ISSN 2321-1059

Journal of Legal Studies

International Refereed Legal Journal
U.G.C. Approved SL NO. 5745 Journal No. 42033

Volume 4 **Issue II** **July** **2016**

Published By:
Manavta Samajik Sanstha
Mughalsarai, Chandauli, U.P. India

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MANAVTA SAMAJIK SANSTHA
MUGHALSARAI CHANDAULI U.P.

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Cite this Volume as *JLS* Vol. 4, Issue II, July, 2016

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International Refereed Legal Journal
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Dr. Pradeep Kumar
Executive Editor & Managing Director
Journal of Legal Studies

Law of Social Security for Labour: Judicial Approach

Dr. Raju Majhi [1]

Abstract

The concept of 'Social Security' is based on the ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain risks. Social security is one of the pillars on which the structure of welfare State rests, and it constitutes the hard core of social policy in most countries. It is though social security measures that the State attempts to maintain every citizen at a certain prescribed level below which no one is allowed to fall. It is the security that society furnishes though appropriate organisation, against certain risks to which its members are exposed. Social security system comprises health and unemployment insurance, family allowances, provident funds, pensions and gratuity schemes, and widows' and survivors' allowances. Social Security may refer to the action programs of government intended to promote the welfare of the population though assistance measures guaranteeing access to sufficient resources for food and shelter and to promote health and well-being for the population at large.

Keywords: Social Security, Welfare State, Provident Fund, Gratuity, Compensation, Directive Principles of State Policy, Constitution of India, Employee Insurance, Government.

Introduction

The term 'Social Security' which originated in the United States of America has spread throughout the World. The Labour Government's Social Security Act, 1938 in New Zealand provided the most comprehensive interpretation of Social Security at that time. Although term has been used in many varieties of ways, and so broadly as it sometimes lose any value as a term of precision.[2] "The concept of Social Security is based on the ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain risks."[3] The large gaps existing between the rich and the poor and the unorganized workers and the organized workers have led in several countries to attempts at providing social and economic security to the poor and to the unorganized sectors. Social security is one of the pillars on which the structure of welfare State rests, and it constitutes the hard core of social policy in most

[1] ***Asstt. Professor, Law School, Banaras Hindu University, Varanasi.***

[2] Haber W. Cohen, "*Social Security Programs Problems and Policies*", Richard D. Irvin Inc., Homewood Illinois US. 1960, pp.28-29.

[3] ILO, "*Approach to Social Security*", 1942, p.80.

countries. It is though social security measures that the State attempts to maintain every citizen at a certain prescribed level below which no one is allowed to fall. It is the security that society furnishes though appropriate organisation, against certain risks to which its members are exposed. Social security system comprises health and unemployment insurance, family allowances, provident funds, pensions and gratuity schemes, and widows' and survivors' allowances. Social Security may refer to the action programs of government intended to promote the welfare of the population though assistance measures guaranteeing access to sufficient resources for food and shelter and to promote health and well-being for the population at large.

The Universal Declaration of Human Rights, 1948 has recognised protection of social security as human rights. According to the Declaration that "*every one as a member of the society has the right to social security and is entitled to realization through national efforts and international co-operation and in accordance with the organisation and resources of each state of economic, social and cultural rights indispensable to his personality*".[4] The Declaration further provides that "*everyone has the right to a standard of living adequate for the health, and well being of himself and of his family, including food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood or circumstances beyond his control*".[5]

The role of the International Labour Organisation (ILO) in maintaining standards of social security at the international level has been significant. The Social Security (Minimum Standards) Convention adopted in 1952 embodied universally accepted basic principles and common standards of Social Security. The ILO, through these principles, have highlighted and guarded workers interest throughout the World.

The World Development Report of 1997 states that Social Security is an essential ingredient in the protection, development and full utilization of human resources, and should, therefore be looked upon as an investment both for the development of human resources and human development. [6] A Social Security Scheme is essentially a personal service to cover a person and his dependents, and its success is measured in terms of benefits such as Medical, Sickness, and Compensation in case of disablement as so on. The Report[7] prepared by the ILO for developing countries states that modern social security programs may be regarded as devices to redistribute income within their field and according to their structure, may divest part of the fruits of currents productions for the benefits of insured workers: securing minimum pension for lower paid colleagues; speed and social cost of widowhood and invalidity, and more widely by appropriate tax

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[4] Universal Declaration of the Human Rights 1948, Article 22.
[5] *Ibid*., Article 25.
[6] The World Development Report 1997 p.182, 268, available at *www.undp.org*
[7] Introduction of Social Security, ILO Publication, 1984, p.123.

measures.[8] Social Security Schemes are important from two viewpoints: Firstly, these constitute an important step towards the goal of welfare State. Secondly, they enable workers to become more efficient and thus reduce wastage arising from industrial disputes.[9]

Social security protections appear as a foundation creating rights incorporated and protected as other fundamental human rights. These rights are on sound basis, developed in social security law of various countries on general principles, like universality social justice, territoriality, equitable covering reciprocity, etc adopted according to needs of a particular country, as the public policy on social security depends on the social and economical positions in the particular nation. Every nation progresses with its people and not in isolation, which contribute and pave the way for all round development.

Lack of Social Security impedes industrial productions and also prevents formation of a stable and efficient work force. Social Security measures should not be considered a burden but a wide investment, which pays rich dividends in long term. According to the Report of the National Commission on Labour 1969, "Social Security has become a fact of life and these measures have introduced on element of stability and protection in the midst of the stresses and strains of modern life. It is a major aspect of public policy today and the extent of its prevalence is a measure of the progress made by a country towards the idea of a welfare State".[10]

It is manifestly clear by going though all the definitions that medical care, sickness benefit, unemployment benefit, old age benefit, maternity benefit, survivor's benefit are certain benefits covered by the term social security. Therefore, it becomes the essential duty of a welfare State to make legislations providing social security to the persons who deserve for it. The social security legislation is a part of social welfare legislation, which emerged and was evolved when *laissez faire* did not work well. In addition to above awareness of workers about their rights, progressive labour policies of the State and ILO Conventions[11] and recommendations are certain factors behind these social security legislations. In view of the above factors, the Legislature has enacted some social security legislations like Employees' Compensation Act, 1923; The Employees' State Insurance

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[8] *Ibid.*

[9] Giri V.V., *Labour Problems in Indian Industry*, Himalaya Publishing House, Bombay, 1965, p.248.

[10] Report of the National Commission on Labour, 1969.

[11] Social Security (Minimum Standards) Convention, 1952 defines nine branches in social security (medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, survivor's benefit) and sets minimum standards for these benefits concerning scope of coverage, kinds of benefits, their duration and their qualifying conditions. Other ILO Conventions on social security are: Equality of Treatment (Social Security) Convention, 1962, Maintenance of Social Security Rights Convention, 1982, Medical Care and Sickness Benefit Convention, 1969, Employment Injury Benefits Convention, 1964 and Maternity Protection Convention, 2000.

Act, 1948; The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Maternity Benefit Act, 1961 and Payment of Gratuity Act, 1972. These enactments provide for distinct type of social security benefits in order to meet or combat against a social risk to which employed persons or their dependants are exposed. Judiciary has also played a significant and praiseworthy role which interpreting the provision of these social security legislations. In this article an attempt has been made to ascertain to what extent judiciary has protected the interest of down trodden by way of giving innovating interpretations of these legislations. Therefore, the judicial approach towards the interpretation of these legislations has been highlighted in this paper.

Promotion and Recognition of Social Security Protections in India

Social Security protections schemes have been in existence since the times of immemorial. In Ancient India, there were groups, guilds, joint family and some institutions, which had considered social security as service towards the mankind. The Great King Ashoka and Chandragupta were leading rules who had considered people as their children and had responsibility to serve them better. This was the era of charity, and humanitarian feelings toward social security. Medieval India was the darkest period in development of social security protections. Majority of rulers were engaged in wars and could not take care of social security protections and welfare of people. This was the era of charity, where social security depended upon will and wish of rulers. Rulers, such as Sher Sah Suri and the Great Akbar considered social security protections as an instrument needed for the development and welfare of people. During Modern India, the concept of social security has been transformed from charity or donation and humanitarian efforts to duty of government to protect interests of the unprivileged and down trodden strata of society. In modern times Social Security has been influencing both social and economical policy of the nations.[12]

The Indian Constitution guarantees Social Security protections under Articles 38, 39, 41, 42, 43 and 47.[13] In order to compliance with the objectives enshrined in the Constitution, some social security legislations have been implemented. The earliest of such legislations is the Employee's Compensation Act, 1923, which ensures payment of compensation in case of a personal injury to a workman arising out of and in the course of employment. The Employees State Insurance Act, 1948 provides for medical, sickness, dependents, disablement, and maternity benefits. The Employees Provident Fund & Miscellaneous Provisions Act, 1952 and the Payment of Gratuity Act, 1972 provides for retirement

[12] Giri V.V., *Labour Problems in Indian Industry*, Himalaya Publishing House, Bombay, 1965, p.247.

[13] The Part IV of Indian Constitution provides for various policies to its citizens, with respect to social security. "Article 39-A, right to an adequate means of livelihood, Article 41, right to work, education and public assistance in certain cases, Article 42, just and human condition of worker and maternity relief, Article 43, the State shall endeavor to secure to all workers, agricultures, industrial or otherwise, work, a living wage, condition of work ensuring a decent standard of life, Article 47, Duty to raise the standard of living and improvement of health.

benefits. The Maternity Benefit Act, 1961 provides, to those workers who are not covered under the ESI Act, 1948 for maternity leave and medical facilities before and after the delivery of the child and benefits for family planning.

Constitutional Validity of Social Security

Constitution has been considered as the supreme law of the land. Social security legislations serve as the instruments to achieve the value goals mentioned in Part III and Part IV of the Constitution. There are many instances wherein Constitutional validity of these legislations has been challenged in the Courts from time to time. In *Basant Kumar Sarkar v. Eagle Rolling Mills Ltd.,* [14]section 1(3) of ESI Act, 1948 was challenged before the Supreme Court. This section confers powers upon the Central Government to appoint different dates for operations of different provisions of the Act and also for different States and different parts of any one of the States. Therefore, section 1(3) was contended to be a piece of excessive delegations of powers and therefore, unconstitutional. The Supreme Court held that section 1(3) is a case of conditional legislation not a case of delegated legislation. The Act intends to provide benefits to the industrial employees in case of sickness, maternity, and employment injuries and other matters relating thereto. Therefore, it was not possible for the legislature to decide in what areas and in which factories the Act in question should apply on the date of coming into force of the Act[15]. In view of the above, section 1(3) of the Act was held to be Constitutional.

