy of tribunals to gain access to such information. This regime was arrived at through concerted public actions by civil society actors, a series of remarkable judgments from the higher judiciary in the 1980s and 1990s that recognized this right as a facet of the freedom of speech and expression contained in article 19 (1)(a) of the Constitution, a number of state legislations in the late 1990s and early 2000s, as well as the principles and institutions subsequently brought to fore by the Right to Information Act of 2005 (RTI Act).

Commendable test litigations have helped in successfully clarifying the ambit of the statutory right in regard to the documents connected to the grant of environmental clearances. Thus, under the RTI Act, the Central Information Commission has held that documents like pre-feasibility reports which project proponents are required to submit during an application for environmental clearance are crucial to ensure transparency and accountability in institutions, and hence, are expected to be uploaded on the ministry website as suo moto disclosures. Consequently, the relevant authorities are expected to upload these reports on the official website.[5] There are also a number of formal stipulations under the EIA notification of 2006, to ensure

3 S. Divan and A. Rosencranz, Environmental Law and Policy in India: Cases, Materials and Statutes (OUP, New Delhi, 2002)

4 M.C. Mehta v. Union of India, AIR 1997 SC 734 (Taj Trapezium Zone case); M.C. Mehta v. Union of India, AIR 1988 SC 1037 (Kanpur Tanneries case); M.C. Mehta v. Union of India, AIR 1998 SC 617 (Vehicular Pollution case); Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715.

5 MoEF, available at: http://moef.nic.in/downloads/public-information/order-20032012-a.pdf

access of important documents and to provide notice for the general public provided which is discussed in detail in a subsequent section. At a formal level, thus, the legal system facilitates accessing of information upon which a decision to grant or deny clearance is made, thereby helping the citizens in evaluating the desirability of a grant of an environmental clearance, widening the possibilities of a subsequent challenge of the decision with respect to the basis of granting such a clearance, as well as ascertaining the compliance with requirements for implementation and post clearance monitoring.

Significance of Public Participation in Policy Making Process:

The rationale and importance of public participation in the environmental decision making can be explained in the following words:

With increased protection of environment....various states have assumed the responsibility to meet dangers and risks, which may threaten a great number of citizens and even the general public. The open landscape, the water and the air, have come to be considered as the common property of all, and their rational management is not only in the interest of one single individual but in the interest of all. Therefore, States have increasingly begun to recognize that, in the law of environment protection, the traditional structures of the individual participation and judicial protection of individual are inadequate, and the public, interested citizens and organizations ought to have the opportunity to participate in the administrative decision making process...When it is the public who are expected to accept and comply with those measures, the public should have the chance to develop and articulate its opinion, and to air it during the environmental decision making process.[6]

In a democratic country like India, the mechanism of public participation in decision making manifests the direct democracy of people. The Public participation bridges the gap between the heterogeneous groups of the society. It tries to maintain balance between the right to environment and right to development. At one end project proponents makes efforts to succeed in convincing the acceptance of the project. They are having vast resources at their disposal. On the other hand, the public hearing in the environmental decision making plays vital role in providing true information about the impact of the big projects. When members of the public express their views on a proposed project, alternative views, otherwise not represented, are

6 Lothar Gunding , Public Participation in Environmental Decision Making, in Michael Bothe (Ed.), Trend in Environmental Policy and Law, (1980) 131, as quoted in P. Leelakrishnan, Environmental Law in India (3rd Ed., Lexis Nexis Butterworths Wadwa Nagpur, 2008) 352 .

presented. This paves the way for the decision-making agency to be thorough in their analysis and thus brings quality and objectivity in the decisions. The effective public participation eliminates judicial review of the administrative action. It generates public confidence in the decision making process and ensures acceptance of the decision. The right to participation should be supported by a right to information that is accurate, accessible, timely and comprehensive. It includes right to seek information from public authorities, with a corresponding duty of public authorities to collect and disseminate information. This right enables the citizens to participate effectively in the decision making process. Right to information and participation will have little meaning if the public lacks access to justice.

The right of access to justice allows people to enforce environmental laws and remedy in case of any breach-it thus establishes a right to clean environment.[7] Access to justice allows affected communities and environmental activists to challenge decision adopted by public authorities or businesses that have failed to comply with environmental laws. The sources of the above mentioned procedural rights are international, regional and national laws. At the international level, several interrelated factors have influenced the growth of participatory processes in decision-making.[8]

Provisions of Environment Impact Assessment & Public Participation in India:

Environment assessment involves a study to determine any unique environmental attributes from endangered species to existing hazardous waste to historical significance. Environment Assessment procedure ensures consideration of environmental implications before making a final decision of assessing the environmental attribute. Process of assessment analyses the effects on environment and is useful for reporting those effects undertaking a public consultation exercise and lastly it reveals decision to public after reviewing the comment of the report. One of the main strengths of environmental assessment (EA) is its flexibility.

Project planning processes can integrate EA as essential step giving sensitivity to the social and economic as well as environmental impacts of projects. In this way project managers can compensate shortcomings in the project planning process.

7 T. Hunte and K. Lunde, Access to Justice and Environmental Protection: International and Domestic Perspectives, Journal of Environment and Development ,7, 1998, 437-41.

8 B.Reichardson and J.Razzaque, Public Participation in the Environmental Decision-making, in B.J. Richardson and S. Wood (Ed.), Environmental law for Sustainability Critical Reader, (Oxford: Hart Publishing,2006) 165-94.

In recent years, there has been a remarkable growth of interest in environmental issues, sustainability and the better management of development in harmony with the environment. Associated with this growth of interest has been the introduction of new legislation, emanating from national and international agencies (e.g., the European Commission) that seek to influence the relationship between development and environment. Environmental impact assessment (EIA) is an important example.[9] It is defined as an activity designed to identify and predict the impact of legislative proposals, policies, programmes, projects and operational procedures on the bio-geophysical environment and on the health and well being of human beings and to interpret and communicate information about the impact.

