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INDIAN TELEMEDICINE PRACTICE GUIDELINES IN CONTEXT

*Prof. (Dr.) Nandimath Omprakash V**

*Dr. Suresh Bada Math***

I. Introduction

Access, equity, quality and affordability are critical issues while developing efficient healthcare delivery systems, especially in developing economies. India is no exception to this. Information Communication Technologies (ICTs) are viewed to provide great solutions in healthcare delivery, like other spheres of human activity. In rough terms, provisioning of health care services by embracing ICTs is called 'telemedicine'. Health experts consider telemedicine to provide much needed innovation in allowing quality healthcare at affordable costs to millions of underprivileged. However, effective implementation of telemedicine services requires detailed policy clarification and regulatory articulation in India. This paper places the recently released 'Telemedicine Practice Guidelines' (Practice Guidelines) in context.¹ The paper also attempts to understand plausible developments in the area of telemedicine in the days to come.

II. Defining telemedicine

Telemedicine is a term coined in 1970s to mean 'healing from a distance'.² However, the practice of telemedicine is quite ancient dating back to the early 20th century. Medical literature provides testimony to electrocardiograph data being transmitted over telephone wires and use of television to facilitate consultation among doctors at a psychiatric institute in a mental hospital etc., in ancient times. Probably the development of every single technology (like telephone, telegraph, television etc.,) might have given impetus to telemedicine, but

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¹ "Telemedicine Practice Guidelines - Enabling Registered Medical Practitioners to Provide Healthcare using Telemedicine" - document released on March 25, 2020 by Board of Governors, In suppression of the Medical Council of India. These guidelines are considered to be part of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002.

² See generally Sterile EM, Shabde N. One hundred years of telemedicine: does this new technology have a place in podiatrists? Archives of Disease in Childhood, 2006, 91(12):956-959.

without referring it scientifically so. WHO has adopted the following definition for telemedicine:

"The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interest of advancing the health of individuals and their communities".

The same definition is embraced by the Telemedicine Practice Guidelines in India.³ The term 'health care services' include not just curative care but also preventive and promotive aspects of health. It also includes into itself, the aspect of health education as well. However, in this paper we concentrate more upon curative-care aspect of health delivery.

III. Utility of telemedicine

Following are the four elements of telemedicine:⁴

1. Its purpose is to provide clinical support;
2. It is intended to overcome geographical barriers, connecting users who are not in the same physical location;
3. It involves the use of various types of ICT; and
4. Its goal is to improve health outcome.

Telemedicine is an ever-evolving science showing great promise. The recent COVID-19 pandemic times have made us realize the potential of telemedicine, as the next new things to redefine the way health services are provided. Penetration of internet at affordable prices, connected wearable devices monitoring health parameters of an individual

³ The Practice Guidelines also define another confusing term viz., 'Telehealth' as "the delivery and facilitation of health and health-related services including medical care, provider and patient education, health information services, and self-care via telecommunications and digital communication technologies". Use word 'tele' creates some confusion to the reader, as 'tele' is much restricted word in comparison to 'digital communication technologies'. Some argue that telemedicine and Telehealth are two distinct concepts. But the present Practice Guidelines treat them as synonymous by defining both of them into the document.

⁴ Telemedicine - Opportunities and Development in Member States, Report on the Second Global Survey on eHealth, Global Observatory for eHealth Series - Volume 2, World Health Organisation, 2010.

with remote surveillance facilities - would further make telemedicine as one of the revolutionary things in transforming health care delivery. More so in developing and lower income countries. Experts in the field predict that telemedicine will transform the delivery of health services in the current global scenario, provided proper policy and regulatory support is provided.

India poses a typical example to benefit from telemedicine. Right to health is a fundamental right in India; making the corresponding duty lie upon the State. Which means the Government shall strive to provide equal access to quality health care to all its population, especially to the less privileged population. 1.33 billion of Indian population is being currently served by 1.8 million doctors. This works out to a meager 1.34 doctor per 1000 citizen.⁵ this is an alarming number. Moreover, the density of doctors varies in favor of urban and semi-urban areas. In cities and urban centers, the number of doctors increase, whereas in villages and remote places, there are hardly any doctors practicing. Telemedicine provides equal opportunity to people to access quality health care in most of the situations. Moreover, it is economically viable for both the stake holders viz., doctor and patient. Doctors need not invest huge amount in physical infrastructure to provide consultation and from patient perspective, associated cost of health care procurement (like travel from village to the nearest urban center, loss of daily wage and attender for the day spent in travelling to and from the health center, time saved, staying at the urban center along with the patient for one or two days to complete the consultation and investigations). The Practice Guidelines, therefore, correctly attempts to mainstream telemedicine in health care delivery systems. Effective telemedicine strategies would certainly minimize inequity and barriers to access towards health care.

During outbreak of pandemic and natural calamities, telemedicine provides quick, efficient and economical treatment solutions to the affected.

⁵ Estimated in 2017.

IV. Challenges in telemedicine

The first very challenge was, speculation among the professionals regarding legal validity of telemedicine. Many considered telemedicine to be illegal in India. This was not just a wild guess. A judgement of Bombay High Court added fuel to this speculation, although the findings of the Court were extrapolated beyond the facts of the case.⁶ In the light of facts of the case, the Bombay High Court framed the issue - "prescription without diagnosis and hence resulting into death of the patient amounts to criminal negligence on the part of the doctor" for its consideration. In this case, a patient fell sick, after undergoing a caesarian section. Unfortunately, the patient was attended by hospital's nursing staff, with telephonic advice from the doctor. Due to arising complications, the patient became serious and was shifted to another hospital with better facilities, but in vain. In the light of these facts, the Court ruled that, prescription without physical diagnosis is culpable negligence. This part of the ruling was later taken in isolation and propagated that telemedicine is illegal and can't be practiced in India. In common law, it is customary for the doctor to treat the patient only after clinically examining the patient. Therefore, treating the patient without examination would be deemed as negligence *per se*. Nevertheless, there was substantial confusion with regard to prescribing medication electronically as well. It was also felt that, follow up action can happen through telephone or any other medium of technology; but the maiden consultation had to be in person only.

India does not have dedicated law either prohibiting or regulating telemedicine. However, the greatest advantage of issuance of Practice Guidelines - irradiate the skepticism regarding the practice of telemedicine as illegal or opposed to public policy. However, telemedicine continues to be governed by multiple laws like (i) Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002; (ii) The Drugs and Cosmetics Act, 1940; (iii) Drugs & Cosmetics Rules; (iv) Information Technology Act, 2000; and (v) Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

Practice Guidelines aptly observe that "the purpose of these guidelines is to give practical advice to doctors so that all services and models of care used by doctors and health workers

⁶ *Deepa Sanjeev Pawaskar and Sanjeev Anant Pawaskar v The State of Maharashtra*, Criminal Anticipatory Bail Application No. 513 of 2018.

are encouraged to consider the use telemedicine as a part of normal practice. These guidelines will assist the medical practitioner in pursuing a sound course of action to provide effective and safe medical care founded on current information, available resources, and needs to ensure patient and provider safety".

The Consumer Protection Act, 2019 will likely to pose a threat for telemedicine practice because of the territorial jurisdiction rule. The new law allows the patient to lodge complaint in his hometown or at a workplace, away from the RMPs place of practice. This may demotivate the RMPs to provide telemedicine consultation for patients coming from remote places. This might also influence specialists providing telemedicine services as well.

V. Practice guidelines

The first debate, before proceeding further, should be towards identifying the normative character of the Guidelines. The document is titled as 'Telemedicine Practice Guidelines'. Literal translation of Guidelines would suggest that these are not mandatorily applicable; and can at the most be taken as a soft legal document indicating standards to be adopted. However, these Guidelines are appended (as Appendix 5) to the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002. These Ethical Regulations are delegated legislation under the Medical Council of India Act and are binding in character. When made part of them; obviously they get the character of law. More than anything else, due to absence of any other authoritative professional document in India, these Guidelines would get the normative character by default.

Following are the nine cardinal principles on which the Practice Guidelines are built:

1. **There is no difference in standard of care between telemedicine and in-person care** - Telemedicine is only an interphase or medium used by the Registered Medical Practitioner (RMP) in delivering medical care to the patient. The patient safety being central part of health care, there is no difference between the channel of telemedicine and in-person care provisioning.
2. **Use of discretion before adopting telemedicine** - Guidelines state that the RMP is well positioned to decide whether technology-based consultation is sufficient,

or an in-person review is needed. The practitioner shall exercise proper discretion and not compromise on the quality of care. As referred above, there exists a school of expertise, which claims that the first visit (or examination) of the patient shall be in-person; and subsequent follow up can happen over telemedicine. This would comply the so called legal and ethical mandate that, the doctor shall physically examine the patient before treating him/her. However, instead of answering the question either in positive or negative, the present Guidelines remain silent. But they clearly place the burden upon the medical practitioner to take a call before proceeding under telemedicine channel. For instance, doctor feels it is essential to physically examine the patient, then he shall do so without adopting technological avenue. If the use of technology for some reasons is not working out (like the image is not clear) the doctor shall insist on in person examination of the patient. Guidelines also insist that in case of emergency, the patient must be advised for an in-person interaction with an RMP at the earliest.

3. **No anonymous consultation** - the Guidelines mandate that both patient and RMP need to know each other's identity. To identify the patient by name, age, address, email ID, phone number, registered ID or any other identification as may be deemed to be appropriate. On the other hand, the RMP should begin the consultation by informing the patient about his/her name and qualifications. This is to address the issue of quacks practicing and prescribing drugs. In addition, the RMP shall display his professional registration number accorded to him by his Professional Regulatory Body on prescriptions, and other e-communications.
4. **Use of best possible technology** - Guidelines encourage almost all modes of communication for telemedicine. However, each technological medium might have their own limitation considering the context of patient treatment. Therefore, the RMP is advised to use the best possible technology for giving tele medical care. Guidelines state that "considering the situation, using his/her best judgement, an RMP may decide the best technology to use to diagnose and treat".
5. **Situation of inherent limitation for telemedicine** - Although telemedicine helps to heal from a distance, it has its inherent limitation at times. If physical examination is critical then the RMP may - (i) insist for in-person consultation; or

(ii) recommend, video consultation or examination by another RMP/health worker. Depending upon expertise and experience between RMPs, the communication in the latter scenario poses challenge. Therefore, development of standard protocol and uniform standardized language becomes key, which shall be developed by the professional community.

6. **Prescription of medicine** - The RMP may prescribe medicines via telemedicine only when he/she is satisfied that adequate and relevant information about the patient's medical condition; and prescribed medicines are in the best interest of the patient. It has been specifically made clear that 'prescribing medicines without an appropriate diagnosis/provisional diagnosis will amount to a professional misconduct'. The medicines that can be prescribed via telemedicine are classified in the following four categories.

1. List O - generally those common medicines which are sold 'over the counter' and which are safe to be prescribed through any mode of teleconsultation and do not require actual prescription to dispense the medicine. These would include those medicines which become necessary to be used during public health emergencies.
2. List A - These medicines can be prescribed during the first consultation through video mode; or being re-fill prescription in case of follow up consultations. These would include medicines which are relatively safe medicines with low potential for abuse.
3. List B - these are medicines which RMP can prescribe in a patient who is undergoing follow-up consultation in addition to those which have been prescribed during in-person consult for the same medical condition.
4. Prohibited List - The medicines which have high potential of abuse and could harm the patient or the society at large if used improperly. Therefore, via telemedicine, the RMP is prohibited from prescribing the medicines. These are medicines listed in Schedule X of Drug and Cosmetic Act, 1940 and Rules, 1945 or any Narcotic and Psychotropic substance listed in the Narcotic Drugs and Psychotropic Substances Act, 1985.

7. **Ethics, data privacy and confidentiality** - All principles of medical ethics are equally applicable to the telemedicine scenario, as patient autonomy and safety are pivotal interests to be protected. Special mention regarding patient privacy and confidentiality is made in the guidelines. As there is propensity of data compromise in this digital world, the RMPs should ensure that reasonable degree of care undertaken during hiring such services. RMP is absolved from liability if confidentiality is breached by a technology breach or by another other person than the RMP. In this regard the telemedicine practice guideline has been very liberal and facilitated the adoption of telemedicine by healthcare professionals
8. **Fee consideration for telemedicine services** - telemedicine consultations are equated to in-person consultations as far as fee consideration is taken into account. The RMP may charge an appropriate fee for the telemedicine services provided. For the fees charged, RMP should provide fee receipt/invoice.
9. **Explicit patient consent** - Except the medium of consultation, there is no difference between in-person consultation or telemedicine consultation. Apart from these specific Practice Guidelines, all other regulatory aspects would apply to telemedicine. Hence, consent before providing telemedicine care is absolutely imperative. It can be implied or explicit (express). Naturally, if the patient initiates the telemedicine consultation, then the consent is implied. If the initiation is on behalf of the RMP or caregiver, then express consent is required. The express consent here might be recorded in any form for subsequent verification or retrieval. It was deemed to be unethical if the doctor approaches the patient for providing health-care services, as it amounts to solicitation. However, in case of telemedicine, may be considering special circumstances, the guidelines contemplate initiation of consultation on behalf of RMP by a healthcare worker or by an another RMP as well. Or the Guidelines mandate express consent to be recorded during continuation of telemedicine episodes, where the RMP as per the schedule initiates the process.

VI. Further progress, post breaking the barrier

The issuance of Practice Guidelines herald ushering new era in the sphere of health care management. The single largest positive point of these guidelines is elimination of speculation among the community, regarding legality of telemedicine. However, the imminent need of the hour is to build upon the guidelines strategically. The Guidelines envisage, online training of doctors in telemedicine approved by Medical Council of India /National Medical Commission. The professional bodies should work toward starting a practical training programme at the earliest.

It is ideal that, a competent professional body, prescribes technical standards for successful adoption of telemedicine, without the fear of litigation. Currently all means and modes of technology (WhatsApp, Videocalls, Skype, SMS etc.) can be adopted. However, it is always advantageous if low cost 'plug and play' technology is developed, preferably with public funding, relieving the medical community of working with other details.

Patient record maintenance and confidentiality is another critical area where clear protocols and guidelines need to be worked out. Further, the newer technological advances such as artificial intelligence (AI), virtual reality (VR) and big data analysis will play major role in assisting the RMP in providing care. For example, AI can administer the standardized digital informed consent and can also explain or take the patient on a virtual reality tour to explain the procedure, alternatives, benefits and side effects of the treatment. This can revolutionize the treatment procedures and educating the patients about their illness and may improve the communication gap existed between the RMP and patients.

VII. Conclusion

RMPs have to embrace emerging newer healthcare technologies in order to stay relevant in the coming years. Patients are already exploring the internet before they seek help from a medical profession. Future healthcare industry will be driven by the client's comfort and

technology driven health care. The newer technology may play a crucial role in building relationship between medical professionals and patients. Further, the telemedicine can provide economical and access to evidence-based healthcare options. Artificial intelligence, Virtual reality, Augmented reality, wearables and sensors can play a crucial role in technology assisted administration of standardized digital informed consent, investigations, treatment and rehabilitation. This will herald the new wave of well-informed patient care.

UNDERSTANDING MEDICAL NEGLIGENCE IN THE LIGHT OF THE CONSUMER PROTECTION ACT, 2019: A CRITICAL ANALYSIS

*Binota Roy**

I. Introduction

William James Mayo way back in the year 1928 had once, while addressing an annual meeting on the ideals of American Medical Association, remarked that “the aim of medicine is to prevent disease and prolong life, the ideal of medicine is to eliminate the need of a physician”⁷. Time, unfortunately has witnessed otherwise. Increased commercialisation of all spheres of life compelled every profession to come under public scrutiny and medical profession was no exception. The fiduciary relationship that doctor-patient shared for decades together, took a toll. What was noble service and every unfortunate outcome of treatment a patient’s deemed misfortune, today has been coined as professional or medical negligence and is being time and again under judicial scrutiny. India, in the last two decades, have witnessed a steep rise in such medical negligence *vis-à-vis* professional misconduct incidents being dragged to courtrooms. Sad but true such litigation against the medical fraternity is gradually gaining momentum in our country.

Primarily, as per the existing law of the land, for an aggrieved patient or patient relative, there are three broad ways of seeking redressal, which are either as a civil wrong or criminal offence or in the form of disciplinary action for such professional misconduct. While the civil laws on confirming the occurrence of a civil wrong compensates monetarily for the loss suffered or injury sustained and the criminal laws aims to sanction a medical professional for such crime if proved in a court of law. Disciplinary action on the other hand is taken by the concerned Medical Councils and their Penal & Ethics Committee under whom such medical professionals are registered. However, bulk cases are being filed as civil wrong under the tort system of liability mainly under the statutory provisions of the Consumer Protection Act

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⁷ An American Physician & Surgeon and one of the seven Founders of Mayo Clinic, USA in one of his concluding remark in his address, *The Aims and Ideals of the American Medical Association*, collected in Proceedings of the 66th Annual Meeting of the National Education Association of the United States (1928), 163[https://todayinsci.com/QuotationsCategories/M_Cat/Medicine-Quotations.htm] as accessed on 28.03.2020.

(CPA), 1986 adjudicated summarily by a 3-tier quasi-judicial machinery at the district, state and national level.⁸

This article aims to touch upon the interplay of civil law in medical profession and further move on to briefly touch upon the concept of medical negligence. Thereafter, this article shall look into the concept of medical negligence through the lens of the consumer laws of 1986 and how healthcare, the incorporation of which was not otherwise the legislative intent, gradually went on to become a dominant sector of service as defined eloquently by the Hon'ble Supreme Court of India in one its landmark judgments in the *IMA Case*⁹. The article then moves on to focus on the new Consumer Protection Act, 2019 which repeals the previous consumer laws and further attempts to emphasize on the different ways by which the new piece of legislation shall have an impact on how medical negligence cases are dealt with under the new consumer laws. After a detailed discussion on how the new law in the name of benefitting the consumers, shall do more harm than good in the near future especially when it comes to litigation against the medical fraternity under the consumer laws, this article finally concludes with a few recommendations/suggestions on how to deal with the problems that are likely to arise post-implementation of the new Act of 2019.

II. Medical profession & law

As Dr. Atul Gawande had aptly outlined “It (Medicine) is an imperfect science, an enterprise of constantly changing knowledge, uncertain information, fallible individuals, and at the same time lives on the line.”¹⁰ It is this uncertainty of this branch of science together with increased commercialisation that has perhaps led to increased accountability of the medical fraternity. Nevertheless, notwithstanding reasons for such increased accountability, reality is that there has been a remarkable shift from fiduciary relationship between doctor-patient to service provider-consumer relation. Today medicine is no more that branch of science where doctors are placed next to God but are rather being held accountable for every untoward incident that occurs in the course of treatment and is under constant judicial scrutiny. However, prior to dealing with the interplay of law in medicine, it is imperative to

⁸Dr.MukeshYadav, *Statics of Medical Negligence Cases filed in various consumer courts of India*, May, 2018 available at <https://www.researchgate.net/project/Study-of-medical-negligence-cases-decided-by-Consumer-Court-NCDRC-SCDRC-DCDRC-in-India> as accessed on 13.04.2020.

⁹*Indian Medical Association v V.P. Shantha*, AIR 1996 SC 550.

¹⁰ Atul Gawande, *Complications: Notes from the life of a young surgeon*, (2002) New Delhi: Penguin India, p xix

briefly touch upon the concept of medical or professional negligence that holds the medical fraternity accountable in a court of law.

a. Medical negligence

The word negligence is derived from the Latin term *negligentia*, from *neglegere*, i.e. to neglect, thereby, in the literal sense meaning "not to pick up something"¹¹. In other words, it refers to an omission to do something which someone else in his position would have done. It, therefore, denotes culpable carelessness. It is worth quoting the definition of the term in Black's Law Dictionary wherein it says that negligence is "any conduct that falls below the legal standard established to protect others against unreasonable risk of harm"¹².

However, in India the concept of actionable negligence in recent times have been aptly defined by the Hon'ble Supreme Court of India in landmark case of *Jacob Mathew v. State of Punjab*¹³ as that negligence wherein any person who otherwise owes a duty of ordinary care and skill towards another, has neglected to use such care and skill with the resultant injury being suffered by the latter due to such neglect. In other words, in order to establish a case of negligence, there must *prima facie* be (a) an existence of a legal duty to exercise reasonable degree of care; (b) failure to exercise such reasonable care; (c) caused physical harm due to such negligent conduct; and (d) physical harm in the form of actual damage. Question might arise that when reference is being made to exercise of reasonable degree of care, what is the standard degree and how do one assess such standard. In this context, it is important to note that while determining such breach of legal duty, courts use an objective standard. Under this standard, the defendant's action is compared to that of a hypothetical reasonable man.¹⁴

Defining negligence in medicine on the other hand is often a daunting task and at times impossible. Nevertheless, as rightly pointed out by Tapas Kumar Koley, medical negligence may be referred to as that act or conduct of a medical professional or health care provider – be it omission or commission, which indicates gross deviation from the standard medical practice of similar medical men with the resultant injury caused to the patient.¹⁵ In order to establish such negligence on the part of the doctor or other health care providers, it is

¹¹ Wikipedia also available at <https://en.wikipedia.org/wiki/Negligence>.

¹² Black's Law Dictionary, 9th Ed. (Thomas Reuters 2009).

¹³ (2005) 6 SCC 1.

¹⁴ *Blyth v. Birmingham Waterworks*, (1856) 11 Exch 781.

¹⁵ Tapas Kumar Koley, *Medical Negligence & The Law in India – Duties, Responsibilities, Rights* (Oxford University Press 2010), p 28.

important that all the essential components of negligence are complied with. In other words, any patient or his or her relatives have to establish all the following elements for a successful medical negligence claim (a) Existence of a legal duty – there is an implied legal duty whenever a doctor, hospital or other health care provider accepts a patient for treatment; (b) Breach of such legal duty– the doctor, hospital or other health care provider fails to provide the accepted standard of care to the patient; (c) Causation of injury– the breach of such duty is the proximate cause of the injury to the patient and sometimes death; and (d) Damages– the losses may be physical or emotional either for the patient or for his/her relative. As far as reasonable degree of care is concerned, the law has taken the position that the standard in medicine is that level of care expected of a reasonably competent medical professional, rather than a reasonably prudent man¹⁶ and this has been duly recognised by the Hon'ble Supreme Court of India in some of its landmark cases¹⁷. Based on these basic tenets, plethora of such professional negligence cases is being filed and adjudicated summarily under the provisions of the Consumer Protection Act, 1986 summarily adjudicated by the 3-tier quasi-judicial machinery at the district, state and national level.

III. Medical Negligence – A civil liability under The Consumer Protection Act, 1986

Medical negligence as a tort is very well settled and neatly outlined in Indian jurisprudence. While discussing the civil liabilities of negligence as a civil wrong, the Consumer Protection Act, 1986 (CPA) plays a dominant role. However, prior to discussing the applicability and subsequent connection between CPA and medical negligence, it is important that we have a brief idea of the said Act of 1986.

a. The Consumer Protection Act, 1986

Widespread industrial revolution and development in international trade had led to a race for earning wealth by all means – whether fair or foul. Business houses and industrial organisations secured their interests against the consumers. The worst sufferers in this kind of industrial growth were the consumers. This necessitated the need for protection of the rights of the consumers. This piece of benevolent legislation is the first of its kind that was conceived to ensure better protection and/or safeguard of the interests of the consumers and is regarded as the '*magna carta*' in the field of consumer protection for checking unfair trade practice by business organisations. Upholding these social goals the Consumer Protection

¹⁶ *Id*, at p 51.

¹⁷ *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1.

Act, came into force on 24th December 1986. The Hon'ble Supreme Court of India in the case of *Lucknow Development Authority v. M.K. Gupta*¹⁸ has also acknowledged the worthiness of the Act.

This legislation is uniquely distinct from others in the sense that it is made exclusively for the consumers to protect their interests against 'defective goods'¹⁹ and 'deficient services'²⁰. It provides for speedy²¹ and inexpensive settlement of disputes within a limited time frame²². The said Act of 1986 defines the term 'consumer' (of goods) to mean not only a person who buys any goods for a consideration but also any user of such goods with the approval of the buyer.²³ Similarly, a 'consumer' (of services) is a person who hires or avails of any services for a consideration and includes any beneficiary of such services when availed of with the approval of the hirer.²⁴ However, any such aggrieved consumer can make a complaint in writing under the said Act, 1986 for 'deficiency'²⁵ in service or "adoption of unfair trade practice"²⁶.

b. Three-tier system of redressal of grievance

What makes this piece of socio-economic legislation unique is the summarily redressal by the three-tier system of quasi-judicial tribunal which expedites adjudication thereby providing speedy relief to aggrieved complainants. It is imperative to note that Section 9 of the Consumer Protection Act, 1986 deals with the establishment of the three-tier Consumer Disputes Redressal Agency, namely, the District Forum – one at each district at the district level in every State; the State Commission – one at each State, which is also the highest tribunal at the State level; and the National Commission – the highest tribunal at the national level.

Section 11, 17 and 21 of the Consumer Protection Act, 1986 categorically outlines the jurisdiction of these Disputes Redressal Agencies as hereunder – (i) District Forum- to

¹⁸AIR 1994 SC 787 It was observed that the *Act is a mile-stone in the history of socio-economic legislation...to meet the much desired mandate of safeguarding the interest of the common man from the damage resulting from such wrong for which relief and/or remedy within the ambit of common law for various reasons has turned out to be an illusion.*

¹⁹ The Consumer Protection Act, 1986, Section 2(1)(f), Defines the term "defect".

²⁰ *Id*, at Sec. 2(1)(g), Defines the term "deficiency".

²¹*Id*, at Sec. 13(3A) (3A), Deals with the procedure on admission of complaint.

²² *Id*, at Sec. 24A, Deals with the limitation period.

²³*Id*, at Sec. 2(1)(d) – Defines the term "consumer".

²⁴ *Id*

²⁵ Supra note 16 Sec. 2(1)(g), Defines the term "deficiency".

²⁶*Id*, at Sec. 2(1)(r), Defines the phrase "unfair trade practice".

entertain complaints having pecuniary limit upto rupees twenty lakhs (value of goods or services + compensation claimed, if any); (ii) State Commission- a) to entertain complaints having pecuniary limit upto rupees one crore (value of goods or services + compensation claimed, if any); b) to entertain appeals against orders of the District Forum; c) to entertain revisional applications where District Forum passes an order exceeding that which has been vested on it as per the provisions of the CPA; (iii) National Commission- a) to entertain complaints having pecuniary limit above rupees one crore (value of goods or services + compensation claimed, if any); b) to entertain appeals against orders of the State Commission; c) to entertain revisional applications where State Commission passes an order exceeding that which has been vested on it as per the provisions of the CPA.

However, the Supreme Court of India stands as the highest court of appeal as per the Consumer Protection Act, 1986. Another remarkable feature of the Act that makes it unique is that an aggrieved consumer can knock the doors of these quasi-judicial tribunals in-person without being mandatorily represented by any lawyer. Therefore, ever since the enforcement of this piece of benevolent legislation in the year 1986 there have been sea-through changes in consumer awareness and rights.

The Landmark Judgment: It is worthy of note that way back in 1986 when the Consumer Protection Act was drafted and enacted, medical professionals were not considered as service-providers, neither were patients identified as consumers within the purview of the said Act. The noble profession like practice of medicine was not recognised as service under the CPA. There was *prima facie* no legislative intent at the time of enactment of Consumer Laws in the year 1986 to incorporate healthcare within the purview of the Consumer Protection Act. This issue was considered for the first time in the year 1995 in the landmark case of *Indian Medical Association v. V.P. Shantha*²⁷.

After much debates and arguments between the medical fraternity and the judiciary, on the applicability of the Consumer Protection Act of 1986 in area of healthcare, it was finally decided by the Apex Court that the said Act being a welfare legislation enacted for the adequate protection of the consumers from hazards to their health and safety, incorporation of medical practice within the scope and ambit of “service” rendered under Section 2(1)(o) of the Consumer Protection Act, 1986 necessitated for reasons good or bad, indifferent. It was further categorically observed that the service rendered by the medical fraternity did not

²⁷AIR 1996 SC 550.

qualify the exempted category of 'contract of service' since such service implies some master and servant relationship where there is an implied obligation on the part of the latter to obey the order of the former, which is absolutely not the case in a doctor-patient relationship. It was clearly upheld that such doctor-patient relationship qualified a 'contract for personal service' and as such well within the purview of Section 2(1)(o) of the Consumer Protection Act, 1986.

Further as regards the other part of exclusionary clause relating to service rendered 'free of charge' in the definition of Section 2(1)(o) of the Consumer Protection Act, 1986 is concerned, the Apex Court in the above referred case has categorically held that medical professionals, Government and private hospitals and nursing homes broadly fall in three different categories: (i) where services are rendered free of charge to everybody availing the said services; (ii) where charges are required to be paid by everybody availing the services; and (iii) where charges are required to be paid by persons availing services but certain categories of persons who cannot afford to pay are rendered service free of charges.²⁸ As far as the first two categories are concerned, there is no difficulty. In other words, patients who avail service from doctors and hospitals free of charge, such service shall not fall within the scope and ambit of "service" under Section 2(1)(o) of the Act.

It is worthy of note in this regard that mere payment of a token amount for registration will not alter the position in respect of such doctors and hospitals. So far as the second category is concerned, since the service is rendered on payment basis to all the persons they would clearly fall within the ambit of Section 2(1)(o) of the Act. Last but not the least is the third category of service rendered by doctors and hospitals which although free of cost but such service is otherwise provided on payment basis falls within the meaning of "service" under Section 2(1)(o) of the Act. In other words, since such expenses of treatment are met out from the service rendered to the paying patients, it undoubtedly falls within such scope and ambit.

However, ever since then, there has been a steady increase in medical negligence cases filed in consumer courts across the nation. Survey conducted by the National Law School of India University (NLSIU), Bengaluru five years back revealed that medical negligence cases

²⁸ *Indian Medical Association v. V.P. Shantha*, AIR 1996 SC 550.

have gone up by 400% in the last decade.²⁹ In fact statistics reveals that post *V.P. Santha* case total medical negligence cases filed in consumer courts across the country in the year 2000 was 183 which rose to 3510 in the year 2017.³⁰ Be it noted that depending on the quantum of compensation claimed and value of service, that cumulatively determines the pecuniary jurisdiction of the case, such medical negligence cases are filed in the District Fora and the State and National Commission. However, for reasons good or bad, indifferent, the figure unfortunately is steadily on the rise.

IV. The Consumer Protection Act 2019: Tectonic changes in the regime

After nearly three decades ever since the Consumer Protection Act came into force, the said piece of legislation has been repealed and replaced by the Consumer Protection Act, 2019. The new Act intends to impose stricter measures and tighten the existing rules to further safeguard the consumer rights. The Act of 2019 has introduced a central regulator, imposed stricter penalties for misleading advertisements and new guidelines for e-commerce and electronic service providers are some of the key highlights. However, careful perusal of the new Act of 2019 would reveal that by incorporating new Agencies such as Central Consumer Protection Agency, Mediation Cells attached with every Consumer Commission, which we shall delve into in the foregoing paragraphs, this new piece of legislation has been an attempt to allow excessive Executive intervention within quasi-judicial machinery. Nevertheless, notwithstanding the same, it would not be untenable to mention that the new law had a seminal bearing on the healthcare system too. Although it has categorically exonerated healthcare from the definition of ‘service’, which was otherwise a part of it in the Bill, nevertheless, one ought not to forget that the Consumer Protection Act, 2019 does not bar the judicial enunciation in *Indian Medical Association v. V.P. Shantha*³¹ by the Supreme Court and as such the service rendered by the medical fraternity is still well within the scope and ambit of the consumer laws in India with the new Act of 2019 being applicable in its form and content.

²⁹ Available from <https://health.economictimes.indiatimes.com/news/industry/medical-litigation-cases-go-up-by-400-show-stats/50062328> as accessed on 13.04.2020.

³⁰ *Supra* note 3.

³¹ AIR 1996 SC 550.

V. Impact of new consumer law on medical negligence cases

Some of the key changes of the Act of 2019 amongst others are inclusion of the Central Consumer Protection Authority (CCPA), Mediation cells, alteration in the territorial as well as pecuniary jurisdiction of the consumer courts, compensation for misleading advertisements, etc. that will have a potential impact on how medical negligence cases are filed and adjudicated upon under the Consumer Protection Laws in our country.

Central Consumer Protection Authority (CCPA)- One of the most welcoming attempt of the new Act of 2019 has been the proposal for setting up of the CCPA by the Central Government for the first time with its primary object being ‘to promote, protect and enforce the rights of the consumers.’³² The CCPA shall have an investigative wing headed by a Director General that would conduct inquiries and investigations into any violations relating to consumer rights, unfair trade practices and misleading advertisements. The CCPA upon proper investigation shall have the power to issue necessary orders and even prefer cases before the Consumer Disputes Redressal Commissions at all levels – District, State and National.

From the medical profession stand point, question that arises is – can complaints be filed against medical professionals or clinical establishments for adoption of unfair trade practice or even misleading advertisements? In other words, if for example, a clinical establishment advertises having 24 hours emergency in super specialty areas like trauma cases, and a road traffic accident victim is brought in but referred to another centre after preliminary medical aid for absence of concerned medical professional to attend such patient, will such cases fall under the scrutiny of the CCPA for misleading advertisement eventually if the victim dies due to delayed treatment? Similarly, can individual doctors having separate clinics cum other facilities like infertility centres, fall under the scanner of the CCPA and can complaints filed against such centres lead investigation and subsequent proceedings under the new Act of 2019? If for example, a complaint is rejected by the CCPA, question is, can the complainant prefer a complaint on the same subject matter in dispute before the Consumer Commissions? The questions are enormous with the new Act of 2019 leaving room for adequate ambiguity that perhaps shall settle post judicial scrutiny through subsequent cases/disputes that comes before them for adjudication.

³² Section 10 (1) of the Consumer Protection Act, 2019 available from <http://egazette.nic.in/WriteReadData/2019/210422.pdf> accessed on 13.04.2020.

a. Mediation cells

Chapter V of the Consumer Protection Act, 2019³³ is a new incorporation to the existing laws relating to consumer protection. For the first time, there has been an attempt to establish mediation cells with each of the District and State Commission as well as the National Commission with the objective to give opportunity to settle disputes amicably. However, when it comes to medical negligence cases, opting for mediation or referral for the same by the Commissions have the potential to open the floodgates for further dilemmas and ethical issues.

In other words, if a medical professional or clinical establishment agrees for mediation, the message that would pass on to the society *in rem* would be that the concerned medical professional and or clinical establishment has accepted the allegations levied against them and agreed to settle monetarily. This shall have an immense negative impact on the overall medical profession owing to such perceived societal branding. The flip side of such mediation in medical negligence cases is that the medical fraternity might be more inclined to settle disputes amicably especially when modern day medicine practice comes mandatorily with professional indemnity insurances. So, when the insurance companies take care of the monetary compensation, medical professionals and clinical establishments will have a tendency to easily cover up their laches by settling such disputes amicably which undoubtedly raises certain ethical issues.

Besides, another important issue that has been left unaddressed is whether there is any binding effect of the written agreement in pursuance to such settlement of dispute duly signed by the parties. In other words, the new Act of 2019 is silent as to what redressal a complainant has in the event of non-compliance of the terms of the agreement otherwise mutually agreed upon in mediation.

b. Alteration in the jurisdiction of the Consumer Courts

The new Act of 2019 has brought about a radical change in the way consumer disputes are dealt with at the District, State and National level. This piece of legislation has enhanced the pecuniary jurisdiction of the District and State Consumer Commissions. What was outlined in the Act of 1986 as up to rupees twenty lakhs before the District, above rupees

³³ Available at <http://egazette.nic.in/WriteReadData/2019/210422.pdf> as accessed on 13.04.2020.

twenty lakhs and up to rupees one crore before the State Commission and above rupees one crore before the National Commission has been raised in the new Act of 2019 to one crore before the District Commission, above rupees one crore and up to rupees ten crore before the State Commission and above rupees ten crore before the National Commission.³⁴ Another path-breaking change in the existing law that defines pecuniary jurisdiction is that unlike the Act of 1986, it is not mandatory to include the quantum of compensation claimed in addition to the total value of goods or services, but ought to take into consideration only the actual value of goods or services paid as consideration.³⁵ Quantum of compensation claimed is no more a determining factor to access the pecuniary jurisdiction of a complaint.

Although this might be a positive change in the existing laws for different sectors, but such a change only invites further trouble and raises pertinent questions of law when it comes to medical negligence cases. To put it in simple terms, several hospitals across the country have bad debts that specifically arise owing to non-payment of hospital bills by the patient or patient party.³⁶ Such non-payment may be specifically of two types, the first category being part-payment made out of the total bill and the second category is totally not paying any amount out of the total hospital bill.³⁷ Although instances of the former are more rampant than the latter, nevertheless, hospitals have also witnessed instances of the latter category. Problem arises with the second category where there is complete non-payment of hospital bills. In other words, given the new law for determining the pecuniary jurisdiction of a case which only emphasises on the actual consideration paid, when a patient or patient party leaves the hospital without clearing the hospital bills and further prefers to file a complaint before the Consumer Commission for redressal of grievance, will he or she be entitled to file such medical negligence case? And if yes, how will the pecuniary jurisdiction be determined in such a situation especially when fact looms large that there was no consideration paid by such consumers?