In another case named *Mohemmadali v. Union of India*[16], a notification issued under section 1(3)(b) of the EPF Act was challenged on the ground that the powers conferred upon the Central Government under the section are unguided, uncanalized and therefore, it amounts to excessive delegation of legislative powers and ultimately unconstitutional. The Supreme Court held that ".. It cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may be notification in the Official Gazettee specific is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the preamble indicates… This court has repeatedly laid down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused."

In a subsequent case the Constitutional validity of section 14B of EPF Act was challenged as violative of Article 14 of the Constitution.[17] It was contended before the Supreme Court that section 14B confers unguided and uncontrolled discretion upon the Regional Provident Fund Commissioner to impose such damage "as he may think fit".

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[14] 1964-II-LLJ-105.

[15] *Ibid*., Also see. *Regional Provident Fund Commissioner* v. *Laxmi Ratan Engineering Works*, 1962-II-LLJ-604.

[16] 1964-I-LLJ-536(SC).

[17] *Organo Chemical Industries and Another v. Union of India*, 1979-II-LLJ-416(SC).

The Supreme Court rejected the contention by saying that it can't be said that there are no guidelines provided for fixing the quantum of damages under the Act.[18] However, there are certain cases where certain provisions of the EPF Act were held to be unconstitutional.[19] Section 4(1) (b) of the Payment of Gratuity Act was challenged as violative of Article 19(1)(g) of the Constitution.[20] The Supreme Court held that the provisions for payment of gratuity contained in section 4(1)(b) of the Act, are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Article 19(6) of the Constitution, the said provisions are both sustainable and valid.[21] Likewise in *Hindu Jea Band, M/s. Jaipur v. Regional Director, ESI Corporation, Jaipur*[22], section 1(5) of ESI Act was challenged as unconstitutional because it authorizes the State Government to extend all or any of the provisions of the Act to other establishments in the State and thus suffers from the vice of excessive delegation of essential legislative powers. But the Supreme Court found no merit in any of the contentions raised in the writ petition. After going through the cases discussed above, it is clear that the judiciary has judged the validity of social security legislations in the light of the goals mentioned in the Constitution. It is manifestly clear that in most of the cases the judiciary has upheld the Constitutional validity of social security legislations. While doing so it has followed a pragmatic approach by taking into account a benevolent attitude and has done nothing which undermines the supremacy of the Constitution.

Liberal Construction of Social Security Legislation

Judiciary has performed an important role by way of giving liberal and benevolent construction to the social security legislations. It has always construed these legislations in favour of the weaker sections of the society. Moreover, the courts have always widened the scope and ambit of these legislations from time to time. Although it is not possible to discuss all the cases in this paper, yet an attempt has been made to discuss a few of them.

(A) The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

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[18] *Ibid.*, There are certain other cases also where the Constitutional validity of social security legislation was challenged, but the courts held that these legislations are consistent with the Constitution. These cases are *Kunhipaly v. R.P.F. Commissioner*, 1966-I-LLJ-642; *R.P.F. Commissioner* v. *Free India Industries*, 1964-I-LLJ-662; *Bharat Board Mills* v. *R.P.F. Commissioner*, AIR 1957 Cal.702.

[19] In *Wire Netting Stores Delhi and Another v. Regional P.F. Commissioner and Another*, (1981) 59 FJR 24, section 7A of EPF Act, 1952 was held to be violative of Article 14 of the Constitution by the Delhi High Court. Also see, *Sonapur Tea Co. Ltd., v. Deputy Commission*, AIR 1962 SC 137.

[20] *Bakshish Singh v. Union of India*, AIR 1994 SC 251.

[21] *Ibid*.

[22] AIR 1987 SC 1166.

The object of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the EPF Act) is to make provision for the future of industrial worker after he retires or for his dependents in case of his early death. It provides for the institution of provident fund for the employees in factories and other establishments. This is social security legislation. Commenting upon the nature and object of the Act, the Supreme Court in *Otis Elevator Employees Union Regd.* v. *Union of India*[23] has held that the Act is a social welfare legislation to provide for the institution of Provident Fund, Pension Fund and Deposit- Linked Insurance Fund for employees in factories and other establishments. In another case Supreme Court has held that the provident fund is payable to an employee under the provisions of a statute and this statutory obligation cannot possibly, be deferred in the event of an untimely death of a worker or an employee.[24] Commenting upon the purpose of the Act, the Supreme Court in *Provident Fund Inspector v. T. S. Hariharan*,[25] has held that the basic purpose of the Act was to provide for Provident Funds and to make provisions for future of the workman after his retirement or his dependants in the case of his early death.

In *Nanzeena Traders Ltd*., v. *R.P.F. Commissioner*[26] the Andhra Pradesh High Court has held that the scope of section 1(3)(a) of the EPF Act, 1952 is not limited to factories exclusively engaged in the industries enumerated in Schedule I of the Act, and fact that a factory carrying on one industry which is excluded in Schedule I, while the other industry within its purview dies not absolve the employer from obligations imposed by the Act if the total strength of the employees in both the industries exceed the required number. Likewise, Patna High Court has held that establishment engaged in the manufacturing of guns will be covered by EPF Act, 1952.[27] If employer failed to produce cogent material to show he employed less than 20 employees, coverage under EPF Act cannot be contested.[28] Therefore, it is evidently clear that the trend of the judiciary has always been to preserve the discretion of the Government regarding the coverage of the Provident Fund Schemes. While doing it has also ensured the welfare of the employees. The courts have always made a sincere attempt to bring to the force the intention of the legislature behind the Act. It has never allowed for the frustration of certain benefits merely because of non-observance of certain formalities.[29]

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[23] AIR 2004 SC 3264.

[24] *Balbir Kaur v. Steel Authority of India,* AIR 2000 SC 1596.

[25] AIR 1971 SC 1519.

[26] 1966-I-LLJ-334.

[27] *Lawton& Co. Gun Factory Bihar v. Presiding Officer, Employees Provident Appellate Tribunal, New Delhi,* 2012-I-LLJ-233.

[28] *Siamangala Enterprises, Bangalore* v. *RP.F. Commissioner II, Bangalore,* 2012-IV-LLJ-778 (Kant.). Also see, *K. S. Engineers & Contractors* v. *Asstt. P. F. Commissioner,* 2012-IV-LLJ-667 (Guj.)

[29] See *Aiegappa Mudaliar v. Veerappan Chettiar,* AIR 195Mad. 116; *Shapoorji Nurserwanji and Company v. Trustee*s EPF, 1968-I-LLlJ-739; *Associated Industries (P) Ltd., v. Regional Provident Fund Commissioner Kerala,* 1963-II-LLJ-652; *Kunhiplay v. RPF Commissioner,* 1966-I-LLJ-642.

The judiciary has also paid its attention towards infancy benefits under the EPF Act. The meaning of infancy benefits is to provide umbrella protection to the infant industries, as these industries face financial crisis in the initial stage of their development. Therefore, section 16(2) of EPF Act exempts infant industries from Provident Fund contribution for some time. But transfer of ownership of such industries may cause problem some times. The new owner often claims 'infancy benefit' under the Act. Here, the judiciary has played a pertinent role to prevent the misuse of this benefit as well as to protect the welfare of the employees.[30]

The judicial approach has always been to ensure that the change of ownership must not be a mere illusion so that the owner may not avoid his responsibility towards the employees under the EPF Act. Regarding the EPF Act, Punjab & Haryana High Court has held: *"It must be remembered that the Act has been enacted for the benefit of workers to give them medical benefits, which have been mentioned in Section of the Act… because the Act is a labour legislation made for the benefit of the workman."*[31]

(B) The Employees' State Insurance Act, 1948

The Employees' State Insurance Act, 1948 (hereinafter referred to as the ESI Act) is a social security legislation enacted with a purpose to ameliorate certain risks and contingencies sustained by the workers while serving in a factory or other establishment. It was enacted with the object of introducing a scheme of health insurance for industrial workers. It provides for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work of factories other than seasonal factories. In *ESI Corporation, Hyderabad v. J.C. and Co. Products Ltd*.,[32] the Andhra Pradesh High Court has held that ESI Act is entitled to promote the general welfare of the workers. Hence the enactment demands a liberal interpretation in order to achieve the legislative purpose and object. The scheme envisaged under the Act is one of compulsory State Insurance providing for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work in factories other than seasonal factories. Kerala High Court, in the case of *ESI Corporation* v. *New India Maritime Agencies*[33], has held that the provisions of ESI Act may be extended by the appropriate Government to any establishment or class of establishments, industrial, commercial, agricultural or otherwise.

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[30] See, *Nazeema Traders Ltd.,* v. *RPF Commissioner,* 1966-II-LLJ-(AP); *Devi Press, Madras,* v. *RPF Commissioner,* 1965-I-LLJ-294 (Mad); United *Hotelliers Calicut* v. *Government of India,* 1972-II-LLJ-596 (Ker.); *Balaji Enterprises* v. *Deputy Regional Provident Fund Commissioner, Madras,* 1980-II-LLJ-380 (Mad).

[31] *V.K. Yadav* v. *EPF Appellate Tribunal & Others,* 2012-I-LLJ-879.

[32] 1980 Lab IC 1078.

[33] 1980-II-LLJ-232. Also see, *Union of India* v. *Ogale Glass Works,* (1971) 40 FJR 258.