That is to say, EIA focuses on problems, conflicts or natural resource constraints that could affect the viability of a project.[10] It also examines implications of a project that might harm people, their homeland or their livelihoods, or other nearby developments.

After predicting the problems, EIA identifies measures to minimise the problems and outlines ways to improve the project's suitability for its proposed environment

In the last three decades, has been recognised as the most valuable, inter-disciplinary and objective decision-making tool with respect to alternate routes for development, process technologies and project sites. It is considered an ideal anticipatory mechanism allowing measures that ensure environmental compatibility in our quest for socioeconomic development.[11]

In India, EIA was legally notified under the Environmental Protection Act 1986, in the year 1994. However, it was only in 1997 that the EIA Notification 1994 was amended and for the first time public involvement in the environmental clearance through the public hearing mechanism was made statutory. It specifically provided that the findings of the impact assessing authority should be based, inter alia, on the details of public inquiry. The project proponent has to submit 20 sets of documents to the state pollution control board. The board has to give notice of hearing in two newspapers of wide circulation in the locality, one which should be in the vernacular language. The notice should mention the date, time and place of public hearing. Suggestions, views,

9 Htun, N., (1988), The EIA Process in Asia and Pacific Region in P. Wathern ed. Environmental Impact Assessment: Theory and Practice, UNwin Hyman, London.

10 Ramachandra T V, Subash Chandran M D, Gururaja K V and Sreekantha, 2007. Cumulative Environmental Impact assessment, Nova Science Publishrers, New York.

11 Kulkarni V and Ramachandra TV, 2009. Environmental Management, TERI Press, New Delhi.

comments and objections of the public are invited within 30 days from the date of the publication of the notice.[12]

The EIA notification categorizes all kinds of developmental projects in various schedules. The project proponent/investor has to identify to which schedule his proposed project belongs to. All the projects coming under Schedule 1 require environmental clearance. Schedule 1 contains two Categories A and B, Category B is further classified as B1 and B2 by respective

Later, the project proponent also prepares a detailed project report/feasibility report and submits to the authorities concerned the executive summary containing the project details and findings of the EIA study, which is to be made available to the concerned public.

The rationale behind public participation in environmental decision-making process has further been explained by Lothar Gundling (1980) in the following words:

"With the increased protection of environment… States have assumed the responsibility to meet dangers and risks, which may threaten a great number of citizens and even the general public. The open landscape, the water and the air, have come to be considered as the common property of all, and their rational management is not only in the interest of one single individual but in the interest of all. Therefore, States have increasingly begun to recognize that, in the law of environmental protection, the traditional structures of individual participation and judicial protection of the individual are inadequate, and that the public, interested citizens and organizations ought to have the opportunity to participate in the administrative decision-making process. When it is the public in whose interest environmental protection measures are taken, and when it is the public who are expected to accept and comply with those measures, the public should have the chance to develop and articulate its opinion, and to air it during the environmental decision-making process.[13]

Public consultation is currently envisaged as a separate component at a very late stage between screening, scoping and the preparation of a draft EIA report, on the one hand, and the appraisal, on the other. There are other models of public involvement during the grant of clearance of development in India.[14] For instance, during the grant of forest clearances, in certain limited scheduled areas the involvement

12 The Existing Environmental Impact Assessment Notifications Environment Impact Assessment Notification ,S.O.60(E), Dated 27/01/1994.

13 Lothar Gundling, `Public Participation in Environmental Decision- Making', in Michael Bothe (ed), *Trend in Environmental Policy and Law* (1980) pp.131-153, cited in Environmental Law in India (1999) by P. Leelakrishnan at 170.

14 Public Participation In Environmental Clearances In India: Prospects For Democratic Decision-Making, Naveen Thayyil.

and written consent of the communities is intrinsic to the grant of a forest clearance, through the Forest Rights Act, 2006 and the Panchayat Extension to Scheduled Areas Act, 1996. These Acts vest a right to recommend the grant of certain licenses and concession with the local community, to be exercised through a written resolution of the gram sabha. By late 1990s, ministry guidelines also stipulated that whenever any proposal for diversion of forest land is submitted, it should be accompanied by a resolution of the Aam Sabha of gram panchayat/ local body of the area endorsing the proposal that the project is in the interest of people living and around the proposed forest land in other forest areas.[15]

It is humbly submitted that the need of the hour to ensure an effective and legitimate environmental clearance is to have public participation at the core of the clearance process. Involvement and participation of the local communities provides a qualitative change in the way in which EIA scoping, framing of studies, and appraisal can be done. Ideally, formalization of public consultation and participation is required to make each of these aforementioned stages more effective and legitimate. Such public involvement can augment the inadequate application of mind by EACs during the phase of screening and scoping.[16] Currently, in contrast, the screening and scoping are done by official bodies which have serious limitations of time, personnel, expertise as mentioned earlier.

The Role of Indian Judiciary

The constitutional courts have generally played a seminal role in the setting up of a legal regime for environmental protection in India. Over and above the general reputation as a non-conservative supporter of socio-economic rights of the unprivileged and marginalized, including through liberal notions of locus standi, non-traditional reliefs, and processes, the Supreme Court has time and again recognized and elaborated the necessity of having an effective environmental regime in the country. These instances of judicial activism have included elaborations on the principles of polluter pays, strict and absolute liability, precautionary principle and the goal of sustainable development.[17]

---

15 Sharma R., Agrawall N. and Kumar S., Ecological sustainability In India through ages, International Research Journal of Environment Sciences, 3(1), 70-73(2014).

16 Environmental Compliance and Enforcement in India: Rapid Assessment, A report prepared by OECD Programme jointly with the Secretariat of the Asian Environmental Compliance and Enforcement Network (AECEN) (2006).

17 AP Pollution Control Board v. Prof. MV Nayudu, AIR 1999 SC 812; M.C. Mehta v. Union of India (1992) 3 SCC 256; M. C. Mehta v. Kamal Nath (1997) 1 SCC 388; Rural Litigation and Entitlement.