Going back to the guidelines outlined by the Supreme Court in *Indian Medical Association v. V.P. Shantha*³⁸ in the midst of the existing Act of 1986, the law is clear that even services rendered free of charge or service hired by the patient or patient party is free

³⁴ *Id.*, at Chapter IV.

³⁵ The Consumer Protection Act, 2019, Section 34.

³⁶ As a Legal Advisor of hospitals in Kolkata like AMRI, Saltlake, AMRI, Mukundapur, ILS Hospitals, Dum Dum, ILS Hospital, Saltlake, GNRC Hospital, Barasat, to name a few, information with regard to the same has been gathered in course of my professional service rendered to them.

³⁷ *Id.*

³⁸ AIR 1996 SC 550.

which otherwise is paid service fall within the scope and ambit of the consumer court and the determining factor for pecuniary jurisdiction of such complaints have been the quantum of compensation alone with value of service being nil. In the light of the new Act of 2019, if the sole determining factor for pecuniary jurisdiction is the consideration actually paid, how will such consumers access the pecuniary jurisdiction of consumer complaints while preferring the same before the Consumer Commissions? Unfortunately, the new Act of 2019 does not have an answer to the same.

In addition to issues arising out of the new law pertaining to pecuniary jurisdiction, careful perusal of the new Act of 2019 would reveal that the amendment of the laws relating to territorial jurisdiction is not devoid of legal dilemma. Section 34 (2) (d) of the Consumer Protection Act, 2019 for example, allows a consumer to file a complaint within the territorial limits where the complainant either resides or personally works for gain thereby opening floodgates for further chaos and confusion especially when it comes to cases against the medical professionals. To put it in simple terms, if for instance, a patient is treated in a hospital in Kolkata and the patient expires and his son is of the opinion that had the treating consultant been more diligent, his father would have survived and thereby prefers to file a case of medical negligence, but since he works in one of the IT firms in Bengaluru, the new Act allows him to file such a case against the doctor, otherwise practising in Kolkata, before the Bengaluru jurisdiction. Imagine a similar situation against the same doctor but this time a complaint has been filed before the New Delhi jurisdiction because the complainant works in Delhi. Implementation of this Act would mean the medical practitioner, who practises in Kolkata have to run to Bengaluru and New Delhi for such cases repeatedly. Although, I appreciate the fact that consumer laws have been drafted with the intent to protect the interest of the Consumers, but let us pause for a while and ask ourselves that isn't the scale pans tilted more towards the consumers and all done at the cost of making it detrimental for the other side to a great extent? Considering medicine as a profession for instance, such change in law will do no good for medicine as a whole. Defensive practice of medicine shall be more rampant and it is the general public vis-à-vis consumers who shall suffer in this vicious circle. Ideally, territorial jurisdiction, in my opinion should be confined only to the local limits where the cause of action arises or else, in the name of benefitting the consumers, such changed law shall do more harm than good in the near future.

VI. Conclusion

The Consumer Protection Act of 2019 passed and received the presidential assent on 9th August 2019, repealing the Consumer Protection Act, 1986, although aimed to strengthen consumer rights and dispensing consumer justice, but the ground reality especially when it comes to sectors like the healthcare is completely otherwise. The problems and potential issues that are likely to arise upon implementation of the new Act of 2019 as discussed hereinabove is just the tip of the iceberg and is in my opinion, the related laws are not reconsidered, the new consumer laws will create further hardship and complicate adjudication of cases more than civil courts in the days to come. In fact, it would not be untenable to mention here that adjudication of medical negligence cases under the new consumer laws will perhaps change the very modus operandi of practice in medicine.

A CRITICAL ANALYSIS OF THE TRANSGENDER ACT, 2019

Akshita Tiwary*

I. Introduction

The Transgender Persons (Protection of Rights) Act, 2019¹ (*hereinafter*, the Act) came into effect on 5th December, 2019. In keeping with the landmark judgement of the Supreme Court in the case of *National Legal Services Authority v. Union of India and Others*²(*hereinafter* NALSA), this Act reflects the endeavour of the Indian Parliament to defend the necessary rights of India's transgender community. However, this Act has met with a lot of criticism and opposition by the public, inclusive of transgender people. This article aims to analyse the main drawbacks of the Act using the NALSA judgement as the appropriate standard. By detailing a historical analysis of the treatment of the transgender community in India and abroad, the article attempts to prove that transgenderism is a pervasive occurrence and that the transgender community deserves to have equal rights and dignity in keeping with the principles of international human rights law. A comparison with the transgender laws of other nations shows how the Act is unsatisfactory in respect of providing certain basic minimum rights to the transgender community. With this view in mind, the article provides certain suggestions for filling up the gaps in the current Act.

Gender constructs have been deep-rooted in society since the ancient period. However, often people incorrectly assume that gender has a biological connotation, when in reality it has more to do with socio-cultural distinctions. An individual's personal sense of gender defines his/her gender identity. It is unique to every individual. Gender identity may coincide with a person's assigned sex at birth or it may vary. The term 'transgender' encapsulates the sense of a person's gender identity which does not correlate with their assigned sex at birth.³

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¹ The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Act of Parliament, 2019.

²*National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863.

³Wex, *Transgender*, Legal Information Institute (Cornell Law School), Available on <https://www.law.cornell.edu/wex/transgender>.

II. Historical analysis of the status of the transgender community

a. Transgenderism- a worldwide reality

The term 'transvestite' was coined by the German sexologist Magnus Hirschfeld in 1910. He later developed the Berlin Institute where the very first 'sex operations' took place.⁴ In fact, the terms 'transsexual' was not coined until 1949, 'transgender' not until 1979 and 'trans' not until 1996.⁵

The phenomenon of transgenderism has been existent for thousands of years and has even been mentioned multiple times in recorded history.⁶ Pharaoh Hatshepsut was a female pharaoh who ruled Egypt from 1479-1458 BC.⁷ As the pharaoh at that time was typically supposed to be a male, she invented a hybrid gender so that she could rule.⁸ In 16th century France, King Henry III often cross-dressed and was referred to as 'Her Majesty' by the courtiers.⁹ Chevalier D'Eon was a famous spy and ambassador in the 18th century. He was born as a male (Charles), but spent a significant part of his/her life as a woman, thereby giving rise to the term 'eonism'.¹⁰

All over the world, acts of homosexuality and transgenderism have been seen as a threat in the past because they defied the laws of nature. As a result, these people have often been discriminated against in social, legal and economic spheres. In 1885, UK passed the Criminal Law Amendment Act¹¹ which criminalized all homosexual behaviour, and Section 11 of this Act was used to prosecute Oscar Wilde.¹² For fear of being prosecuted, transgender people started seeking out doctors who could cure them of this 'disease', and the field of sexology developed whereby sex-change operations were carried out. Through the efforts of sexologists like Richard von Krafft-Ebing and Magnus Hirschfeld, discussions concerning

⁴ Stephen Whittle, *A brief history of transgender issues*, The Guardian (June 2, 2010), <https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>.

⁵ *Id.*

⁶ Richie Gupta & Anil Murarka, *Treating Transsexuals in India: History, prerequisites for surgery and legal issues*, 42(2) Indian J. of Plastic Surgery (2009) 226-233, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2845370/>.

⁷ *Timeline – Transgender History*, Transgender Health U.K. Social Resources, <http://www.transgenderzone.com/features/timeline.htm>.

⁸ Zahi Hawass, *Quest for the Mummy of Hatshepsut*, http://www.guardians.net/hawass/articles/quest_for_the_mummy_of_hatshepsut.htm.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The Criminal Law Amendment Act 1885 (Eng.).

¹² Robert W. Burnie, *The Criminal Law Amendment Act 1885*, British Library (1885), <https://www.bl.uk/collection-items/the-criminal-law-amendment-act-1885>.

transgenderism and its treatment became popular in public circles. Throughout the 20th century, psychiatrists carried out several studies to understand the causes behind transgenderism. This, combined with the emergence of prominent figures like Christine Jorgensen as transgender, gradually broadened the scope of integration of transgender people in mainstream society.¹³

b. Transgenderism in India

Indian mythology contains several references to altered sexual states. *Ardhanarishwara* is an androgynous deity who is half-man and half-woman.¹⁴ King *Ila*, referred to in various versions of the Ramayana, spent half his life as a man and half as a woman.¹⁵ One of the most prominent characters and warriors in *Mahabharata*, *Arjun*, spent one year in an intersexed condition.¹⁶ Another character in *Mahabharata*, *Shikhandini*, was born a female, but raised as a man and trained in warfare.¹⁷ She came back as the man '*Shikhandi*' after an encounter with *Yaksha*, and was able to father children.¹⁸

India's history has witnessed dynamic changes in the status of the transgender community at different points of time.¹⁹ During the ancient period, several religions saw them as the third type of sex. The same is recognised by the *Manu Smriti*, a principal scripture in Hindu law.²⁰ Hence, concepts of "*tritiyaprakriti*" or "*napumsaka*" have been an integral part of the Hindu mythology, folklore, epic and early Vedic and Puranic literatures. Some of the early texts dealt extensively with the ideas of sexuality and the 'third gender'. This is evidenced in the Jain text, which mentions the concept of "psychological sex", distinct from an individual's sexual orientation.

During the Mughal era, transgender people were accorded status and respect and went by the name of '*hijras*'.²¹ They served as political advisors, administrators and guardians of the

¹³ Whittle, *supra* note 5.

¹⁴ *Kalkinath Ardhanarishwara - the god who is half woman*, http://philhine.org.uk/writings/tt_ardhanarishvara.html.

¹⁵ Gupta & Murarka, *supra* note 7.

¹⁶ *Id.*

¹⁷ Cornelia Sorabji & Warwick Goble, *Shikhandi: The Maiden-knight and Other Stories* (Bombay: Blackie and Son, 1916).

¹⁸ *Id.*

¹⁹ Preeti Sharma, *Historical Background and Legal Status of Third Gender in Indian Society*, 2(12) IJRESS (Dec. 2012).

²⁰ M. Michelraj, *Historical Evolution of Transgender Community in India*, 4 Asian Rev. of Social Sciences (2015) 17.

²¹ *Id.*, at 18.

harems. Their cleverness, trustworthiness and fierce loyalty guided the political atmosphere favourably during the reign of the Mughal Empire. They also served as guardians of Islamic religious spaces like the Mecca and Medina. All this allowed them to wield considerable political, economic and social power.

It was during the British period that the vulnerability and marginalization of the transgender community increased due to stringent criminalization.²²Accounts of early European travellers showed how the sight of *hijras* used to repulse them. They failed to understand how they were given so much respect in Mughal political institutions. Through criminalization and segregation, the British Government deprived them of basic civil rights. Under the Criminal Tribes Act of 1971, the colonial Government would kidnap *hijras* and castrate children and all those who danced in public spaces while being dressed like women.²³ Punishment for such activities included imprisonment up to two years, or a fine, or both. Such discrimination perpetuated the prejudice and stigmatization faced by this community even after India gained independence.

Since 1947, the state of transgender rights in India has improved slightly due to increasing awareness. The main credit for this can be attributed to the Lesbian, Gay, Bisexual, Transgender and Queer (hereinafter, LGBTQ+) movement, which has been gaining currency since the past decade or so. From judgements of the Supreme Court to schemes of the Government, an active effort has been taken to provide the community with adequate rights and protection. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) is one of those schemes which provided employment opportunities for the transgender community.²⁴ Reforms have also been brought about in legal and constitutional fields to address their specific concerns and prevent human rights violations. One such significant reform was the passing of the NALSA judgement in 2014.

III. NALSA Judgment

In 2014, the Supreme Court of India pronounced a landmark judgement in favour of transgender rights.²⁵The NALSA judgement recognizes due rights of the transgender community, like the right to self-identify their gender.²⁶This judgement provided for the

²² *Id.*

²³ *Id.*

²⁴ *Id.*, at 19.

²⁵ *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863.

²⁶ *Id.* para. 19.

equal treatment of the transgender community, in accordance with Articles 14,²⁷ 15 and 16,²⁸ 19²⁹ and 21³⁰ of the Indian Constitution.

The apex Court took notice of the social exclusion faced by the community. It thereby directed Governments at the Central and State level to frame welfare schemes for transgender people, especially in the medical and educational spheres.³¹ It was strongly suggested that to redress the stigma faced by this community, reservations should be provided in public employment and educational institutions.³² Hence, by granting the transgender community the right to be treated as the third gender, the Supreme Court paved the way for a better future for millions of transgender Indians. The spirit of this acclaimed judgement is completely in consonance with international human rights law.

IV. Transgender rights under International Human Rights Law

Human rights consist of certain core rights which are guaranteed to all human beings, regardless of factors like nationality, race, sex, language, ethnicity, etc.³³ These human rights are formulated and contained in the Universal Declaration of Human Rights (hereinafter, UDHR).³⁴ The opening line of the UDHR proclaims “All human beings are born free and equal in dignity and rights.” International human rights law principles contained in the form of treaties, customary international law, general principles and other sources of law bestow Governments with an obligation to promote and protect these rights for all individuals.

United Nations (hereinafter, UN) human rights bodies have explicitly maintained sexual orientation and gender identity to be included among the prohibited grounds of discrimination under international human rights law.³⁵ In a series of resolutions, the UN General Assembly has called upon states to ensure that no person within their territorial jurisdiction are executed on grounds of their sexual orientation and gender identity, thereby protecting their right to

²⁷ *Id.* paras. 54-55.

²⁸ *Id.* paras. 56-61.

²⁹ *Id.* paras. 62-66.

³⁰ *Id.* paras. 67-69.

³¹ *Id.* para. 129.

³² *Id.*

³³ UN for LGBT Equality, *International Human Rights Law and Sexual Orientation & Gender Identity*, Fact Sheet, <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>.

³⁴ UN G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

³⁵ *Sexual Orientation, Gender Identity and International Human Rights Law-Practitioners Guide No. 4*, International Commission of Jurists (Geneva, 2009), <https://www.refworld.org/pdfid/4a783aed2.pdf>.

life.³⁶ Extensive research has been carried out by the UN Human Rights Council and the UN Office of the High Commissioner of Human Rights to investigate instances of violence and discrimination against people on the basis of sexual orientation and gender identity.³⁷ Hence, several resolutions have been formulated containing measures to address such violence.³⁸

Being a signatory to the UDHR, India is committed to enforcing its principles and safeguarding the human rights of every Indian citizen.³⁹ The implementation of these rights can be carried out by promoting a culture of inclusiveness and equality and dignity for all. With respect to the protection of rights of the transgender community, India needs to work towards ending the discrimination faced by members of this community. This can be accomplished by enacting proper legislations monitoring such discrimination and providing for its criminalization. The Parliament of India has been working towards this step since the past few years.

V. Bills pertaining to transgender rights

Following the NALSA judgement, the first Bill⁴⁰ to safeguard transgender rights was introduced by *Tiruchi Siva*, a member of the *Dravida Munnetra Kazhagam*. This Bill was initially introduced in the Rajya Sabha in 2014.⁴¹ The Bill was a private member's Bill, drafted in conformity with the NALSA judgement. It was accepted and passed in the Upper House in April 2015. Then, it was transmitted to the *Lok Sabha* where it was never taken up for discussion.⁴² When the Government introduced the next transgender Bill in the *Lok Sabha* on August 2, 2016, as the Transgender Persons (Protection of Rights) Bill, 2016,⁴³ it was opposed on many counts, including the proposal for "screening committees" to decide who

³⁶ UN Human Rights Council Res. 67/168, U.N. Doc. A/RES/67/168 (Mar. 15, 2013).

³⁷ UN Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011); UN Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Oct. 2, 2014); UN Office for the High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation* (Geneva 2011),

www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf.

³⁸ UN Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

³⁹ Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, Nat'l Human Rights Commission, India, A Handbook on International Human Rights Convention (2012), http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

⁴⁰ The Rights of Transgender Persons Bill, 2014, No. 49, Bills of Parliament, 2014.

⁴¹ Chaitanya Mallapur, *Why New Bill Meant To Benefit Transgender People Is Termed Regressive*, IndiaSpend (Aug. 22, 2019), <https://www.indiaspend.com/why-new-Bill-meant-to-benefit-transgender-people-is-termed-regressive/>.

⁴² Vijaya Lalwani, *What next for transgender people, as India clears a Bill that activists call "murder of gender justice"?*, Quartz India (Nov. 27, 2019), <https://qz.com/india/1756897/indias-transgender-rights-Bill-disappoints-the-lgbtq-community/>.

⁴³ Transgender Persons (Protection of Rights) Bill, 2016, No. 210, Bills of Parliament, 2016.

was a transgender and who was not, and the criminalisation of begging, a mainstay for a majority of transgender Indians. The Bill was also criticized for including a biased definition of transgender persons as those who are “neither wholly female nor wholly male”. Thereafter, a parliamentary standing committee was asked to evaluate the Bill, and it was finally abandoned by the Government in July 2017 after being rejected in the committee’s report.

VI. The Transgender Persons (Protection of Rights) Act, 2019

The latest Act passed by the Parliament which has stirred debates amongst the public is The Transgender Persons (Protection of Rights) Act, 2019.⁴⁴ Prima facie, the Act intends to safeguard the honour and freedom of the transgender community. It encapsulates an all-inclusive definition of a transgender person. It prohibits discrimination against the transgender community, and provides them with rights to education, medical facilities, healthcare, employment, property, etc. Under the Act, every transgender person is guaranteed the right to reside and be included in his/her household. The District Magistrate can issue a certificate recognising an individual as a transgender. The Act empowers the Government to implement transgender-friendly welfare schemes and measures in order to encourage their vocational training and participation in cultural activities. It also specifies offences against transgender persons, and the penalties thereunder. Lastly, it provides for the establishment of a National Council for Transgender Persons (NCT) to monitor the impact of Government policies and to address the grievances of the community. Overall, the Act reflects a positive effort of the Government to develop the rights of the transgender community so as to reduce the intolerance that they face in our society. Yet, the lack of meticulous consideration in the drafting of the Act has prevented it from gaining universal support amongst the community and the general public. People are viewing it to be more of a half-hearted concession by the Government rather than a comprehensive legislation aiming to grant the long-awaited rights that the transgender community deserves to have in the 21st century.

The biggest demerit of the Act relates to its inefficacy to take note of current ground realities. One of the main issues being debated about this Act is that it was drafted and passed without approaching anyone from the transgender community. Supposedly an Act which has been passed for the benefit of the transgender community, it is surprising that no one from the community was asked about their needs or requirements. Hence, assumptions were made mostly based on stereotypes, leading to major loopholes in the Act itself.

⁴⁴ The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019.

a. Defects in the Act

First, the Act defines a “transgender person” as one whose gender identity does not match with his/her gender assigned at birth, and includes different categories of people like trans-man or trans-woman, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as *kinner*, *hijra*, *aravani* and *jogta*.⁴⁵ However, the conflation of transgender people with persons with intersex variations is evident of the fact that the Act was not properly deliberated upon, because these two categories of people are very different from each other. A transgender⁴⁶ person’s sense of gender-identity differs from his/her actual assigned sex at birth, but they are usually born with typical male/female anatomies. On the other hand, the anatomies of intersex⁴⁷ people are not entirely male or female. This fundamental fact distinguishes the two groups immensely, despite the existence of minor similarities.⁴⁸ Keeping in mind this distinction is necessary to formulate different solutions to address the diverse types of discrimination that these two groups face.⁴⁹

Second, the Act prohibits discrimination against a transgender person in various fields like education, medical care, employment, right to movement, etc.⁵⁰ This idea may be noble, but the Act fails to specify provisions to apprehend those who actually discriminate against, bully or harass transgender people in different settings like the workplace, educational institutions or anywhere else. No monetary compensation is provided to the transgender person if he/she faces any discrimination. Under the Act, even private entities like companies and firms are not allowed to discriminate against transgender people.⁵¹ A complaint officer is to deal with the complaints relating to violation of provisions of the Act.⁵² Yet, there is no mention of penal consequences if such private entities do not comply with the same. Hence, the right against discrimination remains only on paper for this community, and there is no accountability for the same because of lack of precision in the Act.

⁴⁵ *Id.*, at § 2(k).

⁴⁶ *Transgender*, Merriam Webster Dictionary (11th ed. 2003).

⁴⁷ *Intersexuality*, Merriam Webster Dictionary (11th ed. 2003).

⁴⁸ LGBTQ Centre, *Intersex*, UNC Student Affairs, <https://lgbtq.unc.edu/resources/exploring-identities/intersex>.

⁴⁹ *Understanding Intersex and Transgender Communities*, Interact Advocates for Intersex Youth, <https://interactadvocates.org/wp-content/uploads/2016/05/LavLaw-Trans-and-Intersex-Fact-Sheet.pdf>.

⁵⁰ The Transgender Persons (Protection of Rights) Act, 2019, § 3, No. 40, Acts of Parliament, 2019.

⁵¹ *Id.* at Sec. 3(i).

⁵² *Id.* at Sec. 11.

Third, the Act specifies that a transgender person may be recognised as such by the Government⁵³ after issuance of an official certificate by the District Magistrate.⁵⁴ Post this, the gender of the person will be recorded in the same manner in all official documents.⁵⁵ If the person chooses to undergo sex reassignment surgery after this, such person can be re-issued the certificate after proper verification, to allow the person to change his/her gender to male or female on all official documents.⁵⁶ However, this requirement to apply for a certificate through certain procedure is contrary to the spirit of privacy, self-identity and personal integrity of transgender people, which were assured as their fundamental rights in the NALSA judgement. The Judgment identifies self-determination of gender as an integral part of personal autonomy which is guaranteed by personal liberty according to the Constitution of India.⁵⁷ At the end of the day, concepts like gender and sexual orientation lie within the ambit of privacy. The same has been upheld by landmark judgements like those of *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*⁵⁸ Even the European Court of Human Rights recognized the same in the case of *S and Marper v. United Kingdom*.⁵⁹ Affirmation of these judgements thereby show that obtaining a certificate of proof is a clear violation of the right to privacy of transgender persons. Additionally, it also undermines their personal right to self-identify their gender.

Fourth, the Act directs the Government to take welfare measures in favour of the transgender community.⁶⁰ However, it fails to provide specific details, leading to multiple questions over the exact scope and benefits of these measures. Section 9 of the Act prohibits discrimination against these persons in matters of employment, but surprisingly, reservations for them are not provided. Even Section 13 which prohibits discrimination against the community in educational institutions contains no mention of reservations. It is disappointing that the Act overlooks the social and economic discrimination faced by the transgender community, and in lieu of this, fails to provide reservations for them. Again, this is

⁵³ *Id.* at ch. 3.

⁵⁴ *Id.* at Sec.5.

⁵⁵ *Id.* at Sec. 6(2).

⁵⁶ *Id.* at Sec. 7(2).

⁵⁷ *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863 para. 74.

⁵⁸ *Justice KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁵⁹ *S and Marper v. UK*, Eur. Ct. H.R. (Dec. 4, 2008).

⁶⁰ The Transgender Persons (Protection of Rights) Act, 2019, ch. 4, No. 40, Acts of Parliament, 2019 (India).

antithetical to the spirit of the NALSA judgement, which favoured reservations for the transgender community in educational institutions and public appointments.⁶¹

Fifth, under the Act, transgender people are ensured of the 'right to residence'.⁶² Competent courts can transfer these people to rehabilitation centres if their immediate family cannot look after them properly.⁶³ This provision aims to create a safe space for transgender people within their own families. However, it does not address how a transgender person should deal with the discrimination he/she may face within the family, or how families should become more accepting of them. Often, traditional families put pressure on transgender persons to conform to their original sex.⁶⁴ If they refuse to do so, then they are treated as outcasts or even subjected to violence. Perceiving such a hopeless situation, it is simply not enough that the Act only provides for relocation as opposed to addressing and punishing this kind of stigma which is prevalent in the Indian society.

Sixth, the Act calls for providing medical care and health facilities to the transgender community.⁶⁵ This includes facilitating access in hospitals⁶⁶ and providing hormonal therapy counselling,⁶⁷ among other things. Yet, it mentions no specific timeline for introducing such measures. This too goes against the NALSA judgement which explicitly directed the Government to do this in 2014 itself.⁶⁸ It is not surprising then that the transgender community feels like the Act provides no real remedy to improve their lives.⁶⁹ Unless there is a definite plan with concrete steps to implement such measures, this may as well only be a theoretical right.

Seventh, the Act includes a list of offences and penalties given in Chapter VIII. Some of these offences include forcing transgender persons to indulge in bonded labour,⁷⁰ denying them the right of passage,⁷¹ forcing them to leave their household or village,⁷² and indulging

⁶¹ *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863 para. 60.

⁶² The Transgender Persons (Protection of Rights) Act, 2019, Sec. 12(2), No. 40, Acts of Parliament, 2019.

⁶³ *Id.* at Sec. 12(3).

⁶⁴ Patricia Gagné & Richard Tewksbury, *Conformity Pressures and Gender Resistance among Transgendered Individuals*, 45(1) *Social Problems* (1998) 81-101, <https://www.jstor.org/stable/3097144?seq=1>.

⁶⁵ The Transgender Persons (Protection of Rights) Act, 2019, § 15, No. 40, Acts of Parliament, 2019.

⁶⁶ *Id.* at Sec. 15(f).

⁶⁷ *Id.* at Sec. 15(c).

⁶⁸ *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863 para. 22 (India).

⁶⁹ Anureet Watta, *Why The Indian LGBTQ Community Rejects The 'Progressive' Trans Bill*, Youth Ki Awaaz (July 15, 2019), <https://www.youthkiawaaz.com/2019/07/why-the-trans-rights-Bill-is-unacceptable-to-the-lgbt-community/>.

⁷⁰ The Transgender Persons (Protection of Rights) Act, 2019, Sec. 18(a), No. 40, Acts of Parliament, 2019 (India).

⁷¹ *Id.* at Sec. 18(b).

in physical, sexual, verbal, emotional and economic abuse.⁷³ However, the Act does not identify the clear criteria for determining sexual abuse. Moreover, the prescribed punishment of two years with fine is highly dissatisfactory, as opposed to a minimum sentence of seven years which is meted out to a sexual offender of a cisgender woman (which can extend to life imprisonment as well).⁷⁴ These inconsistencies reflect poorly on the Government's duty to secure the safety of the transgender people.

Eighth, rights related to marriage, inheritance and adoption are not covered within the scope of the Act. The NALSA judgement guaranteed these rights as basic civil rights that the transgender community is entitled to.⁷⁵ Silence on such a facet is a glaring gap when it comes to establishing the well-being of the transgender community.

All these loopholes in the Act need to be reflected upon carefully in order to implement transgender rights in India in keeping with the NALSA judgement. A lesson can be taken from the experience and legislation of other countries in this regard, some of which are addressed in the following section.

VII. Transgender Rights in Other Nations

The struggle for recognition of transgender rights is a common phenomenon all over the world. Currently, only a few nations legally safeguard rights of transgender people.⁷⁶ Prominent judgements in favour of transgender rights have been pronounced by the apex courts of some countries like Nepal and Pakistan.⁷⁷ The cabinet of Bangladesh in 2013 issued a decree recognizing hijras as their own legal gender.⁷⁸ Yet, several other nations still criminalize or refuse to recognize the existence of the 'third gender'.⁷⁹ Some of these countries include Malaysia, Kuwait and Nigeria.⁸⁰ Nevertheless, persistent efforts by activists have resulted in major strides with respect to legal rights of the transgender community.

⁷² *Id.* at Sec. 18(c).

⁷³ *Id.* at Sec. 18(d).

⁷⁴ Indian Penal Code Sec. 375, No. 45 of 1860, India Code.

⁷⁵ *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863 para. 49 (India).

⁷⁶ LGBTI Law Committee, *Mr. & Ms. X: The Rights of Transgender Persons Globally Research Digest*, International Bar Association.

⁷⁷ Neela Ghoshal & Kyle Knight, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, Human Rights Watch, <https://www.hrw.org/world-report/2016/rights-in-transition>.

⁷⁸ *Id.*

⁷⁹ Rachel Savage & Hugo Greenhalgh, *Transgender people criminalized in every part of world: study*, Thomson Reuters Foundation (London, May 17), <https://news.trust.org/item/20190517160526-pcinf/>.

⁸⁰ Ghoshal & Knight, *supra* note 78.

According to the Global Commission on HIV and the Law, around twenty nations have passed some form of legislation recognizing transgender rights.⁸¹

In 2012, Argentina created a landmark Gender Identity Law, allowing anyone over the age of 18 the right to self-identity of gender.⁸² This even entails the right to undergo sex reassignment surgery and revise official documents without prior judicial or medical approval. Minors can choose to do this with the consent of their legal representatives or through summary proceedings before a judge. This law is considered to be the gold standard for transgender rights all over the world. It ensures confidentiality and rights to equality, free personal development and dignified treatment for the transgender community.⁸³

By 2015, countries like Colombia, Denmark, Ireland and Malta removed legal barriers to gender recognition within their own specific jurisdictions.⁸⁴ The evolution of their respective laws accepts a legal change in gender identity simply by filling out the appropriate official forms. This differentiates them from nations which either do not allow their citizens to change their gender identity at all, or only allow them to do so when certain criteria like surgery, psychiatric evaluation, forced sterilization, etc. are met. The latter method is still adopted by around thirty-four European nations which prohibit a transgender person from changing his/her name or registered gender without some sort of medical procedure.⁸⁵ Similarly in nations like Iran, the law differentiates and discriminates between transgender people who undergo medical intervention and those who do not.⁸⁶ Hence, the creation of progressive laws which equally protect the rights of all transgender people is a superior achievement for nations like Colombia, Denmark, Ireland and Malta.

All these developments are influencing debates and discussions pertaining to the importance of gender identity. Countries like New Zealand and Australia guarantee individuals the option to have gender listed as “unspecified” on official documents.⁸⁷ At the same time, the Dutch Parliament is considering whether to record a person’s gender on

⁸¹ Azadeh Ansari, *Transgender Rights: These countries are ahead of the US*, CNN (Feb. 23, 2017), <https://edition.cnn.com/2017/02/23/health/transgender-laws-around-the-world/index.html>.

⁸² Law No. 26.743, May 24, 2012, A.D.L.A. (Arg.).

⁸³ *Id.*

⁸⁴ Ghoshal & Knight, *supra* note 78.

⁸⁵ *Watch: 34 Countries in Europe Make This Nightmare a Reality*, Transgender Europe (Feb. 23, 2015), <https://tgeu.org/nightmare/>.

⁸⁶ Ansari, *supra* note 82.

⁸⁷ Ghoshal & Knight, *supra* note 78.

official documents at all.⁸⁸ Therefore, the endeavor to guarantee equal and transgender-friendly rights to this community requires sensitization on the part of Governments all over the world. Steadily, albeit slowly, things are progressing in the right direction in some nations. This creates an urgent need for the emergence of a progressive Indian law and perspective which can enable India's transgender community to also enjoy the same modern rights that are provided to transgender people in other nations around the globe.

VIII. Suggestions for improvement in the present law

Drawing on the experience of nations like Argentina and Denmark, following suggestions can be made for improvement in the current Act in order to make it more comprehensive and beneficial:

1. The first right to be given under the Act should be the right to gender identity. Its definition should encapsulate the right to be treated according to the gender with which transgender people identify themselves, thereby ensuring free personal development.
2. The right to gender identity can be fully guaranteed only when it is recognized legally. Hence, the Act should contain a section specifying the appropriate measures for recognition or change in one's choice of gender identity on all official documents in a hassle-free and non-discriminatory manner. This should not require any kind of certification or proof from a Government official (a requisite under the current Act), and medical intervention should not be deemed necessary for such recognition.
3. The definition of a transgender person as given in section 2(k) of the Act should be made broad by providing a psychological perspective. Intersex people should be mentioned in a separate category and not conflated with transgender people due to the existence of significant differences between the two.
4. The Act should specify exact measures to apprehend those who discriminate against transgender people in public spaces. This can entail the mandatory creation of a Complaints division specifically to deal with issues of the transgender community in offices, universities, etc. Stringent punishment should be meted out to offenders. Additionally, the transgender person should be entitled to monetary compensation.
5. Welfare measures specified under the Act should include reservations for the transgender community in order to accelerate their social and economic growth.

⁸⁸ *Id.*

Under this section, State Governments should be compulsorily directed to carry out transgender-sensitive awareness programmes and campaigns in different schools and localities.

6. The penalty for sexual harassment of a transgender person should be increased and made equivalent to that of a cisgender woman.
7. A specific timeline should be provided for securing medical and health-care benefits to the transgender community as stressed upon in the NALSA judgement.
8. The Act should aim to ensure the confidentiality of a transgender person in all respects, thereby protecting the privacy of said person.
9. The Act should give details about rights concerning marriage, inheritance and adoption, etc. for the transgender community. In case these details cannot be accommodated in the current Act, then the Government should define the timeline within which subsequent laws relating to these rights would be created for transgender people.

The above-mentioned suggestions should be considered with a view to ensuring equal and dignified treatment of the transgender community.

IX. Conclusion

India's transgender community widely disapproves of this Act, and rightly so.⁸⁹ Activists supporting transgender rights have undertaken protests against the Act, virtually and in reality. In an attempt to protect the transgender people, the Act has actually created a space for more unanswered questions than ever before. The timing of the passage of the same Bill⁹⁰ in the Lok Sabha has also been questioned. The Bill was passed, almost without debate, on the same date when the proposal to abrogate Jammu and Kashmir of its special status was introduced in the Rajya Sabha.⁹¹ This same date is broadly being designated as the 'Gender Justice Murder Day'.⁹²

Against this backdrop of ongoing protests and debates, this article has analysed the major loopholes in the Act. By drawing inspiration from international human rights law and laws regarding transgender rights in other nations, the article has suggested certain

⁸⁹Mallapur, *supra* note 42.

⁹⁰ The Transgender Persons (Protection of Rights) Bill, 2019, No. 169, Bills of Parliament, 2019 (India).

⁹¹Lalwani, *supra* note 43.

⁹²*Id.*

improvements in the existing Act. This is undertaken with a view to provide dynamic rights to India's transgender community in order to protect them from discrimination and stigmatization. Improvement in legal rights can pave the way for eradication of the social oppression which afflicts this community. This should be supplemented with changing social mindset which can mitigate the prejudice against these people. Hence, the Government should inculcate greater sensitivity in the masses regarding the obstacles faced by transgender people by organizing awareness and educational campaigns.

A 2015 report⁹³ by the World Health Organization and the Asia-Pacific Transgender Network explicitly recommended that Governments “take all necessary legislative, administrative, and other measures to fully recognize each person’s self-defined gender identity, with no medical requirements or discrimination on any grounds.”⁹⁴ There is no doubt that the current Act does aim at promoting solidarity between the transgender community and the mainstream society. However, the absence of specific provisions defeats this aspiration. In light of the same, it is essential that the Government revisits the Act to rectify all possible errors, thereby achieving maximum potential to contribute to the development of India’s transgender community in every aspect.

⁹³ Health Policy Project, Asia Pacific Transgender Network & United Nations Development Programme, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*, Washington DC: Futures Group, Health Policy Project (2015), http://www.healthpolicyproject.com/pubs/484_APTBFINAL.pdf.

⁹⁴ Kyle Knight, *India's Transgender Rights Law isn't worth Celebrating*, Human Rights Watch (Dec. 5, 2019), <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>.

UNIFORM CIVIL CODE IN INDIA: LEGAL PLURALISM V/S LEGAL CENTRALISM

*Dr. Manojkumar V. Hiremath**

I. Introduction

Article 44 of Constitution of India mandates the State to formulate Uniform Civil Code (UCC) but it has been a dead letter for last 70 years for various reasons. However, the idea of uniform civil law for Indians was not conceived for the first time in Constituent Assembly but it was in vogue during British period also.

How is a uniform law to be introduced in a society that has been regulated for ages by parallel systems of 'personal' law? This difficulty was seen as early as during Macaulay's time when he argued the need for uniform *lex loci* in India. While the Law Commissions, initiated by Macaulay, were able to unify criminal law, hopes of the regulation of Civil Law were not readily realised.¹

Warren Hastings decree in 1772 is also a testimony of acknowledgment of the strong presence of plural legal orders in India and not insisting for Uniform Civil Law. It stated that in matters of inheritance, marriage and other such religious affairs "the laws of the Koran with respect to the *Mahomedans* and those of the *Shashtra* with respect to the Gentoos [Hindus] shall be invariably adhered to."² This decree reaffirmed the legal pluralism that existed in India and the same was respected by the British, though with the motive of avoiding the wrath of religious communities and to gain confidence of the Indians.