In Kumbakonam Milk Supply Co-operative Society v. Regional Director, ESI Corporationn., Madras,[34] Madras High Court held: *The ESI Act is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in case of sickness maternity and employment injury and also to make provisions for certain other matters incidental thereto. In an enactment of this nature, the endeavour of the court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made.*

Supreme Court has also widened the coverage of the word 'employees' by holding that all the workers including clerks and administrative staff engaged in connection with the work of the factory and the employees working outside the factory, but whose duties are connected with the work of factory are all employees under the ESI Act.[35] Madras High Court[36] has justified the wider and comprehensive coverage of ESI Act by observing that:

"The ESI Act is the outcome of a policy to provide a remedy for the widespread evils arising from the consequences of national poverty. It is a piece of social security legislation, conceived as a means of extinction of the evils of society by LORD BEVERIDGE (in his report which inspired this type of legislation in all countries), namely, want, disease, dirt, ignorance and indigenous."

It is also relevant to mention here that the courts have held that though one benefit does not exclude the other, but overlapping of benefit is not allowed.[37] The process of widening the scope and ambit of the ESI Act by the judiciary is also manifestly clear in the case of *K. Venkateswara Rao v. State of Andhra Pradesh*.[38] In this case the Andhra Pradesh High Court has held that the employees employed by the independent contractors running canteen and cycle stands in the precincts of the cinema theatre have been brought under the scope of ESI Act. The persons working in the administrative office are employees within the meaning of the definition of employees under ESI Act. To work on the floor of the factory is not necessary.[39] If an employee happens to be a shareholder of a co-operative society, it does not disable him for being nevertheless an employee under the ESI Act.[40] The administrative staff engaged in the purchase of raw materials for the

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[34] 2003 III LLJ 416.

[35] *Nagpur Electric Light and Power Co., v. ESI Corporation*, AIR 1967 SC 1364. There are many other decisions of the Courts where the coverage of ESI Act was made wider. These are: *Birla Cotton Spinning and Weaving Mills Ltd.*, v. *ESI Corporation*, AIR 1970 Del. 167; *Hindustan Lever Ltd.*, v. *ESI Corporation*, 1973-I-LLJ-259; *ESI Corporation v. Prabhu Lal Brothers*, 1973-I-LLJ-304; *ESI Corporation Hyderabad v. Shrikrishna Bottlers*, 1977-II-LLJ-227.

[36] *ESI Corporation v. Seiramulu Naidu*, AIR 1960 Mad 248.

[37] *Trading Engineering, New Delhi v. Smt. Nirmala Devi*, (1980) 57 FIR 143.

[38] 1980-I-LLJ-70(AP).

[39] *D. V. Jakati and Others v. ESI Corporation*, (1981) 59 FJR 143.

[40] *Pondicherry State Weavers Co-operative Society* v. *Regional Director, ESI Corporation*, 1983-I-LLJ-17.

distribution or sale of product of the factory, whether work is done in the factory or elsewhere would be employees within the meaning of the Act.[41]

In another case the petitioner claimed unemployment allowance under the scheme called Rajiv Gandhi Shramik Kalyan Yojana framed by ESI Corporation. It was contested on the ground that the unemployment occurred prior to the scheme and the workers were not 'insured persons'. The Kerala High Court held that as the workmen concerned fulfilled the conditions stipulated in Rajiv Gandhi Shraik Kalyan Yojana Scheme for unemployment allowance, their claim was upheld as proper and it could not be denied.[42]
In view of the decisions discussed above, it is manifestly clear that the judiciary has always attached the maximum widest possible and liberal interpretation to both the Acts discussed above.

(C) The Payment of Gratuity Act, 1972

The Payment of Gratuity Act, 1972 is enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure for social security. The courts from time to time have emphasised upon the widest coverage of the Act. The Supreme Court in *Indian Ex-Services League and Others* v. *Union of India*,[43] has held that the claim for gratuity can be made only on the date of retirement on the basis of salary drawn on the date of retirement and being already paid on that footing, the transaction was completed and closed. Gratuity Act is a beneficial legislation for employees.[44] Discussing the nature of gratuity, the Supreme Court in *Indian Hume Pipe Co. Ltd.*, v. *Workmen*,[45] has said that the principle underlying gratuity is that by virtue of the length of their services, the workmen are entitled to claim certain amount as retiral benefit. It is some of 'efficiency devices' and is considered necessary for an orderly and humane elimination from the industry of superannuated or disabled employees, who but for such retiring benefits could continue in employment even though they function inefficiently.

It is paid not gratuitously or as a matter of boon, but for long and meritorious services rendered by the employees to their employer. The Gujarat High Court [46]has said that the Act is to be interpreted in such a manner that maximum amount of benefit is given to both the types of workers. In order to avoid injustice to either permanent or seasonal employee, the seasonal employees are to be paid gratuity on the particular footing provided in the second proviso to section 4(2) and those who are on the permanent establishment have to be paid gratuity as provided in the main clause of section 4(2). The Court further held that the Act applies to all employees irrespective of the fact whether

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41 *Indian Jute Mill Co.* v. *Regional Director of ESI Corporation, West Bengal*, 1977-II-LLJ-467.
42 *Thiruvepathi Mills Labour Union* v. *ESI Corporation*, 2012-IV-LLJ-767 (Ker).
43 1992 I LLJ 765
44 *M.C. of Greater Mumbai* v. *Vittal Anna Kamble*, 2013 LLR 531 (Bom.).
45 1959 II LLJ 830 (SC).
46 *Akbar Hussain v. Payment of Gratuity Authority, Ahmedabad*, 1979 Lab IC 366.

they are operative on the industrial side or on the clerical side because the definition of the word 'employee' covers all skilled, unskilled, semi-skilled, manual, supervisory, technical or clerical workers so song as other requirements of the definition of the world 'employee' are fulfilled.[47] Supreme Court has also discussed the concept of gratuity and opined that the Act is enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments, as a source of social security.[48] The court further observed:[49]

"… Now it is universally recognised that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work due to invalidity and old age etc. For the wage earning population, security of income, is of consequential importance. The significance of this legislation lies in the acceptance of the principle of gratuity as compulsory statutory retiral benefits. The workers who have rendered long and meritorious service are not deprived of their right to gratuity by reason of absence from duty due to circumstance beyond their control."

While giving a liberal construction to the Act, the Gujarat High Court has held that the absence from duty without leave will not be treated as break in service for purposes of gratuity, unless order treating such absence as break in service had been passed in accordance with rules.[50] Gratuity for workers is no longer a gift but a right.[51] The qualifying period for the entitlement of gratuity is ten years continuous service. Payment of gratuity leads to distributive justice. The delayed payment of gratuity causes great hardship to the workers and his right becomes illusory.[52]

Regarding the meaning of expression 'seasonal establishment' used in the Act, it has been held by the Kerala High Court that the expression has to be understood in its popular sense. Any factory which only works during certain seasons of the year and not throughout the year is seasonal establishment.[53] The court, in this case, construed the expression in its widest possible manner. As a result of that workers who remained absence from their duty because of the circumstances beyond their control were also entitled to get gratuity. However, the right to get gratuity can be forfeited if the employee misbehaved with the employer. The purpose of gratuity is to provide a retiring benefit to workman who has rendered long and unblemished service to the employer.[54] The forfeiture of gratuity is justified for the misconduct involving damage to the employers'

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[47] *Ibid.*
[48] *Lalappa Lingappa and Others v. Laxmi Vishnu Textile Mills Ltd.*, AIR 1981 SC 852.
[49] *Ibid.*
[50] *PBM Polytex Ltd., v. Union of India & Another*, 2012-IV-LLJ-740.
[51] *Straw Board Manufacturing Company Ltd.*, v. *Its Workmen*, 1977-I-LLJ-463.
[52] *Ibid.*
[53] *Consolidated Coffee Ltd., v. Uthaman*, 1980-I-LLJ-83 (Ker). Also see *Kothayee Cotton Mills v. Gopoala Pillai*, 1980-I-LLJ-356.
[54] *Delhi Cloths and General Mills Co. Ltd., v. Their Workmen*, 1960-II-LLJ-(SC).

property, violence or riotous or disorderly behaviour in or near the place of employment and conducive to grave indiscipline.[55] Regarding the question of claiming two benefits, the Supreme Court has held that statutory provisions for payment of retrenchment compensation under section 25F of Industrial Disputes Act, 1947 is no bar to claim gratuity.[56] The amount of pension cannot be reduced simply because the petitioner was in receipt of Provident Fund and Gratuity.[57] However, overlapping of benefits which are of similar nature, objective and effect are not allowed.[58] Payment of Gratuity Act, 1972 has overriding effect of Section 14 and dismissal of employee without proof of loss to employer could not be a ground for forfeiture of gratuity Section 4(6) although so provided by service regulations of an establishment.[59]

After going through all the decisions discussed above, it is clear that the trend of the judiciary has always been in favour of the persons for whom these social security legislations have been enacted. It has always given the widest possible interpretation to some expressions like employee, continuous service, seasonal establishment etc. While doing so, it has protected the interests and rights of a large number of people who are poor, ignorant or in a socially and economically disadvantageous position. Justice P.N. Bhagwati has said:[60]

"*Time has come when the courts must become the courts for the poor and struggling masses of the country… The poor too have civil and political rights and the rule of law is meant for them also."* The judiciary has made a sincere attempt for achieving a coherent socio-economic order based on social justice and basic human values. However, at the same time it has also tried to protect the genuine and justified interests of the employers.

(D) The Employee's Compensation Act, 1923

The Act has been considered as the first piece of social security legislation. It has been amended from time to time and has created legal right for certain employees who can claim compensation for the injury suffered by them by way of an accident. The Act is a piece of social security and welfare legislation. Its purpose is to provide compensation to the workman who suffers some injuries because of the accident arising out of and in the course of employment. The ultimate object of the Act is to maximize the welfare of industrial workers. Therefore, the intention of the legislature was to make the employer as insurer of the workman responsible against the loss caused by the injuries or death which happened while the workman was engaged in his work. Considering the ultimate object of the Act it is necessary to give a benevolent construction to the provisions of the Act. This Act, not being a quasi penal statute, must be interpreted with sympathetic

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[55] *Ibid.*
[56] *Indian Hume Pipe Limited v. Workmen*, AIR 1960 SC 251.
[57] *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212.
[58] *Trading Engineering, New Delhi v. Smt. Nirmala Devi*, (1980) 57 FJR 143.
[59] *Haryana Financial Corporation, Chandigarh v. D. R. Sharma*, 2012-IV-LLJ-42(P&H).
[60] *People's Union for Democratic Rights v. Union of India*, 1982-II-LLJ-455.

leniency and must not be construed very strictly.[61] Royal Commission on Labour has also commented upon the then Workmen's Compensation Act in the following manner[62]:

"The Workmen's Compensation Act was framed with a view to provide for compensation to a workman incapacitated by injury from accident. But compensation is not the only benefit flowing from the Act; it has important effect in furthering work on prevention of accident, in giving workmen greater freedom from anxiety and in rendering industry more attractive."