In the case of Vedire Venkata Reddy And Ors. vs Union Of India And Ors[18], submissions were made on the question that whether or not it is obligatory on the part of the State Government to obtain environment clearance prior to commencement of the project work in any manner whatsoever or whether the work undertaken is such which would not require the said clearance. In Narmada Bachao Andolan v. Union of India,[19] the environmental clearance was given by the Central Government in 1987, much prior to above notification of 1994. Even the dispute regarding the raising the height of the dam was also settled by an award given in 1978. Thereafter, the construction was taken up in 1987. The writ was filed to challenge the construction of and raising the height of dam in 1994.

The Supreme Court held that when projects are undertaken and hundreds and crores of public money are spent, individual and the organization, petition in the garb of public interest litigation cannot be entertained.

In M.C.Mehta v. Union of India,[20] the Supreme Court stressed the need for introducing such scheme, "In order for the human conduct to be in accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires. This should be possible only when steps are taken in the adequate measures to make people aware of the indispensable necessity of their conduct being oriented in accordance with the requirements of law.[21] The decision and the directions of the High Court of Gujarat in Centre for Social Justice v. Union of India have a persuasive impact on the development of concept of public participation in India.

In Centre for Social Justice v. Union of India[22], the court made the following observations:

1. The place of public hearing shall be as near as possible to the proposed site and both far away from the headquarters of the taluka where the site is proposed.
2. Notice of public hearing shall be published in newspapers not less than two, which have wide circulation in region. Local government in area should also be asked to give publicity to the notice. The minimum period of notice shall be 30 days.

---

18 AIR 2005 AP 155, 2005 (1) ALD 325.

19 Narmada Bachao Andolan vs Union Of India And Others on 18 October, 2000, Bench: B. N. Kirpal, Dr. A. Anand.

20 1987 SCR (1) 819.

21 Sairam Bhat, Natural Resources Conservation Law October 2010.

22 AIR 2001 Guj 71, (2000) 3 GLR 1997.

3. Executive summary of the project should be made available at all local places at least 30 days prior to the date of public hearing. Summary of the EIA report in the local language also shall be made available to the concerned person on demand.
4. Quorum of the hearing panel shall be one half of the total membership. Representatives from the board and state environment department, one senior citizen and an environmentalist nominated by the collector are necessarily to be present.
5. The committee can decide such numbers of hearings as are found necessary by looking at the impact of the project on the environment. There is no hard and fast rule in this respect
6. The state pollution control board on demand shall furnish minutes of the hearing as expeditiously as possible. The state government or the Central government shall cause publication of the gist of clearance certificate in newspapers in which the notice for public hearing is published.

Conclusion

The environmental awareness needs to be cultivated in any society to be an ideal society, or rather to be more precise, in other words, an ideal society means, and the society which has the environmental awareness. Now a day, a mutual trust and faith of project affect people on the regulatory bodies and project proponent has sharply fall.

The role of non govt organization, people forums is quite important in educating and making aware people on various aspects of proposed project in a simple and lucid way. Similarly the expert appraisal committee should give due emphasis on the deliberations rose at public hearing during the clearance process and it should be clearly reflected in the conditions that are imposed on the project for comply in post clearance period. This also brings into focus the need for private multinational (or public) industries to take some responsibility towards the environments and populations they are located in.[23]

The development of public participation provisions in Indian EIA legislation has experienced several periods, from non-legalization stage to initial legalization stage to development stage to refinement stage. Public participation has become a legal and important component for the EIA process in India. These developments have made the public participation provisions more and more specific and comprehensive. Therefore, the information transparency to the public has been

23 Padia R.G., Global Concern for Environmental Hazards and Remedial Measures', In: R.B. Singh and S. Misra (eds.) Environmental Law in India Issues and Responses, Concept Publishing House, New Delhi (1996)

enhanced, the communication between the general public and decision-makers/proponents has been promoted, and the influence of public comments on decision-making has also been more significant.

However, there are still some provisions for public participation in Indian EIA legislation need to be improved and made clearer, such as the cost issue, public consultation methods, the starting time of public participation in the EIA process stages, the timeline for the public to make comments, and appeal issue.

The Law on Privacy In Indian Scenario

[*]Dr. Deepak Kumar Srivastava
[**]Mr. Rana Navneet Roy

"We can evade reality, but we cannot evade the consequences of evading reality"

- Ayn Rand

Ayn Rand, a well renowned Russian-American novelist, in her novel titled, '*The Fountainhead*' in the year 1943 mentioned that, "*civilization is the progress towards a society of privacy and it is a process of setting man free from men.*" But time and again not only individuals but government also due to different reasons try to invade into the private sphere of individual, which requires proper attention and law to deal with the situation. In India till date there is no specific statute which deals with privacy as a whole. It is because of the judicial creativity[1] of Article 21[2] and Article 19 (1) (d)[3] of the Constitution of India that right to privacy has got recognition as a fundamental right. Supreme Court of India also observed that, "*the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India."* In this background it is high time to analysis the law on privacy in Indian scenario. In the present article author is intended to trace the origin of law on privacy from legal centric and case laws from chronological point of view in Indian scenario. Cases specifically related with Domiciliary visits, Surveillance. Health information, Informed consent and Prisoners' interview vis a vis Privacy has been dealt in the present paper.