Following independence in 1947 and the partition of British India into India and Pakistan, the debate over a Uniform Civil Code revolved around the Government's power to regulate family relationships and the need to protect the culture and identity of minorities. Muslims in India needed reassurance that the new country being a democracy, with Hindus as vast majority of citizens, would grant them religious freedom. While the members of the Constituent Assembly hoped to integrate the nation's Hindu majority into one community,

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¹ Vijay Nambiar, "India: How Secular?", *The Economic Weekly*, June 6, 1964, p.947.

² *The Hindu* Dated 23rd Nov.2014. <http://www.thehindu.com/opinion/open-page/uniform-civil-code-will-it-work-in-india/article6625409.ece>.

they also sought, through the preservation of personal laws, to assure Muslims and other religious minorities that their religious and cultural identities would survive.³

Additionally, the debates that took place on Uniform Civil Code in Constituent Assembly Debates also to some extent reflect the fact of existence of plural legal orders and their deep rootedness, hence they deferred the formulation of UCC though Committee on DPSP proposed to make it a reality within 5-10 years from the commencement of the Constitution.

The strong presence of plural legal orders from the ancient time to medieval time and fear of facing the rebellion by religious communities in modern times are the reasons for endurance and survival of plural legal orders in India during British period and post-independence period. In the second half of the 20th century, the bitter experiences of communal clashes at the time of partition of the country, political leaders experience of conservationist opposition to Hindu Code bill and expectation of the same kind of opposition from Muslim Community, due to codification of their personal law being attempted, are the few reasons that went on to endure plural legal orders in India. In spite of onslaught of positive law regime and continuing legacy of British legal system, plural legal orders are surviving in India. Thus, in the present scenario of uproar for Uniform Civil Code, here an effort is made to analyse how wrongly the ostensible reasons to have UCC are being professed and how the legal pluralism developed in India. Further the interface between legal pluralism and legal centralism is discussed and lastly in the concluding part the possibility of an alternate to UCC and way out for Secular state to deal with the society with multi-religions is discussed.

II. Perceived reasons to demand for Uniform Civil Code

The demand for UCC in India is increasing and those who propagate its formulation contend that it promotes national integrity, addresses the problem of gender discrimination prevailing within the personal laws of different religious groups and strengthens the secularism by placing the matters like marriage, succession, inheritance and adoption beyond the realm of religions. However these reasons are not strong enough to justify the formulation of UCC.

³ Srikanth Reddy, "What Would Your Founding Fathers Think? What India's Constitution Says—And What Its Framers Would Say—About The Current Debate Over A Uniform Civil Code" *The Geo. Wash. Int'l L. Rev.* [Vol. 41:2009], p.425.

a. National integrity

Dorothy Simpson defines national integration as “creating a mental outlook which will promote and inspire every person to place loyalty to the country above group loyalties and the welfare of the country above narrow sectarian interests.”

According to Prof. B.C.Upreti “national integration constitutes a process of coming together of various segments of society of a nation into a cohesive whole”. Further he clarified that integration does not mean complete uniformity. Instead he opines that it is a condition in which people share some values and have a consensus which is reflected in terms of growth of feeling of nationalism and unity.⁴

The reading of definitions of national integration of Dorothy Simpson and Prof. B.C. Upreti makes it clear that, national integration is a value. It should evolve organically among the people of the nation but not in-organically by the force of law made by the State. It’s an attitude which people should develop; it’s not the behaviour that law can mend.

National integration cannot be built by brick and mortar, by chisel and hammer. It has to grow silently in the minds and hearts of men. The only process is the process of education. This may be a slow process, but it is a steady and permanent one.⁵ Thus the national integration has to be an evolution. It’s a social transformation and it’s possible to achieve only through the holistic education but not with uniform coercive law.

Even few members of the Constituent Assembly were of the opinion that UCC promotes the national integration. It was stressed by Mrs. MinooMassani, Rajkumari Amrit Kaur and Mrs. Hansa Mehta in the Constituent assembly. All these three women members of the Committee on Directive Principles were of the strong opinion that one of the factors that hindered India’s growth was personal laws based on religion and kept the nation divided into watertight compartments in many aspects of life. But the division of people based on their

⁴ Ranbir Singh and Anupama Arya, “Nehru’s Strategy of National Integration” *The Indian Journal of Political Science* Vol. 67, No. 4 (OCT. - DEC., 2006), pp. 919,920.

⁵ Report of Working Group of National Integration Council to Study Reports of The Commissions of Inquiry on Communal Riots 2007, p.112. Available on - http://mha.nic.in/sites/upload_files/mha/files/pdf/NIC-W-Group.pdf - Visited on - 22/2/2017.

religion and adherence to their personal laws is in no way connected to the growth of the nation.

Surprisingly even the Supreme Court, in a number of cases pertaining to the challenge to the personal laws while expressing the need for UCC has reasoned that the uniform law promotes the integrity among the people belonging to different faith.

In *Shah Bano* case⁶ expressing the need for Uniform Civil Code, the then, Chief Justice Y V Chandrachud *inter alia* observed that “...A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies...”⁷

Further Supreme Court in *Sarala Mudgal Case*,⁸ while reiterating the views of the court in *Shah Bano case* on the Uniform Civil Code as a vehicle for national integration, singled out the Muslim community as the primary obstacle to achieving such integration. It supported its views by saying that - when more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "Uniform Civil Code" for all citizens in the territory of India.

Again in 2003 Supreme Court in *Vallamattom v. Union of India*,⁹ observed that, “It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies”

Ruma Pal also has opined that, the religious communities have to be made aware that, calls for the enactment of a Uniform Civil Code are grounded in claims for legal uniformity and national integration, as well as equal protection, particularly of women who often suffer discrimination under India’s religious personal laws.¹⁰

Most of the civil laws in India are uniformly applicable to people of all religions. The subjects like, Contract law, Transfer of property law, Law of Limitation, Labour Law, Civil

⁶*Mohd. Ahmed Khan v. Shah Bano Begum and Ors*, AIR 1985 SC 945.

⁷*Id.*

⁸*Sarala Mudgal v. Union of India*, (1995) 3 S.C.C. 635.

⁹ 2003(5) S.C.A.L.E. 384

¹⁰Ruma Pal, *Religious Minorities and the Law*, in Larson Gerald James Larson,(edt.), “ Religion and Personal Law in Secular India: A Call to Judgment”, Indiana University Press,2001,p.27.

Procedure, Negotiable Instrument, Law of Sale of Goods, Partnership, Company law and Land Acquisition law etc., constitute more than 90% of the Uniform Civil Laws; only the laws governing marriage, succession, adoption are not uniform. If uniform law brings national integration then with 90% of uniform civil law India should have attained the national integration over seven decades. The point to be driven home here is, it's not the uniform law that brings national integration but sense of belongingness and fraternity, that could be promoted through holistic value based education.

b. Gender discrimination

Equality of women was the main reason for some of our women members in the Constituent Assembly to get Article 44 introduced in the Constitution. In their minds the issue of Hindu women was more predominant than the issue of Muslim women. The multiplicity of Hindu law was resulting in the inequality of women on several issues, particularly of property. Therefore, they wanted this law to be reformed and made uniform for all Hindus.

Thus in post-independence period as a part of reform of personal laws, the Hindu law was codified through five enactments enacted in 1950's. Those laws ameliorated the status of women to some extent but did not eliminate all discriminatory practices. These codified laws were amended time to time and recently in 2005 by an amendment to the Hindu Succession Act, 1956, equal right of female coparcener in the joint family property was recognised. However still there exists few more discriminatory provisions under codified Hindu law and they can be eliminated by further amendments and that is well within the competence of the Union legislature.

Further, the personal law of Muslims has not been codified and many discriminatory provisions exist there in. The attempt was made to codify and reform their personal law by enacting few legislations. However it has not been codified and reformed on the lines of Hindu law. As a result there exists many discriminatory practices against Muslim women. The issues like *triple talaque*, maintenance and inheritance related discriminatory practices are eliminated, the Muslim personal law also stands reformed.

Thus Uniform civil law is not required to address the problem of gender discrimination. Instead what is needed is thorough reform of personal laws separately to address the unique problems pertaining to women belonging to different religious

communities. For Muslims marriage is a Contract, for Hindus marriage is a Sacrament and for Christians marriage is Status. The value and importance attached to the institution of marriage in these three religion is different, they cannot be treated same by a uniform law.

c. Strengthening secularism

Secularism is understood as a policy of the State to not to adopt any religion as an official religion, equal treatment of all religions and non interference of State in religious matters. Today it is stretched too much to mean and include the act of the State to remove the matters like Marriage, Succession and Adoption from the realm of the religion. It has been argued even in the constituent assembly that, matters like marriage, succession and adoption have nothing to do with the religion and they are the secular matters. Same argument is endorsed by the Courts in series of cases. However the fact that the institutions like marriage, succession and adoption have their origin in religion is conveniently undermined. The scholars who argue that these matters have nothing to do with religion and they are the secular matters, forget that the idea of secularism came into vogue only after the political institution called State came into existence and religion had strong roots by then in the society and it was the religion which regulated all aspects of life of the men in the society including marriage and succession.

Thus the argument that the UCC will promote secularism is a flawed argument because the institutions like marriage, succession and adoption are the products of religion. If there exists any unreasonable religious practices relating to these institutions, they might fall under the purview of ameliorative secularism and State shall take measures to reform the law suitably. Hence there shall be reform of each religious personal law separately instead of writing the uniform norms to govern the institutions inseparable from the religion.

III. Legal pluralism in India

India's legal system is a common law system; a relic of British imperialism which is at the same time is very different from the original British common law. During colonization, novel ideas of utilitarianism and legal positivism informed many English innovations in India. The usual organic relationship between a legal system and its society was violently disrupted doubly by this experiment. Indians came to have a legal system developed in response to the needs of a very different society, that of England. The concept of religious personal laws is one of those ideas.

Historically, in Europe, the law made a distinction between personal (often ecclesiastical) laws and the legal codes of the territory as a whole. In India before colonization, however, Hindus and Muslims with very few exceptions were governed by their own respective laws. Colonization in India happened in a complex and geographically varied manner. Different parts of the country came under colonial control under different legal arrangements. British laws were introduced gradually and selectively and "personal matters" were to remain governed by the religious laws of these communities. However, the content of personal laws was determined almost randomly in the successive charters and regulations.¹¹

The first state recognition of legal pluralism in India can be traced out through the Warren Hasting's regulation of 1772 which maintains that "In all suits regarding marriage, caste, and other religious usages and institutions the law of the Koran with respect to the Mohammedans and of the Shaster with respect to the Gentoos shall be adhered to."

Thus religious laws and personal laws became interchangeable and in the process it was forgotten that before the arrival of the British administrators, all aspects of the laws of Hindus and Muslims were religious. Moreover, British policies determined what should be designated as a personal matter and of course the final shape of the laws governing such personal matters whether administered by the English courts or legislated by the colonial parliaments modified the religious laws of the people.

In the post- independence era the Hindu personal law has undergone changes by a continuous process of codification. The Muslim personal law has been comparatively left untouched by legislations.

The following enactments were enacted to codify the personal law of Hindus - The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956.

The Indian Parliament also enacted the Special Marriage Act, 1954, as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. The Parsi Marriage

¹¹ Raghav Pandey, "Are Personal Laws Justified In Secular India- Law General Essay" 2012 CJ 014.

and Divorce Act, 1936 as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

The Christian Marriage Act, 1872, was enacted as an Act to consolidate and amend the law relating to the solemnization of the marriages of Christians in India and the Divorce Act, 1869 as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Muslim Women (Protection of Rights on Divorce) Rules, 1986, apply to Muslims living in India.

With this kind of codification of personal laws in India to some extent legal pluralism which existed among these religious communities is affected. Something which was strong case of Legal pluralism has been transformed into a weak form legal pluralism by the exercise of secular power by the State. This kind of legal pluralism which exists today with respect to personal law can be described as Controlled Legal Pluralism and also plurality in official law.

The present legal pluralism in whatever limited manner it exists in India under the aegis of Constitution of India can be termed as 'state-law pluralism'.

Gardiol van Niekerk while explaining the legal pluralism in the context of South Africa observes that, through the years, the indiscriminate compliance with analytical positivism and mechanical adherence to legal centralism engendered in lawmakers an inability to see legal rules in their social context. Consistent with the ideology of legal centralism, law was viewed as the law of the state, uniform for all persons, exclusive of all other laws and administered by a single set of state institutions. Values were regarded as universal and all true values as compatible. Consequently, indigenous law was recognised only in so far as it was compatible with the Western concept of public policy and natural justice and a legal order was created which is largely incongruent with the needs of the

heterogeneous South African society.¹² Exactly the same thing happened with respect to indigenous legal orders of India.

In a bid to attain equality, legislation is entrenching legal centralism which, in the multicultural Indian society, can only lead to cultural inequality and injustice.

The relationship between the imposed Western law and the official indigenous law is not based on equality. The imposed law, which is regarded as the national law, is perceived to be the superior, dominant system, while official indigenous law is the servient law. Thus, the national law may abolish the indigenous law at any given time; the national law usually prevails when there is a conflict of values; and the classifications and descriptions of the national legal system are used to explain the indigenous system.

IV. Legal pluralism v/s Legal centralism

The long dominant western view that law is a unified and uniform system administered by the state has blurred the understanding and history of legal pluralism. To know the importance of legal pluralism it's necessary to understand that meaning of legal pluralism.

a. Legal pluralism

Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system. It also refers to the descriptive fact of a multiplicity of legal orders within the same social field.¹³

More simply, legal pluralism is the recognition of the simultaneous coexistence of multiple normative worlds, with the state being only one among other creators of legal meaning of these words “of right and wrong, of lawful and unlawful, of valid and void” are “constantly created and maintained” by those who inhabit them through common understandings, rituals, language, myths, strong interpersonal obligations and commitments.

¹²Gardiol van Niekerk, “State Initiatives to Incorporate Non-state Laws into the Official Legal Order: a Denial of Legal Pluralism?”, *The Comparative and International Law Journal of Southern Africa*, Vol. 34, No. 3 (November 2001), p. 349. Available on <http://www.jstor.org/stable/23251042>.

¹³Sally Engle Merry, *Legal Pluralism*, 22 *L. & SOC'Y .REV.* 207 (1988), Quoted in Jean L. Cohen *The politics and risks of the new legal pluralism in the domain of intimacy*, *I • CON* (2012), Vol.10 No. 2, 380-397 Available on <http://www.corteidh.or.cr/tablas/r29951.pdf> p.382.

Legal pluralism is a concomitant of social or cultural pluralism and is not dependent on state recognition of the various legal systems. Deep legal pluralism is not founded upon relations of unequal power, as is the case with state law pluralism. The dominance of the central or state law is in fact irrelevant to the continued existence of the unofficial laws.¹⁴

b. Legal pluralism : Definition

For John Griffiths, Legal pluralism means, “Presence in a social field of more than one legal order. And Legal centralism means, law is and should be the law of the state, uniform for all persons, exclusion of all other law and administered by a single set of institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to and in fact are hierarchically subordinate to the law and institutions of the state.”¹⁵

Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim and an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory.¹⁶

Sally Falk Moore gives her idea of legal pluralism in different terms. She claims that “the social structure” is composed of many “semi-autonomous social fields”, the definition and boundaries of which are not given by their organisation, but “by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them”.¹⁷

Three characteristics of Moore’s concept Legal Pluralism: first, she presents these fields as the fundamental unit of social control, which is directly connected to behavioural norms of conduct; second, every individual may simultaneously belong to many social fields, which accounts for social complexity; third, a social field is autonomous, *i.e.* it can resist the penetration of external norms, but never totally, its capacity of resistance being function of

¹⁴Gardiol van Niekerk, “State initiatives to incorporate non-state laws into the official legal order: a denial of legal pluralism?”, *The Comparative and International Law Journal of Southern Africa*, Vol. 34, No. 3 (November 2001), p. 353..Available on <http://www.jstor.org/stable/23251042>.

¹⁵ John Griffiths, *What is Legal Pluralism*, *Journal of Legal Pluralism*, 1986, nr-24, p.2-3. Available on <http://www.jlp.bham.ac.uk/articlesindex.htm>

¹⁶*Id*, at p.4.

¹⁷S.F. Moore, *Law as Process : An Anthropological Approach*, London, Henley and Boston, Routledge & Kegan Paul, 1978, p. 57.

the degree of independence of its members vis-à-vis itself and of its force of resistance to norms originating in other fields.¹⁸

Massaji Chiba's theory of non-official laws to describe Legal Pluralism: Instead of simply opposing state law and people's law, Chiba identifies many legal levels: official law, *i.e.* "the legal system authorised by the legitimate authority of a country"; unofficial law, *i.e.* "the legal system which is not officially authorised by the official authorities, but authorised in practice by the general consensus of a certain circle of people" and having a distinctive influence upon the effectiveness of the official law; legal postulates, *i.e.* "the system of values and ideals specifically relevant to both official and unofficial law in founding and orienting the latter"¹⁹

What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This state of conflict, moreover, poses a challenge to the legal authorities themselves, for it means that they have rivals. Law characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim.²⁰

V. Impact of Positive law on legal pluralism

The natural state, which Hobbes described as state of nature, people lived by their group norms, which in one or the other respect differed from group to group. But Hobbes gave a harrowing depiction of that society and developed the idea of a sovereign to whom all people expressed their allegiance in exchange for establishing order. Austin used that concept to define law in top down terms that all law was direct or indirect command of the sovereign and whatever could not be so proved could not be law. Later scholars like Kelsen and Hart gave a bottom up description of all law by propounding that any norm or rule of conduct to be law must be capable of being traced back to a grund norm or rule of recognition. Unless it is capable of being so traced it is not law. But from 1930s several scholars, most prominently

¹⁸ Baudouin Dupret Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification European Journal of Legal Studies : Issue 1.

¹⁹M. Chiba, "Three Dichotomies of Law in Pluralism: An Analytical Scheme of Legal Culture", TokaiLaw Review, 1987, pp. 1-11, at p. 173.

²⁰ Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" Sydney Law Review ,Vol., 30,p.375.

Ehrlich started questioning this notion of law. They noticed the difference between the state law and people's behavior. People practiced and observed many things of which either there was no reference in the state law or even if there was such a reference, people behaved differently without coming into conflict with it. People indulged in many activities by making clubs or associations or religious groups or any other informal organisation without coming in conflict with the state law. The norms set by these bodies or groups could regulate large part of their lives, sometimes even larger than regulated by state law. Initially all societies lived like that by their customary laws. Even after the establishment of the state they continued to live like that except in criminal activities for which generally the same law applied to all of them. Accordingly, they claimed that legal centralism is a myth while legal pluralism is the reality, the fact of life.²¹

Bodin's famous portrait of the ideal early modern sovereign state, one containing a host of cities, inferior magistrates, colleges and corporations, each enforcing diverse rules and customs, yet all subordinate to a ruler whose permission allowed them to exercise jurisdiction and whose laws and power limited the range of their acceptable activities.²² This centralizing conception of Bodin became basis for administration of modern states and gradually resulted in weak form of legal pluralism.

The practices of early modern states kept pace with this emerging theory. Crown institutions such as English justices of the peace and royal courts and commissions curtailed or more intensely scrutinized municipal, occupational, and seigniorial jurisdictions. Monarchs issued far more edicts to regulate society from the center, developed standing bureaucracies and more intensive networks of revenue collection, encouraged reliance on Roman law, crown tribunals and learned lawyers and pressed for codification or judicial pruning of customs all of which decreased local variation in norms and procedures. Post-Reformation confession-building transferred jurisdiction over family life, education, and social welfare to state institutions and reduced the privileges of nobles, clerics, and cities in the name of religious uniformity.²³

²¹ M.P. Singh, "Special Editorial Note On Uniform Civil Code, Legal Pluralism and the Constitution of India", *Journal of Indian Law and Society*, Vol. 5,p.VII,IX.

²² Richard J. Ross and Philip Stern, *Reconstructing Early Modern Notions of Legal Pluralism*, available on-
law.huji.ac.il/upload/RossSternReconstructing.pdf

²³ *Id.*

The Bodinian sovereign expected the villages and trades of his commonwealth to live by a wide variety of usages provided that none threatened to constrain him against his will and each drew its power to bind as law not from the people who created it but from the approval of the crown.

This kind of political theory transformed the plural legal systems of ancient England into centralist or uniform legal system. This wave was spread to the British colonies including India and there also distorted the plural legal systems and imposed centralist legal system which stood for top down method of flow of power and jurisdiction.²⁴

After the Constitution was enacted, the first set of reforms was for Hindus, which violated the mandate of Article 44. The justification was that the Hindu law is extremely gender unjust compared to laws of other communities and needed immediate reforms. Daughters had no right to inherit property; the right of widows was a limited life estate. Women had no right to divorce and there was no restraint upon men regarding polygamy. Child marriage, abandonment of widows, etc were problems faced by women.

To eradicate the unreasonable and discriminatory practices and institutions among Hindus was considered to be need of the hour. However, though this was the stated objective, there was a political motive to acquire the legislative power over Hindus which until then was in the hands of religious heads of different sects. The aim was also to bring all reformed religions such as Buddhism, Sikhism and Jainism etc within the broad Hindu fold.

Thus the State used its legislative power to formulate uniform laws to bring all offshoot religions of Hinduism under one umbrella though they had diverse cultures. This was the first attempt to replace the legal plural orders with uniform legal order. With the use of positive law making power State took out the subjects like Marriage, Succession, Adoption, Maintenance and such similar subjects out of the realm of religion and uncoded personal laws of different religious groups.

Prof. Faizan Mustafa, after the recent Supreme Court's move to examine the constitutionality of discriminatory Muslim law, has argued against UCC. He quotes, John Duncan Martin Derrett who said - "The best way to reform Mohammedan law is not to reform it at all. Let its inconvenient and archaic features wither away. Once it is accepted that

²⁴*Id.*

this is the policy, it will wither away fast enough. If there is a frontal attack on personal law, it will survive with a tenacity it has been unable to show in countries where the majority of the population are and always have been Muslims.”²⁵ Further he opined that, Supreme Court judges should pay heed to these words of John Duncan Martin Derrett.

Prof. Faizan Mustafa’s argument is based on maintaining the legal pluralism instead of opting for legal centralism in the form of UCC. Between uniformity and legal pluralism, the latter is a superior value. History contains many instances of pluralistic legal systems in which multiple sources of law existed.²⁶

Supreme Court also in *Pannalal Bansilal Pitti & Ors. Etc vs State of Andhra Pradesh & Anr.*²⁷ made the following observation highlighting the importance of legal pluralism;

“In a pluralist society like India in which people have faith in their respective religions, beliefs or tenets propounded by different religions or their off-shoots, ... A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. ... It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go.”

VI. Conclusion

Thus in the light of the foregoing discussion it is concluded that decolonization of centralist mind is need of the hour in India. The State has to preserve the legal pluralism with necessary reforms. However, romanticizing plural legal order is also wrong, because many legal orders based on religion are discriminatory and unreasonable. Such disadvantageous part of plural legal orders needs to be reformed and that has to be welcomed when it is done through the positive law of the State.

Uniformity means sameness and sameness means equality. Such equality need not be brought by virtue of single code; it can be assured through different personal laws. Each

²⁵ The Indian Express, Dated 16th Nov.2015. Available on - <http://indianexpress.com/article/opinion/columns/why-legal-pluralism-matters/>.

²⁶ *Id.*

²⁷ (1996) 2 S.C.C. 498

personal law has to be constitutionally valid internally. If the constitutional ideals are incorporated in each personal laws there is no need to have one Uniform Civil Code reflecting the constitutional ideals and values. Article read with 44 read with Article 25 must be construed as requiring legal pluralism with an intra religion constitutionality.

A sense of national unity and integrity or solidarity is something that comes from within and cannot be imposed by law. It is said the law can regulate the human behaviour but not the attitude. Unity and integrity shall become attitude of the people and that attitude can be developed through education but not through the law.

National integration task is not of Governments alone although governments have to play a major role in strengthening the forces of integration. This task is the collective responsibility of all citizens, politicians, educationists, artists, writers, teachers, parents and students, intellectuals' businessmen and all institutions of the society.

AN ANALYTICAL VIEW OF THE POSITION OF PERSONAL LAWS UNDER INDIAN CONSTITUTION

*Raghuveer Kulkarni**

I. Introduction

In India the Constitutional Law is regarded as the highest law of the land. It is not only sets out the frame-work and the principal functions of the organs of the Government of a State, but it lays down the fundamental principles on the touchstone of which the legality and the constitutionality of other laws are determined in the prevailing socio-economic and political trends.

The contemporary Indian society is the successor of three different legal systems such as, Hindu, Muslim and British. The Hindu and Muslim personal laws have their source and authority in their religious ancient texts. Since ancient time, religion regulated almost all aspects of human life whether it is public or personal. Religion was the guiding force behind the laws including the personal matters as well as crime, contract, trade and commerce etc.

Now the area of applicability of personal laws has been reduced and confined only to the Institution of Marriage, Dissolution of Marriage, Maintenance, Guardianship, Adoption, Succession and Inheritance. These personal laws were considered as permanent, unchangeable and beyond the jurisdiction of the legislature. In this article the relationship between the 'Constitution of India' and the 'Personal Laws' is highlighted.

II. Personal laws and the legislative powers

Article 372 of the Indian Constitution is the most important which deals with regards to the legislative powers on the matters relating to personal laws. Article 372 provides for the 'continuance of the existing laws and their adaption'.

It states that:

- (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395, but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until arrested or repealed or amended by a competent Legislature or other competent authority.

- (2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by such order make such adaptation and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.
- (3) Nothing in clause (2) shall be deemed:
- (a) To empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or
 - (b) To prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I: The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II: Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect.

Explanation III: Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV: An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force

immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.¹

The expression ‘law in force’ under this Article shall include a law passed or made by the Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or its part may not be then in operation either at all or in particular areas.

The phrase ‘all the law in force’ under this Article includes Statutory, Customary and reasonably it seems to include Personal laws also. The language used in Article 372 (1) is analogous to Section 292 of the Government of India Act, 1935, which also recognized the continued application of ‘all law in force’ then.

In *The United Provinces v. Mst. Atiqa Begum and Others*,² the Federal Court had held that, the phrase ‘all laws in force’ included non-statutory laws including personal laws also. In this case, in view of an unprecedented fall in the prices of agricultural produce, the United Provinces Government directed a remission in the rents payable by tenants to their landlords; but this remission was declared by the High Court unauthorised and inoperative as being in contravention of the provisions of the Agra Tenancy Act, 1926. In 1938, the Provincial Legislature passed the Regularization of Remissions Act which precluded any question as to the validity of these orders of remission being raised in Courts. This Act was held by a Full Bench of the Allahabad High Court to be ultra vires, as being opposed to S. 292 of the Government of India Act. In this case the whole Court held, (1) that S. 292 of the Constitution Act did not prevent Legislatures in India from giving retrospective effect to measures passed by them; (2) that the impugned Act was within the competence of the Provincial Legislature; and (3) that the impugned Act was legislation with respect to the ‘collection of rents’ within the meaning of entry no. 21 of List II and was not the less so

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¹Mahendra P. Singh, “*V.N.Shukla’s Constitution of India*” (Thirteenth Ed, Eastern Book Company, Lucknow) at p. 1122-1125.

² AIR 1941 FC 16.

because it related to remission of rent or was so framed as to protect invalid remission orders passed by executive officers from being questioned in Courts.

After the commencement of the Constitution, in *Naresh Chandra Bose v. Sachindra Nath Deb And Ors.*³ the Calcutta High Court has confirmed the applicability of Article 372 to the personal laws also. In this case an appeal was filed by the judgment-debtor from an order dismissing his application under Section 47, Code of Civil Procedure objecting to the execution of a decree obtained by the respondents against him as far back as 4-4-1938, for arrears of putni rent in a court of Jessore, now in East Pakistan. The decree was transmitted by the Jessore Court to an Alipore Court on 31-10-1946, and on 1-3-1947, the decree-holders applied for execution there against certain properties of the judgment-debtor in Calcutta. The honourable court has held that the Indian Independence (Legal Proceedings) Order, 1947, is still a surviving law and that being so the pending execution proceeding must be regarded as validly and legally pending and cannot be dismissed as void in law.

In *Motibai v. Chanayya*⁴ the Hyderabad High Court also confirmed the applicability of Article 372 to the personal laws. In this case the question is whether it is permissible under the Constitution that the Muslims, Hindus, Christians, Parsis and Jews of India be governed by different sets of religion based laws relating to Marriage and Inheritance etc. Are the personal laws not hit by the fundamental rights? The answer to these questions depends upon whether the phrase “all laws in force” used in Article 13 (1) covers personal laws too or not. The history of enactment of the Article 13 and some other constitutional provisions shows that the Constituent Assembly did not intend to exempt personal laws from the legislative competence of the State. In this case the court held that, all personal laws including their non-statutory parts are hit by Article 13 (1).

According to Sir Tahir Mahmood, Article 372 is the only provision of the Constitution under which personal laws can be claimed to have been recognized. If we do not apply it to the personal laws, those laws are left without any constitutional recognition.⁵

With regard to the constitutional theory of continuity and change in the matter of pre-constitutional laws and post-constitutional laws are concerned, a variety of personal laws

³ AIR 1956 Cal. 222.

⁴ AIR 1954 Hyd. 161.

⁵ Syed Tahir Mahmood, *Muslim Personal Law: Role of the State in the Subcontinent* (Vikas Publishing House, 1977, Original from the University of California) at p. 97.
Available on https://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06_chapter%202.pdf.

both codified and un-codified were applied to various religious and ethnic communities. In the light of Article 372 of the Constitution, all these laws of every variety got a statutory lease for all such law extended till 'further action', if any, by a competent authority.

According to Article 372 (1) the word 'further action' could be taken in the form of alternation, repeal, amendment, or adaptation. The principal competent authority that could take any such 'action' would be Parliament or the State Assembly. However, an executive authority, could also exercise the power of delegated legislation.

The question if the power of adaption and modification of the existing laws conferred by Article 372 (2) is on the President, then why it could not be exercised by him in respect of an un-codified laws or customs also, has not been free from difficulty. However since that power was not exercised by the President within the stipulated period after the commencement of the Constitution, this question is now rather redundant. It is notable that all the three lists in Schedule VII of the Constitution include even those subjects to which traditionally the personal laws should apply.

It is notable that, all the three lists in Schedule VII of the Constitution include even those subjects to which traditionally the personal laws should apply.

List III specifies the following:

- (a) Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal laws.
- (b) Transfer of property other than agricultural land; registration of deeds and documents.
- (c) Charities and charitable institutions, charitable and religious endowments and religious institutions.

List II includes burial and burial grounds, 'rights in or over land' (covering succession to agricultural lands) and administration of justice and organization of courts at the district level. While, List I reveal to Muslim law is 'pilgrimage to places outside India'. Under this Provision the Parliament can make laws regulating Haj and Ziyarat.

Thus, nearly the entire list of subjects which traditionally fall within the ambit of personal laws has been placed at the disposal of either the State legislatures or the Parliament.

III. Personal laws and the Fundamental Rights

Although, in theory, there is no Constitutional restriction on the legislative powers of the State in respect of personal laws, the policy of successive governments at the Centre has lead to their continued exemption from direct interference. Thus, by virtue of the main provision of Article 372, those part of Pre-Constitution personal laws, both codified and un-codified and applicable to whichever community that have not unit today been touched by any competent authority, remain in force, as before. Apart from these laws, new personal laws have been enacted by the Parliament for the larger community bringing the Hindus, Sikhs, Jain and Buddhists under the shadow of the new legislations. However, the traditional laws of all these communities not covered by these new enactments are still applicable to them.

Now there exists a question that, whether the existence of various personal laws with full of conflicting features and applicable to different religious communities, is in itself inconsistent with the fundamental rights guaranteed under Part III of the Constitutional law or Personal laws have upper hand over the fundamental rights? The following discussion in this relation throws light on these issues.

a. Personal laws and Article 13

Article 13 of Part III of Constitution of India enunciated the general principle that, (1) “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part shall, to the extent of such inconsistency, be void.”⁶

While Clause (2) Article 13 restraints the State from making any law which ‘takes away or abridges the Fundamental Rights’. The fundamental rights include, inter alia, (a) equality before law and equal protection of laws culmination into prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth⁷ and (b) religious and cultural freedom. ‘All laws in force’ in India during the

⁶ Supra note 2, at p. 38-47.

⁷ Articles 14 &15.

commencement of the Constitution, if repugnant to these primary fundamental rights, have to cease to apply in any manner whatsoever.

The question is whether the Constitutional law permits the Muslims, Hindus, Christians, Parsis and Jews in India be governed by different sets of religion-based laws concerned with marriage and inheritance, etc. Are the personal laws not hit by fundamental rights? The answer to these questions depends on whether the phrase “all laws in force” used in Article 13(1) covers personal laws too or not.

Article 13 (3) (a), itself says that law “includes any ordinance, order by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law”. It further mentions under sub clause (3) (b) that ‘law in force’ “includes laws passed made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such laws or any part therefore may not be then in operation either at all or in particular area”.

However, Personal law is not specified here in this Article. Are, then, the words used in Article 13 (3) (a) & (b) wide enough to include personal laws; or was a reference to personal laws deliberately omitted? The use of the word ‘include’ shows that the lists are not exhaustive and could enlarge to the rules of conduct not specified in them. The history of enactment of this Article and of some other constitutional provisions (Article 19, 25 and 44) shows that the Constituent Assembly did not intend to exempt personal laws from the legislative competence the State. Do then, the different personal laws becomes automatically void in terms of Article 13(1)? It is difficult to answer this question.

In *State of Bombay v. NarasuAppa Mali*,⁸ the petition was filed under the Bombay Prevention of Hindu Bigamous Marriage Act, 1946. It was argued before the Bombay High Court that the rule of Muslim personal law permitting bigamy had become void after the commencement of the Constitution and by virtue of Article 13(1), the Muslim men can have more than one wife. While the Bombay Act of 1946 forced Hindus to stick to monogamy. The Court thereupon examined in details if Article 13 (1) was applicable to personal laws; and they arrived at the negative finding.

The following points were stressed by the Chief Justice in that case.

⁸ AIR 1952 Bom. 84.

- i. The words ‘custom and usage’ used in Article 13 do not include personal laws. ‘Custom or usage is deviation from personal law and not personal law itself’.
- ii. Relisting the difference between customary law and personal law, The Constituent Assembly, in defining ‘law’ under Article 13 has expressly and advisedly used only the expression custom or usage and has omitted personal law. This is a ‘very clear pointer’ to the intention of the Constitution making body to exclude personal law from the purview of Article 13.
- iii. There are other ‘pointers’ as well. Article 17 abolishes untouchability under Article 25 (2) (b) which enables the state to make laws for the purpose of throwing open of Hindu religious institutions of a public character of all classes and sections of Hindus. Now, if Hindu personal laws became void by reason of Article 13 and by reason of its provisions contravening any fundamental rights, then it was necessary specifically to provide in Article 17 and Article 25(2) for certain aspects of Hindu personal law which contravened Articles 14 and 15. This clearly shows that only in certain respects the Constitution has dealt with personal law.
- iv. The very presence of Article 44 in the Constitution ‘recognizes’ the existence of separate personal laws. Entry No. 5 in the Concurrent List gives power to the legislatures to pass laws affecting personal laws.
- v. It is clear from the language used in Article 372 (1) and (2) that the expression ‘laws in force’ used in this Article does not include personal law, as Article 372 entitles the President to make adaptations and modifications to law in force by way of repeal or amendment, and it cannot be contended that it was intended by this provision to authorize the President to make alterations and adaptations in the personal laws of any community.

The Chief Justice concluded his remarks by observing: “Although the point urged before us is not free from difficulty on the whole, after a careful consideration of the various provisions of the Constitution we have come to the conclusion that the personal law is not included in the expression ‘law in force’ used in Article 13 (1)”.⁹

⁹ AIR 1952 Bom. 89, para 13.

Justice Gajendradkar too agreed with all remarks passed by the Chief Justice Chagla, and added that Article 13 (1) applied to “what may compendiously be described as statutory laws”, that is say, laws, “passed or made by a legislature or other competent authority.” He added that the Muslim and Hindu personal laws, whose foundations were their respective “scriptural texts”, could not be said to have been passed or made by the legislature or competent authority and therefore “do not fall within the purview” of Article 13 (1).

In *Srinivas Iyer v. Saraswathi Ammal*¹⁰ the validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, Madras Act VI of 1949 was challenged. The Madras High Court held that the Act is not violative of Article 14 and hence declared it as valid one.

In *Gurdial Kaur v. Mangal Singh*¹¹, the validity, legality and enforceability of the custom was challenged on the ground that the usage based on the said custom is a violative of Article 15 of the Constitution. The argument of the Appellant was that, usage is as good as a statutory law as both have been equated in the definition of “law” contained in Article 13 (3) (a) of the Constitution and that in so far as the usage in question discriminates against fate as compared to other Hindus governed by their personal law, the usage discriminates merely on the ground of caste or race; and in so far as this law disinherits a mother on remarriage as compared with a father who continues to be an heir of the estate of his predeceased son in spite of remarrying, it discriminates against females merely on the ground of sex; and that on both these counts, the fundamental rights of the plaintiff-appellant guaranteed to her under Article 15 of the Constitution have been violated.