The expression 'arising out of and in the course of employment' has always been the subject matter of judicial analysis. Though it is not possible here to mention all the case law, yet an attempt has been made to discuss a few of them. In the case of *Mackinnon Mackanzie and Co. Ltd.* v. *Ibrahim Mohammad Issak*,[63] the Supreme Court analysed the expression and held that the words 'arising out of employment' are understood to mean that during the course of employment injury has resulted from some risk, incidental to the duties of service, which unless engaged in the duty owing to the master, it is reasonable to believe that the workman would not otherwise have suffered. Therefore, there must be a casual relationship between the accident and the employment.[64] The words 'in the course of employment' means in the course of work which the workman is employed to do an is incidental to it.[65] It is essential and relevant to mention here that in this case the Supreme Court did not make any contribution at its level regarding the beneficial construction of this legislation. However, there are certain other cases where the judiciary adopted the benevolent attitude and the Act was construed liberally.

Two workmen who had left the harbour premises to drink coffee and after having coffee returned to the harbour premises to resume their work. They took a short cut and as a result of that they were killed by a railway engine. Madras high Court held that the accident was one which arose out of and in the course of their employment.[66] In another case, a boy was employed by the factory in a teashop to take tea from the teashop to various persons working in the factory. One day when the boy was returning to the teashop after serving the tea, he was killed by a bullet which was fired by the police in self-defence when the mob of workmen attacked the police. It was held that the death of the boy arose in the course of employment.[67] If employment is a contributory cause or has accelerated the death or if death was due not only to the disease but disease coupled with the employment, then it could be said that the death arose out of employment.[68]

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[61] *Golden Soap Factory (P) Ltd., v. Nakul Chandra Mondal*, AIR 1964 Cal 217.
[62] Report of Royal Commission on Labour, p.298.
[63] AIR 1970 SC 1906.
[64] *Ibid.*
[65] *Ibid.*
[66] *K. Ramabraham v. Traffic Manager, Vizagapatnam*, AIR 1942 Mad 353.
[67] *National Iron and Steel Company v. Manorama*, AIR 1962 Cal 143.
[68] *Mackinnon Machenizie and Co. Private Ltd., v. Rita Fernandez*, 1969-II-LLJ-812.

Delhi High Court has held that the workman although employed through contractor for carrying out repair work in premises of employer, non-connected with his principle activity, is with Section 2(n) of the Act and entitled to get compensation from employer under the Act.[69]

It is evident that the attitude of the judiciary has always been sympathetic to the workers. It has always made an attempt to confer maximum benefit of this legislation upon the maximum number of workers.

An employee suffered pain in his chest when he was accompanying his manager to a shop. As a result of that he died on the way to hospital. Gujarat High Court held that the sudden collapse of the worker is clearly the result of the work he was doing. Therefore, the widow of the deceased workman was entitled to get compensation.[70] If the employee is suffering from a disease and employment causes acceleration of the disease either by strain or fatigue incidental to employment, the employer would nonetheless be liable for compensation.[71]

There are some other cases where the judiciary has applied the theory of 'notional extension of place of employment.' As a result of that maximum benefit of compensation has been given to a large number of workers or their dependents. This theory has been comprehensively discussed by the Supreme Court in the case of *B.E.S.T. Undertaking, Bombay v. Mrs. Agnes*.[72] The Supreme Court said that it is well settled that the employment of a workman does not necessarily end when the 'tool down' signal is given or when the workman leave the actual workshop where he is working, and that there is a notional extension of the employment of a workman both in time and space, the scope of such extension depending on the facts and circumstances of the given case.

An employment may begin or may end, not only when the workman begins to work or leaves his tools, but also when he uses the means of transport to or from the place of employment.[73] An employee who was standing outside the factory gate to join his duties was knocked down by a cyclist and died was awarded compensation by Gujarat High Court.[74] Parents of deceased employee fall in the category of 'partially dependents' on the earning of deceased workman at the time of his death under section 2(1) (d)(iii) of the Act.[75] However, it is also evident that the judiciary has not permitted the misuse of the

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[69] *Govind Goenka v. Dayavati*, 2012-IV-LLJ-157 (Del).
[70] *B. N. Sodha and Others v. Hindustan Tiles*, 1977-II-LLJ-95.
[71] *Amu Bibi v. Nagri Mills Co. Ltd*., 1977-II-LLJ-510.
[72] 1963-II-LLJ-615. Also see, *Union of India v. Noorjahan*, 1979 Lab IC 652.
[73] *Ibid*.
[74] *Dudhiben Dharamshi and Others v. New Jahangir Vakil Mills Ltd., Bhavnagar*, 1977-II-LLJ 194.
[75] *Raziyaben v. Surrendra*, 2012-IV-LLJ-164(Bom).

theory of the 'notional extension of place of employment.'[76] Thus, the trend of the judiciary has been to give comprehensive meaning and scope to the expression 'arising out of and in the course of employment.' While doing so it has been given liberal interpretations to the terms like employee, establishment, wages and notional extension of the place of employment. Construction of this Act has been stretched to such an extent so that relief to aggrieved workman may be available. Regarding Maternity Benefit Act, the Karnataka High Court has held that the benefits of leave etc. under the Act can be claimed by woman employee engaged on contract basis, although the terms thereof did not provide for their grant.[77]

Conclusion

The judiciary has always performed an active and significant role for securing the effective enforcement of the laws providing social security to the employees. These legislations will have a real meaning if stress is laid on what is described as 'remedial jurisprudence' through judicial powers. This is clearly evident from the analysis of various cases decided by the courts from time to time. It has taken adequate care that the poor and ignorant workman might not be deprived of the benefit of social security legislations. While doing so, it has also emphasised that the socio-economic goals mentioned in the Constitution must be achieved through the instrumentality of social security laws. The trend of the judiciary has always been to widen the scope and ambit of these legislations. As a result of that it has very liberally construed and clarified certain terms and expressions laid down in social security legislations. The judiciary approach has always been towards the effective implementation of these laws and in this process it has always observed the principles of natural justice. It has applied the theory of 'notional extension of the place of employment' in a number of cases. But it has never permitted the misuse of this theory. The attitude of the judiciary has always been towards the humanitarian purpose of the social security laws. Therefore, it has always given a beneficial and most liberal construction to these laws. In the end, it can be concluded that while interpreting the social security legislations, judiciary has evolved a 'new labour jurisprudence', which provides social security to the workers.

[76] See B. *Jenav Deaulbore Colliery v. National Coal Development Corporation Ltd*., 1977-I-LLJ-128.

[77] *C. Vidya Murthy, Bangalore v. Bangalore Metro Rail Corpn. Ltd.,* 2012-III-LLJ-113(Kant).

Power of Employer and Industrial Courts

Dr. Rajneesh Kumar Patel[1]

Abstract

Before the advent of modern industrial relations philosophy the doctrine of laissez-faire dominated the attitude and thinking of policy maker, planner and legislators. However, in the later eighteenth century the dominant school of jurisprudence was the 'natural law school', whose basic principle was "law is what, it ought to be". The natural law school relied heavily on reason, equity and good conscience, and in fact equated it to law. In sharp contrast to the natural law school, in the nineteenth century the "positivist school" of law, has taken its birth which is the counterpart of the "laissez-faire" school in economics. According to this school, law should be distinguished from morality and the law courts were directed to keep away from ethical, social and equitable consideration and strict strictly to the form and letter of the law. The main drawback of the positivist school was that it was devoid of social content and was strictly formal in nature. It was increasingly realized that "laissez-faire" only result in exploitation of the worker and hardships to the consumers. It was then believed that the "greatest service which the state could render to industry was to stand out of its sunshine". Obviously the legislators of those days were dead against any outside an authority's intervention in labour management. The purely positivistic approach towards labour management relations has restricted in too much of exploitation of the working class. As a reaction to the theory of laissez-faire arose the concept of welfare state in the twentieth century, which maintained that the third party should intervene in disciplinary matters in the social interest.

Key Words: Employer, Industrial Relation, Laissez-Faire, Tribunal, Labour Court.

Introduction

With the emergence of the concept of a *Welfare State* and collective bargaining, the state is no longer content to play the part of a passive onlooker in an industrial dispute and in the name of protecting public interest assumed an intervention role in labour management relations. As a result of this development, the old principles of the absolute freedom of contract and the doctrine of *laissez-faire* have now been replaced by new principles of "social welfare and common good".

Labour law which is a branch of sociological jurisprudence is essentially an abridgement on the right of freedom of contract and provides the concept of social justice. It was with this objective in mind that the Industrial Disputes Act, 1947, a progressive measure of social legislation, was enacted by the Central Legislature. It aims at creating conditions

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congenial to industrial peace which means not only the absence of industrial conflict, but also requires the security of jobs. To this end, the Act not only establishes machinery for settlement of disputes but also provides protection of workers from vindictive and capricious actions of the management and security of tenure against illegal and unjustified deprivations of employment.

Added to the Industrial Disputes Act, 1947 by Act 45 of 1971, Section 11-A occupies a predominant place in the scheme of the Act. It, provides a platform to a delinquent workman to represent his case before an adjudicating authority without any fear or favour from the management side, and confers on the Labour Court, Tribunals and National Tribunals certain powers, which they did not have earlier. The result is, expanded power of the industrial adjudicators in the case of discharge or dismissal of workmen, enacted in pursuance of an International Labour Organisation, recommendation of 1963, as this provision that is, it now allows the adjudicating authorities, to sit as a court of appeal in disciplinary cases and substitute their own judgment for that of the management and to interfere with the quantum of punishment awarded by the latter.

This section 11-A raises a number of issues about its constitutional validity and whether it can be given retrospective operation or not? The next important issue relates to scope of enquiry under Section 11-A. In what manner, powers conferred by this Section on the adjudicating authorities are to be exercised? When enquiry held is defective or no enquiry has been held by the employer then can evidence be produced for supporting his action? What is the meaning and scope of the phrases “materials on record”?