* Assistant Professor, Law, HNLU, Raipur

**Assistant Professor, Law, HNLU, Raipur

1 Supreme Court of India has developed the '*fundamental rights jurisprudence*' while giving liberal interpretation to part III of the Constitution of India, specifically Article 21 which deals with the '*protection of life and personal liberty*.' In this context, it is not only the right to privacy but several other rights were recognised by the Supreme Court of India like: Right to food, Right to shelter, Right To Medical Care & Health, and right to go abroad etc. which is clear from the case of *Francis Coralie v. Union Territory of Delhi* in which Supreme Court of India observed that, "*The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self.*"

2 Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

3 Article19. Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right.

(d) to move freely throughout the territory of India;

Preamble to the Constitution of India specifically provides to all its citizens the LIBERTY of thought, expression, belief, faith and worship. The term '*expression*' used in the preamble will include *not to express* which is the base of right to privacy and the role of the judiciary is to balance these conflicting rights in the society.[4] Article 19(1) (a) of the Constitution of India explicitly recognises the citizens' right to freedom of speech and expression. This is not an absolute right Article 19(2) of the Constitution of India deals with eight specific grounds[5] on the basis of which this right may be curtailed. Privacy is not mentioned under Article 19(2) but in various case laws it has been recognised that freedom to speech and expression does not mean to invade the privacy of others. What is the definition of privacy? Is not mentioned in any enactment made by the Parliament till date, therefore it would be apt to refer the case of *Sharda v. Dharmpal*[6] in which it was observed by the Supreme Court of India that, "*the state of being free from the intrusion or disturbance in one's private life or affairs*" is known as privacy. This right is also known as zero-relationship[7] or right to let alone.[8]

Before dealing with the origin and development of right to privacy it would be beneficial to refer the change in view of the judiciary with respect to the interpretation of Article 21 of the Constitution of India. *Maneka Gandhi v. Union of India*[9] is a landmark judgment which played the most significant role towards the transformation of the judicial view. This case is always read and linked with the case of *A.K. Gopalan v. State of Madras,*[10] because this judgment evolved the concept of'*due*

4 Bijoe Emmanuel & Ors. v. State of Kerala & Ors. and In Re-Noise Pollution (2005)

5 The sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

6 AIR 2003 SC 3450

7 Edward *Shils*, *Privacy*: Its Constitution and Vicissitudes, 31 Law and Contemporary Problems 281-306 (Spring 1966); available at: https://scholarship.law.duke.edu/lcp/vol31/iss2/4, last accessed on 21/04/2017

8 Thomas M. Cooley, Law of Torts (2d ed. 1888). Around the same time that Warren and Brandeis published their article, the Supreme Court referred to the right to be let alone in holding that a court could not require a plaintiff in a civil case to submit to a surgical examination: "As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.'" Union Pac. Ry. Co. v. Botsford, 141 U.S. 250,251 (1891). See Daniel J. Solove, 'Conceptualizing Privacy' California Law Review

Volume 90 | Issue 4 Article 2, July 2002; available athttps://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1408&context=californialawreview; last accessed on 21/04/2017

9 1978 AIR 597, 1978 SCR (2) 621

10 1950 AIR 27, 1950 SCR 88

process of law'[11] in Indian scenario. The crux from *Gopalan* to *Maneka* in simple terms is that mere existence of an enabling law is not enough to restrain personal liberty. Such a law must also be "*just, fair and reasonable*". Therefore, Article 21 should be read along with Article 14 and 19 because they form a '*golden triangle*' which must be reflected in terms of '*natural justice*'.[12]

Origin of right to privacy can be traced back from the article titled, '*The Right to Privacy*' written by Samuel D. Warren and Louis D. Brandeis in the year 1890 which was published in Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220.[13] This article laid down the foundation for the intellectual discussions, debates and decisions for the recognition and application of right to privacy in US, UK and followed by common wealth nations including India. It is pertinent to mention that initially courts have decided the notion of privacy from property point of view but later they have observed it as a separate class of right. Now right to privacy can be analysed from common law of tort and constitutional law point of view as mentioned in the beginning of the present article.

In Indian scenario there are various statutory provisions which deals with right to privacy. Some of them are as follows:

- Code of Criminal Procedure, 1973 [Section 327][14]

---

11 The phrase "due process of law," found in the fifth amendment of the constitution of U.S., is the equivalent of the phrase "law of the land," which for so many hundreds of years was one of the bulwarks of English liberty secured by the Magna Carta. See, Murray's Lessee v. Hoboken etc. Co. (I855) I8 Howard 272 and Francis W. Bird, "The Evolution of Due Process of Law in the Decisions of the United States Supreme Court," Columbia Law Review, Vol. 13, No. 1 (Jan., 1913), pp. 37-50. Available at https://www.jstor.org/stable/pdf/1110274.pdf?refreqid=excelsior%3Ad6bf86e31b2af9908c60af0df80614f4; last accessed on 22/04/2017

12 See, supra no. 10

13 http://links.jstor.org/sici?sici=0017-811X%2818901215%294%3A5%3C193%3ATRTP%3E2.0.CO%3B2-C; available at http://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf; last accessed on 21/04/2017

14 Section 327. Court to be open:

(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub- section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C, [section 376D or section 376E of the Indian Penal Code (45 of 1860)] shall

- The Indecent Representation of Women (Prohibition) Act, 1980 [Section 3 and 4][15]
- The Special Marriage Act, 1954 [Section 33][16]
- The Medical Termination of Pregnancy Act, 1971 [Section 7(1)(c)][17]
- The Juvenile Justice Act, 1986 [Section 36][18]

---

be conducted in camera: Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court: [Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate.]

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court:] [Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.]

15 Section 3. Prohibition of advertisements containing indecent representation of women:

No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form.

Section 4. Prohibition of publication or sending by post of books, pamphlets, etc., containing indecent

representation of women:

No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form:

16 Section 33. Proceedings to be in camera and may not be printed or published:

(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section

(1), he shall be punishable with fine which may extend to one thousand rupees.