In this case the Punjab High Court dismissed the appeal by stating that, there is no analogy between the two usages, and whereas it may be abhorrent to judicial sense that a prostitute should be penalised for giving up her profession and starting a married life, it is certainly not so in the case of a widowed mother remarrying. Moreover, as already observed, the usage in question was recognised as a valid one as long ago as in 1891 and has stood the test of time ever thereafter. Later years, similar opinions were expressed by some other High Courts in various cases. Until this day, the court has said that either the continued application of separate personal laws is, or the exclusive reform of any one of them could be, ultra virus part III of the Constitution.

¹⁰ AIR 1952 Mad. 193.

¹¹ AIR 1968 P & H 396.

In 1959, *Moti Das v. S.P. Sahi*,¹² came before the Supreme Court of India. The appellants as the Mahants of the respective maths or asthals were served with notices under S. 59 of the Bihar Hindu Religious Trusts Act, 1950, by the President, Bihar State Board of Religious Trusts, asking them to furnish statements and accounts of the properties in their possession. They challenged the constitutional validity of the Act on the grounds: (1) that ss. 2, 5, 6, 7 and 8 of the Act infringe Art. 14 Of the Constitution, inasmuch as there was inequality of treatment as between Hindu religious trusts on one hand and Sikh religious trusts on the other, the latter having been excluded from the purview of the Act, and that there was inequality of treatment even as between Hindu religious trusts and Jain religious trusts, though both came under the Act;

(2) that the provisions of Ch. V of the Act and in particular ss. 28 and 32 violate Art. 19(1)(f) of the Constitution, as under those provisions the mahant or Shebait practically loses his right of management and is reduced to the position of a mere servant of the Board;

(3) that the provisions of the Act contravene Arts. 25 and 26 of the Constitution, as the power to alter or modify the budget relating to a religious trust or the power to give directions to a trustee may be exercised by the Board in such a way as to affect the due observance of religious practices in the math or temple;

(4) and that s. 70 imposes an unauthorised tax.

The Supreme Court expressed its opinion that, “application of different endowment administration laws of different religious communities was not unconstitutional”. Since then, in numerous cases the Supreme Court has taken the note of the existence of separate personal laws and applied them to respective communities without questioning the legality or the constitutionality of the personal-law system.

However, in *Krishan Singh v. Mathura Ahir*,¹³ the Supreme Court has categorically ruled that: “Part III of the Constitution does not touch upon the personal laws.” In this case, the respondent Mathura Ahir alias Swami Harswanand, the Mahant of Garwaghat Math filed a suit for declaration of title to and possession of house no. C/27/33 situate in Mohalla Jagatgunj, Varanasi, for arrears of rent and mesne profits in respect thereof. The said property was purchased by his Guru Atma Vivekanand Paramahans (Baikunth Singh) from out of the

¹² AIR 1959 SC 962.

¹³ AIR 1980 SC 707.

income of the Math i.e. the offerings (Bhent) made by the devotees. The appellant who was impleaded as defendant 5 to avoid further litigation claimed that this property acquired by his late father Baikunth Singh alias Swami Atma Vivekanand, after he became a Guru and out of Math funds devolved upon him the natural son and disciple. Since the claim went in favour of the respondent Mahant the appellant came in appeal by special leave to this Court. The original plaintiff died during the pendency of the appeal.

This judgment has been strongly criticized by Justice A.M. Bhattacharjee in his M.N. Bose Lectures of 1981.¹⁴ It is, however, submitted that this was the only way in which the various provisions of the Constitution relating to personal laws, apparently generating various kinds of tensions and conflicts, could have been reconciled by the Supreme Court.

b. Personal laws and Article 14 and 15

As far as the applicability of Part III of the Constitution to non-statutory personal laws is concerned, the question that has been particularly, raised is whether the religion and sex-based diversities found in the fabric of any such laws would be affected by the equality-clauses of the Constitution contained in Articles 14 and 15. It is alleged and all classical personal laws particularly those applicable to Hindus and Muslims – abound in discrimination between persons on the basis of religion or sex. Much such alleged discrimination under various laws have been brought to the notice of the courts; but the courts so far convinced that Part III of the Constitution does not hit non-statutory personal laws, have generally left those laws intact.

For instance, in *Nalini Ranjan Singh And Ors. v. The State of Bihar And Ors.*¹⁵ application under Articles 226 and 227 of the Constitution of India has involved some common questions arising out of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962), hereinafter referred to as the parent Act, and the amendments made therein by virtue of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972 (Bihar Act I of 1973) hereinafter referred to as the amending Act. The Patna High Court held that, limited meaning shall have to be given to Section 13 (3) of the amending Act, so that the amendment introduced in Section 6 (1) by that Act is not rendered useless. Therefore, Section 13 (3) of

¹⁴ A.M. Bhattacharjee, *Hindu Law and Constitution* (M N Bose Lectures, Eastern Law House Publications, New Delhi, 1983)

¹⁵ AIR 1977 Pat. 171.

the amending Act cannot be given a meaning that once a proceeding had been initiated and either dropped or otherwise finally decided under the parent Act, before the commencement of the Amending Act, the matter could not be reopened after the commencement of the Amending Act. The Patna High Court held that the rule that daughters cannot be coparceners is not hit by the provisions of Article 15 of the Constitution.

In *Mukta Bai Ors. v. Kamalaksha And Ors.*¹⁶ the appellants were the three illegitimate daughters of one K. R. K. Sheti by his permanently kept mistress Sumathi Bai. They brought a suit in the Court of the Subordinate Judges of South Kanara, for the recovery of their maintenance and their marriage expenses, from the estate of their putative father, now in the hands of the defendants. The learned Subordinate Judge dismissed their suit, having come to the conclusion that under the Mitakshara School of Hindu Law, by which the family of the plaintiff's putative father was governed, illegitimate daughters were not entitled to maintenance. From that decree, the plaintiffs have filed this appeal. The Karnataka High Court held that the legitimate and illegitimate distinction in the matter of children's maintenance rights under the conventional Hindu law does not affect an unconstitutional discrimination.

However, in *Ahmadabad Women Action Group v. Union of India*,¹⁷ Ahmadabad Women's' Action Group placed three petitions before the Supreme Court and all filed as Public Interest Litigations. The in this petition, the petitioners sought to challenge several aspects of Law.

(1) In Writ Petition CO No. 494/96, the petitioners asked for the following aspects of Sharia Law to be declared void under the Constitution of India: (i) The existence of polygamy; (ii) The existence of Talaq; (iii) Polygamy as an act of cruelty vis-a-vis S. 2 of Dissolution of Muslim Marriages Act 1939; (iv) The Women (Protection of Rights on Divorce Act 1986; (v) Shia laws of inheritance, which discriminate against females on the ground of sex.

(2) In Writ Petition CO No. 196/96, the petitioners asked for: i) Repeal of certain sections of the Hindu Succession Act 1956; ii) Repeal of s. (2) of the Hindu Marriage Act 1955; iii) Repeal of ss. 3, 6 and 9 of the Hindu Minority and Guardianship Act; iv) Repeal of s. 6 of the Guardians and Wards Act; v) The Court to declare void the discretion allowed to a Hindu spouse to make testamentary disposition without providing for a spouse and dependants.

¹⁶ AIR 1960 Mys, 182.

¹⁷ (1997) 3 SCC 573.

(3) In Writ Petition (C) No. 721/96, the petitioners asked the Court to declare ss. 10 and 34 of the Indian Divorce Act void and ss. 43 to 48 of the Indian Succession Act void.

However, the Supreme Court dismissed all the three writ petitions which challenged the constitutionality of various provisions of different personal laws on the ground, inter-alia, of being violative of Articles 14 and 15. The Court observed by saying that, “these Writ Petitions do not deserve disposal on merits inasmuch as the arguments advanced before us wholly involve issues of State policies which the Court will not ordinarily have any concern and the remedy lies somewhere else and not by knocking at the doors of the courts.”

The same opinion was expressed by the Supreme Court in *Maharshi Avadhesh v. Union of India*.¹⁸ This is a petition by a party in person under Article 32 of the Constitution. The prayers are two-fold. The first prayer is to issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India. The second prayer is to declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 Fundamental Rights and Articles 44, 38, 39 and 39-A of the Constitution of India. The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection. The Court held that, these are all matters for legislature. And the Court cannot legislate in these matters and hence the writ petition was dismissed. The judicial trend, so far, clearly indicates the reluctance of the Courts to determine the constitutionality of various personal laws on the touchstone of Articles 14 and 15.

c. Personal laws and Articles 25, 26 and 29

Article 25 of the Constitution provides for, Freedom of conscience and free profession, practice and propagation of religion.

(1) Subject to public order, morality and health and to the order provisions of this part, all persons are equally entitled to freedom of conscience and right freely to profess, practice and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law.

¹⁸ 1994 Supp. (1) SCC 713.

- a. Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- b. Providing for social welfare and reform.¹⁹

Accordingly, Article 26 gives Freedom to manage Religious Affairs. According to this Article, subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

- (a) To establish and maintain institutions for religious and charitable purposes;
- (b) To manage its own affairs in matters of religion;
- (c) To own and acquire movable and immovable property; and
- (d) To administer such property in accordance with law.²⁰

Article 29 (1) says that, “any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same”.²¹ Now the question is, whether the terms ‘religion’, ‘affairs in matters of religion’ or ‘distinct culture’, include the religion-based personal laws of any community. If that is not so, personal laws will be a secular activity associated with religion, which the state can regulate.

A large number of Muslims have a firm conviction that their personal law is a part of their ‘religion’ and ‘distinct culture’ within the meaning of these terms as used in Article 25 and 29 respectively, and that since it is a matter of religion, within the meaning of Article 26, their community should have a right to manage it itself. An important question in this regard is who will decide whether a particular thing is a part of religion, culture or religious affairs? Will the conviction in that behalf of a particular community itself be given any consideration in determining that question?

In *RatilalPanchand Gandhi v. The State of Bombay And Ors*,²² the petitioners assailed the constitutional validity of the Act, known as the Bombay Public Trusts Act, 1950 (Act XXIX of 1950), which was passed by the Bombay Legislature with a view to regulate and make better provisions for the administration of the public and religious trusts in the

¹⁹ Prof. M. P. Jain, *Indian Constitutional Law* (LexisNexis Butterworths Wadhwa: Nagpur, Reprint 5th Ed., 2000) at p. 1202.

²⁰ *Id.*, at p. 1209.

²¹ *Id.*, at p. 1221.

²² (1954) SCR 1035.

State of Bombay. By saying that the provision of Article 44 of the Bombay Public Trust Act, 1950, relating to the appointment of the Charity Commissioner as a trustee of any public trust by the court without any reservation in regard to religious institutions like temples and Maths is unconstitutional and must be held to be void the Supreme Court held that, subject to the restriction which Article 25 imposes, every person has a fundamental rights “not merely to entertain such a religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion.”

In, *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt*,²³ the petition was directed to be heard along with two other petitions of a similar nature relating to the temple at Chidambaram in the district of South Arcot and questions were raised in all of them regarding the validity of Madras Act 11 of 1927, hereinafter referred to as the Earlier Act. While the petitions were still pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (hereinafter called the New Act), was passed by the Madras Legislature and came into force on the 27th of August, 1951. In view of the Earlier Act being replaced by the new one, leave was given to all the petitioners to amend their petitions and challenge the validity of the New Act as well. The Supreme Court said that “Religious practices or performance of acts in pursuance of religious belief is as much a part of religion as faith or belief in particular doctrines.” The Court held that, ss. 21, 30(2), 31, 55, 56 and 63 to 69 of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) are ultra vires Arts. 19(1) (f), 25 and 26 of the Constitution of India.

In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*,²⁴ the Supreme Court struck down a statute outlawing the practice of excommunication by the Syedna, the head of the Dawoodi-Bohras, as going beyond the provisions of Articles 25(2)(b) of the Constitution. The majority judgment held that not only could the Syedna expel members from the religious life of the community, but that the loss of some civil rights of the excommunicated member was acceptable as a "necessary consequence of excommunication." The court further held that "the fact that civil rights of a person are affected by the exercise of the fundamental right under Article 26(b) is of no consequence."

²³ (1954) SCR 1005.

²⁴ AIR 1962 SC 853.

In *Durgah Committee v. Hussain*,²⁵ it said that whether a religious practice is an essential part of a religion is an objective question to be determined by the court and that the view of a religious denomination itself is not final.²⁶ It is in the light of these judicial decisions that we have to examine the place of personal law as an essential part of Islamic religion; a Muslim will ordinarily give an emphatic affirmative answer. There is no dearth of statements made by Muslim Ulema, lawyers and politicians, or of resolutions adopted at Muslim conferences, asserting that the Muslims personal law is a part of Islamic religion. But in view of Supreme Court decision in *Durgah Committee* case, their conviction is not decisive in the matter and is subject to judicial scrutiny.

As regards polygamy, the Allahabad High Court has held, in two different cases that “contracting a bigamous marriage cannot be said to be an integral part of either the Muslim or the Hindu religion”,²⁷ it may be, said justice Oak in the first case, “that under the personal law of Muslims one may have as many as four wives. But I do not think that having more than one wife is a part of religion. So a legislative requirement to the effect that a Muslim man may not have more than one wife does not amount to interference with freedom of conscience or interference with the right to profess, practice and propagate religion.”

In *State of Bombay v. NarasuAppa Mali*,²⁸ Justice Chagla had said: “If religious practices run counter to public order, morality or health, or a policy of social welfare upon which the state has embarked, then the religious practices must give way. Marriage is undoubtedly a social institution, an institution in which the state is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praise worthy institution. If, therefore, the state of Bombay compels Hindus to become monogamists, it is a measure of social reform the state is empowered to legislate with regard to social reform under Art. 25(2) (b) notwithstanding the fact that it may interfere with the right of a citizen of process, practice and propagate religion”.

The learned Chief Justice added: ‘It must not be forgotten that, in a democracy the Legislature is constituted by the chosen representatives of people. They are responsible for

²⁵ AIR 1961 SC 1402.

²⁶ *Id.*, at p. 1415.

²⁷ *Badruddin v. Aisha* (1957), ALJ 300; *Ram Prasad v. State of U.P.*, AIR 1957 All. 141.

²⁸ *Supra* note 12, at p. 86-87.

the welfare of the State and it is for them to lay down the policy that the state should pursue. Therefore it is for them to determine what legislation to put on the status book in order to advance the welfare of the state. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the state, then it is not for the courts of law to sit in judgment upon that decision’.

Thus, bigamy is not recognized by the courts either as ‘an essential part’ of any religion or as a ‘religious practice’. Most probably the same will be the judicial attitude toward unilateral divorce in Islamic law, since it cannot be proved by any strength of arguments that Islam enjoins as husband to away with his wife by a unilateral and arbitrary action. But how about the shares of various heirs in the scheme of inheritance which are specially the part of their personal laws to be an integral part of their religion. It seems that, with regard to the Muslims, marriage and divorce can be more easily ascribed to realm of secular activities associated with the religion, than inheritance and succession. The matter will however, have to be decided by the courts. From the discussion so far, it can be inferred that in spite of the absence of a clear cut distinction between ‘essentially religious’ and ‘secular’ activities, the judicial trend is such the personal laws do not find the protection of Religious Freedom guaranteed under Article 25.

The place of the personal law system in the scheme of Article 26 guaranteeing to every ‘religious denomination’ the right to manage its own ‘affairs in matters of religion’ will, of course, be determined by how one interprets the various provisions of Article 25. If ‘practice of religion’ does not include adherence to personal laws and if matters now regulated by personal laws are in fact ‘secular activity associated with religion’, obviously Art 26 cannot apply to personal laws.²⁹

But what is, or should be, the place of personal laws under Article 29 of the Constitution – guaranteeing to all sections of citizens the fundamental right to ‘conserve’ their ‘distinct culture’? Personal law may not be part of religion, but is it part of culture? Personal law may not be part of religion, but is it part of culture? Is it part of our culture how to form a family and live our domestic life? Or culture only means how we dress up, sing and dance? Will it be wholly absurd if a particular section of citizens claims that its age-old personal law is a part of its ‘distinct culture’? Notably there is no clause in Article 29

²⁹ Tahir Mahmood, *Personal Laws in Crisis* (Dr. P.B. Gajendragadkar Endowment Lectures, Metropolitan Publications, New Delhi, 1st ed., 1986) at p. 20.

enabling the state to regulate ‘secular activity associated with culture’. Who will, then, have the authority to adjudicate upon the assertion of a section of Indian citizenry that its distinct culture is found in its personal law? And if it accepted that personal law is a part of culture, will Article 29 come into conflict with Article 25 or with Articles’ 14 and 15? No answers seem to have been given to these questions.

IV. Personal laws and Directive Principles of State Policy

The ‘directive principles of state policy’, are enshrined in Part IV of the Indian Constitution. In this regard, Article 44 happens to be the most controversial, misunderstood and misused provision. It lays down that: ‘That state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’.

Undoubtedly, the expression ‘civil code’ used in this Article refers to a code of law relating to those matters which are, at present being regulated or governed by different personal laws. It is worth mentioning here that, like all other directive principles specified in the Constitution, the provision of Article 44 too shall not be enforceable by any court, but it is nevertheless fundamental in the governance of the country and has to be applied by the State in making laws.³⁰

Despite its being ‘legally non-enforceable’, the Court at times has raised the issue of the enactment of a ‘uniform civil code’ more often when the case did not require any such incidental generated by the obiter dicta in *Shah Bano* and *Sarla Mudgal* cases.

V. Conclusion

In India, personal laws are the distinct products of multi-cultural system evolved through generations. Even though the relation between personal law and religion is considerable remote, because of the sentimental reverence of people to the living law of the tradition, the task of attaining social justice in this sphere is resisted by some orthodox sections of the society directly or indirectly. However, the majority of the population has favorably responded to the introduction of social reforms in their personal laws. But the experience of the law maker in the direction of Uniform Civil Code is that effecting changes even in an incremental manner is very difficult. In fact, Uniform Civil Code in its strict sense may not be so much essential as compared to the need of attaining social justice in each and

³⁰ Article 37, The Constitution of India.

every enclave of personal law. The intention of the Constitutional Law makers in enacting Article 44 was to orient the state action towards attaining social justice in the familial relations. As the national social justice in its broader contours has the same accentuation and insistence, ultimately social justice in each and every sphere will lead to attain the Uniform Civil Code or a situation nearer to it.

The disappointing factor in this area is the total neglect of the goal by the legislature. In the area of reforming Muslim Personal Law, no sincere effort is made by the State to adopt the Nehru laid two pronged approach of implementing the law and educating the public opinion in favour of it simultaneously. On the other hand, the Muslim Women (Protection of Rights on) Divorce Act, 1986 has shown the retrograde policy of preferring archaic notions to the secular idea of social justice. It is true that in matter of social morality, the power of the law to bring social changes is limited. But if the legislator positively obstructs the desirable social change it is the betrayal of the confidence reposed in him to strive for social justice.

It is notable from the discussion so far that, in spite of the best efforts from the Muslim members, the majority of the members of the Constituent Assembly were unwilling to provide a constitutional protection to the personal laws of the different communities for all the time to come. Instead they introduced Article 44, which envisages a 'Uniform Civil Code'. The Constitutional law, however, adopts the policy of continuity and changes under Article 372 as far as personal laws are concerned. As regards the conformity of personal laws with part III of the Constitution, the judicial attitude shows that this part does not touch upon the personal laws.

CURRENT RESEARCH AND THEORY IN JURIDICAL SCIENCE

*Dr. V Sudesh**

I. Introduction

The theme assigned to the Juridical Science Research Committee of the 43rd Indian Social Science Congress – i.e., Current Research and Theory in Juridical Science, required us to, in the first place, take stock of the current state of legal research in India and how far it has contributed for developing theories.

An exercise of this kind was done in 1983 by Prof. Rajkumari Agrawala, then Professor of Law of the Poona University, Poona. In her essay titled “Indian Legal Research: An Evolutionary and Perspective Analysis” in *Legal Research and Methodology* published by the Indian Law Institute in 1983, she had made an assessment of the Legal Research in India since the British period. She had divided that into three phases: *First*, early colonial; *second*, later colonial; and *third*, post-colonial.

In her essay she had argued that circumstances congenial to legal research was created in the post-colonial Independent India. She observed:¹

Realisation of the necessity of legal research encouraged the establishment of governmental, semi-governmental and autonomous legal research forums and institutions. The Law Commission of India was constituted for recommending reforms in the law. The Indian Law Institute, the Indian Institute of Constitutional and Parliamentary Studies and the Indian Society of International Law were established for research and other purposes. The University Grants Commission (UGC) and the Indian Council of Social Science Research (ICSSR) (eventually) initiated the funding and encouragement of legal research, its planning and publication. The practice of holding law seminars by universities and other forums was initiated. Institutional framework, and need and motivation for legal research, which were lacking in the early colonial and later colonial phases, now

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¹RajkumariAgrawala, “Indian Legal Research: An Evolutionary and Perspective Analysis” in *Legal Research and Methodology*(ILI, 1983).

clearly came into existence. As could be expected, legal research increased both at governmental and non-governmental level.

She has also evaluated the contributions of University departments of law and certain other autonomous research institutes as well. Time does not permit me to elaborate on this further.

II. Problems in legal research

After evaluation, she had identified and flagged some of the problems as far as legal research in India is concerned. It is important for us to take note of the problems she had flagged in order to understand the progress we have made since then i.e., since 1983. We need to look at whether those problems still exists?

The *first* problem she had pointed out was that by and large, the legal research has become exclusively the interest, profession and responsibility of academic lawyers in India. Others, particularly lawyers and judges, in India do not take any interest in general research beyond their routine assignments.

In the past, only few lawyers and judges have taken to research and writing. One may cite as examples, the works of H. M. Seervai and Nani A. Palkiwala etc. They were exceptions. Though one may find a marginal increase now, the situation more or less remains the same. The vast majority of lawyers and judges do not venture into legal research and writing.

Since, recently research contribution has been made one of the criteria to be considered for 'senior counsel' designation, one can hope that more lawyers would do independent research and writing in future.

The *second* problem was that "the research by Indian law teachers (and by the few non-teaching scholars) is typically narrowly based and one-dimensional. Neither the topics selected nor the approach adopted can be said to be policy oriented. The topics are limited to constitutional law, administrative law and public international law." In her opinion, the other branches of law are only marginally researched.

If one looks at the legal research trends in Universities now, it seems there is vast improvement. There is a great diversity in the research topics opted by research scholars. In our own university as well as in other Universities, where I frequently visit, I have seen

research scholars working on implementation and effectiveness of new legislations that are enacted. Research is being undertaken on, to name few:

1. The Disaster Management Act, 2005
2. The Right to Information Act, 2005
3. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005
4. The Protection of Women From Domestic Violence Act, 2005
5. The Unorganised Workers Social Security Act, 2008
6. The Right of Children to Free and Compulsory Education Act, 2009
7. The Gram Nyayalayas Act, 2008
8. The Protection of Children From Sexual Offences Act, 2012
9. The Right To Fair Compensation and Transparency In Land Acquisition, Rehabilitation and Resettlement Act, 2013
10. The National Food Security Act, 2013
11. The Sexual Harassment of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013
12. The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014
13. The Lokpal and Lokayuktas Act, 2013
14. The Rights of Persons With Disabilities Act, 2016
15. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits And Services) Act, 2016
16. The Juvenile Justice (Care and Protection of Children) Act, 2015
17. The Specified Bank Notes (Cessation of Liabilities) Act, 2017 Act No. 2 of 2017
18. The Central Goods and Services Tax Act, 2017
19. The Integrated Goods and Services Tax Act, 2017
20. The Muslim Women (Protection of Rights on Marriage) Act, 2019, etc.,

A cursory look at the research projects undertaken by the University teachers and their publications also indicate that legal research in India is not confined only to certain areas. Policy oriented research has also been undertaken by many.

Ever since linking of career advancement to publications by introducing API system, the research at University level has received further boost (no doubt it has its side effects as well on class room teaching etc.,).

What is more encouraging is that the judiciary has also started relying on, in addition to precedents, the views expressed by academicians and researchers while deciding questions of law. It is an acknowledgement that they too carry persuasive value.

Apart from citing academic works in number of cases, there is also an instance, where the court has accepted the book authored by D.C. Wadhwa as part of the petition in *D.C. Wadhwa v. State of Bihar* (1986), wherein the apex court had declared the governance by ordinances, by re-promulgating them time and again, is unconstitutional.

The *third* problem was with regard to Research methodology. She had stated that by and large, only doctrinal methods were used by legal researchers in India. It broadly consisted of viz., recording and examining legal provisions and reported decisions.

This too has changed drastically. Now the researchers are undertaking extensive empirical studies. Universities are also encouraging not only empirical studies but also, increasingly, inter or trans-disciplinary research. There is no legalistic isolation of legal research in India.

One may note here that even though the comparative legal research is also in vogue, many choose only UK, USA or certain other developed countries for comparison. Hardly any comparison is done with other Asian, most particularly, South – Asian legal systems.

Some of the other problems that existed then are no longer matters of great concern now. More and more libraries provide proper documentation and bibliographic services to researchers upon request. Digitization of library documents and availability and accessibility of legal and non-legal databases also helps the researchers to save lot of time and energy in finding the required materials/readings.

The enactment of the Right to Information Act, 2005, (RTI) has not only contributed for ensuring transparency and accountability in governance, it also enabled the researchers to gather the research data available within the public offices. Since, the Act has conferred a right to access data/information, it has become easier, than ever before, to undertake research, which requires such data or information to test the hypotheses formulated for research. Procurement of data from public offices, in particular, is no longer an uphill task. Certain information is made available on the websites of the government departments and autonomous bodies of the government as mandated under the Act.

It may be noted that dilution of the provisions of the RTI Act may have adverse effect on research particularly in the field of social sciences including research in juridical science as well.

III. What needs to be done: Anglo-American model

Though, one can see lot changes in the research culture and facilities in the recent days, there are certain gaps and lacunas.

Most important among them is that the legal research in India has not contributed much for theory building. This was the position then and more or less continues to be the position even now. Barring few exceptions like Prof. Upendra Baxi and Prof. B. S. Chimni, not many researchers are attempting theory building. As a result we heavily rely on Anglo – American models, theories and concepts even now.

Look at, for example, a conventional topic – ‘rule of law’. Now, as the literature on the subject suggests, it has ‘formal’ and ‘substantive’ versions and both have ‘thin’ and ‘thick’ contents. So far no one has researched and articulated which version of rule of law the Constitution of India contains. Does it have ‘thin’ or ‘thick’ contents? There is no articulation of the Indian version of rule of law as envisaged under the Constitution of India.

Further, the research funding is also a matter of concern. It is hard to get funding for research. Even after getting the funding, bureaucratic procedures involved are too cumbersome and discouraging.

IV. Conclusion

Inter - disciplinary and trans – disciplinary research is imperative need of the hour for bringing about law reforms to suit the fast changing socio-economic and political scenario in the country. Extensive use of science and technology in almost all walks of life has also thrown up many challenges to the legal system. Laws should be suitably modified and made adaptable to changing times. Appropriate evidence based research inputs are required for the purpose.

Apart from law making, even the judiciary is also confronted with many questions like appropriate data, information or inputs on new statutes, interpretation of vague clauses etc

The courts may not be able answer on these questions appropriately unless proper research works are in these grey areas.

Research culture needs to be encouraged, appropriate environment conducive for research must be created in universities and institutions and steps should be taken to provide required facilities for carrying out quality research.

Universities must also encourage researchers to take up research on diverse and emerging topics. Even in conventional subject areas too, there are unexplored and under researched topics are there. Research needs to be encouraged on such topics.

It is difficult to map how much research is done in each of the subject areas in juridical science and point out what are gaps and under researched aspects. Subject experts in each area may have some fair idea whose guidance may be taken in topic selection as well.

TRANSFORMATIVE CONSTITUTIONALISM THROUGH THE LENS OF INDIAN JUDICIARY: AN ANALYSIS OF RECENT PRECEDENTS

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I. Introduction

Substantive justice is an ever-elusive goal for constitution-makers. A desire to structure a system of government and draft rights protections that will advance genuine justice for their people is almost always an aspiration claimed by nation-builders.² But it is a goal that is typically met imperfectly, if not inadequately. Nevertheless, seeking justice that is superior to that of the previous regime motivates many countries to reformulate their government or change their laws, or even to amend or rewrite their constitutions.³

Originally a South African "brand," transformative constitutionalism is increasingly presented as a new, distinctively Southern paradigm of constitutionalism. Yet, it remains unclear what transformative constitutionalism entails.⁴ An advantage of opening up our understanding of transformative constitutionalism in this way is the comparative perspective it offers. Unsurprisingly, courts and lawyers in different countries have approached transformative constitutionalism differently: while some have taken a more "traditional" law-focused approach, others have opted for a more collaborative one. In this aspect, the Indian collaborative approach often involves negotiation between different stakeholders and emphasizes legal flexibility.

According to Dikgang Moseneke, "The meaning of transformation in juridical terms is as highly contested as it is difficult to formulate".⁵ It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.⁶

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² Christiansen, E.C., 2009. *Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice*. J. Gender Race & Just., 13, p.575.

³*Id.*

⁴*Id.*

⁵Langa, P., 2006. *Transformative constitutionalism*. Stellenbosch L. Rev., 17, p.351.

⁶*Id.*

Karl Klare defines transformative constitutionalism as a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.⁷ Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.⁸

Indian constitution has always been a living document, expanding itself with the changing needs of the society. The Apex Court of the country has always tried to interpret the provisions of the constitution from case to case and protect the rights of the individual against the state machineries. Starting from *Shankari Prasad vs Union of India*⁹ to *Indian Young Lawyers Association and Others v. State of Kerala and Others*¹⁰ [also referred to as Sabarimala Judgment] the Apex Court has always acted as the guardian for interpreting the provisions of the constitution and proved the transformative nature of the Indian Constitution.

The year 2018 was no different when Supreme Court continued its tradition of delivering progressive judgments and upholding the Constitution and has won the citizens' heart. In this study focus is placed mainly on 3 such cases, i.e. *Navtej Singh Johar & Ors. v. Union of India, through secretary, Ministry of law and Justice*¹¹ [also referred to as 377 Judgment]; *K.S Puttaswamy (Retd.) & another v. Union of India & another*¹² [also known as Aadhar/ Privacy Judgment] and lastly *Indian Young Lawyers Association and Others v. State of Kerala and others*¹³.

II. Analysis of precedents of Supreme Court of India

***Navtej Singh Johar and Others v. Union of India Through Secretary, Ministry of Law and Justice*¹⁴**

⁷Rapatsa, M., 2014. *Transformative constitutionalism in South Africa: 20 years of democracy. Mediterranean Journal of Social Sciences*, 5(27 P2), p.887.

⁸Koraan, R. and Geduld, A., 2015. *Corrective rape" of lesbians in the era of transformative constitutionalism in South Africa. Potchefstroom Electronic Law Journal* 18(5), pp.1930-1952.

⁹AIR 1951 SC 455.

¹⁰2018 SCC Online SC 1690.

¹¹ AIR 2018 SC 4321.

¹² (2017) 10 SCC 1.

¹³ 2018 SCC Online SC 1690.

¹⁴ (2018) 10 SCC 1.

Background of the case:

This was judgment came as a historic win and end of the struggle for the people belonging to the LGBT community, and proving that love can overcome any difficulties when the Supreme Court of India in an unanimous judgment repealed Section 377 of the Indian Penal Code, a draconian law of Victorian Era that criminalises same-sex relations as well as unnatural sex between consenting adults. This judgment is 493 pages long with 18 chapters. This is a four separate concurring judgment given by a Five Judge Constitution Bench of the Supreme Court on 6th September, 2018 on a batch of petitions challenging the constitutional Validity of Section 377 of Indian Penal Code. Majority of the judgment was given by former CJI Dipak Misra for himself and Justice A.M Khanwilkar. The observation made by them are as follows:

The very introduction of the judgment starts with the thoughts of the great German thinker, Johann Wolfgang von Goethe, “I am what I am, so take me as I am” Similarly, Arthur Schopenhauer had pronounced, “No one can escape from their individuality.”

A few lines from John Stuart Mill was also quoted:-

“But society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency of personal impulses and preferences.” The importance of being unique is the essence of individual life and denying the same amounts to inviting death. The glorious form of individuality is one defining oneself. Quoting Shakespeare from Romeo and Juliet play - “What’s in a name? That which we call a rose by any other name would smell as sweet.” The said phrase, “conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called”. Further the deeper meaning, states that “the name may be a convenient concept for identification but the essence behind the same is the core of identity. Life bestows honor on it and freedom of living, as a facet of life, expresses genuine desire to have it. The said desire, one is inclined to think, is satisfied by the conception of constitutional recognition, and hence, emphasis is laid on the identity of an individual which is conceived under the Constitution. And the sustenance of identity is the filament of life. It is equivalent to authoring one’s own life script where freedom broadens every day. Identity is equivalent to divinity.”

Reliance was placed on the *National Legal Services Authority v. Union of India and others*,¹⁵ popularly known as NALSA case focus on inalienable “gender identity” and correctly connects with the human rights and the Constitutionally guaranteed right to life and liberty with dignity. It stresses on the judicial recognition of such rights as an inextricable component of Article 21 and decries any discrimination that would offend Article 14, the “*fon juris*” of the Constitution. The eminence of identity which has been stated in the case mentioned supra, aptly connects human rights and the fundamental guarantee of right to life and liberty with dignity. The concept of identity has a constitutional spectrum which cannot be pigeon-holed singularly to one’s orientation and may be associated with his/her birth and the feelings he/she develops when he/she grows up as it may be soon realized that the limited recognition may keep the individual choice at bay. At the very core of the concept of identity lies in self-determination, realization of one’s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, is constitutionally permissible. One is entitled to determine and follow his/her pattern of life, as long as it is lawful. And that is where lies the distinction between constitutional morality and social morality or ethicality which assumes a distinguished podium, a different objective.

In *Suresh Kumar Koushal and Another v. Naz Foundation and Others*,¹⁶ a two Judge Bench of the Supreme Court overturned the decision of the Division Bench of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi and Others*,¹⁷, thereby upholding the constitutionality of Section 377 of Indian Penal Code. It was contended that in Suresh Kumar Case, Article 21 was narrowly interpreted, and the Court was basically guided by Article 14 of the Constitution. Reliance was placed on the pronouncement in NALSA case wherein the Supreme Court had emphasized on “gender identity and sexual orientation”. Also the nine Judge Bench decision in *K.S. Puttaswamy and another v. Union of India and Others*,¹⁸ was cited where in the majority, speaking through Chandrachud J., held that, “sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favor or acceptance.” in his concurring opinion Kaul J. emphasize on the decision in *Mosley v. News Group Newspapers Ltd.*,¹⁹, wherein it was held that, “individual’s freedom to conduct his sex life and personal relationships as he

¹⁵(2014) 5 SCC 438.

¹⁶(2014) 1 SCC 1.

¹⁷ (2009) 111 DRJ 1.

¹⁸ (2017) 10 SCC 1.

¹⁹ (2008) EWHC 1777 (QB).

wishes, subject to the permitted exceptions, countervails public interest.” Also the *Suresh Kumar Case* was guided by the doctrine of desuetude.

Hence the reason stated in *Suresh Kumar Case* that the LGBT community comprised of only a minuscule fraction of the country’s population and in last more than 150 years, less than 200 persons have been prosecuted under Section 377 of the Indian Penal Code which cannot, therefore, be made a sound basis for declaring Section 377 ultra vires the provisions of Articles 14, 15 and 21 of the Constitution of India. Hence, such a view is constitutionally impermissible.

The Indian Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armory of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

III. Transformative Constitutionalism and Constitutional Morality

Transformative constitutionalism dissuades discrimination. The primary objective of having a constitutional democracy is to transform the society progressively and inclusively.²⁰ The Constitution of India has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.²¹

²⁰ Section 377 of Indian Penal Code: Summary of Four Separate Judgments, <https://www.livelaw.in/section-377-ipc-summary-of-judgment-in-4-points/>.

²¹ *Id.*

Constitutional morality embraces within its sphere several virtues, and foremost of them is the espousal of being pluralistic and inclusive society.²² The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and only constitutional morality can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, since the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

Protection of the right to live with dignity which has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless as dignity is an inseparable facet of every individual that invites reciprocate respect from others, which he/she perceives as an essential attribute of his/her individuality. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments and enable an individual to fully realize his/her fundamental right to live with dignity.²³

Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.²⁴

The privacy judgment in *Puttaswamy case*, has raised the right to privacy to the pedestal of a fundamental right. The reasoning in *Suresh Koushal*, that only a minuscule fraction of the total population comprises of LGBT community and that the existence of section 377 of IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note, in the majority opinion, is fallacious, for the

²²*Id.*

²³Apoorva Mandhani, S.377 Subjects LGBT Community To Discrimination; Used As A Weapon For Their Harassment: CJI Misra, <https://www.livelaw.in/s-377-subjects-lgbt-community-to-discrimination-used-as-a-weapon-for-their-harassment-cji-misra>.