These issues have been considered in a series of judicial pronouncements of the apex Court and High Courts as a result of which an impressive body of jurisprudence has evolved over the years. Yet partially because of conflicting positions taken by various courts on the contentious, issues and partially because of the lack of uniformity and consistency in the application of, even well-established principles of law in the cases decided by these courts. There is a need for an objective and dispassionate re-examination of the law for increasing our understanding of Section 11-Aand suggesting appropriates measures for improving the existing law and ensuring its better implementation and enforcement.

With these objectives in mind a modest attempt is made under this paper to discuss and examine the provisions of Section 11-A of the Industrial Disputes Act, 1947, in the backdrop of the reported judicial decisions of Supreme Court, and High Courts.

Power of Employers to Maintain Discipline

Maintenance of discipline is necessary pre-requirement for smooth running of an industry. The industrial jurisprudence has therefore recognized the power of the employer to maintain the discipline in the industry. That in all disciplinary cases the employer has the power to take any action against the employee, in order to make administrative

control is a general rule and interference of any other authority is exception only. The power also includes the power to punish the employee for misconduct. At the same time the dictate of 'social justice' demand that the security of jobs of the workmen should be ensured by limiting the exercise of this power to the cases where the employer's decisions is *bonafide* and not actuated by any *malafide* and criminal motives. It is important to note in this regard that till the enactment of the Industrial Disputes Act, 1947 the employer's will was the last word and final law. Under the traditional law of master and servant, the employer enjoyed an unfettered power of "Hire and Fire" over his employees.

General Powers of Employer

In early ages there was the concept of "Hire and Fire" and employer enjoyed unfettered power over the employee. In those days no restriction was imposed upon the employer and as a consequence thereof the employer's will was the last word and final law. In the field of labour management the employers enjoyed four types power in every period and in laissez-faire era they enjoyed unfettered power. However, in the present period they enjoy the same powers but with certain restrictions which are enshrined under many legislations. These powers of employer are summarized as under:

(1) Power of Selection

The first power which the employer enjoys is selection of servant. The selection of employer solely depends upon the will of the employer. In earlier times or in the period in which the concept of laissez-faire was prevailing states never came between the contract of employment and he enjoyed this power without any restrictions. But with the coming of concept of welfare state this power is no more unrestricted. And the selection of employee is no more depends upon the will of the employer, the selection should be based on reasonable criteria which are not arbitrary and must be fair.

(2) Power of Fixing Remuneration

The second power enjoyed by the employer is the fixing of the remuneration. In earlier times the employer fixes the remuneration on their will and no laws were there to check this power and they paid their employees whatever they deemed fit. In India, there was no scarcity of human resources and employers exploited this situation as they knew that there will be no shortage of workers. This leads to low payment to the workers and the situation of workers was in bad shape. However, the State came forward, and enacted certain legislations which saved the workers from further exploitation and imposed the duty on the employers to pay standard amount of wages as prescribed by the state. After the introduction of Minimum Wages Act, 1948 State are empowered to fix and revised the minimum wages after every five years and it shall be mandatory for the employers to pay this minimum wage whatsoever fixed by the State and no employer can take any kind of plea for not paying the same.

(3) Power to Imposition of Work

The third power which employer enjoyed is to direct the worker to do certain activities. In earlier times this power was exercised without taking into consideration the consent of

the worker. But now days the employers cannot dictate any worker to do the hazardous job without his consent. Moreover, laws has been enacted which lays down, that employers cannot employ child worker to do any hazardous work and a women cannot be employed to do any work during the night hours. After the introduction of Factories Act, 1948 certain facilities and amenities are provided to the workers.

(4) Power of Punishment

Power to punish his employee is the most important power of an employer. This power was also unrestricted and unguided in the era of laissez-faire but today it is no more unguided and this power is not only under the rules of natural justice but under certain special provisions of Act and judicial pronouncements. Therefore with the emergence of concept of welfare states, now the power to take administrative action against workmen is no more power of the employers but it may be scrutinized by the adjudicating authorities.

In consequence, the instances of dismissal of workmen by the management by way of victimization were not infrequent, and in many cases workmen were dismissed without complying the provisions of standing order of the company or rules of natural justice. In subsequent years the courts, through a series of judicial pronouncements evolved, and developed a series of broad principles and norms to decide the validity or otherwise of the management's order of dismissal or discharge of his workmen on the charge of misconduct. In so doing the Courts sought to strike a harmonious balance between the conflicting interests of the employer and workmen by recognizing the needs of the industry to maintain discipline and the concerns of the workmen regarding the security of their tenure.

Thus even prior to S 11-A it was the well settled law that no employer could claim an absolute right to 'hire and fire' and the court had jurisdiction to examine whether the termination of service of an employee was a colourable exercise of the power, that is to say whether, while purporting to exercise the employer's right to termination of service in accordance with the contract the employer in substance removed the employee from service for misconduct without holding the necessary departmental enquiry and observing the rules of natural justice. Thus it is too late in the day for an employer to claim the right of hire and fire an employee as the employer pleases and thus to completely negate the security of service which has been secured to industrial employee through industrial adjudication for over a long period.

It is true that the Tribunal's power to interfere with the managerial orders in the disciplinary matters were limited, but it does not mean that Tribunal had no power, at all indeed whenever it was necessary, the Tribunal had right to go into the merits of the case.

According to old law, i.e. the pre-Section 11-A, law an employer could not have dismissed or discharged his employee from service for an act of misconduct committed by him unless a domestic enquiry was held in conformity with the principles of natural justice, into the charges of misconduct leveled against such an employee.

It depicts from the above discussion that prior to insertion of section 11-A in Industrial Disputes Act, 1947 employers were enjoying unrestricted power against their worker. At that time right of employer was very wide and the power of adjudicating authorities was so limited, but this situation was taken over by the amendment now. In the year of 1971, a very drastic change took place in the field of industrial adjudication, when the legislature added a new provision Section 11-A in the Industrial Disputes Act, 1947. In so doing the legislature made a significant departure, and for the first time gave power to an industrial adjudicator to go into the absolute right of *hire and fire* of the management by the amendment in the Industrial Disputes Act.[2] In order to appreciate the ambit and scope of this provision it is relevant to reproduce the relevant Section.

Statutory Provision

Section 11-A: Powers of Labour Courts, Tribunal and National Tribunal to give appropriate relief in case of discharge or dismissal:

"Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of proceedings, the Labour Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any as, it thinks fit, or give such other relief to the workman, including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require":

"Provided that in any proceeding under this Section the Labour Court, Tribunal or National Tribunal, as the case may be shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter". The purpose of introducing Section 11-A has been to enlarge the power of the adjudicating authorities, and empowering them to sit in judgement over the will of the employer's and to award relief of reinstatement or any lesser punishment in lieu of discharge or dismissal depending upon the facts and circumstances of each case. It is important to note that Section 11-A is based on the recommendations of International Labour Organisation.

The I.L.O in its recommendation number 119 concerning "Termination of Employment at the Initiative of Employer" adopted in June, 1963, recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination to a neutral body such as an arbitrator, a court, an arbitration committee or similar body, the I.L.O. further recommended that the neutral body should be empowered, to order that the worker concerned unless reinstated with unpaid wages should be paid adequate compensation or afforded some other relief'. In

[2] The Amendment Act passed by Parliament and received the assent of the President on December 8, 1971; The Central Government by notification no. F.S-11013/1/71-L.R. Dated 15/12/1971, w.e.f.15/12/1971.

accordance with these recommendations after 8 year a Bill was introduced in the Rajya Sabha at 16 November, 1971. Introducing the Bill in Rajya Sabha Shri *R.K. Khadilkar* (The then Minister of Labour and Rehabilitation) said: -

"The provisions of clause 3 of the bill[2] give effect to recommendation of the I.L.D. The National Commission on Labour had also occasion to consider this bill in its report. It recommended that the bill should be enacted without delay."The philosophy underlying Section 11-A, is that the matter of dismissal or discharge of the employee cannot be left solely to the dictum of the management, even if the employee concerned is found be guilty of the charge leveled against him.[3]

The Section 11-A was inserted to confer power on the adjudicators to reappraise the evidence adduced in the domestic enquiry and to grant proper relief to workman, power which the Tribunal did not pass earlier.[4] Since Section 11-A confers a benevolent power on the Labour Court it should be exercised in the spirit, in which the provision has been enacted in order to further the intendment and propose of the legislation, keeping a slow before the mental eye some very important dimension of the matter.

It emerges from the foregoing discussion that Section 11-A of the Industrial Disputes Act, 1947 has been enacted with a view to conferring following powers on the adjudicating authorities, viz. to find out for itself whether the misconduct of employee is proved or not, to reappraise the evidence for itself, to find out if the evidence adduced in the enquiry established the misconduct alleged against the workman, and finally to consider whether the findings of the employer is correct, and whether a proper case has been made out or not.

Changes Brought About by Section 11-A

Now, the question is whether and what extent, Section 11-A has made changes in the legal position in the context of Tribunal's power? Provisions of Section 11-A have opened new vistas in the horizon of Labour-Jurisprudence. After the introduction of Section 11-A the adjudicating authorities has now got power to interfere with the order of discharge or dismissal of workmen, if they finds that the dismissal or discharge is not justified.

It has been settled in a Catena of cases,[5] that the Section 11-A gives power to the Tribunal to go into the merits of the case and to sit as a Court of appeal over the findings of enquiry officer, something it could not formerly do. By virtue of this Section the Tribunal now is clothed with the power to reappraise the evidence adduce in the domestic enquiry and satisfy itself whether the evidence relied on by the employer established the

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[3]*R.M.Parmar v. Gujarat Electricity Board* 1982 Lab. I.C. 1031 (Guj.) .
[4]*Indian Aluminium Company Limited v. Labour Court, Ranchi* (1991)1 L.L.J.644 (Pat.).
[5]*Workman of Firestone Tyre and Rubber Company v. The Management* (1973)1 L.L.J.278 (S.C.);See, also *Prem Kumari v. S.C. Jain*(1993)1 L.L.J.354 (Del.).

misconduct alleged against a workman. Thus what was once in the realm of satisfaction of the employer has ceased to be so and it is now the satisfaction of the Tribunal that finally decides the matter.