17 Section 7. Power to make regulations:

(1) The State Government may, by regulations -

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

18 Section 36. Prohibition of publication of names, etc., of juveniles involved in any proceeding under the Act:

(1) No report in any newspaper, magazine or news-sheet of any inquiry regarding a juvenile under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any

- The Information Technology Act, 2000 [Section 72[19],66-E[20]]

Apart from abovementioned statutes there are programme code and advertisement code under various broadcaster's regulations which specifically recognise the right to privacy and the protection of the same.[21] For example the News Broadcasting Standard Authority (NBSA) drafted a Code of Ethics and Broadcasting Standards governing broadcasters and television journalists which provides guiding principles relating to privacy and sting operations that broadcasters should follow.[22]

At this juncture it would be relevant to mention here that various international documents have been refereed by judiciary and legislative assemblies time and again to recognise the right to privacy in Indian scenario like: Article 12 of the Universal Declaration of Human Rights[23], Articles 14 and 17 of the International Covenant on Civil and Political

---

picture of any such juvenile be published:

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine which may extend to one thousand rupees.

19 Section 72. Breach of confidentiality and Privacy:

Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

20 Section 66E. Punishment for violation of privacy:

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

21 See, http://www.ibfindia.com/public-policy-regulations

22 Privacy & Media Law, available at https://cis-india.org/internet-governance/blog/privacy/privacy-media-law; accessed on 22 April 2017

23 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Rights[24], Articles 16 and 40 in the Convention on the Rights of the Child[25], Article 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[26] and Article 22 of The Convention on the Rights of Persons with Disabilities[27] etc.

Judicial Recognition of Right to Privacy

Article 21 and Article 19(1)(d) of the Constitution of India considering abovementioned international instruments had refereed by the Supreme Court of India for the recognition and development of the right to privacy with its various facets. In this background rest part of the present paper will cover case laws related with different aspects of privacy as follows:

---

24 Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

25 Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

26 No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

27 No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

Domiciliary visits, Surveillance and Privacy:

Initially the aspect of privacy emerged with respect to the police surveillance in India where courts found the opportunity to test the constitutionality of such laws which empowered police to have check on individual. This aspect starts with the case of *Kharak Singh v State of U.P.*[28] in which Regulation no. 236 (b) of the U.P. Police Regulation was struck down by the Supreme Court of India.[29] But while considering the validity of clauses (c), (d) and (e) which provided for periodical enquiries, reporting by law enforcement personnel and verification of movements, this Court held that, "*the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III*." However, Justice Subba Rao expressed the minority view and gave the dissenting judgment that, "*where a law is challenged as infringing the right to freedom of movement under Article 19(1) (d) and the liberty of the individual under Article 21, it must satisfy the tests laid down in Article 19(2) as well as the requirements of Article 21… It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.*"

In another case *Govind v. State of Madhya Pradesh*[30] Supreme Court of India recognised the limited right to privacy. Court observed that, "*depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right that fundamental right must be subject to restriction on the basis of compelling public interest.*"

In *People's Union of Civil Liberties v. Union of India*[31] while dealing with the constitutionality of Section 5(2) of the Telegraph Act,

---

28 1963 AIR 1295, 1964 SCR (1) 332

29 "(a) Secret picketing of the house or approaches to the houses of suspects; (b) domiciliary visits at night; (c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and chaukidars of movements and absences from home; (c) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history-sheet of all information bearing on conduct."

30 1975 AIR 1378, 1975 SCR (3) 946

31 AIR 1997 SC 568, (1997) 1 SCC 301

1885[32] Justice Kuldip Singh observed that, "*Telephone-Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse."* In other cases also, the Supreme Court of India dealt with the issue of Surveillance and Privacy apart from abovementioned case laws like: *Malak Singh v. State of Punjab & Haryana*[33], *People's Union of Civil Liberties v. Union of India*[34], *Ram Jethmalani v. Union of India*[35] *and Amar Singh v. Union of India*[36] *etc.*

Health information, Informed consent and Privacy:

On this topic *Mr. 'X' v. Hospital 'Z'*[37] is a leading case law in which the question under consideration was whether the disclosure by a hospital of the medical condition of an AIDS patient would amount to a breach of patients' privacy? To address the issue regarding the duty to maintain confidentiality, the Court placed reliance on the Code of Medical Ethics (the Code) formulated by the Indian Medical Council. It held that the medical profession did have a duty to not disclose the secrets of a patient that have been learnt in the exercise of a ¦profession. The Court, however, held that the doctor's duty to maintain confidentiality did not confer an absolute right on the patient. It held that in public interest and in cases where the duty to maintain confidentiality could result in a health risk to another, this duty would not be binding on the doctor. The Court, therefore, held that, "*since the marriage posed a health risk to the woman the doctor was not bound by*

32 Section 5(2) states that: On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any Officer specially authorised in this behalf by the Central Govt. or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

33 1981 AIR 760, 1981 SCR (2) 311; Case related with Right to privacy of the citizen versus duty of the police to prevent crime-Surveillance register to be maintained by the police as per Punjab Police Rules.

34 (2004) 9SCC 580: AIR 2004 SC 456.

35 (2011) 8SCC 1.

36 (2011) 7SCC 69.

37 AIR 1999 SC 495; JT 1998 (7) SC 626; 1998 (6) SCALE 230.

the duty to maintain confidentiality."[38] On this issue another landmark case is *Sharda v. Dharampal*[39] in which the question for consideration was that Can anyone be forced to take medical test? On this issue the Supreme Court of India observed that, "*a matrimonial court has the power to order a person to undergo medical test. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.*"[40]

However, it would be pertinent to note here that medical examinations in the case of criminal proceedings have different footing as observed in the case of *Selvi v. State of Karnataka*[41] the hon'ble court observed that, "*no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to unwarranted intrusion into personal liberty.*"

Prisoners' interview and Privacy:

Its an accepted fact that just imprisonment does not mean to waive the rights as being human. Prisoners also have right to express themselves includes not to express, but this right cannot be invaded at the end of Press or Media. Therefore, this part deals with the cases which strike a balance between the public's right to know and the right to privacy of an individual. In *R. Rajagopal v. State of T. N.*[42] which is known as *Auto Shankar case* the Supreme Court of India held that, "*the media have a right to publish, what they allege to be the life story/ autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication.*"

---

38 See, Global Health and Human Rights Database, available at http://www.globalhealthrights.org/pdf.php?ID=345; accessed on 23/04/2017.