²⁴*Id.*

framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts shall interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view is completely against the constitutional ethos, as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

The expression “against the order of nature” has neither been defined in Section 377 of Indian Penal Code nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it “against the order of nature”.

Section 377 of Indian Penal Code, in its present form, being violative of the right to equality, dignity and privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in *Maneka Gandhi case*.

An examination of Section 377 of IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions, i.e. Section 375 IPC and the Protection of Children from Sexual Offences Act. Per contra, Section 377 of Indian Penal Code have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

Section 377 of Indian Penal Code, is manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down, Section 377 of Indian Penal Code is liable to be partially struck down for being violative of Article 14 of the Constitution.

An examination of Section 377 of Indian Penal Code on the basis of Article 19(1) (a) of the Indian Constitution reveals that it amounts to an unreasonable restriction, in the name of public decency and morality and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 of Indian Penal Code in its present form violates Article 19(1) (a) of the Constitution.

Hence, the decision in *Suresh Koushal*, not being in consonance with what they have held hereinabove, is overruled. Justice Nariman though concurring with the majority gave his own observations, which are as follows: “Persons of LGBT community have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, and assured by some of judgments of the Supreme Court, i.e., (1) *Nandini Sundar v. State of Chhattisgarh*,²⁵; and (2) *Subramaniam Swamy v. Union of India*²⁶. He further declares that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to them. He observed that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

He ordered the Union of India to take all measures to ensure that the judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment.

Concurring judgment of Justice D.Y. Chandrachud: Justice Chandrachud gave his own concurring judgment.

- (i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;
- (ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
- (iii) The choice of whom to make partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation;
- (iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law;
- (v) The decision in *Koushal* stands overruled.

²⁵ (2011) 7 SCC 547 at paragraphs 16, 25 and 52.

²⁶ (2016) 7 SCC 221 at paragraphs 153 to 156.

Justice Indu Malhotra's judgment was in consonance with the majority judgment and it is as follows:

- (i) She also declared that insofar as Section 377 criminalises consensual sexual acts of adults in private, is violative of Articles 14, 15, 19, and 21 of the Constitution and such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.
- (ii) The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the reopening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.
- (iii) The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.
- (iv) The judgment in *Suresh K. Koushal & Anr. v. Naz Foundation & Ors.* is overruled.

In this way, in the present judgement, Chief Justice Misra (on behalf of himself and Justice Khanwilkar) relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality" to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.

***K.S Puttaswamy(Retd.) & another. v. Union of India & another*²⁷:**

Background of the case:

The judgment beautifully authored by Justice AK Sikri, concurring with former Chief Justice Dipak Misra and Justice AM Khanwilkar. It starts with the lines,

"It is better to be unique than the best. Because, being the best makes you the number one, but being unique makes you the only one."

The central message of Aadhaar is "Unique makes you only one." The English meaning of the word Aadhaar means 'foundation or base'. It is a Unique Identity issued to a

²⁷ (2019) 1 SCC 1.

person for his/her identification and the authority which enrolls and behest the Aadhaar Card is known as Unique Identification Authority of India (UIDAI).

The Aadhaar judgment by a majority of 4:1 has read down some of the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, struck down a few but significant ones (mainly Section 33(2), 47 and 57), and upheld the rest of the Act as valid. Section 2(d) of the Act pertains to authentication of records, and would not include metadata as mentioned in Regulation 26(c) of the Aadhaar (Authentication) Regulations, 2016. Hence, the provision in the present form was struck down with the liberty, to reframe the regulation, keeping in view the parameters stated by the Court. Referring to section 2(b) which is concerned with the definition of 'resident', it was apprehended by the petitioners that it should not lead to giving Aadhaar card to illegal immigrants. Retention of data collected for Aadhaar beyond the period of six months is impermissible leading to striking down the Regulation 27 of Aadhaar (Authentication) Regulations, 2016 which provided archiving a data for a period of five years.

Section 29 of the said Act, imposes a restriction on sharing of information and is, therefore, held valid as it protects the interests of Aadhaar number holders. But the petitioners apprehended that because of this provision Government becomes entitled to share the information 'for any purpose as may be specified by regulations'. Since the Aadhaar (Sharing of Information) Regulations, 2016, does not contain any such provision and if such a provision is made in future which infringes upon the privacy rights of the Aadhaar card holders that can be challenged always.

Section 33(1) of the Act is read down as it prohibits disclosure of information, including identity information or authentication records, except when it is by an order of a court not inferior to that of a District Judge. Reason being that an individual, whose information is sought to be released, shall be afforded an opportunity so that he can have the right to challenge such an order passed by approaching the higher court, and can object to the disclosure of information on accepted grounds of law, Article 20(3) of the Constitution or the privacy rights.

Section 47 of the Act provides for the cognizance of offence only on a complaint made by the Authority or any officer or person authorised by it is concerned, and was suggested that a suitable amendment is needed to include the provision for filing of such a

complaint by an individual/victim as well whose right is being violated. Further Section 57 in the present form was a concern, because of its susceptible to misuse inasmuch as:

(a) Identity of an individual ‘for any purpose’ can be established’ under this provision. Hence this provision was read down as such a purpose should be backed by law. Further, “such law” if made, would be subject to judicial scrutiny.

(b) Such “purpose” not being limited to any law alone but can be pursuant to ‘any contract to this effect’ as well which is clearly impermissible as a contractual provision is not backed by the law and, therefore, first requirement of proportionality test was not met.

(c) Even ‘anybody corporate or person’ is authorised to avail authentication services which can be on the basis of purported agreement between an individual and such body corporate or person. The impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision is declared unconstitutional which enables body corporate and individuals also to seek authentication, on the basis of a contract between the individual and such body corporate or person, infringes upon the right to privacy of such individuals. .

Other provisions of Aadhaar Act were held to be valid, including Section 59 of the Act which, saves the pre-enactment period of Aadhaar project, i.e. from 2009-2016. The majority judgment as authored by Justice Sikri also holds that the architecture of Aadhaar, as well as the provisions of the Aadhaar Act, does not tend to create a surveillance state as is ensured by the manner in which the Aadhaar project operates. Also, it is very difficult to create profile of a person by using biometric and demographic information stored in CIDR and in respect to the authentication, there are sufficient safeguard mechanisms as observed by the Judges.

It was recommended by the Judges that robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications should be enacted. The Court also held that not all matters pertaining to an individual qualify as being an inherent part of right to privacy. Only those matters where reasonable expectation of privacy is required are protected by Article 21. It also held that the Aadhaar scheme, backed by the statute, i.e. the Aadhaar Act serves a legitimate State aim. However, the court clarified-

‘Benefits’ and ‘services’ as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., whereby Government is allocating such benefits particularly for the deprived class only and the expenditure thereof has to be drawn from the Consolidated Fund of India. On this basis, it was declared that CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and not backed by any law. The Apex Court also held that for the enrolment of children under the Aadhaar Act, the consent of their parents/guardian is essential.

Such children, on attaining the age of majority, enrolled under Aadhaar with the consent of their parents, shall have the option to exit from the Aadhaar project if they choose so, not to avail the benefits of the scheme. The Court also held that Aadhaar is not compulsory for school admission of children is concerned, as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education under Article 21A of the Constitution, shall not require mandatory Aadhaar enrolment, and school admission cannot be treated as ‘benefit’ as well.

For availing the benefits of other welfare schemes covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, subjected to the consent of the parents, as mentioned above. It was also clarified that no child shall be denied the benefit of any schemes if, for some reasons, he/she is not able to produce the Aadhaar number and that the benefit shall be given by verifying the identity on the basis of any other documents. The bench also upheld the passing of the Aadhaar Act as Money Bill and observed that Section 7 is the core provision of the Aadhaar Act which satisfies the conditions of Article 110 of the Constitution.

The court further held that Section 139AA of the Income Tax Act, 1961 not violative of right to privacy as it satisfies the triple test, i.e. (i) existence of a law; (ii) a ‘legitimate State interest’; and (iii) ‘test of proportionality’. However, the bench held that mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. It also held that mandatory linking of mobile number with Aadhaar is illegal and unconstitutional as it is not backed by any law.

Concurring opinion of Justice Ashok Bhusan and Justice Sikri

Justice Ashok Bhushan concurring with Justice Sikri’s judgment held the following: The requirement under Aadhaar Act to collect individual’s demographic and biometric

information does not violate the fundamental right of privacy. The provisions of Aadhaar Act acquiring demographic and biometric information from an individual for Aadhaar Number pass a three-fold test as is laid down in *Puttaswamy case*, hence is not unconstitutional. Collection of private data, its storage and usage does not violate fundamental Right of Privacy. Aadhaar Act does not create a surveillance state. The said Act and Regulations provides protection and safety to the data collected from individuals. He upheld that Section 7 of the Aadhaar is constitutional should not be struck down on account of denial in some cases of right to claim on account of failure of authentication. The State while enhancing the right to food, shelter etc. as envisaged under Article 21 cannot encroach upon the right of privacy of beneficiaries nor the former can be given precedence over the latter.

He held that the provisions of Section 29 is constitutional and should not be struck down. He also opined that Section 33 cannot be held unconstitutional as it provides the use of Aadhaar data base for police investigation nor it can be said to be violative of protection granted under Article 20(3). He was of the opinion that Section 47 of the Aadhaar Act should not be held unconstitutional on the ground that it does not allow an individual to initiate any criminal procedure on breach of his rights. Section 57, to the extent, of permitting the use of Aadhaar by the State or anybody corporate or person, in pursuant to any contract to this effect is unconstitutional and void. Hence, the last phrase in the main provision of Section 57, i.e. “or any contract to this effect” is struck down.

He set aside the Circular dated 23.03.2017 on being unconstitutional. He also upheld that the Aadhaar Act has been rightly passed as Money Bill. Also the decision of the Speaker certifying the Aadhaar Bill, 2016 as Money Bill is not immune from Judicial Review. Section 139-AA of the Income Tax Act, 1961 does not breach fundamental Right of Privacy as per the Privacy Judgment in *Puttaswamy case*. Hence, the Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

Dissention opinion of Justice Y.V. Chandrachud

Justice Chandrachud dissented in this case. Chandrachud J. observed that, “Constitutional guarantees cannot be compromised by vicissitudes of technology”. In his emphatic dissent from the majority, Justice Chandrachud has held the entire Aadhar project to be unconstitutional. He opined that the very act of passing the Aadhaar Act 2016 as a money bill as unconstitutional. “The passing of the Aadhaar Act as money bill is a fraud on the

constitution", Justice Chandrachud observed. The decision of Speaker to classify a bill as money bill is amenable to judicial review and also highlighted the importance of Rajya Sabha in passing laws. He observed in his dissenting judgment, "If a constitution has to survive political aggrandizement, notions of power and authority must give compliance to rule of law."

Section 57 of the Act violates Articles 14 and 21 of the Constitution. Also allowing private enterprise to use Aadhaar numbers will lead to the exploitation of data of the individual. He held that Aadhaar had the potential to create a surveillance state. Also, it was stated that the architecture posed risk on the potential violation of leakage of the database. The source code is with a foreign corporation. "The data must all the time vest with the individual", said the judgment. It was also held that many provisions of Aadhaar Act provide for invasive collection of biometric data. He also observed that entire Aadhar project commencing from 2009 suffered from constitutional invalidity. He also observed that the government repeatedly violated the interim orders of the Supreme Court, prohibiting them from making Aadhar mandatory for availing benefits. Based on the premise of unconstitutionality of Aadhar, he struck down the Section 139AA of the Income Tax Act, 1961 which mandated linking of PAN with Aadhar, whereas the majority decision has upheld Section 139AA. Lastly, he observed that the forcefully linking of mobile and bank accounts as unconstitutional and directed the telecom companies to delete and destroy the Aadhar numbers forthwith.

Through his dissenting opinion, Justice Chandrachud in this case attempted to uphold the spirit of transformative constitutionalism through his multiple observations.

***Indian Young Lawyers Association v. State of Kerala*²⁸**

Background of the case:

The judgment which open the gates of the Sabarimala Temple to the women and children of menstruating age is of great importance. The Constitution Bench of the Supreme Court, by a 4:1 majority held, that the Sabarimala Temple's practice of barring entry to women between the ages of ten and fifty was unconstitutional. The introductory para of the said judgment depicts the condition of the women in India. It states,

²⁸ 2018 SCC OnLine SC 1690.

The core issue of the case is the exclusion of (a class of) women from the Sabarimala Temple was justified on the basis of ancient custom, which was sanctioned by Rule 3(b), framed by the Government under the authority of the 1965 Kerala Hindu Places of Worship (Authorisation of Entry Act). Section 3 of the Act required that places of public worship be open to all sections and classes of Hindus, subject to special rules for religious denominations. Rule 3(b), however, provided for the exclusion of “women at such time during which they are not by custom and usage allowed to enter a place of public worship.” These pieces of legislation, in turn, were juxtaposed against constitutional provisions such as Article 25(1) (freedom of worship), Article 26 (freedom of religious denominations to regulate their own practices), and Articles 14 and 15(1) (equality and non-discrimination).

Chief Justice of India, Dipak Misra and Justice Khanwilkar held that the devotees of Lord Ayappa at Sabarimala have failed to establish that they constitute a “separate religious denomination” because the test for “separate denomination” is a stringent one, and requires a system of distinctive beliefs, a separate name, and a common organisation. The reason being Sabarimala Temple’s public character (where all Hindus, and even people from other faiths) can go and worship, along with other temples of Lord Ayappa where the prohibition of women does not apply, lead the two judges to hold that it does not constitute a separate “denomination.” They also held that the fundamental rights chapter applies to the Temple, as it is governed by a statutory body (the Devaswom Board). Consequently, women have an enforceable right to entry under Article 25(1). This right is not undermined by a contrary right of exclusion because, on facts, excluding women does not constitute an “essential religious practice” that is protected by Article 25(1), and because no scriptural or textual evidence was shown to back up this practice, it is not possible to say that the very character of Hinduism would be changed if women were to be allowed entry into Sabarimala.

Moreover, on facts, this practice appears to have commenced only in 1950, and therefore lacks the ageless and consistent character that is required of an “essential religious practice”. Therefore, Misra CJI and Khanwilkar J. held that, Section 3 of the 1965 Act prohibits discrimination against “any class” of Hindus, and the Temple is not a denominational temple, declaring Rule 3(b) as ultra vires the parent Act, and therefore must be struck down. Justice Nariman accepts, that for the purposes of argument, barring women of a certain age from accessing Sabarimala is an essential religious practice, and is therefore protected by Article 25(1).

However, he agreed with Chief Justice of India, Dipak Misra and Justice Khanwilkar that Sabarimala failed the rigorous test for a “separate denomination” and thus cannot attract the provision of Article 26, and the proviso to S. 3 of the Act. Therefore, even if there is an essential religious practice excluding women, this practice is hit by Section 3 of the Act, which provides for non-discriminatory access to all “classes” of Hindus. This is further provided by the fact that the 1965 Act is a social reform legislation, and therefore, under Article 25(2)(b) of the Constitution, can override the right to religious freedom. However, Nariman J. adds that even otherwise, this case involves a clash of rights under Article 25(1): the right of women to worship, and the right of the priests to exclude them. The text of Article 25(1) – which uses the phrase all persons are “equally entitled” to practice religion, decides the clash in favor of the women.

Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa. The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation.

Justice Malhotra warns that the issue of maintainability is not a “mere technicality” in the case, but something of more importance. It would open the floodgates for “interlopers” to question all kinds of religious beliefs and practices, something that would cause even graver peril for “religious minorities.” She also observed that the right to equality under Article 14 in matters of religion and religious beliefs has to be viewed differently. It has to be adjudged amongst the worshippers of a particular religion or shrine, who are aggrieved by certain practices which are found to be oppressive or pernicious, demonstrating that even in the PIL

era, the issue of maintainability is particularly crucial to the case. She observed that, “It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practices, which would be outside the ken of the Courts. It is not for the courts to determine which of these practices of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like Sati.”

Malhotra J. observes: “Judicial review of religious practices ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practice one’s religion according to one’s faith and beliefs. It would amount to rationalizing religion, faith and beliefs, which is outside the ken of Courts.” She further observes that, “Worship has two elements – the worshipper, and the worshipped. The right to worship under Article 25 cannot be claimed in the absence of the deity in the particular form in which he has manifested himself.”

Dissenting opinion of Justice Malhotra:

Justice Malhotra strongly opposed the majority decision for holding that the exclusion of women is not an essential religious practice (and therefore not protected by Article 25(1)), and argues, instead, that this determination should be left solely to the religious community itself. In the present case, Malhotra J. relies upon the statements of the Sabarimala Thanthri and the Travancore Devaswom Board to the effect that “the limited restriction on access of women during the notified age of 10 to 50 years, is a religious practice which is central and integral to the tenets of this shrine, since the deity has manifested himself in the form of a ‘NaishtikBrahmachari’.”

The second argument advanced by Malhotra J. pertains to constitutional pluralism. It was argued by the Petitioners that discrimination against women runs counter to constitutional morality. Malhotra J. turns this argument on its head, noting that constitutional morality in India’s plural society requires respect and tolerance for different faiths and beliefs, which have their own sets of practices that might nevertheless appear immoral or irrational to outsiders. Justice Malhotra held that it is not, on the ground that the worshippers of Lord Ayappa at Sabarimala constitute a separate “religious denomination”, and is therefore exempted from the operation of Section 3 as per the Act itself.

Justice Chandrachud in his concurring opinion discussed the issue in the introductory part of his judgment, and observed that “the Indian Constitution is transformative in two

distinct ways: first, in setting up the governing institutions of an independent republic, from colonial rule; also, “placing those who were denuded of their human rights before the advent of the Constitution – whether in the veneer of caste, patriarchy or otherwise in control of their own destinies by the assurance of the equal protection of law”. The reference to caste and patriarchy is important, because discrimination is not limited to State action, or even to hostile individual action, but that it also flows from institutional design. Caste and patriarchy are neither “State” nor an agglomeration of individual acts but are social institutions, whose impact upon the lives of the people is not merely a private matter.

He further observed that, “the significance of this case lies in the issues which it poses to the adjudicatory role of this Court in defining the boundaries of religion in a dialogue about our public spaces.” Justice Chandrachud observed that the Respondents have failed to establish that the exclusion of women from Sabarimala is either an obligatory part of religion, or has been consistently practiced over the years. The only evidence, produced proves the celibate nature of Lord Ayappa. Chandrachud J. advanced an important argument that “the test of essentiality is infused with necessary limitations”, grounded in constitutional morality, and the constitutional values of dignity and freedom. He further noted that the Respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya, i.e., is celibate. Hence celibacy is the foremost requirement for all the followers, and women of menstruating ages are not be allowed in Sabarimala. This assumption cannot stand constitutional scrutiny, which claims that the presence of women would cause deviation from the celibacy and austerity observed by the follower. Such a claim cannot be sustained as a constitutionally sustainable argument. This would deny access to spaces to which women are equally entitled and would stereotype them as being weak and lesser human beings, which a constitutional court as this one, must refuse to recognizes.

Justice Chandrachud’s observation that the effect of the celibacy argument “is to impose the burden of a man’s celibacy on a woman” is the crucial link between the denial of the right to worship and the public aspect in this case. He recognised that the justification offered to exclude women is an integral part of a far broader discourse found on the exclusion and subordination of women in social and community life. He also discussed the stigma around menstruation and held that. This has been built up around traditional beliefs in the impurity of menstruating women and have been used to keep women in a position of

subordination, to deny them equal entitlements and subject them to the dictates of a patriarchal order. Therefore, have no place in a constitutional order.

Both Justice Malhotra and Justice Chandrachud, dealt with the issue, but from opposite angles. According to Justice Chandrachud “you cannot divide social life into different silos, and say that discrimination and subordination are fine as long as they stay within a defined silo. At least as far as religion and society are concerned, in the context of India, the silos are forever merged.” As Alladi Krishnaswamy Iyer said in the Constitutional Drafting Committee, “there is no religious question that is not also a social question.” In this case history is on Justice Chandrachud’s side as the temple-entry movements have a long history, and the caste based temple entry movement started in 1920s and 30s. This substantiates the argument that in India, the “thick” character of religious life implies that you cannot simply wall it off from the rest of social life.

An argument was made by the intervenors that the exclusion of women from Sabarimala amounts to “untouchability” within the meaning of Article 17. The Chief Justice as well as Nariman J. did not address this, while Malhotra J. rejected it on the ground that “untouchability” under the Indian Constitution is limited only to caste-based untouchability. Chandrachud J. totally disagreed with Malhotra J. reasoning. After a detailed survey of the Constituent Assembly Debates, he observes that there was no consensus in the Constituent Assembly over the precise scope and ambit of the phrase. You have the answer when you place the moment of constitutional framing within broader history. The answers lie “in the struggle for social emancipation and justice which was the defining symbol of the age, together with the movement for attaining political freedom but in a radical transformation of society as well.”

Not every form of discrimination or prejudice can fall within Article 17 as the framers use the specific word “untouchability”, limiting the sweep of the Article only to the most horrific kind of discrimination which Justice Chandrachud is aware of, as he justifies that, “the caste system represents a hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste.” “Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.” Justice Chandrachud overrules the Narasu Appa Mali judgment saying that “customs are not subject to fundamental rights

finding the view that customs are subject to fundamental rights as flawed. Justice Chandrachud also advanced that, “Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.”

Chandrachud J concludes his judgment with the following observation proving it to be a transformative judgment:

“In the dialogue between constitutional freedoms, rights are not isolated silos. In infusing each other with substantive content, they provide a cohesion and unity which militates against practices that depart from the values that underlie the Constitution – justice, liberty, equality and fraternity. Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions, but on the structures of oppression and domination which exclude these identities from participation in an equal life. An indispensable facet of an equal life, is the equal participation of women in all spheres of social activity.”

In this way Justice Chandrachud endeavored to establish the concept of transformative constitutionalism through the Indian Constitution by observing that in setting up the governing institutions of an independent Republic, transitioning from colonial rule; but also, “placing those who were denuded of their human rights before the advent of the Constitution—whether in the veneer of caste, patriarchy or otherwise in control of their own destinies by the assurance of the equal protection of law”.

IV. Conclusion

In this way, through these three land mark precedents in the recent time, Supreme Court of India has attempted to imbibe the spirit of transformative constitutionalism in the Constitution of India. In this regard, the role of Justice Chandrachud is really appreciable. His elaborate explanation of the concept and relating the same especially in the context of Sabarimala judgment has are really commendable. This will help the further development of the concept of transformative constitutionalism in the Constitution of India in the coming days.

POTENTIAL USE OF ARTIFICIAL INTELLIGENCE IN INDIAN COURTS

*Muktha T V**

I. Introduction

The internet can be commonly understood as interconnection of networks. The Internet is our information gateway for daily updates. Initially it was used mainly to access information available far away. It is considered as a repository of knowledge. With the advancement of technology, the internet is an absolute necessity and no more a luxury. It is no longer limited to be used just for the assimilation of knowledge. Going digital is the new slogan. The Internet has become a necessity rather than a luxury if one wants to be updated with information. Governments have come up with various policies to offer easy access to the internet to all the people including the ones in the remotest part of the world.

The world has changed but has not come to a standstill due to the pandemic. Government of every nation is using data to take on this unprecedented novel situation. The magnitude of technology that is being used to fight the situation is unimaginable. Technological innovation is seen everywhere, right from creating mobile apps for contact tracing, contactless financial transactions using mobile wallets, online banking, paperless onboarding of passengers into flights, manufacture of Personal Protective equipment (PPE) for frontline workers, use of robotics and advanced screening methods, to conduct research, for online shopping, for staying connected with our friends and family on Social Media, for running businesses as usual and so on. There is also innovation even in the making of face masks.

“Digitization” is seen in all sectors such as Telecom, Education, Banking, Health & Insurance, Banking & Finance and so on. One of the most important and immediate advantages of digitization is the ease at which the transactions are carried out via the Internet with just the click of a button making no human contact. People do not have to stand in long queue to pay their electricity bills or telephone bills or to withdraw money from their bank accounts or to have a comfortable shopping experience. All this can be done from the luxury of their homes.

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The benefits of digitization are only growing day by day. It is no surprise that digitization has also found its way into the Indian legal system. The legal research of case laws and judicial decisions, law commission reports, constituent assembly debates, which once used to take months together, with the legal researchers spending a large chunk of their time to read through bulky books, just to spot that the apt citation which could lead to the disposal of their cases, can now be done within seconds, with just a click. Digitization of legal records reduces time, money and energy, leading to speedy disposal of cases, which is also one of the fundamental rights guaranteed under Part III of The Constitution of India. It is believed that technology can make the justice system more efficient and accessible.¹

Virtual courts are the talk of the town. The advocates can easily check the status of their cases online from their smartphone or laptops. They can now file their case documents online instead of standing in long queues at the filing counters. This saves their time and energy to a great extent. They do not have to run around the counters to file the cases. And also, it might reduce a lot of errors and bring down the cases of office objections largely since the Document Management System (DMS) is completely digital with no manual intervention. However, there is a lot of scope of improvement in this area. There is a need to establish robust online filing systems and procedures that shall dispense with physical filing altogether in all courts. Still there are questions and apprehensions as to the idea of digital courts being completely real in its true sense.

Evidence means and includes electronic records as per Sec. 3 of the Indian Evidence Act, 1872². The Supreme Court of India, in a landmark judgment³, has revolutionized the law relating to the admissibility of the electronic evidence within the meaning of Sec.65B of the above-mentioned Act⁴.

¹Virtual Courts Cannot Fully Replace Open Court Hearings; Technology Can Make Justice System More Efficient & Accessible : Justice Chandrachud ,<https://www.livelaw.in/top-stories/virtual-courts-cannot-fully-replace-open-court-hearings-technology-can-make-justice-system-more-efficient-accessible-justice-chandrachud-157260>, last visited on May 24, 2020.

² Section 3 The Indian Evidence Act, 1872 - Evidence” means and includes all documents including electronic records produced for the inspection of the court, such documents are called documentary evidence.

³*Ansar P.V. v. P.K. Basheer and others*, (2014) 10 SCC 473.

⁴*Shahfi Mohammad v. The State of Himachal Pradesh*, SLP (Crl.) No.2302 of 2017.

There is a huge step taken by the Parliament in recognizing electronic records as permissible evidence under the said provision⁵. The decision of the Supreme Court of India has pushed for the idea of digitizing the court procedure to a large extent. The production of online documents reduced the time and hassle to produce the physical copy of the evidence.

The e-Courts Project, with the backing of the central government as a national policy and an action plan for Implementation of Information and Communication Technology (ICT) in the Indian judiciary was submitted by the e-Committee of the Supreme Court of India, with a vision to transform the Indian judiciary by running virtual courts. If this vision sees the light of the day, it shall drastically ease the filing process of relevant documents, petitions, appeals and the associated time, effort and cost and provide easy access of justice to all.

S.A. Bobde, CJI., made a remark of introducing Artificial Intelligence (AI) within the legal system of India. He said that the use of artificial intelligence in the judiciary system will deliver justice swiftly.⁶ He further expressed that more human attention and involvement could be applied to complex-intricate matters and the routine, simple, straightforward cases could be resolved through Artificial Intelligence. According to him, use of AI in Indian judiciary shall certainly resolve the cases swiftly than ever before. There is a vision of automating routine processes of the judiciary and reducing the piling up of simple cases before the court of law through AI in India. However, Indian legal system lacks the technical expertise and infrastructure to implement this vision. Some of the major law firms have tried to use AI for contract Management and analytics and for legal research.

When we look at the data of pending cases, it is quite alarming. There is no end to the piling up of cases before the Supreme Court, High Courts, and the subordinate courts. This also has a cascading effect on the number of under-trial prisoners awaiting their trial. This is

⁵ Section 65(B) of Indian Evidence Act, 1872 - Admissibility Of Electronic Records- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein of which direct evidence would be admissible.

⁶Prajakta Hebbar, "CJI Bobde supports use of AI in the Indian Judicial System", <https://analyticsindiamag.com/cji-bobde-supports-use-of-ai-in-the-indian-judicial-system/>, last visited on February 21, 2020.

an outright violation of basic fundamental rights of the accused persons and the victims. The victims are further victimized.⁷

II. Data on pending cases as on 2020 from National Judicial Data Grid (NJDG)⁸

According to National Judicial Data Grid, the total number of pending cases is 32.45 million in India, as of May 2020. Out of which, 9.045 million are civil cases and 23.39 million are criminal cases. 32% of those cases are less than one year old. 28% cases fall in the category of cases pending for one to three years. 15.28% cases between 5-10 years, 7.1% between 10-20 years, 1.28% cases between 20-30 Years and 0.26% cases older than 30 years. The same source also provides the age for disposition of cases, both civil and criminal. As per the data, about 43% of the cases are disposed within a year, about 30% between 1-3 years, about 13% between 3-5 years, about 10% between 5-10 years, about 2.5% between 10-20 years and about 0.6% of cases take more than 20 years to be disposed.

III. Five main reasons for delay in administration of justice:

1. There are about 32 million cases pending in India. One of the prominent reasons for such inordinate delay in the administration of Justice is due to lack of Judges at district and subordinate courts, High Courts and the Supreme Court. The method adopted to fill these vacancies has always been a debatable topic. The expectation is to have utmost objectivity in the selection process.
2. The number of adjournments granted is the killer. Data suggests that there are about 46,687 cases that are pending in the High Courts for the last 30 years.
3. Further, the resort to writ jurisdiction⁹ even for trivial cases which in turn shifts the attention from important cases, most of the cases pending before the HC are writ petitions and appeals from single judges of the High Court.
4. Furthermore, there is also delay in disposal of cases due to lack of administrative staff attached to the High Courts.

⁷<https://www.news18.com/news/india/economic-survey-flags-ballooning-pile-of-pending-cases-says-8500-judges-needed-to-clear-backlog-2216877.html>, last visited on February 20, 2020.

⁸https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard, last visited on May 25, 2020. NJDG basically is a case management system. It is seen that with the help of NJDG, reports on cases pending before the local courts can be easily generated with a click of a button.

⁹<https://www.civilserviceindia.com/subject/Essay/indian-judicial-system6.html>, last visited on March 01, 2020

5. Second appeals are made which are infact time barred.

IV. Way forward - For quick administration of justice

1.Digitalization of Indian Courts¹⁰: The Government is not leaving any stone unturned to transform courts into digital or e-courts and is pushing hard for paperless entries. So far, 342 jails and 488 district courts have got the facilities. A digital court is a platform where the trial of cases will be done electronically and includes all types of cases under fresh registration or pending list¹¹.

India's first e-court was opened at the High Court of Hyderabad, a common High Court for the states of Telangana and Andhra Pradesh. The courts are slowly being equipped with local area networks, computer hardware and standard application software, according to reports. They have been connected to the National Judicial Data Grid (NJDG). Thus, cases such as enforcement of contracts, which are many times won based on documentation becomes much easier and faster. Apart from this, the status of the cases is easily tracked in ecourts.gov website on a real time basis. Also, the record of the evidence is also made available real time through video conferencing via electronic mediums such as skype or other applications. Courts have already started accepting cross-examination and testimonies over the use of electronic mediums such as Skype. But, such usage, for now, is limited to only the Supreme Court.¹²

2.Use of Artificial Intelligence (AI)¹³ in Courts:

Artificial intelligence (AI) refers to the simulation of human intelligence in machines that are programmed to think like humans and mimic their actions. The term may also be

¹⁰ FE Online, "Big push for digital courts in India; here is what Modi government is doing", <https://www.financialexpress.com/india-news/big-push-for-digital-courts-in-india-here-is-what-modi-government-is-doing/1134289/>, last visited on March 02, 2020.

¹¹<https://www.indiatoday.in/education-today/gk-current-affairs/story/with-digital-courts-soon-to-become-a-reality-we-might-achieve-our-paperless-dreams-1213109-2018-04-16>, last visited on March 02, 2020.

¹² "One Future Collective in Society", <https://www.youthkiawaaz.com/2019/12/law-and-justice-in-digital-age/>, last visited on March 02, 2020.

¹³ A set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of human beings.

applied to any machine that exhibits traits associated with a human mind such as learning and problem-solving.¹⁴

With the use of Artificial Intelligence based legal assistant, the above-mentioned number of pending cases could be drastically reduced. Considerable amount of time is spent by the judges and their legal research assistants to search for relevant citations while pronouncing the judgments. This in turn adds to the already burdened judiciary system with a rising number of pending cases. A quick dashboard that helps the judges as a ready reckoner to see the number of pending cases before their courts could be developed. This reduces the huge pile of papers and documents that are always stashed up before the bench clerk. The dependency of the judges on such files gets reduced. AI is a tool in the hands of the court which can be used for various purposes. It can be used in open and shut cases such as money recovery suits, computation of damages, listing the cases, filing process (Scrutiny process), automation of reminders, Docket Management, Case Information software, e-payment of court fees, court deposits. However, it is to be noted that, wherever oral evidence is appreciated AI will not be useful. It can only be used in cases that can be resolved by merely relying on documentary evidence.

AI can analyze vast chunks of information, identify patterns, predict strategies, detect anomalies, classify issues, conduct legal research and draft documents¹⁵. With such tedious time consuming and mundane tasks being taken care of, the judges can focus their time and energy on analyzing complex cases by evaluating the merits and circumstances of the case, thus, making the justice system much more accessible to people.

Most of the civil suits such as summary suits, declaratory suits, and so on are generally fought based on documentary evidence, yet the data suggests otherwise. Some of the examples of a summary suit include, the documents such as a bill of exchange, hundies, and promissory notes and suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract (money recovery suit); or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a

¹⁴ Jake Frankenfield, <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp>, last visited on March 01, 2020.

¹⁵ Jonah Wu, "AI Goes to Court: The Growing Landscape of AI for Access to Justice", <https://medium.com/legal-design-and-innovation/ai-goes-to-court-the-growing-landscape-of-ai-for-access-to-justice-3f58aca4306f>, last visited on April 20, 2020.

guarantee, where the claim against the principal is in respect of a debt or liquidated demand only¹⁶. If a suit filed by the plaintiff is proved as a summary suit under Order 37, Rule 1&2 of Civil Procedure Code, 1908, then the plaintiff may get a remedy within 10 days from the date of filing of the suit (provided the defendant does not file for leave to defend). However, the average time that is taken to dispose of a summary suit, for. e.g. a cheque bounce case is about 3 to 5 years, whereas, the case needs to be disposed of within 6 months as per Negotiable Instruments Act, 1881. This sort of delay defeats the very purpose of the Act. Analysis of delay gives details such as it takes about 6 months only for serving summons, frivolous appeals, adjournments and so on. This could be a potential scenario where artificial intelligence could play a vital role in bringing down the duration of disposal of the suit. Artificial intelligence may be used to impart predictive justice by building predictive models, thereby reducing the age of disposal of summary suits. In a cheque bounce case, AI could be potentially used in the signature identification processes and other such stages. These types of suits are mostly disposed based on the strength of the documentary evidence.

Some of the important stages in a civil suit shall include filing of the suit by the plaintiff, scrutiny of the plaint, assigning the case number, servicing of summons, filing / non-filing of defendant's Written statement, awarding of ex-parte decree to plaintiff, motion to compel production of documents by both plaintiff and defendant, framing of issues, evidence from plaintiff and defendant (in writing), written arguments, pronouncement of judgement and computation of costs. Technology could automate the summons process, sending reminders to defendants to file their written statements on time, pronouncement of AI assisted decisions, computation of damages and so on.

3. Artificial Intelligence and Predictive Justice is seen as the future of the judicial system. predictive justice is the analysis of large volumes of case laws and judicial pronouncements with the help of Artificial Intelligence and Machine Learning¹⁷ technology to make predictions of certain outcomes or the end result. It is possible to predict future results through Inductive reasoning. The algorithms or technique identifies correlations between input data (criteria set out in legislation, the facts of the case and the reasoning) and output data (formal judgment such as the compensation amount). Correlations deemed to be relevant make it possible to create models which, when used with new input data (new facts

¹⁶<https://www.lawctopus.com/summary-suits-explained/>, last visited on May 15, 2020.

¹⁷ Machine learning makes it possible to construct a mathematical model from data, incorporating a large number of variables that are not known in advance.

described as a parameter, such as the duration of the contractual relationship), produce a prediction of the decision (for example, the compensation range).¹⁸

4. Transparency & accountability: The most significant elements of AI systems are traceability and explainability. Traceability refers to the data which is used to build an algorithm and explainability is a requirement that decisions made by AI systems can be understood and traced by human beings. AI assisted decisions uphold transparency in the process. Because of its traceability, audit trail, algorithm-based logic and lack of manual intervention, AI assisted decisions are considered to be superior and trustworthy. Because of its traceability factor, it becomes easier to trace the accountability with AI assisted decisions. After a series of trial runs, testing and training, the decisions are imparted by the AI tool.