It is important to note that prior to Section 11-A, the Tribunal had no power, if the enquiry was valid and proper, but this limitation has been removed by Section 11-A, and now the Tribunal has power to go into the merits of the case even when enquiry held was valid and proper. In such cases, now the Tribunals have power to alter or reduce the punishment or to fully set-aside the same. The Tribunal has also power to give any other relief in such cases. Thus, the limitation on Tribunal's jurisdiction as delineated in the Industrial jurisprudence by the decision of apex Court in the case of *Indian Iron & Steel Co.* V. *Their Workmen,*[6] has now been fully altered by Section 11-A and the prior position no longer holds good today.

What Can Adjudicating Authorities Do: Under Section 11-A
Under this section the adjudicating authorities, can exercise following powers.

Power to Re-Appraise the Evidence
By virtue of Section 11-A, now the Tribunals have jurisdiction to re-appraise the evidence recorded by the enquiry officer. It is to be remembered that, prior to Section 11-A where the employer had held a proper and valid domestic enquiry before passing the order of punishment, the Tribunal had no power to interfere with its findings, except in extra-ordinary circumstances. Likewise, the conduct of disciplinary proceedings and imposition of the punishment were all considered to be managerial function, with which the Tribunal had no power to interfere unless the findings were perverse or the punishment was so harsh as to lead an inference of victimisation or unfair labour practice.

But, now the Tribunals have power like an Appellate Court and so they have jurisdiction to re-appreciate the evidence. In *Workmen of Firestones and Rubber Company* v. *The Management*[7] dealing with this power, the Apex Court observed that:

The Words "in the course of adjudication proceeding, the Labour Court, Tribunal or National Tribunal is satisfied that the order of discharge or dismissal was not justified", clearly indicate that the Tribunal now is clothed with the power to reappraise the evidence adduced in the domestic enquiry and satisfy itself whether the evidence relied on the employer establishes the misconduct alleged against a workman. Therefore, what was originally conclusion that could be drawn by an enquiry officer from evidence, has now given place to the satisfaction being arrived at by the Tribunal that the finding on the misconduct is correct.

The view that Section 11-A has clothed the Tribunal with the power to reappraise the

[6] (1958)1 L.L.J.269 (S.C.).
[7] *Ibid.*

evidence was also reiterated in of *Prem Kumari v. S. C. Jain,* P. O. *Labour Court and others*[8]. In this case the Delhi High Court observed:

"The Labour Court was not correct, when it decided the case by applying the law which existed prior to introduction of Section 11-A, in the act which has resulted in miscarriage of justice" The Court further observed that with the introduction of Section 11-A, the position of law has changed, and the Labour Court should have decided the matter according to the law which existed after the introduction of Section 11-A in the Act.[9]

In this connection it is important to note that the Labour Court can apply Section 11-A, *suo-motu*and it is not to depend on the workman seeking relief referring to it. A Division Bench of Gujrat High Court in *R. M. Parmar v. Gujrat Electricity Board, Baroda*[10], observed that:

"It is not necessary for a workman to plead before Labour Court for reduction of penalty, with banded knees and folded hands, particularly when he has been conferred with right to invoke the said powers of the Labour Court under Section 11-A for reduction of penalty".

Thus the Labour Court can apply suo -motu the said Section, even if the relief are not claimed in the pleadings.[11] After insertion of Section 11-A, even though the order of dismissal or discharge was preceded by a legal and proper enquiry the Labour Court has power to re-appreciate the entire evidence on record.

Power to Substitute its own Finding

Another power confirmed by Section 11-A is substitution of its own finding by the adjudicating authorities in place of managerial wisdom. It may be noted that prior to Section 11-A when a proper enquiry has been held, and the finding of misconduct is a plausible conclusion flowing from the evidence adduced at the said enquiry, the Tribunal had no jurisdiction to substitute its own findings. but after the insertion of Section 11-A even in a case where an enquiry has been held by an employer and a finding of misconduct arrived at the Tribunal can no differ from that finding in a proper case, and held that no misconduct is proved on material on record in the enquiry. The Tribunal may also hold that the order of discharge or dismissal is not justified. In other words Tribunal may held that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of discharge or dismissal.[12] Thus Section 11-A now gives full

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[8] (1993) 1 L.L.J.354 (Del.)

[9]For the same view See, also *Bhavani Metal Works v. P.R. Sawant* (1994) 3 L.L.J.supp.711 (Bom.)

[10](1983) 1 L.L.J.261 (Guj.)

[11] *Workmen Employed in Engine Valves Limited v. Engine Valves Limited* (1983)2 L.L.J. 232 (Mad.)

[12]*Workmen of Firestone Tyre and Rubber Company v. The Management* (1973)1 L.L.J. 278 (S.C.); See also, *Ramphool v. State of Haryana,* 1995 Lab.I.C. 1205 (P.H.)

power to the Tribunal to go into the evidence and satisfy itself on both point. In the case of *Baldev Singh v. P. O. Labour Court Patiala and Another,*[13]a roadways bus driver was dismissed from service for causing damage to the state roadways to the extent of Rs. 22.50. The Labour Court come to the finding that the respondent held fair and proper enquiry, but held that the order of dismissal was a serious step taken by the management given the fact that the charges against the workman were of minor nature and accordingly directed his reinstatement without back wages. The High Court upholds the order of Labour Court and reaffirmed the power the Tribunal to pass appropriate orders, in the circumstances of the case.

In *Scooters India Ltd v. Labour Court Lucknow* & *Others*[14], three inquiries were conducted in respect of the misconduct of the workman and consequently his services were terminated. The Labour Court upheld the finding of misconduct, but at the same set aside the order of termination and directed his reinstatement with 75% back wages. The order of Labour Court was upheld both by the High Court and the Apex Court.

Again the Rajasthan High Court in *Rajasthan State Road Corporation v. Ram Karam Chauhan and another,*[15]held that, "even after holding the enquiry as fair and proper the Labour Court or Tribunal under Section 11-A can modify or set aside the punishment as awarded by the employer". Similar view has been taken by the Apex Court in *Palghat, BP.L.* & *P.S.P. Tohzpillai v. B.P.L. India Limited*[16] In the instant case the striking workman threw stone on the officers going to the duty and caused to the grievous inquires. On these allegations three workman were dismissed after due enquiry. The Labour Court interfered with quantum of punishment and directed reinstatement with 25% back-wages. But the Kerala High Court set aside the said order. In appeal against the High Court's decision the Supreme Court held, "The acts of the workmen were certainly misconduct subversive of discipline, but sustained the taking of lenient view by the Labour Court on the ground that the workman alone were not members of the assembly" and uphold the order of the Labour Court.

In, *Mathura Prasad v.* Union of India[17]considering the entire case law on the subject of judicial review, the Apex Court ruled that, "When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under the sub-rules are required to be strictly followed. A judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review."

[13](1984)4 S.C.C. 519.
[14] 1988 (57) F.L.R. 719 (S.C.).
[15]1995 (60) F.L.R. (Raj.).
[16] 1996 (72) F.L.R (S.C.).
[17](2007) 1 SCC 437.

Therefore it depicts from the above discussion that the powers of adjudicating authorities under Section 11-A have substantially increased and the Tribunal has been vested with very wide power in granting relief in the case of dismissal or discharge. In such cases the Tribunals have full power to take differ view from the enquiry officer and substitute its own judgement over the will of the management.

Power to Reduce the Punishment

Reduction of punishment is the third power conferred by the Section 11-A to industrial adjudicators. By virtue of this Section even if the Tribunal holds that the misconduct was proved, it may take the view that proved misconduct does not merit the punishment of discharge or dismissal, but a lighter punishment. In, Management of *Orissa Road Transport* Corporation *Limited v. M.Venkata Rao and Other.*[18]It was held by the Orissa High Court that, for theft of two liters of engine oil, the punishment of discharge from service is disproportionate, and it may be set aside. But, when a *Chowkidar* is sleeping while on duty it amounts to misbehavior and dismissal for such misconduct cannot be said to be disproportionate to the misconduct.[19]

The above view was reiterated in recent case of *Sivaji v. Goderej and Boyce Manufacturing* Co. *Limited, Madras &another.*[20] In this case the service of the employee was terminated on the ground that he has claiming travelling and lunch allowance on the basis of forged signature. The Labour Court found that the enquiry was fair, but directed reinstatement on the ground that the punishment of dismissal for the proved misconduct was too harsh. But on appeal the Madras High Court held that the Labour Court has interfered with the quantum of punishment without any warrant or justification or plausible reason, and sympathy shown to the delinquent workman.

In *Mohan Sugar Naik & others v. N. T.C. Ltd. and others,* [21]the service of a workman had been terminated on the ground of riotous behaviour during working hours and threatening the enquiry officer that he will be stabbed in case he proceeded with enquiry. The Labour Court came to, the conclusion that the charges against the appellant were established, but the order of dismissal was shockingly disproportionate to the guilt of the appellants, and hence directed his reinstatement.

On appeal the High Court confirmed the order of the Labour Court, observing that: "Ends of justice will be met, if the order of the Labour Court reinstating in service, but depriving them of their back wages is upheld"

In *AP State Road Transport Corporation v. Addl. Labour Court cum Tribunal,*

[18](1993)1 L.L.J. 468 (Orri.).
[19]*A.A.A. Nagarwala v. Kinetic Engineering Limited* (1995)1 L.L.J. 23 (Bom.).
[20] (1999)1 L.L.J. 199 (Mad.).
[21](1995)1 L.L.J. 110 (Bom.).

Hyderabad and others[22], a conductor was removed from service for the proved misconduct of failure to issue tickets. The Labour Court in exercise of its power under Section 11-A set aside the order of removal and directed reinstatement with 75% of full back wages. On appeal the High Court modified the impugned order of Labour Court to the extent that 75% of full back wages is paid only from the date of passing of the impugned order of Labour Court.