39 AIR 2003 SC 3450.

40 Can anyone be forced to take medical test? TNN | May 2, 2017, 11:06 IST, available at https://timesofindia.indiatimes.com/india/can-anyone-be-forced-to-take-medical test/articleshow/58471501.cms; accessed on 23/04/2017.

41 AIR 2010 SC 1974.

42 1995 AIR 264, 1994 SCC (6) 632.

Another leading case on this point is *Prabha Dutt v. Union of India*[43] in which the Supreme Court of India observed that, "*the constitutional right to freedom of speech and expression conferred by Article 19(1)(a) of the Constitution, which includes the freedom of Press, is not an absolute right; nor indeed does it confer any right on the Press to have an unrestricted access to means of information. The Press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India the security of the State, public order, decency and morality*." In the case of *State v. Charulata Joshi*[44] it was held by the Supreme Court of India that, "*the Press must first obtain the willingness of the person sought to be interviewed and no Court can pass any order of the person to be interviewed express his unwillingness. The so called right of the Press which it obtains based on a permission from the Court would be subject to the prohibitions of the Jail Manual*."

In this respect there are several other aspects related with privacy like *cinema works and privacy*[45], *right to information and privacy*[46], *gender related issues and privacy*[47] and *right to silence and privacy*[48] etc. But due to limitation with respect to the current paper as an article and more than that pragmatically it would not be possible to deal with each aspect of privacy. So, keeping this in mind author would like to conclude here.

Conclusion:

It is clear from the abovementioned discussion that Preamble, Article 21 and Article 19(1)(d) of Constitution of India provide the basis for the recognition and development of the right of privacy. Therefore, it is through judicial recognition the right of privacy got its current position in Indian scenario. There are enactments with deals with this right but till date there is no specific law which deals with it in totality. With the internet revolution and technological development threat to this right increased. Therefore, I would like to conclude the paper with the observation of the Supreme Court of India in the *Justice K. S. Puttaswamy* case that, "*the right to privacy is claimed qua the State and non-State actors. Recognition and enforcement of claims qua non-state actors may require legislative intervention by the State.*"[49]

---

43 (1982) 1 SCC 1; AIR 1982 SC 6.

44 AIR 1999 SC 1379.

45 See, M/S. Kaleidoscope (India) P. Ltd. v Phoolan Devi and R. Rajagopal @ R.R. Gopal vs J. Jayalalitha etc.

46 See, People's Union of Civil Liberties v. Union of India.

47 See, Anuj Garg & Ors. v. Hotel Association of India & Ors.

48 See, In Noise Pollution (5) re.

49 WRIT PETITION (CIVIL) NO 494 OF 2012.

Understanding Laws of Divorce in India and Islam: The Triple Talaq Analysis

[*]**Dr. Ayan Hazra**
[**]**Mr. Abhishek Bhardwaj**

Introduction

The key concern of law is to provide justice and equality, but through the ages in history, laws have implicated in injustice and inequality. Divorce laws in India is one such arena when the tug of war takes place between religion, justice, and equality. Almost all the religions in India have their own divorce laws which create a sense of inequality with the sovereignty of the country. According to Hindu Marriage Act both male and female can be granted divorce, subject to ground of divorce, whereas under Muslim marriage husband can divorce without any rationale but female is granted divorce under some strict conditions. The Uniform Civil Code can pose a solution to this problem of inequality (also injustice for Muslim women).

In India there are different religions and on that basis different personal laws, that is known as unity in diversity.[1] In India the sources of Muslim personal Laws are Hanafi Fiqh along with some reference to other schools, legislation and certain Judicial texts (classical and modern). During the British Rule, a number of Hanafi sources were translated into English. Article 44 of the Constitution of India obligates towards legal uniformity in India. It directs the state to ensure a *'Uniform Civil Code'* throughout India.[2] But in reality, also after more than 60 years of the inception of the constitution, the Uniform Civil Code not materialized.

Our country is divided in its civil laws which are different according to one's religion. For example, a Hindu man and woman can get divorce mutually or can file separately for divorce through Hindu Marriage Act. Whereas in Muslim society upper hand is given to males in comparison to women due to which they have been subject to manifold atrocities[3] A divorce carries many demerits and disqualifications for woman. Conditionality as well as situations are different for males and females in Muslim community. It will not be unfair to say that in the case of divorce laws, this society continues to be a man's world. Not only this, the triple talaaq allows a Muslim man gives to divorce his wife almost instantaneously by spelling (on writing or texting) 'talaq' three times.

*Assistant Professor, Sociology, HNLU, Raipur

**Faculty of Law, HNLU, Raipur

1 See, Dr. Paras Diwan and Peeyashi Diwan, "*Family Law*"; 3rd edition (2012).

2 See, Article 44 of the Constitution of India, 1950.

3 *Kunhi Moyin v. Pathumma*, 1976 KLT 87.

The Muslim Women (Protection of Right on Divorce) Act, 1986

The Act of 1986 was drafted hastily after the famous case *Mohd. Ahmed Khan v. Shah Bano Begum*.[4] The act was designed to calm a divided Muslim resentment from the decision of the Supreme Court on the case. The act was passed through Parliament with a little debate and a three-line Whip. The Act was considered as a flawed and was open to criticism on many grounds fundamentally as it failed to provide a solution to the adversities faced by Muslim women after divorce. It is ambiguous and prima facie unconstitutional broadly as:

Even Section 3 (1) (b) of the Act related with the maintenance right of children are unethical and loosely framed which does not provide the divorced wife with reasonable and assumable amount of maintenance to the mother or child. However, in the Hanafi law the right to maintenance continues until a daughter reaches the age of puberty and son reaches the age of seven years. Section 3(1)(a) of the Act is also ambiguous. This basically excuses the husband to provide his wife with maintenance in the post-iddat period after paying the amounts in a lump sum along with the *mehr*, etc., as per Section 3(1) (c) and Section 3 (1) (d) of the Act.