5. AI & inherent bias: Existing regulatory and societal structures which are dependent on human judgment and control are subject to inherent biases and discrimination. Thus, to say that current decision-making systems are entirely devoid of these shortcomings would not be completely justified as these are dependent upon human limitations of knowledge, precedent, rationale and bias, both explicit and subconscious. Delegation of some aspects of that decision making to algorithms, may likely result in decisions with increased fairness, reduced bias and discrimination¹⁹.

V. Flaws in AI decisions and its impact on Constitutional provisions

According to D.Y. Chandrachud, Judge of the Supreme court of India, technology is an "adjunct of rule of law"²⁰. He said that the interface between law and technology rests on the following principles:

- a. Technology to enhance access to justice to common citizens.
- b. Technology is an intrinsic element of rule of law
- c. Administration of justice is not just as a sovereign function, but as a service provided to common citizens in the world of technology.

¹⁸<https://rm.coe.int/newsletter-no-16-august-2018-en-justice-of-the-future/16808d00c8>, last visited on March 10, 2020.

¹⁹https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf, last visited on April 25, 2020.

²⁰*Supra* note 1.

Adequate protection of fundamental rights is extremely subjective. The courts need to look into the case in hand based on the circumstances and merits of the case. So, the challenge with AI assisted decisions is how can the algorithms be made to be subjective since it is driven by sheer codes and programs.

1. Inherent bias in data collection

Machine learning depends extensively on the data available in hand for producing predictive justice and help in the decision making process. Hence bias in data collection can adversely affect the outcomes and add to the woes of existing discriminations within a society. This is a downright violation of Right to Equality guaranteed under Art 14 of our Constitution.

2. Understanding the rationality behind AI based decisions

A party to the dispute would want to have a reasoned order and must be in a position to understand the rationale behind a particular decision in order to successfully challenge such a decision. Parties to the suit must establish *prima facie* in most of the cases. If they are unable to understand a particular data, they might not be able to establish or contest their case.

3. Issues in having an AI Judge or AI assisted courts

Whilst AI and machine learning technologies, makes it easier for courts and judges in their decision-making process, it is far from reality. There are many reasons.

Firstly, AI in Indian courts must guarantee that no citizen shall be denied the access to Justice, which is also a fundamental right inherent in Art 21 of our Constitution. However, it must be noted that a large section of our society has no access to technology and the internet. As per TRAI data, internet density in India is around 52% and out of that only 25% have access to smartphones²¹

Secondly, it is also equally important that the advocates and parties to the dispute must also possess a certain amount of IT knowledge regarding AI in order to understand how a device using AI functions. Thirdly, introduction of AI may also raise questions regarding right to effective remedy, Complete Justice and so on since the decisions could also be challenged based on system error or malfunction.

²¹*Supra* note 1.

Fourthly, one must analyze if machine reasoning and human reasoning are the same. There is an input and there is a corresponding output through a model built based on certain correlations, which is deemed as an unknown process. For e.g.: focus on reasoning and the right to explanation has been taken up recently in discussions about the General Data Protection Regulation (GDPR). Articles 13–15 of the GDPR define the rights to ‘meaningful information about the logic involved’ in automated decisions which predicts the possible future requirements for AI systems in the legal field as well.²²

Fifthly, If the data used for testing and training AI based decision is protected as an Intellectual Property as a Trade secret, the most important information is not made available to the party to the dispute since the data protected as an Intellectual Property is key to understanding the reason behind the system reaching a particular decision. Without this, the citizens and the agents or functionalities of the State are kept in the dark as to the clarity, intelligibility, and predictability of these systems.

VI. Conclusion

There have been many apprehensions that introduction of AI in courts would result in loss of jobs. However, it is not so. AI only acts as an aid, just like any other legal assistant in delivering speedy justice and reduces the piling up of cases. However, all decisions cannot be based on programs, commands, algorithms without human touch completely. Because there could be many underlying facts and circumstances that have to be deeply analyzed, reviewed and evaluated to arrive at a conclusion. This can only be achieved with the great minds and experience of the judges. They can never be substituted with machines. The judiciary must analyze and apply its mind in contemplating the cases which could not be solved through AI and cases which require expertise of learned counsels and hon’ble judges. Routine and mundane tasks can certainly be digitized with AI and machine learning assisted decisions in such cases. This shall guarantee the fundamental right of speedy justice. This shall also reduce the over-burdened Judiciary and direct the time and energy of the judges towards deciding complex cases that are beyond a machine’s comprehension.

S.A. Bobde, CJI, said that the Supreme Court has proposed to introduce a system of Artificial Intelligence that would help in better administration of justice delivery. He further

²²Ejtn Themis Semi-final D, “Judicial Ethics and Professional Conduct, The AI is now in session – The impact of digitalization on courts”, last visited on May 25, 2020.

said that machines cannot replace the brilliant minds of the learned judges. According to Justice D.Y. Chandrachud, “Technological divide should not become a means of exclusion; technology should be used for inclusive justice”²³. He further said that his vision is to have a healthy mix between virtual courts and physical courts that constitute the spine of the legal system. There needs to be a balanced approach while using algorithms and the human brain. AI assisted decisions could be deployed in open and shut cases and in cases such as human rights cases, which need appreciation of evidence, careful consideration of the merits and circumstances of the case, intelligent minds of the learned judges, their experience and knowledge cannot be replaced with machine assisted decisions. It is also equally important that technical training needs to be imparted to the legal fraternity to embrace and appreciate the latest technology and its benefits.

²³*Supra* note 1.

FIRST INFORMATION REPORT—A MEANS TO SET CRIMINAL LAW IN MOTION

*Dr. Kotagiri Srinivasa Rao **

I. Introduction

The process of criminal justice starts with the registration of information by the police about the commission of a crime. The information recorded under Section 154 of Code of Criminal Procedure, 1973 (Cr.P.C.) is usually known as First Information Report (hereinafter FIR). A First Information Report is based upon the earliest version of a cognizable offence¹. The principal object of the FIR from the point of view of the informant is to set the criminal law in motion and from the point of view of investigating authorities to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party.² The object of the FIR is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten and embellished.³

Any person aware of the commission of any cognizable offence may give information to the police officer in charge of a police station having jurisdiction. Anyone means, it is not necessary that he/she should be the victim or eye-witness himself. A report cannot be refused to be treated as FIR holding that it is based on hearsay evidence.⁴

A police officer can also lodge an FIR on his own if he comes to know about the commission of a cognizable offence. It shall be recorded in such a form & manner mentioned in Section 154 of the Cr.P.C.⁵ If the information given by the woman against whom an offence under Sections 326A, 326 B, 354, 354A-D, 376, 376A-E and 509 of Indian Penal Code is alleged to have been committed or attempted then such information shall be recorded by a women officer.

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¹ An offence for which a police officer may arrest without warrant- Section 2(c) of Code of Criminal Procedure.

² *Hasib v State of Bihar* AIR 1972 SC 283.

³ *Emperor . Kh. Nazir Ahmed* AIR 1945 PC 18 which was confirmed by Hon'ble Supreme Court in *Wilayat Khan v State of UP* AIR 1953SC122.

⁴ *Hallu v State of M.P* AIR 1974 SC 1936.

⁵ *Dhamanjay Singh Chandhan v State of NCT of Delhi* 2013(6)AD (Delhi) 669 (DB).

Even phone calls made immediately after an incident to the police constitutes an FIR only when they are not vague and cryptic. Calls purely for the reason of getting the police to the scene of crime do not necessarily constitute the FIR. Hence, a telephonic conversation would amount to the constitution of an FIR if the information furnished about the crime is unambiguous, clear and in detail that satisfies the above-mentioned test *i.e.* not vague and cryptic.⁶

An analysis of Section 154 brings out following points:

- a) The information is to be given to an officer in charge of a police station
- b) If the information is given orally, it shall be reduced to writing
- c) Then such information shall be signed by the informant and shall be read over to the informant
- d) The substance of the information is then to be entered in Station Diary or General Diary
- e) A copy of the information shall be given forthwith, free of cost, to the informant.⁷
- f) If the information is given by the woman against whom acid attack, causing hurt to extort property, sexual assault, rape etc. is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer⁸

II. Whether the Police are duty bound to register FIR?

There was an issue that whether the police are duty bound to register an FIR on receipt of information of the commission of a cognizable offence or there is discretion on their part to order a preliminary probe before registering it. There were several conflicting decisions on this point by the apex court. Some judgments held that an officer in charge of the police station was obliged under law to register a first information report on receipt of a complaint. Certain other judgments held that the police officer was not obliged to register an

⁶*Siddharth Vashist Manu Sharma v State (NCT of Delhi)* AIR 2010 SC 2352.

⁷ DR. K.N.Chandrasekharan Pillai, R.V.Kelkar's Criminal Procedure, Eastern Book Company, 5th edi.2008, at 124-125.

⁸ Inserted by Act 13 of 2013 to Section 154 of the Code.

FIR but discretion lies with him/her in appropriate cases to hold some sort of preliminary enquiry in relation to the veracity or otherwise of the accusations made in the report.

A police officer cannot refuse to lodge on FIR without any reason. If he refuses on flimsy grounds, courts can intervene and get the report lodged⁹. Recording of FIR is a mandatory, concerned officer is duty bound to register case on basis of information disclosing cognizable offence¹⁰. He cannot embark upon an inquiry as to whether information is reliable and genuine or otherwise refuse to register on the ground that information is not reliable or credible.

But in *Rajinder Singh Katoch*¹¹ it was held that “ Although the officer in charge of police station is legally bound to register a first information report in terms of Section 154 if the allegations made gives rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned: the same by itself, however does not take away the right of the competent officer to make a preliminary enquiry in a given case in order to find out as to whether the first information sought to be lodged had any substance or not.

The police officer before recording an FIR may hold preliminary inquiry in the following cases:

- a) Matrimonial dispute/family disputes,
- b) Commercial Offences,
- c) Medical negligence cases
- d) Corruption cases

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.¹² If facts are such which make the officer have reasonable doubt/reservation about allegations, he may make some inquiry before registering an FIR.¹³

⁹*Mohinder v State of Punjab* AIR 2001, SC 2113.

¹⁰*Ramesh v State (NCT of Delhi)* 2006 Cr.LJ 1622 SC.

¹¹*Rajendra Singh Katoch v Chandigarh Administration and Ors* AIR 2008 SCC 178.

¹²*Sohoni's Code of Criminal Procedure*, 21st edi.2015, Lexis Nexis at 579.

¹³*Doliben Kantilal Patel v State of Gujarat* 2013(1) Guj LR 237(Guj) (DB).

Preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.¹⁴

III. Remedy in case Police officer refuses to record FIR

The menace of non-registration of crime badly dents the police image and impedes their efforts to better the police-public relations, which are vital for effective functioning of police. In the *Ruchika Girhotra Case*, it took ten years for an FIR to be registered against the former DGP of Haryana Police.

If any person aggrieved by a refusal on the part of police officer to record the information the following are the remedies to approach --

- i) The aggrieved person may send the substance of information in writing, by post to Superintendent of Police (SP) concerned -- Section 154 (3). If the S.P is satisfied that the information discloses the commission of a cognizable offence, he shall either investigate the case himself or direct an investigation to be made by a subordinate police officer.
- ii) If S.P. also refuses the remedy is to approach the Court (Judicial Magistrate First class) to direct the police to record the FIR under Section 156 (3) of Cr.P.C.
- iii) By filing a complaint under Section 200 of Cr.P.C before Judicial Magistrate.

Some State governments¹⁵ established (including Goa) State Police Complaints Authorities – one can complain against police if he refuses to record the FIR. As per report of Common Wealth Human Rights Initiative (CHRI) majority of the complaints against police received by State Police Complaints Authority is that of failure to register FIR.¹⁶

¹⁴*Lalita Kumari v Government of UP* AIR 2014 SC 187.

¹⁵Police Complaints Authority (PCA) is a body that adjudicates allegations of improper or shoddy investigations, refusal to file FIRs, custodial torture and high-handedness against the police. But its recommendations are not binding upon the State Government for action against errant police personnel. Seventeen States have established the PCAs through State Police Acts, while ten states have done this through executive orders with a long-term goal of the PCAs is changing the policing culture and making it thoroughly professional.

¹⁶Times of India, Goa edi. 14th July 2010 at p.4.

The Chief Minister of the State issued instructions not to register FIR or initiate action against a sitting MLA. The Supreme Court condemned this action and imposed exemplary costs of Rs.10 lakhs.¹⁷

IV. What is Zero F. I. R.?

The question whether the police officer of a station has power to investigate into a crime committed outside his local jurisdiction has been answered in the affirmative by the Supreme Court.¹⁸ The reason for the decision was “No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered to investigate”¹⁹. Therefore, FIR can be registered by any Officer in charge of a Police Station even if he has no jurisdiction for investigation of the offence which is called Zero FIR. In such FIR the serialnumber is put Zero and such FIR is forwarded to competent investigating police station.

After investigation is over, if the investigation officer arrives at the conclusion that the cause of action for lodging the F.I.R has not arisen within his territorial jurisdiction, then he is required to submit a report accordingly and to forward the case to the Magistrate empowered to take cognizance of the offence²⁰. This would not mean that a case which requires investigation, the police officer can refuse to record and/or investigate it on the grounds of territorial jurisdiction.

At the stage of investigation, there is no question of interference by high court even by exercising inherent powers on the ground that the investigation officer has no territorial jurisdiction²¹. FIR cannot be quashed only on the ground that the police station has no territorial jurisdiction to conduct investigation. It was observed that if it was found beyond jurisdiction, the FIR can be referred to the concerned police station having jurisdiction.²² In AasaramBapu Rape Case rape was committed in Jodhpur, Rajsthan. FIR was lodged in Kamla Market Police Station, New Delhi. It was transferred to Jodhpur for investigation.

Illustration: On March 9th, 2020 at around 11.42 PM when the 11 year old boy, who is a French national, was waiting in the security hold area to board a Mumbai –bound Goa flight

¹⁷*State of Maharashtra v S chavan* (2011) 1 SCC 577.

¹⁸*Satvinder Kaur v State* (1999)8 SCC 728.

¹⁹Section 156(2) .

²⁰Section 170 of Code of Criminal Procedure.

²¹*Satish Dharmu Rathod v The State of Maharashtra*, 2017 SCC OnLine Bom 186.

²²*Manoj Kumar Sharma v Chattisgarh* 2012 CrLJ 1608(Chh).

at Dabolim AirPort Goa. One Mr. Vikram, aged 25-30 years, working at a shop in the security hold area of the airport terminal, approached the boy in absence of his father and allegedly showed a porn clip to him. The minor boy informed his father about it, but as they were running short of time, they boarded the Mumbai-bound flight and on the following day, the father of the minor boy lodged a complaint against the alleged accused at Santa Cruz police station in Mumbai. The Santa Cruz police station, Mumbai registered a zero FIR and forwarded the case to the Dabolim airport police for further investigation. After receiving the FIR, Dabolim airport police arrested the youth under Section 12 of Protection of Children from Sexual Offences (POCSO) Act and Section 8 of Goa Children's Act 2003.²³

V. Name of the victim in FIR

Sub-section (2) of Sec.228 –A IPC makes an exception for police officials who may have to record the true identity of the victim in the police station or in the investigation file. We are not oblivious to the fact that in the FIR the name of the victim will have to be disclosed. However, this should not be made public and especially not to the media. We are of the opinion that the police officers investigating such cases and offences should also as far as possible either use a pseudonym to describe the victim unless it is absolutely necessary to write down her identity. The copy of an FIR relating to the offence of rape against a women or offences against children falling within the purview of POCSO shall not be put in the public domain to prevent the name and identity of the victim from being disclosed.²⁴

VI. One-Stop Centre

In the interest of children and women and in the interest of justice all the States/Union Territories are requested to set up at least one “One-Stop Centre” in every district within one year. This Centre can be used as a central police station where all crimes against women and children in the town/city are registered. They should have well trained staff who are sensitive to the needs of children and women who have undergone sexual abuse. This staff should be given adequate training to ensure that they talk to the victims in a compassionate and sensitive manner. Counsellors and Psychiatrists should also be available on call at this Centre's so that if necessary, the victims are counselled and in some cases it would be appropriate if the counsellors question the victims in a manner in which they have been trained to handle the victims of such offences. These one stop Centres should also have

²³Navahind Times, Panji, march 15,2020 at p.5.

²⁴*Nipun Saxena and another v Union of India and others* (2019) 2 SCC 703 popularly called Nirbhaya Case.

adequate medical facilities to provide immediate medical aid to the victims and the medical examination of the victims can be conducted at the Centre itself. One such Centre which has already been set up is "BHAROSA" in Hyderabad. This can be used as a model for other One-Stop Centre's in the country.²⁵

VII. Inordinate delay in lodging FIR

The prompt and early reporting of the occurrence to the police with all its vivid details gives an assurance regarding the truth of the prosecution version.²⁶ Neither the Cr.P.C. nor the Limitation Act prescribes any period of limitation for filing FIR.

Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the First Information Report because of the possibility of concoction of evidence by the prosecution. The inordinate delay in registration of the FIR and further delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.²⁷ Unexplained delay in lodging of the FIR casts a serious doubt on the investigation and discredits the truthfulness of the prosecution version.²⁸ An unexplained inordinate delay in filing FIR is fatal to the case of the prosecution.²⁹

However, a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case abroad. The court has to seek the explanation for delay and test the truthfulness and plausibility of the reason assigned.

There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be

²⁵*Id.*

²⁶*State of UP v HarbanSahai* (1998) 6 SCC 50.

²⁷*Ganesh Bhava Patel v State of Maharashtra* AIR 1979 SC 135.

²⁸*Kanchan Chowdary v State of UP* 1989(2) Crimes 510(All).

²⁹*Nalli v State* 1993 CrLJ 409 (Mad-DB).

drawn either way merely on account of delay in lodging of the FIR.³⁰ The delay in lodging of the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity.³¹

If delay is satisfactorily explained, the court will decide the matter on merits without giving much importance to such delay. Court is duty bound to determine whether the explanation afforded is plausible enough in the facts and circumstances of the case. Delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.³² Evidence of an eye witness would not be rejected merely because of delay in giving the First Information to the police.³³ The delay in lodging the FIR in sexual offences has to be considered with a different yardstick.³⁴ In sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family.³⁵ Where the parties belonged to tribal community, after incident of rape the accused promised to marry but subsequently retracted from commitment, delay of five months in filing FIR was held not fatal and ignored.³⁶

VIII. Uploading of FIR on Police website or official website of Government concerned³⁷

The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the First Information Report so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances.

³⁰*Amar Singh v Balwinder Singh*, AIR 2003 SC 1164.

³¹*Tulaisdas Kanolkar v State of Goa* (2003) SCC 590, *N.M. Nimbalkar v State of Maharashtra* 2018 Cr L J 403 (Bombay).

³²*P. Rajagopal and others v State of Tamil Nadu*, (2019) 5 Supreme Court Cases 403.

³³*State of Karnataka v Bhaskar Kushali*, AIR 2004 SC 4333.

³⁴*Satpal Singh v State of Haryana*, 2010 AIR SCW 4951.

³⁵*Deepak v State of Haryana*, (2015) 4 SCC 762.

³⁶*Shyam Naik v State of Jharkhand*, 2008(1) AIR Jhar 971.

³⁷*Youth Bar Association of India v Union of India and Others*, AIR 2016 SC 4136.

It may be clarified here that in case there is a connectivity problem due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

IX. FIR is not encyclopaedia of case

FIR is not an encyclopaedia which is expected to contain all the minute details of the prosecution case, it may be sufficient if the broad effects of the prosecution case are stated in the FIR.³⁸ Where the victim gives essential and relevant details in her testimony her evidence cannot be rendered doubtful on the grounds of improvement or exaggeration.³⁹ If a weapon of offence is not mentioned in the FIR, such omission is of no consequence.⁴⁰ The FIR was lodged by the wife of the accused but she had not given details as to which accused caused which injuries. It does not affect her credibility. Her presence was established and her husband was in a critical condition and it is too much to expect that the report she gave at that time should contain all details about the weapon and the injuries that were caused by the several accused.⁴¹

X. Evidentiary value

Though FIR is an important and valuable document, it is not a substantive or primary piece of evidence. It can only be used to corroborate the statement of the maker under Section 157 of the Evidence Act 1872 or to contradict it under Section 145 of the Evidence Act, 1872. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses.⁴² It is well settled that the first information report is not substantive evidence, but can only be used to corroborate or contradict the evidence of the informant given in the Court or to impeach his credit.⁴³ Once registration of FIR is proved and the same is accepted by Court on record then Court cannot ignore evidentiary value of FIR merely because the informant turned hostile.⁴⁴

³⁸*State of Madhya Pradesh v Chhukki Lal*, AIR 2019 SC 381.

³⁹*Manju Datta v State of West Bengal*, 2018 Cri.L.J 57.

⁴⁰*Shivaji Genu Mohite v State of Maharashtra*, AIR 1973SC55.

⁴¹*Bhajan Singh v State of Punjab*, AIR 1978 SC 1759.

⁴²*Nisara Ali v State of UP*, AIR 1957 SC 366.

⁴³*State of Bombay v Rusy Mistry*, AIR 1960 SC 391.

⁴⁴*Bable v State of Chattishgarh*, 2013(1) SCC (cri)417

XI. Quashing FIR

Though the High Court cannot interfere in recording FIR on the ground of jurisdictional matter by exercising inherent powers, it is not a bar to interfere where such report *prima facie* does not disclose an offence as alleged.⁴⁵ Similarly, if the proceedings are initiated *malafide* or in violation of Art. 21 of the Constitution, the High Court can quash them under Section 482 of the Cr.P.C or by issue a writ of mandamus restraining the police from misusing the powers.⁴⁶ A person cannot be harassed twice or made accused in two FIRs in respect of the same matter or connected matters hence a second FIR would be quashed on petition under Sec.482 Cr.P.C.⁴⁷

The High Court, while exercising the inherent powers cannot quash the first information report and particularly, when Police had not even commenced investigation and no proceedings are pending in any court.⁴⁸ It ought to be realised that inherent powers do not confer any arbitrary jurisdiction on the High Court to act accordingly to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in rarest of rare cases.⁴⁹

XII. Conclusion

Lack of adequate man power, working of long hours, heavy workload and interface of political, NGO, media, and other influential persons in process are major concerns in non-registering FIRs. Filling up the vacancies in the police department, separation of crime investigation wing from that of law and order wing would give them time for investigation work and thereby, facilitate them to take up additional work caused by free and fair registration of crime. Increasing the presence of women in police force is hoped to improve behavioural patterns of police functionaries towards complainants. Actually, categorisation of offences are based on i) powers of police to arrest with or without warrant (Cognizable and Non-Cognizable), ii) Right to bail to the arrested person (Bailable and Non-bailable) and iii) Trial procedure (Summons Case and Warrant Case). But Justice Malimath Committee⁵⁰ suggested removing the distinction between cognizable and non-cognizable offences. Instead,

⁴⁵ *Madhavrao Scindia v Shambhajirao*, AIR 1988 SC 709.

⁴⁶ *S Paswan v State of Bihar*, AIR 1988 SC 709.

⁴⁷ *Niranjan Sharma v State of Jharkhand*, 2006 CrLJ 301.

⁴⁸ *Kurukshetra University v State of Haryana*, AIR 1977 SC 2229.

⁴⁹ *Raisa Begum v State of U.P.*, 1995 CrLJ1067(All-DB).

⁵⁰ Committee was established in the year 2000 and report was submitted in 2002.

the Committee recommended classifying offences as social welfare code, correctional code, criminal code, and economic and other offences code. It is better to remove the categorization as suggested by the Malimath Committee on the basis of rights of police to arrest (*i.e.* Cognizable and Non-Cognizable offence) and give powers to the police right to arrest as well as right to register FIR if there is reasonable suspicion on the basis of information about the commission of offence.

PROTECTION OF PROJECT DISPLACED PERSONS: INTERNATIONAL FRAMEWORK

*Prakash Kanive**

I. Introduction

It has been estimated that world's population would increase from present 7 billion to 8.5 billion by 2030 and to 9.7 billion by 2050.¹ This is because of high fertility rate in underdeveloped countries and globally increasing life expectancy. This increase in population and measures for eradication of poverty would mount pressure on the demand for food, housing requirement and other incidental facilities. This will result in expansion of urban centers and large projects for power generation, infrastructure development, mining and real estate etc. Paradoxically though these large projects are launched as solution to the problems, they themselves created severe social impacts particularly displacement and rehabilitation of large number of evicted people.

There is enough evidence to show that majority of project displaced persons are reduced to less well-being. Nevertheless, the large projects are justified as inevitable in the national interest but it is evident that apportionment of development costs and benefits are not justifiable, because one cross section enjoys the benefits of development, whereas other section bears its pains. In countries like USA and UK, it seems impoverishment of affected community is seen as inevitable collateral damage for execution of development project in the national interest. The World Bank, an international institution which works for ending extreme poverty, has acknowledged that there are shortcomings in the rehabilitation and resettlement scheme provided for the project displaced persons and it has taken the necessary measures to improve it². The real challenge before the international organizations and the institution is, how to introduce large development project in poor countries with rapidly increasing population, while providing sufficient livelihoods to the local communities. Need of the hour is to ensure the support to the victims of development projects, in other words it is called as operation of social licensing. Otherwise these projects shall have to face stiff

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¹ Eddie Smith and Frank Vancly, 'The Social Framework for Projects: a conceptual but practical model to assist in assessing, planning and managing social impact of projects', *Impact Assessment and Project Appraisal*, Vol. 35, No.1, 2017, p. 1.

² Press Release; 'World Bank acknowledges shortcomings in resettlement projects announces action plan to fix problems'. Available at <www.worldbank.org> Last visited on April 24, 2018.

opposition or resistance. Eventually that will be detrimental to developmental goal that everybody is trying to achieve. Several strategies and standard practice frameworks have been developed in international law to remove this paradox. Most important among them is sustainable livelihood approach. Besides, there are international conventions on protection of human rights, where while protecting the human rights of any other persons, the human rights of project displaced is also protected. On the other hand, every country framed its own domestic law based on international framework and UN Guidelines to protect the human rights of project displaced persons at the domestic level. In this article attempt has been made to trace the relevant provisions of various conventions relating to the rights of project affected and displaced persons and how they have been given effect by incorporating in to domestic laws.

II. International Conventions, principles and practices for protection of human rights of project displaced persons: Right to an adequate standard of living

International Conventions and the Standard International Practices imposes obligations on the states to take necessary measures to refrain from forced eviction, in protecting the rights and interests of displaced persons as a matter of human rights protection, with reference to right to an adequate standard of living. It includes giving effect to the provisions of;

a. The Universal Declaration of Human Rights 1948:

It is stated in its preamble that, the United Nations has reaffirmed their faith in fundamental human rights in the dignity and worth of the human beings, in the equal rights of men and women and determine to promote social progress and better standards of life in large freedoms³. Thus it may be noted here that the United Nations Human Rights Declaration is not addressed to nations in general or member states of the United Nations but to each and every individual. Hence, the developer may be state, corporate house or an individual, all owe responsibility towards human rights protection of project displaced and projected affected persons.⁴ Substance of the same is incorporated in Article 21 of the Indian Constitution as right to live with human dignity and standards.

³ The Universal Declaration of Human Rights, Preamble.

⁴*Id*, Formal proclamation of UN General Assembly stated at the end of the UDHR Preamble.

- b. The International Covenant of Economic Social and Cultural Rights, 1966:
The Covenant recognizes the rights of every member of human family regarding his inherent dignity, and of equal and inalienable rights as it forms the foundation of freedom, justice and peace in the world. It makes every individual of member nation to realize that each individual is having duty towards fellow individuals and the community to which he belongs, for striving hard to promote and observance of all recognized rights⁵. Covenant makes every state party to recognize the rights of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure realization of this right, recognition to this effect, the essential importance of national co-operation based on free consent⁶. Substance of this aspect is found in preamble and Article 21 and 19 of the Indian Constitution.
- c. The Convention on Rights of Child, 1989 :
It has been signed and ratified by India in the year 1992. As stated in the convention the state parties shall recognize the rights of every child to a standard of living for the child's physical, mental, spiritual moral and social development. Further it is provided that state parties subjected to national condition and means shall take appropriate measures to assist the parents and other responsible for the child, to provide assistance particularly with regard to nutrition, clothing and housing⁷. Provisions relating to protection of child's rights are found in part II and III of the constitution.
- d. The Convention on the Elimination of all forms of Discrimination Against Women, 1979:
The Convention provides that state parties shall take all appropriate measures to modify the social and cultural pattern of behavior of men and women with the view to eliminate customary practices of superiority or inferiority of either of the sexes or stereotyped roles of men and women, and further it provides that family education includes a proper understanding between men and women in upbringing of children as it is the interest of the children is the primordial condition in all

⁵ The International Covenant on Economic, Social and Cultural Rights, Preamble p.1.

⁶ *Id*, Art. 11 (1).

⁷ Art. 27(1), (2) The Convention on Rights of the Child, 1989.

cases⁸. Essence of this right relating to women has been considered for rehabilitation and resettlement both in Constitution and legislative provisions.

- e. The International Convention on the Elimination of all forms of Racial Discrimination, 1969:

It provides that state parties shall condemn racial discrimination and take immediate measures to eliminate racial discrimination in all forms and to promote understanding among all races, persons; groups of persons and to ensure all public authorities and public institutions, national and local shall act in conformity with these obligations⁹. In conformity with Fundamental obligations laid down in Art. 2 of this convention state parties shall take such measures to prohibit and eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, nationality or ethnic origin to equality before the law notably in the enjoyment of economic social and cultural rights in particular.¹⁰ Safeguards against discrimination are well attended under Article 15 of Indian Constitution and Sections 41 and 42 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (RFCTLARR Act). The Act permits the land acquisition only as demonstrable last resort. Nevertheless, in violation of national and international conventions tribal land in schedule area has been acquired for development projects such as Narmada project, The Thri project and Silent Valley project in India.

- f. The International Convention on Civil and Political Rights, 1966:

Further in conformity with the unique human rights approach, it is provided in this convention that, no one can arbitrarily and unlawfully interfere with the privacy, family, home and correspondence of other individual and he has got the right to get legal protection against such arbitrary attack.¹¹ It is reflected under Art. 21 and constitutional remedies under the Indian Constitution.

⁸ Art. 5. The Convention on Elimination of all Forms of Discrimination against Women, 1979.

⁹ Art. 2. The International Convention on Elimination of all Forms of Racial Discrimination,

¹⁰ *Id.*, Art. 5(c).

¹¹ Art. 17. The International Convention on Civil and Political Rights. It is a multilateral treaty adopted by UN General Assembly on 16 Dec. 1966 and same has been ratified by India on 10 April. 1979.

g. The ILO Convention, 1989 (No. 169) :

Reference is made in ILO convention¹² that indigenous and tribal people shall not be removed from their occupied land unless, relocation of these people is considered as necessary under an exceptional measure and such relocation can happen with their free and informed consent. If at all free consent could not be obtained land acquisition can be made as per the procedure established in national laws and regulations which generally includes public hearing by providing an effective opportunity to represent their community in the process of hearing. Further it is provided that the object for which this land is acquired ceases to exist they are entitled to get back their traditional lands. Whenever it is not possible to return the land, through appropriate procedure they shall be provided with equal quality land with the appropriate legal status equivalent to earlier occupied land, they shall be provided with all the reasonable facilities to meet the present needs and future development. If they desire to get compensation in money or kind they shall be so compensated for the loss of land and otherwise loss and injury. Unfortunately, in all most all projects sites in India indigenous and tribal were found but in none of the projects they were given any privilege of separate hearing or informed consent while acquiring their land.

The U.N. guidelines on development-based eviction and displacement address the human rights implications of displaced persons both in rural and urban centers. These guidelines represent a further development of the comprehensive human rights guidelines on development-based displacement¹³. They are all based on International Human Rights Law and are consistent with Covenant on Economic Social and Cultural Rights which “recognizes the rights of every one to an adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living conditions”¹⁴.

¹² Art 16, The ILO Convention No. 169.

¹³ ‘Guiding Principles on Internal Displacement E/CN.4/1998/53/Add.2.dated 11 Feb. 1998’ Available at <<http://www.brookings.edu/fp/projects/idp/resources/GPsEng.pdf>.> Last visited on 5 March. 2019.

¹⁴ Art. 11, The Covenant on Economic Social and Cultural Rights.

The present UN guidelines having due regard to “definition of the practice of ‘forced eviction’ in consonance with the international standards on human rights applies to acts and omissions involving the coerced displacement of persons from their homes, lands and common property resources that were occupied or depend upon, and restricting the ability of an those persons to reside or work in a particular dwelling, residence or location without the support of appropriate legal provision. However, the provisions of forced eviction do not apply to evictions carried out both in accordance with the law and in conformity with the provision of international human rights treaties¹⁵.

Under international law the concept of forced eviction gains significance as it is often linked to the absence of legally secured tenor which constitutes an essential element of the right to adequate housing and livelihood. Forced evictions results into common consequences as in the case of arbitrary displacement like population transfer, mass expulsion, mass exodus, ethnic cleansing and other practices involving the coerced and involuntary displacement of people from their house, lands and communities¹⁶.

III. UN guiding principles on Internal Displacement

Arbitrary or forced eviction results in gross violation of human rights which are recognized in international law which includes the basic human rights like right to earn livelihood, live in wholesome environment, adequate housing, food, water, health, education, work, security of person, security of the house, freedom from cruel and inhuman treatment and restriction on movement. Thus eviction is permitted only in exceptional circumstances and strictly in compliance with law and procedure prescribed in international human rights and humanitarian law. Forced eviction affects the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women children, minorities and indigenous peoples, as it increases social conflicts¹⁷.

As per the present UN guidelines, evictions for development activities includes any evictions conducted for serving ‘public purpose’ such as large dams, large scale industrial or energy projects or mining and other extraction industries; and land acquisition for urban

¹⁵ ‘Task Force (2012) Guidelines for Mitigating Harm and Suffering in situation of forced eviction, concept note’, available at <<http://www.globalprotectioncluster.org>> Last visited on 21 June. 2019.

¹⁶The UNHRC Special Rapporteur on Right to adequate housing, paragraph. 4.

¹⁷ The UN Guiding Principles on Internal Displacement E/CN.4 /1998/53/Add.2.dated 11 Feb. 1998’ Available at <<http://www.brookings.edu/fp/projects/idp/resources/GPsEng.pdf>> Last visited on 5 March. 2019.

renewals, slum upgradation, housing renovation, city beautification or other land use programs, major international business or sporting events and ostensibly, environmental purposes. Such activities also include those supported by international development assistance. Eviction may take place without regard for existing human rights and humanitarian standards, like right to livelihood, right to wholesome environment, right to housing etc., due to environmental distraction or degradation, public disturbances, natural or human induced disasters, tension, internal or international or mixed conflicts and public emergencies domestic violence and certain cultural and traditional practices. The present set of guidelines does not explicitly address these kinds of displacements but it requires additional set of guidelines drawing attention to the basic principles and guidelines relating to Rights to Remedy and Reparation for victims of gross violations of International Humanitarian Law and Guiding principles on Internal Displacement

The present guidelines on development based eviction recognize various context of development and provide guidelines to states to adopt such measures in order to prevent eviction in violation of international human rights law and standards which do not permit 'forced evictions'. The main object of those guidelines are to help out the states and its agencies to frame and develop their own laws, procedure and policies to prevent forced eviction and to provide effective remedies to those whose human rights are violated at the domestic level.

IV. Conclusion

It has been a challenge indeed for the developing and underdeveloped countries to execute the development projects with the minimum detriment to the interest of community in the project site. All the stake holders of development project should support the project displaced community by ensuring the operation of social licensing. Displaced persons should have their say in execution of projects and sharing its benefit. As a matter of social justice, displaced persons of having sacrificed their traditional home and source of livelihood entitled to get their due share of benefit in the form of rehabilitation and resettlement. On the other hand, international organisations and institutions also trying hard to provide a sound framework of law to save the interest of displaced persons. They created many hard laws in the form of conventions, covenants, treaties, pact and UN Security Council Resolutions. Government of India has become a party to it by ratifying them. Constitution of India also

empowers the parliament to make necessary legislative arrangements for implementing the international obligations.¹⁸

After review of international frameworks, standards and practices in the direction of mitigation of impact of development project on internally displaced persons, it is evident that there are no exclusive international conventions to protect the rights of internally displaced persons. However, all the international conventions basically framed for protection of human rights incidentally made the reference and addressed the issues relating to project displaced. Now it is the obligation on the part of government of India to give effect to those obligations created under various conventions by enacting vibrant and sensitive legislations regarding the protection of project displaced persons at the domestic level.