The decisions mentioned above clearly indicate that the Tribunal has power to reduce the punishment, even if the misconduct was proved by a fair domestic enquiry. In such cases Tribunal has to give reasons for interference in the findings of enquiry officer.[23] A survey of decided cases on this point reveals that the Tribunal could interfere under Section 11-A only if the punishment was so harsh as to suggest victimisation.[24] It follows that when there was no victimisation then the reinstatement on the basis of harshness of the punishment will not be justified.[25]

While author agree that before reducing the punishment the Tribunal should give reasons for doing so, but author do not support any curtailment of the discretion of the Tribunal in the matter of punishment, because it is not in accordance with the intent of Section 11-A. I concur with The Supreme Court view in *Ramakant Mishra v. State of U.P.*[26]that a punishment which is disproportionate to the offence is violative of Article 14 of the constitution of India. It should be remembered that, even though the discharge order may be fair, it need not be justified.[27]

Concluding Observations

Before insertion of section 11-A, the employers had wide powers to punish the workmen. Most of the time employers use arbitrarily their powers to punish them. Now by insertion of section 11-A it reduces the power of employers and make a balance over it. Section 11-A has conferred wide powers on the industrial adjudicators. By virtue of this Section, they have power to look into the order of punishment, and interfere with the absolute right of the management. But they are duty bound to exercise those powers in judicial and judicious manner.

[22] (1984)1 L.L.J. 128 (A.P.).
[23]*Rajasthan State Road Transport Corporation v. Industrial Tribunal* 1999 (82) F.L.R. 766 (Raj.).
[24] *General Manager v. RanjeetSingh1982* Lab.I.C. 604 (P.&H.).
[25] *State of Punjab v. Surat Singh,* 1985 Lab.I.C. 11 (P.&H.).
[26] (1982)2 L.L.J. 473 (S.C.).
[27]*Himanchal Road Transport Corporation , Shimla v. P.O. Labour Court* 1981 Lab.I.C. 356 (H.P.).

Trademark Dilution and Protection in India

Abhishek Kumar[1]

Trademark's protection under intellectual property regime is often justified as marks have the potential to distinguish a product or service of one owner from that of another. This particular characteristic of trademark is beneficial not only to the owners of such product or services but also advantageous to the consumer because it is supposed to ensure that the product or service is having the expected level of quality as anticipated by the customer by way of assuring the source or origin of the goods or services. One of the essential requisite for any mark to be eligible for trademark protection is the requirement of distinctiveness.[2] Originally, the most important function of trademark is source identification and trademark protection seeks to promote this objective.[3]

Traditionally it was considered that there can be an infringement of a trademark only when there is a likelihood of confusion as to the origin of Trademark. The touchstone of any trademark infringement is the "likelihood of confusion". It means whenever any mark, goods or services is creating confusion in the minds of the public about the origin of the product, it generally constitutes trademark infringement. However much has changed now and the modern trend is to read infringement even in situations where there is no reason for confusion in the case of a well known Trademark.[4] Dilution of trademark is one such instance as propagated by Frank Schechter which marked a fundamental shift in the way trademark was protected.[5] Dilution of trademark is fundamentally different from traditional notions of trademark infringement which focus on the confusion or potential confusion of the consumer whereas dilution focuses on the damage that will be done to the mark and the trademark owner.[6] Trademark dilution doctrine also reflects a concern that there is an ever increasing demand for extending the ambit of protection granted to well established trademark which has been accepted positively by the judicial decisions in India.

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[2] N.S. Gopala Krishnan and T.G. Agitha, "*Principles of Intellectual Property*", 118, (Eastern Book Co., Lucknow 2009).

[3] T.G Agitha, "Trademark dilution: Indian approach" 50 *Journal of Indian Law Institute* p. 340 (2008).

[4] *Supra note 2* at p. 486.

[5] *Supra note* 3 at p. 340.

[6] Neil Wilkof & Shamnad Basheer (eds.), *Overlapping Intellectual Property Rights*, 242, (Oxford University Press, New Delhi, 2012).

Meaning of Trademark Dilution

Trademark Dilution in a trademark law permits the owner of a famous trademark to protect its mark by forbidding others from using that mark in a way that would lessen its uniqueness. In most cases, trademark dilution involves an unauthorised use of another's trademark on products that do not compete with, and have little connection with, those of trademark owner.

Trademark law is generally focussed on the need for consumer protection. Consequently, trademark law traditionally concerned itself with situations where an unauthorised party sold goods that are directly competitive with or at least related to those sold by the trademark owner. A trademark is diluted when the use of similar or identical trademarks is in other non-competing markets means that the trademark in and of itself will lose its capacity to signify a single source. In other words, unlike ordinary trademark law, dilution protection extends to trademark uses that do not confuse consumers regarding who has made a product. Instead, dilution protection law aims to protect sufficiently strong trademarks from losing their singular association in the mind with a particular product. It is believed that misrepresentation causes the claimants sign to become familiar or common and as a result of which the ability of the trademark to attract the consumer is undermined, moreover the puling power or the good will of the trademark is diluted.[7]

Types of Dilution of Trademark

The Dilution of Trademark usually occurs in two ways:-

Blurring – Blurring means erosion or watering down of the "distinctiveness, uniqueness, effectiveness and prestigious connotations" of the trademark. Blurring occurs when the power of the mark is weakened through its identification with dissimilar goods such as "Kodak shoes, Mercedes undergarments, Honda utensils, Sony sandal soap, and Wal-Mart food, Rado Cycles, Xerox cigarettes" etc.[8] Although neither example is likely to cause confusion among consumers, but each dilutes the distinctive quality of the mark.[9] The U.S Law defined dilution by blurring under section 43 (c) (2) (b) of the Lanham Act, 1946[10]. It says that "dilution by blurring" is an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors including the following:

1) The degree of the similarity between the mark or trade name and the famous mark.

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[7] Lionel Bently and Brad Sherman, "Intellectual Property Law", 722 (Oxford University Press, New Delhi 2003).

[8] Robert N. Klieger, "Trademark Dilution: Whittling Away of the Rational Basis for Trademark Protection", University of Pittsburgh Law Review, Vol. 58, 1996, at p. 789, 790.

[9] *Supra note* 6 at p. 242.

[10] As amended by the Trademark Dilution Revision Act of 2006 in United States of America.

2) The degree of inherent or acquired distinctiveness of the famous mark.
3) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
4) The degree of recognition of the famous mark.
5) Whether the user of the mark or trade name intended to create an association with the famous mark.
6) Any actual association between the mark or trade name and the famous mark.

Tarnishment

Tarnishment means "weakening of a mark through unsavoury or unflattering associations". It occurs when the mark is cast in an unflattering light, typically through its associations with inferior or unseemly products or services. S. 43 (c) (2) (c) of the Lanham Act,1946 defined Dilution by Tarnishment as it is an association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark. It generally arises when the plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavoury context likely to evoke unflattering thoughts about the owner's product. It is important to note that for a case of dilution to be made, the mark has to be famous, and that use of the dissimilar good has to cause harm to its hard-earned repute.[11]

In such situations, the trademark's reputation and commercial value might be diminished because the public will associate the lack of quality or lack of prestige in the defendant's goods with associate the lack of unrelated goods, or because the defendant's goods with the plaintiff's unrelated goods, or because the defendant's use reduces the trademark's reputation and standing in the eyes of consumers as a wholesome identifier of the owner's products or services.[12].

Comparison between India and U.S. Law

If the Indian law is compared with the United States of America's Anti-Dilution law than it may have to be stated that the Indian law does not match the standards as envisaged in the American law. The Lanham Act, 1946 of the US[13] requires the mark to be "a famous mark that is distinctive, inherently or through acquired distinctiveness" to attract an action for dilution. For being famous, the mark needs to be widely recognized by the general consuming public of the US as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

i) The duration, extent and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

[11] Clarisa Long, "Dilution", Columbia Law Review, Vol. 106 Issue 5, 2006, at p. 1034.
[12]Available on http://www.tms.org/pubs/journals/Jom/matters/matters-9610.html. accessed on 07/06/2017 at 12:45 pm.
[13] As amended by the Trademark Dilution Revision Act of 2006.

ii) The amount, volume and geographic reach of sales of goods or services offered under the mark.
iii) The extent of actual recognition of the mark.

On the other hand, before the Trademarks Act, 1999 was enacted; the trademark law in India was governed by Trade and Merchandise Marks Act of 1958. The Trademark Act of 1958 did not have requisite provisions to deal with the issue of dilution of trademarks and so it was left to the Indian judiciary to provide remedy in cases of dilution.

The Delhi High Court in the case of *Daimler Benzaktiegesellschaft & Anr. v. Eagle Flask Industries Ltd.,* [14] pointed out:
[T]rade Mark law is not intended to protect a person who deliberately, sets out to take the benefit of somebody else‘s reputation with reference to goods, especially so when the reputation extends worldwide. By no stretch of imagination can it be said that use for any length of time of the name ―Mercedes should be not, objected to." "In the instant case, ―Mercedes is a name given to a very high priced and extremely well engineered product. In my view, the defendant cannot dilute that by user of the name Mercedes with respect to a product like a thermos or a casserole.

This case[15] explains the judicial reasoning on trademark dilution without examining the intricacies of its concept prior to the enactment of the Act of 1999. The facts of this case include the use of the device mark where the word "Benz" along with a "three pointed human being in a ring" was used for defendant's innerwear clothing line. The Delhi High Court granted injunction to the plaintiff ignoring the defence of 'honest and concurrent use' and noted that replication of a mark such as of "Benz" by anyone would result in a violation of the trademark law in India.[16] The court without analysing the concept of dilution, or any legal principles underlying trademark violations for that matter, the court vehemently attacked "the great perversion of the law relating to Trademarks" carried out when "a mark of the order of the "Mercedes Benz" was humbled by the defendants by using it on the undergarments. The case is the first case law in India which restrained the defendant from using the plaintiff's famous mark without attracting any analysis of likelihood of confusion or deception into scene.