Major demand of Shah Bano was to have a right to maintenance on reasonable and fair basis; therefore, her husband was ordered to pay Rs. 179.20 per month section 125 of Cr. P. C, 1973. In this manner the court tried to provide justice to Shah Bano but parliament opted the other way. Shah Bano was not the first case where the claim of a Muslim woman with respect to the maintenance under Section 125 of the code was covered.[5]

The Muslim Personal Law (Shariat) Application Act, 1937

The Shariat Act was passed in 1937 as mentioned under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937.[6] The Act was designed to secure the rights of Muslim women which Muslim law granted upon them whereas the same was invalidated under the conventional law. The Muslim Personal Law (Shariat) Application Act, 1948, as amended in the year 1951, to apply personal law in all questions relating to maintenance. The main object of the Act was not to supersede over any enactment but to reject any custom where there is a conflict between custom and personal law.

---

4 AIR 1985 SC 945.

5 *Bai Tahira v. Ali Hussain Fidalli Chothia*, AIR 1979 SC 362.

6 *Mohd. Ahmed Khan v. Shah Bano Begum.* AIR 1985 SC 945.

The Muslim Women (Protection of Rights On Marriage) Bill, 2017

With the change in government of the country the minority appeasement has decreased and with more woman coming out in support of reforms in Muslim laws many steps has been taken by the government to help protect the right of equality of Muslim women. With an object to protect the rights of Muslim women the Bill has been introduced. All declaration of instant talaq, oral, written or electronic form, are as per the Bill are not enforceable in law and illegal. The bill makes this type of talaq a cognizable and non-bailable offence with three years of jail and fine. Under the bill woman is entitled for maintenance and custody of children. The bill has been passed from Lok Sabha but is still pending in Rajya Sabha.

Uniform Civil Code

It is really interesting that even after more than sixty-eight years from the inception of our Constitution, the Uniform Civil Code under Article 44 of the Constitution of India attracted very limited attention. In fact, it remained as unfulfilled wish of the makers of the Constitution hardly taken up by any reformers and thinkers. In a country of this diversity, which is grappling with gigantic problems, combating with internal forces threatening its very foundation, Article 44 was thought to be an idea that could put an end to the great divided and diverse community. However, during the last decade, Article 44 has become a topic of debate in many subsections of the society. The uniform Civil Code will provide the righteous equality to every citizen of India irrespective of its religion, colour, caste or creed, where every human in the country would be viewed equally in the eyes of law. If not done so, Indians whose life is guided by their respective customary and religious beliefs will destroy the existence of their very nation.

Article 25 of the Constitution of India should not be used as a tool to deny the right to equality and justice. The scope of UCC must be enlarged beyond the issues of four wives and three talaqs. We should also look at other social evils like: the honour killings, Khap Panchayant verdicts and many more in different religions.

Conclusion

Our country is a country of belief and disbelief, it is highly sensitive and emotional on the issues of religion, gender etc. A little change in their belief system can lead to a cyclone of unrest in the society. The uniform civil code should be enacted but with great patience and a mindful technique so that the country can transit into a society of uniform civil laws and equality of all can be established. Having said that, I think there is a greater need to focus of the condition of Muslim woman who have suffered injustice from centuries even after sixty-eight years of constitution. There is a need of comparative study of the

various personal laws of every religion and community with a view of discovering their similarities and differences. We can then derive laws which are similar and uniform amongst most of the communities. These laws then can be enacted and enforced without hurting any community or religion. The point of dissimilarities can be dealt with sensitively be involving the legislators, legal experts from all the communities and thus can be implemented with the suggestions of the experts.

The judiciary must restraint itself on excessive commenting or enforcing Article 44. The government should set up a family law board under the Ministry of Law and Justice. It should be an independent body having branches at district level across the nation. We give some of its suggestive workings:

- to set up committees of experts from law and social sciences to study the working of the existing legislation;
- to present periodicals and write-ups to educate and inform people about the need of uniform civil code;
- to arrange opinion polls in the issues of family law and uniform civil code;
- to gain the trust of major leaders of various communities, politicians and other learned people from the institutions, to take their help in the cause towards civil integrity;
- change the social conditions by appreciating the changes in society;
- to create awareness among the people by the different modes of mass communication on the need for family law reform and unification;
- To encourage the study of socio-religious conditions of the country and promoting research through institutions of higher study.

Cyrus Investments Pvt. Ltd. v. Tata Sons Case: Analysis

*Dr. Yamala Papa Rao

Recently the issue in between Cyrus Mistry and Tata Sons gave rise to discussion over governance and oppression and mismanagement aspects in the incorporated form of business entity especially promoters led in Indian Scenario. on 24th October, 2016, the Tata Sons removed Cyrus Mistry and appointed Ratan Tata as an interim Chairman of the group.

Tata sons inter alia cited various reasons for the removal of Cyrus Mistry which included:

1) Growing trust deficit and repeated departures from the culture and ethos of the Tata group;
2) Loss of confidence of the Board; and
3) intentional disclosure of sensitive and confidential information causing loss in Tata Groups market value.

Initially, Mistry family firm was denied *locus-standi* for filing an oppression and mismanagement petition as they did not have the requisite 10% shareholding as mandated under Section 244 of Companies Act, 2013 ("2013 Act"). However, Mistry family firm obtained leave from the National Company Law Appellate Tribunal to file a case against Tata Sons at National Company Law Tribunal, alleging oppression and mismanagement of minority shareholders and also violation of the principles of Corporate Governance. The NCLT finally disposed of the matter vide a 368-page order on 9th July 2018. This case note deals with the issues involved in the said judgment and analyses the correctness of the decision.

1. Issues Involved:

1) Whether Cyrus Mistry's removal as Executive Chairman of the Group Holding Company is justified?
2) Whether there is Oppression and Mismanagement?
3) Whether there is a violation of Principles
4) of Corporate Governance?