¹⁸ Art. 253, The Constitution of India.

‘COLLECTIVE’ ABUSE OF DOMINANCE AND ITS INCLUSION UNDER SECTION 4: THE NEED OF THE HOUR?

*Sarthak Mishra**

*Kritika Singh***

I. Introduction

The phrase ‘Collective Dominance’ can be defined as “a group of independent or unrelated entities sharing an economic link, collectively enjoying a ‘dominant position’ in the market and thereby disrupt the competition in the market by virtue of such dominant position”.¹

The origin of collective dominance may be traced to the European Competition law where this concept has been premised on the fact that “the companies need not necessarily be dominant individually, but may be so collectively”.² In European Union (EU) this concept has been dealt under Article 102 of the Treaty on the Functioning of the European Union (TFEU), wherein, it has been incorporated through the phrase “any abuse by one or more undertakings”.³

Such an approach is in sheer contrast when compared to the Indian regime which is based upon ‘single entity dominance’ and ‘group dominance’. In simpler terms, the market share of every entity is considered independently, which then is further analysed to determine, the contravention of the relevant provisions.⁴ Due to this particular reason, a joint dominance per se which cannot be identified by our Indian antitrust regulators as individually these entities are not dominant in the market.

Here we realise the Indian competition regime is rather restricted in its approach as compared to its EU counterpart. As would be explained in the forthcoming analysis of the Commission orders, the Commission primarily relies on the individual market share of an enterprise to determine whether the said enterprise enjoys a position of dominance in the

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¹ Ronny Gjendemsjo, Erling J. Hjelmeng, Lars Sørsgard, *Abuse of Collective Dominance: The Need for New Approach*, 36(3) WORLD COMP. 355 (2013).

² *Id*, at 356.

³ Art. 102, The Treaty on the Functioning of European Union, 2009.

⁴ The Competition Act, 2002, Sec.4(1).

relevant market. This regressive approach often results in decision, where the entities' actions even after being prima facie abusive, fails to trigger section 4 of the Act.

II. Collective dominance: Concept and perspectives

a. The Competition Act, 2002 *vis-à-vis* collective dominance

Since the competition regime in India is largely modelled on European Union Law and US antitrust regime, India introduced the Competition (Amendment) Bill, 2012 in its attempt to include Collective Dominance within the purview of Section 4. However, the same failed as the proposed bill failed to garner the required numbers.

The proposed Bill was a verbatim portrayal of the existing provision, with an additional inclusion of certain phrases which gave an operational effect to the inclusion 'collective dominance' under Section 4. The same has been reiterated below for reference.

“No enterprise or group, jointly or singly, shall abuse its dominant position”.

Section 4 in its current state merely provides that: “No enterprise or group shall abuse its dominant position.”⁵ There is nothing in the definition of the enterprise,⁶ or in the provisions of Section 4, to suggest that two or more independent entities can be clubbed together to constitute collective dominance.

Section 4 of the Act prohibits the abuse of dominance by any enterprise or group⁷ of enterprises. For proving abuse of dominance liability under Section 4 of the Competition Act, 2002 following must be proved:

⁵ The Competition Act, 2002, Sec4(1): “No enterprise or group shall abuse its dominant position.] (2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].- (a) directly or indirectly, imposes unfair or discriminatory-(i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service”.

⁶ The Competition Act, 2002, Sec.2(h), “enterprise means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.”.

⁷ ‘Group’ under the Act read with the notification of the Ministry of corporate affairs dated 4th march 2011, has been defined to mean two or more enterprises which, directly or indirectly are in a position to exercise 50 percent or more of the voting rights in the other enterprise or appoint more than 50 percent of the members of the board of directors in the other enterprise or control the management or affairs of the other enterprise.

- 1) Defining the Relevant Market
- 2) Assessing the dominant position in the relevant market
- 3) Establishing Abuse of Dominant Position

b. Relevant market

The dominance of an enterprise is always determined concerning a relevant market. The concept of the ‘relevant market’⁸ is critical to competition law, which is bifurcated to ‘relevant product market’⁹ and ‘relevant geographical market’¹⁰ under the Act.

Delineation of the ‘relevant market’ plays a definitive role in establishing the dominant position of an enterprise. This is indeed a murky situation, as a narrow delineation of the relevant market, may result in unjust determination of an enterprise as a dominant entity. The same holds true for the opposite situation as well, where an extreme broad delineation of the relevant market might erroneously dilute the market share of an entity.

A classic example can be that of DLF Limited in *Belair Owners’ Association v. DLF Limited*.¹¹ The Commission had narrowly construed the relevant market and observed that to be as the ‘market for high-end residential apartments in the city of Gurgaon’. Resultantly, both the scope of the product as well the geographical limits of the relevant market became very constricted. The effect of the same was observed in the Commission’s order, where DLF was held to be a dominant player.

The question of collective dominance arises when individual market players who as independent entities may not be dominant but are dominant collectively both in horizontal and vertical markets. This becomes significant in the situations where proving any anti-competitive agreement,¹² or cartelization,¹³ fails, as in such cases, these entities can be booked for abuse of dominance collectively. Further, this also, changes the economic dynamics of the

⁸ The Competition Act, 2002, Sec.2(r), “Relevant Market means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”.

⁹ The Competition Act, 2002, Sec.2(t), “Relevant Product Market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”.

¹⁰ The Competition Act, 2002, Sec.2(s), “Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas”.

¹¹ *Belair Owners’ Association v. DLF Limited*, Case No: 19/2010.

¹² The Competition Act, 2002, Sec.3(1).

¹³ The Competition Act, 2002, Sec.3(3).

market, as the combined market power of the entities are analysed in such cases, rather than their individual market power.

c. Interpretation of ‘*implied collective dominance*’ under the Competition Act, 2002

The authors are of the opinion that a step towards incorporating Collective dominance will not only broaden the scope of applicability of Section 4, but additionally, it will also be a huge boost to the Commission’s endeavour to take stricter actions against the abusive conduct of the parties, even when the parties do not enjoy a dominant position individually, but do so collectively.

However, there is an ongoing debate with regards to the nature of the collective dominance and consequently, its inclusion within the purview of Section 4. On one hand, there have been concerns regarding the overlapping nature of ‘collective dominance’ with that of ‘horizontal agreements’. The advocates of the school of thought arguing against inclusion of an express clause concerning ‘collective dominance’ believe that market players using their cumulative market power, to dominate the market, certainly points towards a collusion among such parties. Such a situation therefore squarely falls within the ambit of ‘horizontal anti-competitive agreements’, which have been already adequately provided for within the Act.¹⁴ Thus, according to them, specific inclusion of ‘collective dominance’ is not required, as the same has already been implicitly covered within Sec. 3(3) of the Competition Act.

Further, according to the proponents of the above school of thought, the concept of collective dominance is necessarily of an European origin, hence, given the developing status of the Indian economy, coupled with that of the nascent nature of Indian Competition regime, a direct extrapolation of the concept of collective dominance would severely undermine the economic situation of the country.

Similar sentiments has been resonated in the report submitted by the Competition Law Review Committee (*hereinafter the Committee*).¹⁵ The Committee in its report has duly noted that, “the existence of two strong players in the market may be indicative of competition between them, unless they have agreed not to compete, further, the successful utilization of

¹⁴ The Competition Act, 2002, Sec.3(3).

¹⁵MR. Injeti Srinivas, *Report of Competition Law Review Committee* (2019).

collective dominance has been rare”.¹⁶The arguments are not without a reasonable basis, as catena of orders of the Commission,¹⁷ as well as judicial pronouncements by the Hon’ble Supreme Court of India have observed that Section 4 in its current form does not envision the inclusion of ‘collective dominance’ within its ambit.¹⁸

On the other hand, the protagonist for inclusion of collective dominance within Section 4 have tendered their arguments based upon the interpretation of the term ‘enterprise’ as provided under Section 4 of the Act.

It is of general understanding that, the General Clauses Act (hereinafter ‘General Clauses’), can be used as an aid for interpreting any term or phrase provided/mentioned in any statute.¹⁹General Clauses provides that, “words in the singular shall include the plural, and vice versa”.²⁰Therefore, the words ‘enterprise’ and ‘group’ as mentioned in Section 4 of the Indian Competition Act, 2002 can be interpreted to bring within its ambit ‘enterprises’ and ‘groups’ also.

Hence, it would be wrong to suggest that the Act does not include collective dominance within its ambit, as the concept of ‘collective dominance’ is already included within its scope and therefore any amendment prying for a specific inclusion of the same would rather be a redundant exercise.

The authors are of the opinion that, given the importance of a competitive atmosphere in a developing economy any event of abuse of dominance (whether individual, group or collective) has far reaching consequences and hence the parties involved in such practice should not be unpunished.

Further, it is an undeniable fact that collective dominance as a practice has severe and long-term consequences on the consumers, other market players and ultimately on the overall economic environment of the country. These effects may range from reduced bargaining

¹⁶MR. Injeti Srinivas *Report of Competition Law Review Committee*, (2019) at.25.

¹⁷*Builders’ Association of India v. Cement Manufacturers’ Association*, Case 29/2010; *Royal Energy Ltd. V.. IOCL*, 2012 CompLR 563 (CCI); *Shri Sonam Sharma vs. Apple, Vodafone, Airtel &Ors.*, 2013 Comp LR 0346 (CCI); *Fast Track Call Cabs Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, Case Nos. 06/2015 & 74/2015; *Meru Travel Solutions Pvt. Ltd. v. M/S ANI Technologies Pvt. Ltd. and Ors.*, Case Nos. 25-27/2017; *Mr. Arjun v. Viacom 18 and Ors.*, Case 57/2017; *Samir Agarwal v. ANI Technologies Pvt. Ltd. and Ors.*, Case No. 37/2018 ; *Sun Electronics Pvt. Ltd. v. ElecTek Solutions Pvt. Ltd.*, Case No. 02/2019.

¹⁸*Rajasthan Cylinders and Containers Ltd. v. Union of India*, 2019 (4) SCJ 247; *Excel Crop Care Ltd. v. Competition Commission of India*, (2017) 8 SCC 47.

¹⁹*Chief Inspector of Mines v. Karam Chand Thapar*, AIR 1961 SC 838.

²⁰ The General Clauses Act, 1897, Sec.13(2).

power in the hands of the consumers and degrading quality of goods and services to foreclosure of the market to the new players and elimination of the existing competition.

Thus, the above discussed effects necessarily warrant that the Commission be empowered to handle such situations of abuse of dominant position, rooted in the collective dominance of unrelated enterprises. Hence, the initiation point for the same is to first recognise the principle of ‘collective dominance’ and including the same with the existing framework of Sec. 4.

Further, the authors would also argue that, the argument of the implicit presence of collective dominance under Sec. 3(3) is necessarily a flawed one. Such a stance is based upon two grounds.

First, the applicability scope of Sec. 3(3) and Sec.4 is entirely different as both the provisions. As evident from the nature of the relevant provisions in question, the standard of proof and investigation procedure and assessment thereof vary significantly for the allegations under Sec.3(3) and 4. Thus, it would be a fallacious assumption to make that any act of collective dominance would be automatically covered under the provisions of Sec. 3(3). Rather, a more reasonable assumption that should be made in such cases would be consider harmonious existence of both Sec. 3(3) (collusion regarding a horizontal) as well as Sec. 4 (collective dominance).

Second, there has been no logical explanation provided with respect to the non-inclusion of collective dominance within Sec. 4, however, a plausible explanation may be derived from the legal maxim ‘*lexspecialis derogate legigenerali*’ meaning special law repeals general law. The special law in the above context would be the Competition Act, whereas, the general law would be that of General Clauses Act. Consequently, if the Competition Act defines the term ‘*group*’ as enterprises being controlled by a common management, then the same under no circumstance, be interpreted as ‘unrelated entities’ by the Commission.

Thus, in our opinion the inclusion of collective dominance via an amendment cannot be termed a ‘redundant exercise’.

III. Need and relevance of collective dominance under the Competition Act, 2002

The very need for collective dominance was highlighted in the dissenting opinion of the DTH Case,²¹ where the informant argued that each of the DTH operators was individually dominant in the relevant market and had abused its dominant position. This contention was rejected by the Commission, observing that “Every single player in any relevant market cannot be said to possess such dominance.... individually, none of the DTH operators has a dominant position in terms of Explanation (a) to section 4”.²²

The Commission, however, observed in this case that “the concept of dominance does centre on the fact of considerable market power that can be exercised only by a single enterprise or a small set of market players”.²³ It is interesting to note here that though Competition authorities had repealed the Monopolistic and Restrictive Trade Practices Act, 1969(MRTP) to Competition Act, 2002 with the aim that market share should not be the only decisive proof or evidence for dominance but unfortunately we see Commission still relying on market share and size of the enterprise as the key factor in dominance cases, particularly at the prima facie stage.

In the recent Meru order,²⁴ the COMPAT has specifically brought out the fact that dominant position under the Act means a ‘position of strength’ but it “does not say that this position of strength necessarily has to come out of a market share in statistical terms”. The Tribunal, therefore, urged the Commission to consider the question of dominance based on the overall picture of the radio taxi service market, including its funding status, global developments, network expansion strategies and associated discounts.

Further, in the Fast track Case,²⁵ the Commission held that Competition Act does not allow for more than one dominant player in the market under Section 4 of the Act. Also in the case of Niraj Malhotra,²⁶ the decision by Commission holding that the pre-payment charges levied on retail home loans by banks are neither anti-competitive nor amount to an abuse of

²¹*Consumer Online Foundation v. Tata Sky Ltd & Ors*, Case No. 2/2009, (Dissenting Order).

²²*Consumer Online Foundation v. Tata Sky Ltd & Ors*, Case No. 2/2009, p 19.

²³*Id.*

²⁴*Meru Travels Solutions Private Limited v. Competition Commission of India*, Appeal No.31/2016.

²⁵*Fast Track Call Cabs Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, Case Nos. 06/2015 & 74/2015.

²⁶*Shri Neeraj Malhotra v. Deutsche Post Bank Home Finance Limited & Ors.*, Case No. 05/2009.

dominant position because individually these banks and home loan financing corporations were not dominant in the relevant market of the retail home loan market.

In the dissenting opinion the learned Member of Commission in the aforementioned case observed as follows:

- (i) Before the meeting of IBA, there was no consensus amongst the banks for levying PPP;
- (ii) Before the meeting of IBA, there existed no policy guidelines of banks and HFCs nor was there any uniform practice for levying PPP;
- (iii) In the meeting of IBA, a concerted decision to adopt a common approach was arrived at by the banks for the first time. Thus, the meeting of members of IBA can be treated as a meeting of minds of the members for taking a concerted action against the home loan borrowers who opt to prepay the loan.

The dissenting opinion by members of Commission in the above case quoted that “to solve the problem to identify whether the banks were dominant or not we would require Collective dominance in our act as according to the market share the banks individually are not dominant.”²⁷

Commission also in the case of *Sanjeev Rao vs. Andhra Pradesh Hire Purchase Association*,²⁸ Commission admitted its failure to penalise parties because of non-recognition of collective dominance under the competition act and accepted that the Parliament must pass the Competition Amendment Bill, 2012 at the earliest to recognise the concept of collective dominance under the Competition Act. The same has been reiterated in cases like *Royal Energy Ltd. vs. IOCL*,²⁹ and *Shri Sonam Sharma vs. Apple, &Ors.*³⁰

IV. Inclusion of collective dominance under Sec. 4 – an urgent necessity?

The authors believe that in the current economic slowdown and where we see a number of mergers are being held only to dominate a particular market, for healthy competition to and consumer welfare to survive and also so that there is no elimination and depletion of

²⁷*Shri Neeraj Malhotra v. Deutsche Post Bank Home Finance Limited &Ors.*, Case No. 05/2009 (Dissenting Order).

²⁸*Sanjeev Rao v. Andhra Pradesh Hire Purchase Association*, Case No. 49/ 2012, ¶ 16.

²⁹*Royal Energy Ltd. v. IOCL*, 2012CompLR 563 (CCI).

³⁰*Shri Sonam Sharma v. Apple, Vodafone, Airtel &Ors.*, 2013 CompLR 0346 (CCI).

competitors from the market due to collective dominance by group of independent enterprises, it is indeed the need of the hour.

Collective Dominance can have horrendous repercussions they being:

- a) Putting consumer at low bargaining power
- b) Lesser options for consumers to choose from
- c) No option for consumers but to buy goods and services on the terms and conditions of such dominant players
- d) Barrier to entry for competing firms
- e) Paralysis the fair competition in the market

Hence looking at these repercussions it has become of paramount importance to add collective dominance under the scheme of Section 4 of the Competition Act, 2002.

V. Conclusion

The regime of Competition Law is a regime that is earmarked by the principles of econometrics and market forces. It is due to the involvement of such principles, that Competition Law stands at a different pedestal when compared with any other laws. Hence, the general norms otherwise applicable to all the other legal regimes are often found to be falling short, when looked from the perspective of a law having an economic basis, rather than a legal basis. It is this understanding that needs to be ingrained within the thought process of the legislature as well as the regulator. It is essential and rather necessary to understand that, it is extremely difficult to provide for a straitjacket classification of the activities being carried out by the market players and the same act may have facets of 'anti-competitive agreements' as well 'abuse of dominance'. The reluctance of the Legislature and the Commission for the inclusion 'collective dominance' on the pretext of the same having extensive similarity with the offence of 'horizontal agreements amounting to cartel' although cannot be said to be without basis, however, at the same time, it is also undeniable that such an approach is merely hampering the ambit and scope of the Act.

As discussed in the previous segments, experts have argued about the existing similarity between collective dominance and cartel, makes the entire exercise of including the former a redundant. However, one specific factor that needs to be considered here is the 'standard of proof'. Cartels, being included within Section 3(3) are made subject to the per se approach, consequently, the threshold of standard of proof applicable to such cases is significantly

higher. Further, cartels often have covert agreements, which can be extremely difficult to prove. Therefore, in such cases, resort can be taken to the '*collective dominance*' principle, for holding the contravening players responsible within the Act, which would be irrespective of the individual market power being exercised by such players.

The authors would make a final comment that, inclusion of '*collective dominance*' would not be amounting to an attempt of subverting the current legal structure that is in existence. Rather, it should be considered as an extension of the existing principles to ensure better legal tools at the disposal of the Commission to ensure fair competition in the market.

SETTLEMENT OF SPOUSAL PROPERTY: THE GOAN WAY

Pearl Monteiro*

I. Introduction

“Property is surely a right of mankind as real as liberty”¹ The concept of property is as ancient as time itself. Wars have been fought and blood has been shed over property. Right from biblical time’s property has been a bone of contention between people, even brothers. The infamous prodigal son said to his father, 'Father, give me the share of the estate that falls to me' So he divided his wealth between them.² Henry Maine declared, “Private property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community”.³ Aristotle said, “property may be a means to the end of good life of the citizens”⁴.

Thus the general understanding of property, is that it is something that is owned by person or by a group, and the owner of property has certain rights over it. The legal regime created the idea of ownership. ⁵The basic postulate being the exclusive control of an individual over some ‘thing’, encompassing the owner’s right to consume, sell, rent, mortgage, transfer, exchange or destroy their property, and/or to exclude others from doing these things. Property has economic, socio-political, and legal connotations. Property has even played an important role in marriage. Historically gifts are given and received at the time of weddings. This role of property in marriage, like an unruly horse got out of control and finally had to be muzzled by the Dowry Prohibition Act, 1961⁶.

“A good marriage is one where each partner secretly suspects that they got the better deal”

Even a marriage made in heaven has to subsist on this material earth and unless the loving couple finds its self on the Blue Lagoon, sooner or later the cooing and billing takes a turn for words on money. It is a given that many individuals and couples stress over money. The fights begin and may even ultimately lead to a bitterly contested divorce. The couple

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¹ John Adams *The Works of John Adams*. Edited by Charles Francis Adams. 10 vols. Boston: Little, Brown & Co., 1850—56.

¹*Id.*

² The Bible, Luke 15:12 New Revised Standard Version.

³ Kenneth E. Bock *Comparison of Histories: The Contribution of Henry Maine* Comparative Studies in Society and History Vol. 16, No. 2 (, pp. 232-262 Cambridge University Press Mar., 1974). Available at <<https://www.jstor.org/stable/178313>> accessed on 5 March 2020.

⁴ Sen, N.B. *Wit Wisdom of Socrates, Plato, Aristotle*, New Book society of India, New Delhi, 1967.

⁵ Saxena, Poonam Pradhan, *Property Law* Nagpur: Lexis Nexis Butterworths Wadhwa) 2006.

⁶ Act No. 28 of 1961.

now finds itself turning to the law, looking for solutions to the marital tangle, to divide and to acquire instead of the have and to hold!

“Women constitute half the world's population, perform nearly two-thirds of its work hours, receive one-tenth of the world's income and own less than one-hundredth of the world's property.” - United Nations report, 1980⁷

This article is an attempt to state the law dealing with spousal property.⁸ The law in India is woefully inadequate. “Matrimonial laws singularly lack in the provisions relating to the settlement of properties of the spouses and the matrimonial home.”⁹ A smattering of provisions have been culled as follows:

II. The Indian Divorce Act, 1869¹⁰

This archaic legislation is based on the then English law, it applies to Indian Christians. It provides, on a decree of divorce or judicial separation the court has power to make such orders as to the settlement of wife's, who is guilty of adultery, property as it thinks fit and reasonable for the benefit of husband or children of marriage or both¹¹. The Act does not specify any limit as to the property which may be so settled. The Act appears to be penal and misogynistic in nature as it specifically makes such provision only in respect of a wife who is guilty of adultery. There is no analogous provision if the husband is guilty of adultery. In case the husband has recovered some damages from the co respondent, the court may direct that the whole or any part of the damages be settled for the benefit of the children or as maintenance for the wife.¹² After a decree for divorce or nullity of marriage the court may make orders for application of property for the benefit for the husband, wife & children as necessary¹³

A wife who has been deserted by her husband may make a petition to the court for an order to protect her property from her husband or his creditors, or any person claiming under him.¹⁴ The Court may pass an order stating the fact of desertion, the modus of operation and the consequential separation of the property of the wife. She is deemed to be a spinster with

⁷Rand Lindsly's Quotations: The Quotation Page available at <<http://www.quotationspage.com/quote/23214.html>> accessed on 5 March 2020.

⁸ ownership regime of property acquired by one or both spouses before or during their marriage Duhaime's Law Dictionary available at <<http://www.duhaime.org/LegalDictionary/M/MaritalProperty.aspx>> accessed on 5 March 2020.

⁹ Dr Paras Diwan Law of Marriage and Divorce, 7th ed Universal Law Publication 2002

¹⁰ Act No. 4 of 1869.

¹¹*Id.*, at Sec. 39 (omitted by Act 51 of 2001).

¹²*Id.*, at Para 3.

¹³*Id.*, at Sec.40.

¹⁴*Id.*, at Sec. 27.

regard to all her property as well as all her personal liabilities.¹⁵ In case the husband or his creditors forcibly seize the wife's property after such order is passed, they are liable for the same. As far as the person and property of the wife are concerned this order has the same effect as judicial separation. The husband or his creditors may apply to the Court for any variance in such order. The Court has the power to change such order, on an application, and may oblige in its discretion. Any person who acts on the strength of such order, and has any contractual dealings with the wife is protected. Such dealings will be given effect even if subsequently the Court varies its initial order.¹⁶ Similarly, as the status of the wife is that of a spinster, the husband is not liable for any contracts that she might have entered into, during the validity of the order. However, if the husband has been asked to provide maintenance, then he is liable to pay for the wife's necessities.¹⁷ In such a suit for maintenance the maximum amount allowed may not exceed one fifth of the husband's net income.¹⁸ In *Annurita Vohra v. Sandeep*, it was held:-

“In other words the court must first arrive at the net disposable income of the Husband or the dominant earning spouse. If the other spouse is also working these earnings must be kept in mind. This would constitute the Family Resource Cake which would then be cut up and distributed amongst the members of the family. The apportionment of the cake must be in consonance with the financial requirements of the family members, which is exactly what happens when the spouses are one homogeneous unit. Ms. Geeta Luthra, learned counsel for the Respondent, had fervently contended that normally 1/5th of the disposable income is allowed to the Wife. She has not shown any authority or precedent for this proposition and the only source or foundation for it may be traceable to Section 36 of the Indian Divorce Act, 1869. This archaic statute mercifully does not apply to the parties before the Court, and is a vestige of a bygone era where the wife/woman was considered inferior to the husband as somewhat akin to his chattels. The law has advanced appreciably, and for the better. In the face of Legislatures reluctant to bring about any change over fifty years ago the Courts held that the deserted wife was entitled to an equal division of matrimonial assets. I would be extremely loath to restrict maintenance to 1/5th of the Husband's income where this would be insufficient for the Wife to live in a manner commensurate with her Husband's status or similar to the lifestyle enjoyed by her before the marital severance. In my view, a satisfactory approach would be to divide the Family Resource Cake in two portions to the

¹⁵*Id.*, at Sec. 24 & Sec. 25.

¹⁶*Id.*, at Sec. 60 & Sec. 61.

¹⁷*Id.*, at First proviso to Sec. 25.

¹⁸*Id.*, at Sec. 36.

Husband since he has to incur extra expenses in the course of making his earning, and one share each to other members.”¹⁹

This case was quoted with approval by the Calcutta High Court in *Suhan Basu v. Indrita Basu*²⁰, and, in *Sri Subrata Roy v. Smt. Sushrita Roy*²¹, by the Delhi High Court in *Pawan Kumar v. Rekha*²². However, in *Nathan Francis Anand Kumar v Angelina Selvarani Francis*, the applicable legislation was S. 36 of the Indian Divorce Act, and the High Court of Madras held its provisions to be mandatory.²³

III. The Parsi Marriage and Divorce Act, 1936²⁴

This enactment applies to Zoroastrians.²⁵ The legislation provides in case the wife is guilty of adultery the court has power to settle ½ her property for the benefit of the children.²⁶ This penal and male centric provision is similar to that under the Indian Divorce Act, only here, the legislator has provided a limitation on the quantum of property which may be settled to mitigate the grievance of the innocent husband if the wife is guilty of adultery. Thus under this Act, a parsi woman guilty of adultery may be forced by the court to part with half her property. The Court may then settle this property on the children. The court may make any provisions for the equitable settlement of the joint properties of both spouses, which were presented to them at marriage.²⁷ Thus under this Act, as well there is no legislative provision made for the individual properties owned or properties acquired individually after marriage. The character of the property is retained and it does not become joint property by mere factum of the marriage of its owner.

The Act permits the Court to provide for maintenance²⁸ for either party, on an application made, such order may be permanent or temporary and may be secured by means

¹⁹ (2004) 110 DLT 546

²⁰ LNIND 2020 CAL 296; C.O. 2203 of 2018 Calcutta High Court (Appellate Side) on 7 January, 2020

²¹ LNIND 2020 CAL 345; C.O. 4267 of 2019 Calcutta High Court (Appellate Side) on 8 January, 2020

²² LNIND 2019 DEL 3243; CrI.M.C.No.4347/2019 & CrI. M.A. 34796/2019 Delhi High Court on 11 October, 2019

²³ LNINDORD 2019 MAD 10591; CrI.RC.No.1017 of 2013 Madras High Court on 16 August, 2019

²⁴ Act 3 of 1936.

²⁵ Zoroastrians are the followers of Zoroaster, they are also called parsis and fire worshipers. They believe in the power of good over evil. Originally from Persia, they migrated to India to avoid persecution. They form a miniscule proportion of the total population, in 2014, their population was approximately 68,000. One reason for their diminishing numbers is that they do not believe in intermarriage. In fact a consequence of interfaith marriage is excommunication. They are mostly urban dwellers, settled in Gujarat and Maharashtra.

²⁶ Sec. 50 Parsi Marriage and Divorce Act.

²⁷ *Id.*, at Sec. 42.

²⁸ Sustenance; support; assistance; aid. The furnishing by one person to another, for his support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife. Black's Law Dictionary

of some income or property of the defendant. Such order may be varied according to the changed circumstances. A peculiar aspect of this legislation, is that such order may be revoked if the applicant ceases to be 'chaste'. Either spouse may claim maintenance, another limitation being it cannot exceed more than 1/5th of the other party's income²⁹In *Pirojshah Bharucha v. Hirabai Bharucha*, the wife by settlement, during divorce proceedings, agreed not to claim maintenance from the husband, later being unable to maintain herself, she approached the Bombay High Court. The question arising on this application is an important one, namely, whether the wife after the dissolution of marriage can give up her claim to future alimony³⁰. The Court looking at the circumstances of this case held, the consent order is not a bar to the present application by the wife for fixing her alimony³¹ under Section 40 of the Parsi Marriage and Divorce Act of 1936.³²

IV. The Hindu Marriage Act, 1955³³

The statute applies³⁴ to Hindus³⁵, to any person who is a Hindu by religion³⁶ in any of its forms or developments, including a Virashaiva³⁷, a Lingayat³⁸ or a follower of the Brahmo,³⁹Prarthana⁴⁰ or Arya Samaj⁴¹, Sikhs,⁴² Jains⁴³ and Buddhists.⁴⁴ It enables the court

²⁹Sec. 40.

³⁰ Comes from Latin "alimonia" meaning sustenance, and means, therefore, the sustenance or support of the wife by her divorced husband and stems from the common-law right of the wife to support by her husband. Allowances which husband or wife by court order pays other spouse for maintenance while they are separated, or after they are divorced (permanent alimony), or temporarily, pending a suit for divorce (pendente lite). Generally, it is restricted to money unless otherwise authorized by statute. But it may be an allowance out of the spouse's estate. Black's law dictionary

³¹ Alimony may be paid to the spouse in lump sum as cash or any other kind of payment method, as well as in form of property after the divorce is finalised. Unlike alimony, maintenance is only paid in form of cash or any other kind of payment method and the husband cannot pay maintenance to wife in form of property. Sometimes the words are used interchangeably.

³² (1945) 47 BOMLR 514

³³ Act No 25 of 1955.

³⁴*Id*, atSec. 2

³⁵ The term "Hindu" has been defined in the Constitution under Article 25(2)(b) Explanation II as "Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly"

³⁶*Tilkayat Shri Govindlalji v. The State Of Rajasthan* AIR 1963 SC 1638 the existence of differing and conflicting tenets of Hinduism has been cited to judicially appropriate the right to determine essential practices.

³⁷Worshippers of Shiva in his manifestation of linga.

³⁸Worship Shiva as the only deity and wear linga.

³⁹ Brahmo Samaj, (Sanskrit: "Society of Brahma") theistic movement within Hinduism, founded in Calcutta [now Kolkata] in 1828 by Ram Mohun Roy.

⁴⁰PrarthanaSamaj or "Prayer Society" is as a movement for religious and social reform in Bombay, founded by Dadoba Pandurang with an aim to make people believe in and worship only one God.

⁴¹ Arya Samaj ("Noble Society") is a monotheistic Indian Hindu reform movement that promotes values and practices based on the belief in the infallible authority of the Vedas. The samaj was founded by the sannyasi (ascetic) Dayanand Saraswati. Members of the Arya Samaj believe in one God and reject idol worship

to make any provisions for the equitable settlement of the joint properties of both spouses, which were presented to them at marriage.⁴⁵ There is no provision in the Act dealing with the properties acquired by the spouses after marriage, nor with the status of their individual properties after marriage. Thus the character of the property owned by either spouse before or acquired after marriage does not depend on the Act. Alimony & maintenance can be claimed by either party⁴⁶ The party may apply to the Court for maintenance, the Court may pass any order it deems fit for the purpose. Provision may be made in the order of maintenance for its enforcement. Order may be varied due to any change in circumstances. This maintenance comes to an end, naturally, with remarriage of the party seeking maintenance. It is unfortunate that no provision is mentioned casting any obligation for providing any maintenance till such application is made. There are some conflicting decisions as to whether wife can recover her jewelry under S. 27. the Allahabad High Court in *Kanta Prasad v. Omvati*, held that the court has inherent power to make arrangement in respect of the individual property also.⁴⁷ However, the same Court in *Satya Pal Sethi v. SushilaSethi*, has held that wife cannot maintain a claim for the recovery of ornaments under section 27 in proceedings for divorce filed by the husband. Since ornaments were the exclusive property of the wife as stridhan, if she desires to recover the same from her husband, she will have to file a separate suit.

The Madhya Pradesh High Court has held in *Manish Nema v. Sandhya Nema*, where marriage has been declared null and void wife can file an application under section 27 to claim her ornaments back.⁴⁸ The court can entertain such application in its inherent jurisdiction. In *Sangeeta Balkrishna Kadam v. Balkrishna Ramchandra Kadam*, it has been held that the court can grant relief in regard to the other properties under section 151 of the Code of Civil Procedure, 1908.⁴⁹

⁴² Sikhism is the fourth largest religion in India contributing 1.7% of the population and has existed for 550 years, beginning with the birth of its founder Guru Nanak Dev. The Sikhs are predominantly located in Punjab, but also in many other parts of India.

⁴³ Jainism, ancient Indian religion teaching a path to spiritual purity and enlightenment through disciplined nonviolence (ahimsa, literally “noninjury”) to all living creatures.

⁴⁴ Buddhism encompasses a variety of traditions, beliefs and spiritual practices largely based on original teachings attributed to the Buddha and resulting interpreted philosophies.

⁴⁵ Sec.27 Hindu Marriage Act.

⁴⁶ *Id.*, at Sec.25.

⁴⁷ AIR 1972 All 153.

⁴⁸ AIR 2009 MP 108.

⁴⁹ AIR 2005 Bom 262.

In *Krishna v. Padma*⁵⁰, the Mysore High Court held that property, which is not presented to spouses at or about the time of marriage, is outside the purview of this section. The Delhi High Court in *Subhash Lata v. V.K. Khanna* has held that under section 27, the court has no power to adjudicate about stridhan or any other property exclusively belonging to one of the parties to the marriage.⁵¹ In *Braj Kishore v. Rekha*, in the peculiar circumstances of the case, the Patna High Court held that ornaments kept in a bank locker in the joint names of husband and wife and could be operated by both should be presumed to belong to both and the court passed an order under section 27 restraining the husband from removing the same during the pendency of the proceedings.⁵² Thus in the absence of legislative provision concretely providing for joint ownership of property, the learned high courts have given conflicting interpretations of the existing provision, depending on the facts of the individual case. There is no certainty and security from the point of view of the wife, who in most cases owns the jewelry and is often the aggrieved and weaker party.

Recent decisions show the various Courts taking cautious note of and restrained upholding of any settlement agreement that the parties might have entered into, in *Palanivel v Savitha* the Madras High Court observed that the parties had voluntarily and equitably settled all of the issues between them, including all parenting arrangements, child and spousal support, property division, responsibility for debts and attorney fees and costs, set aside order of the Additional District Judge, and upheld the settlement agreement.⁵³ A similar decision was of the Kerala high court in *Rosna v. Muhammed* where in the parties had divorced and remarried but were joint owners of a property due to a settlement agreement.⁵⁴ In *Geeta Satish Gokarna v. Satish Shankarrao Gokarna*, parties in consent terms agreed not to initiate any proceeding against each other and claim alimony/maintenance in future, the Bombay High Court - held, both the clauses were against public policy and would not disentitle wife from claiming maintenance.⁵⁵

Settlement agreements between prospective spouses or spouses in a loving relationship are few and far in between in India. In a vast majority of cases marriages are arranged, dowry clandestinely given, and no thought meted to future, specially property matters.

⁵⁰ AIR 1968 Mys 226.

⁵¹ AIR 1992 Del 14.

⁵² AIR 1992 Pat 173.

⁵³ LNIND 2019 Mad 2681; CMSA NO.20 OF 2016 Madras High Court on 25 April, 2019.

⁵⁴ LNIND 2019 Ker 13181; MAT Appeal No. 465 of 2013 Kerala High Court on 11 April 2019.

⁵⁵ 2004(3) ALL MR 229.

V. The Muslim Women (Protection of Rights on Divorce] Act, 1986

Muslims were originally governed by the Shariat. Marriage is regarded as a contract and divorce is permitted. Divorce may be at the instance of husband, wife or by mutual consent. Traditionally men were permitted to divorce their wives by means of the simple triple talaq, which is now not permitted in India after *ShayaraBano v. Union of India*.⁵⁶ Muslim women had limited right to divorce her husband, the right was expanded by Dissolution of Muslim Marriage Act, 1939. Maintenance of muslim wives was traditionally only during the period of iddat, that is approximately, three months, following the divorce, or duration of pregnancy, if she was expecting. In addition, she was entitled to her mahr, that is sum of money payable in consideration of marriage⁵⁷. She had no other claim under the traditional law. *Mohd. Ahmed Khan v. Shah Bano Begum*, recognized and guaranteed the right of any wife, including muslim, to claim maintenance from husband under S. 125 of the Criminal Procedure Code, if she was unable to maintain herself.⁵⁸ Unfortunately, the effect of this decision was somewhat diluted by Muslim Women (Protection of Rights on Divorce] Act, 1986. This Act gave muslim couples the option to be governed by it or by the Criminal Procedure Code.⁵⁹ Under this Act, the obligation of the husband to maintain divorced wife, is only during the period of iddat⁶⁰, she is entitled to a further maintenance for two years only if she has minor children,⁶¹ after such period she is to be maintained by her children and in case of inability of children, by parents, each parent may be called to maintain the woman, if such woman has neither children nor parents, her potential heirs, in the proportion in which they stand to inherit from her. if she has property and by the Wakf Board,⁶² if she is indigent⁶³. Muslim divorced wives have no right to property on divorce under Dissolution of Muslim Marriage Act, 1939. However S.3 (d) of the Muslim Women (Protection of Rights on Divorce] Act, 1986 emphasized the payment of mahr at the time of divorce and introduced

⁵⁶ (2017) 9 SCC 1.