---

* Assistant Professor of Law, Hidayatullah National Law University, Nava Raipur, Chhattisgarh.

2. **Legal Framework:** As Section 169 of the Companies Act, 2013 ("2013 Act") provides the shareholders the inherent right to remove directors by an ordinary resolution and also appoint somebody on his place. It is relevant to note here that for the application of present section, it is not necessary that there should be a proof of mismanagement, breach of trust, misfeasance or other misconduct on the part of the directors.

The Principle of rule of majority will be applicable to management of the affairs of the company. Since the decisions of Corporation are mainly based on the principles of democracy i.e. will of the shareholders or majority of the Shareholders' will ultimately prevail. In the leading case of *Foss v. Harbottle* two rules have been laid down, namely Proper plaintiff rule and Majority rule. The court held that the majority of the shareholders should be left to decide whether to commence proceedings against the directors.

NCLT felt that there was no violation of Insider Norms. The NCLT's decision has provided the following relevant expositions of law relating to oppression and mismanagement.

1) Sections 241 and 242 of the 2013 Act can only be used for preventive relief and not for seeking declarations as to whether certain acts are oppressive. The intent is to cease malafides that are occurring within a company.

2) A company must be a going concern for invoking Section 241 of 2013 Act and the action which is complained as oppressive must be in progress and within the confines of Section 241 of the Act

The decision given by NCLT is justified as per the provisions of Companies Act, 2013 and Principles of Corporate Governance under various laws including the Companies Act, 2013 have been complied. The NCLT dismissed the petition of oppression and mismanagement on the following detailed grounds:

3. Case Analysis:

1) In a democratic society the 'will' of the shareholders ultimately prevails. The same has been proved in leading case of Foss vs. Harbottle as well as similarly, in Rajahmundry Electric Supply Co. v. Nageshwara Rao. Section 169 of 2013 Act, states that the Shareholders can remove the director by passing an ordinary resolution in a general meeting. It is concluded that the decision of the Board is in accordance with the provisions of the Companies Act, 2013 as well as the previous case laws. I finally feel that the decision of the National Company Law Tribunal (NCLT) is based on the sound principles of democracy. The allegations of oppression and mismanagement raised by the Petitioners could not stand the threshold of scrutiny under Section 241 of the 2013 Act as they

were merely an exercise of corporate democracy by Tata Sons.

2) The plea that Cyrus Mistry has been wrongfully terminated as an executive chairman does not come within the ambit of Oppression and Mismanagement under Section 241 of the 2013 Act. Cyrus Mistry's complaint is merely a directorial complaint and is not a shareholder's grievance. Therefore, it cannot attract the tribunal's jurisdiction under Section 241 of the 2013 Act.

3) The NCLT observed that the principles of corporate governance i.e. transparency, accountability and fairness were not breached by the Respondents through the exercise of corporate democracy. The NCLT stated that the Respondents have maintained a balance between corporate democracy and corporate governance and therefore have not acted oppressively towards the minority shareholders and the public at large.

From the case analysis it is clear that tribunal has also applied the general principle of corporate laws regarding the majority rule. Now the case is pending before the National Company Law Appellate Tribunal. Whatever would be the decision but one thing that is clear is that family owned entities also started to be scrutinized under the lens of corporate governance in India.

Get Connected to the outreach platforms of HNLU

1. Sui Generis

"Sui Generis" is the faculty seminar series at HNLU for the faculty presented online. The platform to be expanded for connecting with the legal fraternity at large in the coming phases will have research topics currently dealt by faculty and also their contributions in various conferences. The format to have 35 minutes of presentation by the faculty led by a discussant followed by interaction with the participants. A total of 31 Sui Generis seminars were conducted between April to September of 2020 and were recorded. The second phase of the programme will also have select invited speakers and will be open to other registered participants.

Email id: digital@hnlu.ac.in

2. Lex Osmose (Non CGPA Credit Courses @ HNLU)

The five-year law programme introduced three decades back has over the years facing the challenge of balancing the mandatory courses of the regulatory bodies with that of the specialized domains of knowledge. To enable the students with emerging areas of new developments. The Lex Osmose programme is designed as customized single/ double credit courses offered by external faculty comprising of Academics, Advocates, Policy wonks and Civil Society enthusiasts. These courses to be offered online /off line to interested applicants to be evaluated for the learning outcome and will be part of the certification outside CGPA.

Email id: lexosmose@hnlu.ac.in

3. Ex Arca

EX ARCA is the outreach platform of Hidayatullah University to connect with the student community at the University and to the legal fraternity at large. EX ARCA means 'out of the box' is a blended platform of Online and Off line dissemination of the interface of Arts & Humanities, Social Sciences, Science & Technology and management with law. The programme will invite academicians, lawyers, Judges, Civil Servants and NGOs. The conceptual thrust behind EX ARCA is to provide exposure on nuanced professional – 'The Future Lawyer'.

Email id: exarca@hnlu.ac.in

4. ALMA Matters…

The future autobiography of many a 'thought leaders' had their preface inked in a class room, cafeteria, cultural fest or a college dorm. Teachers and class mates are often the inspiration for the future screen play of the alumni in their life and career.

The 'Alma Matters…' webinar platform designed at HNLU aims to invite, honour and get inspired from the Alumni of their turbulence and triumphs, ambivalence and achievements for an intergenerational motivation.

Yes, Alma Mater Matters…

Email id: alma@hnlu.ac.in

HNLU JOURNAL OF LAW & SOCIAL SCIENCES (HNLU JLSS)

Volume: III **January – December, 2017**

Mode of Citation: *HNLU JLSS 2017 (III) <Page No.>*

HIDAYATULLAH NATIONAL LAW UNIVERSITY

Atal Nagar, Raipur, Chhattisgarh – 492002
Phone: 0771-3057604 Email: jlss@hnlu.ac.in
Website: www.hnlu.ac.in

ISSN 2347-839X