⁵⁷ Dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law.

⁵⁸ 1985 (1) SCALE 767.

⁵⁹ Sec. 5.

⁶⁰ "iddat period" means, in the case of a divorced woman,

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;

⁶¹ *Id.*, at Sec. 3.

⁶² An inalienable charitable endowment under Islamic law. It typically involves donating a building, plot of land or other assets for Muslim religious or charitable purposes with no intention of reclaiming the assets. A charitable trust may hold the donated assets.

⁶³ *Id.*, at S. 4.

the return of property that was given to her before, at or after the marriage.⁶⁴ The Court is empowered to fix a reasonable amount and fair amount as maintenance and also to ensure the payment of mehr and return of the properties. The legislation casts a minimal obligation on the husband and is more onerous on the relatives of the wife or leaves her to the mercy of charity. The other legislations cast an obligation on husband to maintain divorced wife, unable to maintain herself, till she remarries.

Law in United States of America⁶⁵

It may be noted that some of the States in the United States of America have similar provisions. In the USA, Marital property is a legal jargon that describes property acquired during the course of a valid marriage. Separate property is property that an individual owned before a marriage, as are third-party gifts or inheritances accrued during marriage. Prenuptial or a postnuptial agreement may be used to exclude certain property from marital property regime.

Most states are common law property states. The property acquired by one spouse is owned individually by that person under the common law system. However, it is open to the spouses to acquire property jointly listing both parties as owners.

Under common law, when one spouse dies the property devolves according to a will, if any. However, in spite of a will the devolution also depends on the type of ownership. If the property is owned in "joint tenancy with the right of survivorship" or "tenancy by the entirety," the property devolves on the survivor. But, if the property regime was "tenancy in common", then the property devolves as per will.

Nine States are all community property states.⁶⁶ These nine states follow the law that all assets acquired during a marriage is community property. Alaska has an "opt-in" community property law that allows such a division of property, providing both parties agree.

In community property states marital property is owned by both spouses equally. This marital property includes earnings, all property bought with those earnings, and all debts

⁶⁴ Muslim Women (Protection of Rights on Divorce] Act, 1986 S. 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.—(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

⁶⁵ Michael Davie *Matrimonial Property in English and American Conflict of Laws* The International and Comparative Law Quarterly Cambridge University Press Vol. 42, No. 4 Oct., 1993, available at <<https://www.jstor.org/stable/761134>>accessed on 5 March 2020.

⁶⁶ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

accrued during the marriage. Community property starts at the marriage and ends when the couple physically separates with the aim of dissolving the marriage.

VI. Marital property and divorce

On divorce the property may be divided either by the spouses amicably or by court or on the basis of a pre nuptial agreement if any.

Law in England and Wales⁶⁷

The Matrimonial Causes Act, 1973 (MCA 1973) governs divorce in England and Wales. The MCA 1973 was introduced to consolidate various laws relating to matrimonial proceedings, maintenance, legitimacy, validity of marriage and British nationality. PART II of the Act provides for financial relief for parties to marriage and children of family. The provisions enable the Court to provide for settlement of the ‘guilty’ spouse property on the ‘innocent’ one and on the children in a similar manner to the Indian law.

Law in Jamaica⁶⁸

The Property (Rights Of Spouses) Act, 2004 is a legislation from Jamaica which came into effect in 2006. The Jamaican legislation provides for that property be shared equally between spouses on divorce or irreconcilable separation. Even the house is divided equally between the spouses. On the death of one spouse the other inherits the house. However this “equal” rule will not apply in case of a prenuptial agreement or marriage settlement.

The above provisions deal with settlement of spousal property on divorce. But given the local mind set and taboo dealing with divorce, an unhappy couple may resort to settling property matters between themselves without going through the ordeal of a divorce. The Civil Code of Goa has elaborate provisions regulating the proprietary relations between a man and his wife both during the subsistence of a valid marriage and further on divorce.

⁶⁷ Michael Davie *Matrimonial Property in English and American Conflict of Laws* The International and Comparative Law Quarterly Vol. 42, No. 4 (Oct., 1993), Cambridge University Press available at <<https://www.jstor.org/stable/761134>> accessed on 5 March 2020.

⁶⁸ The Matrimonial Causes Act available at <<https://moj.gov.jm/sites/default/files/laws/Matrimonial%20Causes%20Act.pdf>> accessed on 3 March 2020.

Civil Code in Goa⁶⁹

The Civil Code of Goa⁷⁰, is a Portuguese inherited legislation, applicable to all goans. After liberation, Parliament of India continued the applicability of the laws in force, until amended or repealed.⁷¹ Unlike the rest of India, all goans irrespective of religion are governed by this code which applies 'uniformly'. Under the Code, marriage is defined as a perpetual contract made between two persons of different sex with the purpose of legitimately constituting a family.⁷² The Code also states that the spouses, before the solemnization of marriage, within the bounds of law, may stipulate, whatever they think fit in respect of their properties.⁷³ The immoveable properties, both common and exclusive, cannot be charged or alienated in any manner without the consent and agreement of both spouses.⁷⁴

VII. Property relations

a. The power of husband to administer the couple's assets⁷⁵

The husband shall administer all the couple's assets⁷⁶. Thus the husband has the freedom to manage the joint property on behalf of both spouses. Generally, except for alienation of the property, in day to day management, or mismanagement, as the case may be, the consent of the wife is not required. Even if the property is going to waste, the wife cannot act without the legal parameters. The wife is responsible for their administration only when the husband is absent or unable to do so.⁷⁷ The husband can freely dispose the couple's movable assets⁷⁸.

The husband will not administer the couple's assets and the wife will:

- i. If the assets have been given or left to her subject to a condition that she administer them⁷⁹
- ii. If the husband consents to her administration⁸⁰

⁶⁹ Prof. Doutor Pires de Lima & Prof. Doutor Joao de Matos Antunes Vatela *Fundamental Concepts of Civil Law* (Mirandela) (1997).

⁷⁰ Civil code of 1867.

⁷¹ Goa, Daman and Diu (Administration) Act, 1962.

⁷² *Id.*, at Art 1056.

⁷³ *Id.*, at Art 1096.

⁷⁴ *Id.*, at Art 1119.

⁷⁵ *Id.*, at Art 1189.

⁷⁶ *Id.*, at Art 1117.

⁷⁷ *Id.*

⁷⁸ *Id.*, at Art 1118.

⁷⁹ *Id.*, at Art 1109.

- iii. If the husband is absent⁸¹
- iv. If the husband is unable to act⁸²

b. The incapacity of married women in property matters⁸³

The wife may not except in cases which are specially authorized by law, acquire or dispose of assets or contract obligations, without the husband's permission.⁸⁴ However in the exceptional cases when the husband permits or is declared incompetent by court, the wife is the administrator of the couple's assets. It may be noted that this incapacity does not apply to household management.⁸⁵ The wife has other disabilities too, she is incapable of accepting conditional⁸⁶ or onerous⁸⁷ gifts⁸⁸ without husband's permission.⁸⁹

The Code allows the wife "pin money"⁹⁰, pin money is a kind of allowance made by a man for his wife's personal expenses,⁹¹ the wife may reserve for herself part of the income arising from her property as pin money and dispose it as she pleases. Again if there is absolute separation of property⁹², she may freely dispose her movable assets that are not part of the community of assets and are not invested for interest, together with 1/3 of her income⁹³. She may also encumber these assets.⁹⁴

As mentioned earlier, this incapacity can be overcome with the husband's permission. The wife may also apply to a judge for an order dispensing with her husband's consent if it is unreasonably withheld.⁹⁵ If she does any of the act for which she lacks the necessary

⁸⁰*Id.*, at Art 1194.

⁸¹*Id.*, at Art 1117.

⁸²*Id.*

⁸³*Id.*, at Art 1193.

⁸⁴*Id.*, at Art 1116.

⁸⁵*Id.*, at Art 39 of decree no 1.

⁸⁶ A gift or asset transfer with some condition attached. The condition in some way usually benefits the original owner.

⁸⁷ Onerous means "burdened with obligation". Obligation here means debt, interest etc on the property.

⁸⁸ A voluntary transfer of property or of a property interest from one individual to another, made gratuitously to the recipient.

⁸⁹*Id.*, at Art 1478.

⁹⁰*Id.*, at Art 1104.

⁹¹ Money allowed by a man to his wife to spend for her own personal comforts. When pin money is given to, but not spent by the wife, on his death it belongs to his estate. It has been conjectured that the term pin money, has been applied to signify the provision for a married woman, because anciently there was a tax laid for providing the English queen with pins.

⁹² Matrimonial regime.

⁹³*Id.*, at Art 1128.

⁹⁴*Id.*, at Art 1127.

⁹⁵*Id.*, at Art 1193.

capacity, without producing the necessary authorization the act is affected by a relative nullity.⁹⁶

c. Matrimonial property regimes⁹⁷

A property regime is the institution that regulates property relations between spouses and between them and third parties. The regime is a direct consequence of law or of an ante nuptial agreement. The ante nuptial agreement must be by notorial deed⁹⁸ or is null and void.

Ante nuptial agreements are governed by two principles:

- i. Principle of liberty⁹⁹
- ii. Principle of immutability¹⁰⁰

The basic premise being, that the contract of marriage and its antecedents, like any other contract, is freely and voluntarily entered into without any force or coercion. Immutability implies that such regime cannot be revoked or altered after the marriage. Ante nuptial agreements are irrevocable and may not be altered by further agreement subsequent to the marriage. The four standard regimes are:

- i. The regime of community of property (regime de comunhão geral de bens)¹⁰¹
- ii. The regime of simple community of acquired property (regime de simples comunhão de adquiridos)¹⁰²
- iii. The regime of absolute separation of property (regime de separação absoluta de bens)¹⁰³
- iv. Dower (regime dotal)¹⁰⁴

⁹⁶*Id*, at Art 1190.

⁹⁷ Civil Code .

⁹⁸*Id*, at Art 1097.

⁹⁹*Id*, at Art 1096.

¹⁰⁰*Id*, at Art 1105.

¹⁰¹*Id*, at Art 1108.

¹⁰²*Id*, at Art 1131.

¹⁰³*Id*, at Art 1125.

¹⁰⁴*Id*, at Sub division IV.

d. The regime of community of property¹⁰⁵

The regime of community of property applies by default if no other is specified¹⁰⁶. There are a few exceptions, Catholic marriages celebrated in:

- a. articulo mortis¹⁰⁷
- b. when child birth is imminent or
- c. when celebration of marriage was authorized by appropriate bishop¹⁰⁸

is contracted subject to the regime of absolute separation of property.¹⁰⁹ Thus a marriage, which might be performed due to special reasons such as, on the deathbed or when the bride is *enciente*¹¹⁰ or an inter faith marriage or marriage with a cousin, the default regime is separation of assets.

So also in civil marriages celebrated in extremis the regime that applies by default is the regime of absolute separation of property when any of the spouses dies before the marriage is ratified¹¹¹ Spouses can even adopt a mixed regime by combining features of two or more standard regimes.¹¹²

General community of property is characterized by community between the spouses of all their present and future assets other than those excluded by law¹¹³. The spouses are jointly liable for all debts subsequent to the marriage; these debts should be contracted with each other's consent.¹¹⁴ Disposal of the assets is possible only with consent of both.¹¹⁵ Community of property comes to an end by dissolution of marriage or separation, in accordance with the law.¹¹⁶ When division of assets takes place, each spouse has the right to receive his or her private property and half the joint assets¹¹⁷

¹⁰⁵*Id*, at Articles 1130 to 1133.

¹⁰⁶*Id*, at Art 1098.

¹⁰⁷ at the point of death.

¹⁰⁸ In the jurisprudence of the canon law of the Catholic Church, a dispensation is the exemption from the immediate obligation of law in certain cases. Matrimonial dispensations can be either to allow a marriage in the first place, or to dissolve one. Examples, when parties are related by affinity and consanguinity; in favour of a contemplated marriage or to legitimize one already contracted;

¹⁰⁹ Art 18 of decree no.30:615 of 25th July 1940.

¹¹⁰ unwed pregnant woman

¹¹¹ Art 312 of the Civil Registry Code .

¹¹²*Id*, at Art 1096.

¹¹³*Id*, at Art 1108.

¹¹⁴*Id*, at Art 1113.

¹¹⁵*Id*, at Art 1119.

¹¹⁶*Id*, at Art 1121.

¹¹⁷*Id*, at Art 1123.

e. The regime of simple community of acquired property

This regime applies in two circumstances:

- i. When expressly agreed by the engaged couple.¹¹⁸
- ii. When imposed by law¹¹⁹

In this regime the law indicates which assets are deemed to be joint and which are deemed to be private.¹²⁰ The assets belonging to either spouse at the date of the celebration of the marriage or which are inherited there after, or are acquired other than for valuable consideration or pursuant to any private right are private¹²¹. These assets should be enumerated in an inventory in the ante nuptial contract or in a notorial deed or they will be considered as acquired assets.¹²²

All assets acquired for valuable consideration after the celebration of the marriage are joint assets.¹²³ The same principles that apply to the regime of community of property in relation to title to and the possession and administration of the couple's assets, also apply in this regime. Regime comes to an end by dissolution of marriage or separation, in accordance with the law.¹²⁴

f. The regime of absolute separation of property¹²⁵

The law applies the regime of absolute separation of property in three cases:

- i. When the spouses expressly agree to this regime¹²⁶
- ii. When the law makes this regime applicable by default and the parties have not expressly excluded it¹²⁷
- iii. When the law makes this regime mandatory¹²⁸.

¹¹⁸ *Id*, at Art 1100.

¹¹⁹ Art 53 to 56 of Decree no 1.

¹²⁰ *Id*, at Art 1131.

¹²¹ *Id*, at Art 1130.

¹²² *Id*, at Art 1131.

¹²³ *Id*, at Art 1125.

¹²⁴ *Id*, at Art 1132.

¹²⁵ *Id*, at Articles 1125 to 1129.

¹²⁶ *Id*, at Art 1101.

¹²⁷ *Id*.

¹²⁸ Art. 1063 guardian or descendent marrying ward during minority.

This regime is characterized by a complete separation of the spouses' assets with each of them, in principle, retaining the power of free disposal.¹²⁹ However, the wife may not dispose off her immovable assets or capital invested for interest, or 2/3 of her income, without husband's permission. There is no restriction on the husband's power to dispose his property.¹³⁰ There are no joint assets but some assets may belong simultaneously to both of them and are subject to the rules governing co ownership i.e. this property may be divided

Debts contracted before marriage are the sole liability of the spouse who contracted them.¹³¹ In case of debts contracted after marriage there three possibilities¹³²:

- i. If debts are contracted jointly by both parties, they are payable jointly¹³³
- ii. If the debt is contracted by husband only or by wife with the permission of the husband, the debt is satisfied out of the private property of the spouse who contracted the debt¹³⁴
- iii. If the debt is contracted by wife without the permission of the husband, the debt is satisfied out of her private property which she can freely dispose of ¹³⁵

g. Dower¹³⁶

Dower only applies when expressly stipulated by the engaged couple.¹³⁷ This regime is basically characterized by the existence of property that belongs to the wife which is termed the dote, and is subject to very special rules. The purpose of these rules is to ensure that the dote is preserved throughout the marriage. The immovable assets comprised in the dote cannot be disposed of and cannot be executed against to satisfy debts and are imprescriptible¹³⁸. The restitution of the movable assets to the wife or to her heirs is secured by a guarantee by way of mortgage. Dower can be instituted by the wife herself, for her own benefit, by the husband, by her parents, by her grand parents, or by any third party.¹³⁹ All the parties must sign the same contract.¹⁴⁰

¹²⁹*Id.*, at Art 1127.

¹³⁰*Id.*, at Art 1128.

¹³¹*Id.*, at Art 1110.

¹³²*Id.*, at Art 1113.

¹³³*Id.*

¹³⁴*Id.*, at Art 1114.

¹³⁵*Id.*, at Art 1129(4).

¹³⁶ Sub Division IV.

¹³⁷*Id.*, at Art 1134.

¹³⁸*Id.*, at Art 1149.

¹³⁹*Id.*, at Art 1135.

¹⁴⁰*Id.*

Dote can consist of movable and immovable assets, all the wife's present assets, and those she may inherit (both by will & intestate) in the future.¹⁴¹ Assets acquired by the wife for valuable consideration, after marriage, does not form part of dote.

Once the dote has been institute it may not be altered.¹⁴² If the dote consists of money it shall be converted into immovable property, grazing right deeds, or company shares, or shall be invested for interest, by deed secured by a mortgage, within three months of the marriage.¹⁴³ A dote not so converted shall merge with the community of assets.¹⁴⁴ If the dote consists of movables other than money, the ante nuptial agreement shall state their value.¹⁴⁵ An inventory should be made of the immovable properties in the dote.¹⁴⁶

No disposal of these properties can be made without order of Court and they will be sold at public auction.¹⁴⁷ If any immovable asset is disposed of in breach of these provisions, they may be claimed at any time by the wife even if she agreed to such alienation.¹⁴⁸ The husband is liable to the wife and the third party.¹⁴⁹ The husband may dispose of the movable properties but is liable for their value.¹⁵⁰ A wife has a legal mortgage of the husbands assets to make restitution of the movable assets (both money & kind) included in the dote.¹⁵¹ The assets which a wife acquires and which are not a part of the dote shall belong to the wife exclusively as private assets, but income of these is usually joint.¹⁵² This is known as paraphernalia. The wife has no right to a mortgage in respect of these assets.¹⁵³ The following assets are joint:

- i. Immovable assets that are a part of the dote but are not included in the inventory¹⁵⁴
- ii. Movable assets included in the dote but whose value has not been declared¹⁵⁵
- iii. Money in the dote which is not converted¹⁵⁶

¹⁴¹*Id*, at Art 1136.

¹⁴²*Id*, at Art 1141.

¹⁴³*Id*, at Art 1140.

¹⁴⁴*Id*.

¹⁴⁵*Id*, at Art 1138.

¹⁴⁶*Id*, at Art 1137.

¹⁴⁷*Id*, at Para 3, Art 1149.

¹⁴⁸*Id*, at Art 1150.

¹⁴⁹*Id*, at Art 1151.

¹⁵⁰*Id*, at Art 1152.

¹⁵¹*Id*, at Art 1150.

¹⁵²*Id*, at Art 1153.

¹⁵³*Id*, at Art 1154.

¹⁵⁴*Id*, at Art 1137.

¹⁵⁵*Id*, at Art 1138.

- iv. The private assets of either spouse, if not included in the inventory¹⁵⁷
- v. Income arising from paraphernalia¹⁵⁸
- vi. Income arising from husband's assets¹⁵⁹
- vii. Income arising from dower assets¹⁶⁰
- viii. All assets acquired for valuable consideration after marriage¹⁶¹

It may be noted that the dote may be alienated in the following mitigating circumstances¹⁶²:

- i. With the consent of both spouses to endow and settle the common issues
- ii. For maintenance of the family when same cannot be otherwise provided
- iii. To pay debts of wife under certain circumstances
- iv. For indispensable repairs of other dotal properties
- v. By nature inseparable from non dotal properties
- vi. To substitute with properties of equal or greater value
- vii. In case of acquisition for public utility

Once the marriage is dissolved, the dote shall be returned to the wife or her heirs, together with any assets that belong to her¹⁶³

VIII. Conclusion

M. Venkaiah Naidu , Union Minister of Urban Development, Housing and Urban Poverty stated, "Perhaps, the time has come for us to take a close, hard look at the Goa Family Law and see if it could be emulated in the rest of the country. The Portuguese Civil

¹⁵⁶*Id*, at Art 1140.

¹⁵⁷*Id*, at Art 1137.

¹⁵⁸*Id*, at Art 1153.

¹⁵⁹*Id*, at Art 1155.

¹⁶⁰*Id*, at Art 1153.

¹⁶¹*Id*, at Art 1098.

¹⁶²*Id*, at Art 1149.

¹⁶³*Id*, at Articles 1134 to 1165.

Code of 1867 was continued in Goa after its liberation, and it should be the model for other States. The progressive law provides for equal division of income and property regardless of gender between husband and wife and also between children.”¹⁶⁴

Dr. Paras Diwan, a noted authority writes, “If we want to have a socially just law of divorce it is mandatory that we pay more attention to the aftermath of divorce as that alone can lead to stability of marriage.” He advocates provisions which enable the Court to transfer property from one spouse for the benefit of the children and the other. “Under the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936 there are penal provision for the settlement of the property of the adulterous wife. Apart from this, no matrimonial statute stipulates for the settlement of the property of the parties in favour of the children. Even the provisions relating to maintenance, custody and education of children are inadequate.”¹⁶⁵

A perusal of the available legislations in India, emphasize that the aspect of property relations between spouses is brought before the Courts only when the marriage turns sour. Either the husband has deserted the wife, or neglects to maintain her or the parties are battling matrimonial disputes before the Courts either for judicial separation or divorce. It is the unfortunate event, that cases are won in Court depending very often on the persuasive skills of the lawyers, the party preferring an application for maintenance, is not likely to be in a position to avail the advice of lawyers, unless they charge a minimum fee or are provided under a legal aid scheme. In such a situation her ability to obtain a reasonably good maintenance for herself is doubtful. Also we may note that the laws generally provide for maintenance and do not give her a right in her husband’s property. Immovable property definitely provides more security than a monthly or lumpsum amount of money granted as maintenance.

On the other hand in Goa, the married couple generally acquire a right in each others’ property at the time of marriage. This is a tangible asset which provides a tremendous amount of economic security. The Couple does not depend on any settlement, any application for maintenance and order of Court. The law grants them rights which cannot be altered or abrogated after marriage. The above mentioned provisions have their own infirmities. There is always the danger that a marriage may be entered into solely for the purpose of acquiring a share in the other party’s property. A suitable antidote to this, is the pre nuptial agreement of

¹⁶⁴M. Venkaiah Naidu , Union Minister of Urban Development, Housing and Urban Poverty Alleviation, and Information and Broadcasting available at <<https://www.thehindu.com/opinion/lead/Why-not-a-Common-Civil-Code-for-all/article14491018.ece>> accessed on 6 March 2020.

¹⁶⁵ Dr Paras Diwan Law of Marriage and Divorce, 7th ed Universal Law Publication 2002.

separation of assets, but again, in India where emotions run high, these safe guards are usually not availed of. Another grave defect, it will be noted is the male centric or male biased approach, as generally, the husband is recognized as the administrator of the couple's assets. A truly progressive legislation would create opportunity for both spouses or if push comes to shove, for the more competent one to administer the couple's assets. However it is an old legislation and a beginning and should not be unduly criticized or rejected without due consideration.

As former chief justice of India, Shri Y V Chandrachud said "We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform...But, a beginning has to be made if the Constitution is to have any meaning...it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable."¹⁶⁶

¹⁶⁶*Mohd. Ahmed Khan v. Shah Bano Begum* 1985 SCR (3) 844.

CORPORATE DEBT RESTRUCTURING: TIME TO CARVE OUT

Vivek Narayan*

I. Introduction

Corporate Debt Restructuring (CDR) is not a new concept, but utilisation of the same in India has not been high, as evidenced by its fewer use in some large transactions.¹ Debt is fundamental to the growth of business. Corporate finance requires a balance between debt and equity in company's capital. Individual business determine the size of the debt required to be raised. Investments with large gestations require huge investments, proportionally large debts. Individual lenders will not be willing to lend entire sum due to the inherent risk involved. Consortium lending cropped up as a solution to such problems, where, multiple lenders lend to legacy institutions.

CDR begins when the conch is blown sounding alarm over company's management of finances. The cause for concern could be the result of operational mishaps or financial mismanagement at micro level or economic slowdown at macro level. In these circumstances creditor agrees to renovate the existing debt, and, provides the debtor an opportunity to reinvigorate the business, termed as CDR. The object of such jamboree is to protect the interests of stakeholders involved. The effect, is that the debtor gets an extended line of credit, evading winding up simultaneously. For the economy, it leads to effective re-allocation of capital as businesses get separated into nonviable and viable,² the former would be buried by the process of winding up.

II. The regulatory process

CDR can occur through multiple ways. If the lender and the borrower agree the same can be implemented by changes to the key terms of the loan agreement, termed as 'purely contractual' based on private re-negotiations and informal agreements between the parties. The restructuring can also occur by formal intervention of judicial authorities through insolvency and allied regulations. Finally, the company can utilise the road of winding up to

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¹*In Re Arvind Mills Ltd*, (2002) 111 Comp. Cas. 118 (Guj); *Infrastructure Leasing and Financial Services Ltd. v. B.P.L. Ltd.*, (2015) 189 Comp. Cas. 1 (SC); *The Peerless General Finance and Investment Co. Ltd. v. Essar Oil Limited*, MANU/GJ/0043/2005 (Guj).

² Jennifer Payne, "Debt Restructuring in English Law: Lessons from the US and the Need for Reform", University of Oxford legal Research Paper Series (February 2014), available at <https://ssrn.com/abstract=2321615>.

liquidate the assets and pay of the debts. This article is concerned with the middle path amidst the above approaches, which is provided by chapter XV of the Companies Act 2013 (“the Act”). This hybrid mechanism³ envisages a scheme for entering into compromise between the parties.

The aim of the CDR is to put the company on the right path. This begs for identification of problems which have caused the company to go downhill. Broadly, problems are classified into operational and financial. Operational changes would result into change in the business process. This might also lead to restructuring the business through merger, demerger, slump sale, asset sale, and shutting down a part of company. This is also undertaken to project the viability of company to the creditors. Changes to financial operation involves altering the source of capital, interest and related policies.

III. The trigger: When is a scheme of compromise used?

Commercially, CDR is not undertaken when the company is healthy with adequate cash flows. Yet at this stage it should be noted that Chapter XV of the Act makes no distinction between healthy and sick companies. Thus CDR for companies which are solvent is possible under Section 230-232. The failure of company to pay interest or it's working capital acts as a flagging point. The interested parties i.e. corporate debtor, creditor and prospective lenders if any, negotiate the further course of action. Once the parties have a formal plan and contracts ready, the companies act kicks in.

Section 230 requires that in a scheme of arrangement and compromise the applicant has to disclose that it is for CDR and secured creditors with not less than 75% in value have consented to the same. It also mandates additional safeguards by requiring the submission of valuation reports, compliance statement with respect to Reserve Bank of India (RBI) debt restructuring rules (if it is to be followed), creditor's responsibility statement and auditor's statement confirming liquidity test. The court would call meetings of affected parties. Though creditors are largely affected, interests and rights of members also takes a hit, considering the company is under dire condition. The consent of majority of members or creditors (more than 50%) representing $\frac{3}{4}$ in value has to be obtained. This acts as first hurdle to the creditors. Even if the creditors have consented to the scheme, approval of shareholders

³Varottil, Umakanth, The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects (March 30, 2017). NUS Law Working Paper No. 2017/005. Available at SSRN: <https://ssrn.com/abstract=2943855> or <http://dx.doi.org/10.2139/ssrn.2943855>.

cannot be dispensed with. Further the meetings have to be conducted on the basis of class, which is segregated as per rights and interest shared by the parties.⁴ Indian courts have even held that one member can constitute a separate class. However, Sec. 230(9) provides for dispensing with the meeting of creditors when 90% or more have consented vide affidavit.

After consent, the right to object to the scheme is the next pitfall. This should be taken in the light of discretion provided by Section 231 to modify the scheme. The discretion provides wide scope for judges, who have overridden commercial decisions in the interest of public.⁵ The right to object coupled with the discretionary use of power under Section 231 doesn't guarantee the interested parties that CDR would flow through.

IV. Administrative and sectorial pits: Find me if you can!

The pitfalls don't stop at this. Section 230 also requires that elaborate notice be given to all the members and creditors whose meetings are to be held. Additionally, notices to regulators are also dispatched. Non-compliance with this may prove to be fatal. Multiple regulators have *locus standi* to raise objections, sling shots from them are not inconsequential and have to be anticipated. If the adjudicating authority finds that the scheme has successfully ducked against these, the same is sanctioned. Though the provisions under Section 230 are clear that any member or creditor can make an application for sanctioning of scheme of compromise. In one of the case the National Company Law Tribunal (NCLT) has disallowed the application filed by the member.⁶ This very lack of certainty and time frame within which scheme can be sanctioned makes this a dangerous proposition.

V. Alternative modes: Highway with only speed bumps.

It is also important to consider that the compromise scheme hinges on other economic considerations such as interest rates, liquidity in the market, and supply-demand factors. RBI has issued guidelines for banks which have to be adhered to during Scheme process. This is related to sustainable structuring of stressed assets (S4A) coupled with Joint Forum lending rules and Strategic Debt restructuring rules. This has acted as an alternative mechanism to

⁴ Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge: Cambridge University Press, 2014), at xiii. In *Re Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, (1970) 40 Comp. Cas. 819 (Guj) which is based upon the common law principle of rights and interest of group not being dissimilar.

⁵ *Madura Coats Limited v. Modi Rubber Ltd*, (2016) Comp. Cas. 261 (SC).

⁶ In *Re, Bhaskar silicon Pvt. Ltd*, 2017 SCC Online 11216.

the scheme process, parties have tried to negotiate and settle out of court.⁷ Creditors, through this process obtain equity rights by converting their debt and interest payments. However the limited applicability of RBI framework on banks and financial institutions (mostly NBFC's) excludes others, which is not the case under the scheme process.

The lack of adequate provisions to enforce the rights of creditors paved way for number of reforms from 1990's. This was concerned mainly with empowering banks and other financial institutions to recover.⁸ As a result The Sick Industrial Companies Act of 1985 (SICA), The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBI Act), and The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 was passed. The narrow focus of these legislations in providing redress mechanisms to large players turned out to be a major bump. But the moratorium that could be obtained under SICA and RDDBI Act made them more acceptable in the corporate world.⁹

The presence of a number of these modes were not alternative to each other. In the beginning the courts held that pending litigation under SICA was not a bar to invoke the scheme mechanism.¹⁰ The Bombay High Court had opined that they were not inconsistent with each other¹¹, as SICA was primarily concerned with insolvency ridden companies whereas a scheme was applicable to healthy companies too.¹² This development was short lived as a Division Bench of Bombay High Court in *Ashok Organic Industries Ltd. v Asset Reconstruction Company (India) Limited (ARCIL)*¹³ ruled that SICA would exclude the Companies Act to the extent of inconsistency, as SICA 1985 was meant to be a complete code. This was affirmed by the Supreme Court which held that it was not possible to harmonise provisions of Section 391-394 of Companies Act¹⁴ along with SICA provisions.¹⁵ The ruling is similar in cases of incongruence between Companies Act and RDDBI Act.¹⁶ Application of Companies Act provisions has been restricted terming the general nature of the legislation.

⁷Varrotil, *supra* note 3, at 13.

⁸ Sengupta, Sharma & Thomas, "Evolution of the insolvency framework."

⁹Varrotil, *supra* note 3.

¹⁰*Kotak Mahindra Bank Ltd. v. AAIFR*, (2008) 144 Comp. Cas. 588 (Del).

¹¹*In Re Pharmaceutical Products of India Ltd.*, (2006) 131 Comp. Cas. 747 (Bom).

¹²*National Organic Chemical Industries Ltd. v. Nocil Employees Union*, (2005) 62 SCL 373 (Bom). para 7,8,9.

¹³ (2008) 114 Comp. Cas. 144 (Bom).

¹⁴ Indian Companies Act 1956.

¹⁵*Tata Motors Ltd. v. Pharmaceutical Products of India Ltd*, (2008) 114 Comp. Cas. 178 (SC).

¹⁶*In Re IMP Powers Ltd.*, MANU/MH/1322/2007 (Bom).

On this background, the possible failure of scheme mechanism for CDR could be identified in the BLRC report. The cause has been attributed to the costly and time driven process.¹⁷ The interim report also noted that the scheme can be an effective tool for restructuring whenever informal agreement is reached. “The cause ascribed by the interim report appears to be correlation.” The magnitude in which the scheme process has been used to effect other kinds of restructuring evinces that cost and time have not stopped the parties from using the same. The availability of alternative better solutions in the form of SICA and RBI framework appears to be a better cause for the failure of scheme mechanism in CDR.

VI. IBC: Express with no pitfalls only pit-stops

The enactment of Insolvency and Bankruptcy Code (IBC) has brought about changes in more than 13 statutes, repealing two. Institutional changes that is sought to be achieved by the Act like Insolvency Regulator, Insolvency Resolution Professional, and Informational Utilities are laudatory, as it would provide the necessary support by reducing transaction costs. This overhaul of corporate insolvency process, which is time bound, has bettered the alternative option for the creditors to realise their debts. The trigger for the process is fairly simple where any operational or financial creditor whose debt exceeds one lakh can apply to the court on the event of default. Once the debt is admitted and there exists no dispute as to default, moratorium is invoked to provide an all-round protection, which is glaringly absent in the Companies Act 2013.¹⁸

The control of the entire process is vested with the committee of creditors. The management of the company is placed in the hands of IRP, this provides symmetry of information and accountability of affairs during stressed times. The COC also shall have the authority to approve the plan, requiring 66% of votes in favour of the plan. If no agreement is reached, liquidation is just a one step ahead. NCLT has all the powers to order for liquidation. This power under Section 230 exists with the tribunal, when it deems that the company may not be able to pay its debts, it can exercise the discretion. However under the IBC the liquidation is result of an objective process when (a) COC cannot agree on a resolution plan (b) NCLT rejects the resolution plan (c) COC decides to liquidate the company (d) debtor contravening any of the provision. The right to call for liquidation by creditors acts as a

¹⁷ Ministry of Finance, Government of India, The report of the Bankruptcy Law Reform Committee (November 2015), available at http://finmin.nic.in/reports/BLRCReportVol1_04112015.pdf (hereinafter the “BLRC Final Report”). Interim Report at 78.

¹⁸ Indian Companies Act 1956 had provisions for moratorium albeit discretionary.

trump card. Though the court under a scheme mechanism, can order the same under the auspices of the creditors, yet it is discretionary at the best. The very objective of the IBC was to provide parity to creditors in determining the fate of companies which are debt ridden. Recent amendments prohibiting bids from defaulting promoters fortifies the position of creditors and makes it a creditor-in control process.

VII. Conclusion.

The major deficiency which the scheme process is the debtor-in control mechanism, contrast with creditor-in control as envisaged by IBC. The scheme process also requires classification and cramming down of minority within the class, whereas, IBC applies to all the stakeholders without much procedure. Further the benefit of IBC is available to all the players including operational creditors, obtaining the benefit under Section 230 the act would depend on the bargaining power. The hugely advantageous moratorium is automatically granted under IBC, but the same is not available under scheme. Invoking IBC appears to sound a death knell. The stigma attached¹⁹ with the process locks the company in a whirlpool rendering the financial condition of company to suffocate.²⁰ Yet, absence of requirements such as holding meetings of all affected parties, discretionary approvals, and lack of sectorial objections provides an easier mechanism. The benefits under IBC substantial outweigh the advantage, if any, under the scheme process.

However, a major advantage which the scheme possess over IBC is with respect CDR related to solvent companies. Authors have argued that CDR provisions should be furthered to protect this aspect.²¹ But the provisions of IBC don't explicitly bar "prepacks". These are out of court arrangements, where, the negotiations have taken place before invoking the jurisdiction of the courts, applied during a phase before company becomes insolvent. As seen above parties seeking to enforce the compromise through Companies Act have an easy alternative through IBC. IBC cannot be invoked when there is no default.²² This can be remedied, by providing for applications by solvent companies too. Resultantly, the entire CDR mechanism would be under IBC providing a unified framework for parties. This would

¹⁹ Tracey Evans Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience" (2009) 18 International Insolvency Review 37, at 42.

²⁰ Christian Pilkington, Schemes of Arrangement in Corporate Restructuring (London: Sweet & Maxwell, 2013), at 11-12.

²¹ Varrotil, *Supra* note 3.

²² Insolvency and Bankruptcy Code 2016, Section 6. This provides that an application can only be made on default by corporate debtor, operational and financial creditor.

provide even solvent parties the option of utilising time bound process under the IBC. Getting rid of the age old scheme mechanism though practical, appears difficult due to the emotional attachment for being there for a long time.

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