When the Trademarks Act, 1999 was finally enacted, the concept of dilution was also statutorily incorporated by virtue of section 29(4) of this Act. This section provides that a registered trademark having reputation in India is infringed in the case of use of an identical or similar mark even of dissimilar goods by a person who uses it in the course of trade, if such use is without due cause and "takes unfair advantage" or is detrimental to the distinctive character or repute of the registered trademark. Unlike the other provisions

[14] *Daimler Benzaktiegesellschaft & Anr. v. Eagle Flask Industries Ltd.*, ILR (1995) 2 Del 817.
[15] *Ibid.*
[16]Available on http://www.rslr.in/uploads/3/2/0/5/32050109/2._trademark_dilution.pdf last accessed on 07/06/2017 at 12:49 pm.

dealing with infringement, there is no requirement of confusion under this section. This provision has helped in setting the standards which the courts must ascertain before granting any remedy in cases of dilution wherein there has been uses on dissimilar goods or services, of marks which has a "reputation in India", if such use is without due cause and "takes unfair advantage of or is detrimental to the distinctive character or repute of the registered mark". If this provision is compared with the US Act it can be seen that Federal Dilution Act of the US appears to be stricter as under the US law, there is no requirement of the marks to be "famous".[17]

Important Indian case law

Caterpillar v. Mehtab Ahmed[18] in this case, the plaintiff, a U.S. based company was using trademarks 'caterpillar' and 'cat' in respect of manufacture for construction, mining, roads, building agriculture industries, footwear and garments etc. since 1904 in the U.S. But they neither got the mark or logo registered in India for footwear till the time of the decision nor the products were sold in India. Defendant was selling articles including footwear under the trademark 'cat' and 'caterpillar' in India. However, as the plaintiff's trademark enjoy, a reputation and goodwill as they are extensively sold and advertised in the U.S and in other countries, it is averred by the plaintiff's that there is a spill over of reputation into India and among the relevant customers.

While deciding this case, the Court compared the trademark like a property and said that unauthorised use would result in trespass. As per the court, adoption of similar or near similar marks, even in respect of same goods, by subsequent user would result in the dilution of the mark. In this case, the court also accepted the theory of spill over of reputation as sufficient to constitute trademark dilution. The court held that the mark of the plaintiff has become synonym for quality of high degree and adoption of its name along with distinctive and unique characteristics of style by defendants disclose propensity to trade or cash upon goodwill and reputation of the plaintiff's trademark and it is nothing but piracy of trade name.

Aktibolaget Volvo v. Volvo Steels Limited[19] this is another case in which remedy was granted under trademark dilution. In this case sales of plaintiff's products in India were absolutely insignificant and the activities and products of the plaintiff's and the defendants were different and distinct. The court in this case concluded that the plaintiff's brand name 'Volvo' have reputation and goodwill throughout the world therefore protection for dilution can be granted. The court also did not discuss or analyse the scope or meaning or extent of the concept of dilution. As in this case the plaintiff did not sell his products in India, the courts should have adopted a strict stand against granting remedy for dilution as the alleged mark would have failed to satisfy the criterion of well known

[17] *Supra note* 3 at p.350.
[18] 2002 (25) PTC 438 (Del).
[19] 1998 PTC (18) 47 (Bom.) (DB).

mark under the trademark act, 1999. But the court never looked into the nature of the distinctiveness of the mark which is of paramount importance in cases of dilution.

Instead of searching for the reputation of the plaintiff's mark, the court questioned the reasons for the defendants' adopting the word 'Volvo'. It is not clear how this becomes relevant when the plaintiff's mark itself is not famous enough among the general consuming public in India so as to indicate a connection or association in the minds of the public between the plaintiff and the mark.[20]

ITC Ltd. v. Philip Morris Products SA & Ors.[21] in this case, the two marks in question belonged to two companies with well-established reputations in India. The plaintiff, ITC Ltd., argue that in the year 2008, Philip Morris had begun using a hollow flaming roof design similar to the "WELCOMEGROUP" mark that ITC had been using in respect of its hospitality business for many years. ITC Ltd. claimed that Philip Morris has done away with its traditional roof design used for marketing Marlboro cigarettes in India and has been using a mark similar to theirs. ITC Ltd. contended that the persistent use of the mark on the covers of the Marlboro cigarettes, had the effect of diluting the distinctiveness of ITC's trademark, and thereby sought relief on the basis of Section 29(4) of the Trademarks Act, 1999.[22]

In this landmark judgement, the Court engaged in an extensive discussion on the trademark dilution doctrine. The court, for the very first time in this judgment, stated that the test evolved for the traditional trademark infringement actions were inapplicable or inapposite to cases falling under Section 29(4), 58 and consequently detached the likelihood of confusion test from all actions falling under this clause. The Court pointed out that the absence of a presupposition of infringement under Section 29(4) of the Act of 1999, unlike the other clauses of Section 29, was suggestive of the legislative intent requiring a higher standard of proof for the cases falling under Section 29(4) of the Act of 1999.

On the basis of the facts, the Court stated that the plaintiff had failed in making out a case of dilution of the 'WELCOMEGROUP' logo. The court accepted the claim that its brand had acquired distinction in the hospitality sector and further added that the plaintiff was required to show that the logo had been diluted and not that it's ''WELCOMGROUP'' brand was affected.[23]

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[20] *Supra note* 3 at p.363.
[21] 166 (2010) DLT 177.
[22] Sumatha Chandrashekaran, 'ITC loses TM Dilution case against Philip Morris', available at http://www.spicyipindia.blogspot.com/2010/01/itc-loses-tm-dilution-case-against.html, (last accessed 10/06/2017 at 09:45 am.).
[23] Available on http://www.rslr.in/uploads/3/2/0/5/32050109/2._trademark_dilution.pdf last accessed on 10/06/2017 at 10:11 am.

There are many other cases like *Glaxo India Ltd. And Anr v. Drug Laboratories*[24] , *Honda Motors Company Limited v. Charanjit Singh and Others*[25] in which the Courts have applied the concept of dilution without discussing the intricacies of the concept of dilution and its extent and ambit. A close analysis reveals that the court in almost all these cases never bothered to analyse the conceptual differences, if any, between infringement, passing off and dilution of trademark.

In a case filed by *Kamdhenu Ispat Ltd*. before Delhi High Court, Justice Ravindra Bhat held that in order to get remedy under dilution the standard of proof to establish reputation of the alleged trademark was rather high and would require the plaintiff to conclusively establish that the reputation and goodwill of the mark transcended the main business of the plaintiffs. In this case the plaintiff had at best managed to establish its reputation with respect to steel bars and not to any other class of goods. Moreover there was least possibility of the customers getting confused as the nature of products is totally dissimilar: one being used for steel and other being used for pickles. On the basis of these arguments suit was dismissed stating that "*the plaintiff has not been able establish the case for either infringement by dilution or of the corporate name, by the defendant; the suit itself does not disclose any cause of action, for any of the reliefs claimed. The suit and pending applications are therefore rejected; in the circumstances, there shall be no order on costs.*"[26]

Conclusion

After analysing the dilution of trademark it is well understood that dilution is a concept which reduces the uniqueness of famous trademark by its unauthorized use and seeks to increase the ambit of protection to the trademark. The main difference in infringement and dilution is that infringement took place in similarly or identical goods or services while dilution takes place in other non-competing goods. When we compare the anti dilution laws of America and India, we come to the conclusion the American law on dilution of the trademark law is very strict and clear while on the other hand Indian law on the same is still evolving and is in process of settling down.

The U.S. system only grants protection to the famous marks against dilution while India uses the concept of the "well-known" mark for the protection of the trademark against dilution. The Indian Trademark act, 1999 does not draw a distinction between 'famous and well-known' marks. But the U.S laws have explained to some extent the difference between 'famous and well-known' marks. It says that "famous" marks are a special category of well-known marks and are traditionally considered to have a higher degree of reputation than well-known marks. Hence, it is believed that "famous" marks deserve a broader scope of protection. The yardstick for any mark to become famous mark and thus

[24] 2002 (25) PTC 105 (Del).
[25] 2003(26) PTC 1 (Del).
[26] Available on https://spicyip.com/2010/10/delhi-high-court-raises-threshold-for.html last accessed on 04/06/2017 at 12:30 pm.

become eligible for protection against dilution is higher as compared to the well known marks which is healthy practise. The courts while granting remedy under dilution doctrine must strike a balance between the owner of trademark and the interest of the consumers; even if courts lean more towards furthering the public interest by relying more on the interest of consumers through laying down strict interpretation of well known marks or by raising the bar for the marks to get remedy against dilution will be a healthy practice.

As the application of dilution is confined to the non-competing marks, the Court has to adopt a careful approach in examining whether there is actual dilution or any possibility of actual dilution before granting any remedy. However, the doctrine of dilution is not entirely ill-conceived because preventing dilution in appropriate cases also serves a larger public interest as it will reduce aggregate consumer confusion and also help the owner to focus on the quality of his products.

Governmental Initiatives for Curbing Black Money in India

Dr. Anjali Agrawal[1]

A white paper on black money issued by the finance ministry in 2012 defines black money as "as assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession." The same report also admits, "There is no uniform definition of black money in the literature or economic theory."[2]

The Cambridge Dictionary makes it somewhat simpler whenit says that black money is "money that is earned illegally, oron which the necessary tax is not paid."[3] In its 1985 report on Aspects of Black Economy, the National Institute of Public Finance and Policy (NIPFP) defined 'black income' as 'the aggregates of incomes which are taxable but not reported to the tax authorities'. Further, black incomes or unaccounted incomes are 'the extent to which estimates of national income and output are biased downwards because of deliberate, false reporting of incomes, output and transactions for reasons of tax evasion, flouting of other economic controls and relative motives'.

Thus, in addition to wealth earned through illegal means, the term black money would also include legal income that is concealed from public authorities:

- To evade payment of taxes (income tax, excise duty, sales tax, stamp duty, etc);
- To evade payment of other statutory contributions;
- To evade compliance with the provisions of industrial laws such as the Industrial Dispute Act 1947, Minimum Wages Act 1948, Payment of Bonus Act 1936, Factories Act 1948, and Contract Labour (Regulation and Abolition) Act 1970; and / or
- To evade compliance with other laws and administrative procedures.

The government has taken a number of steps to curb black money. The responsibility of dealing with the challenge of unaccounted wealth and its consequences is jointly and collectively shared by a number of institutions belonging to the central and state governments. This includes various tax departments which are assigned the task of

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[2]http://www.finmin.niccin/reports/WhitePaper_ BackMoney2012.pdf, accessed on 11 January 2017.

[3]http://dictionary.cambridge.org/dictionary/english/black-money, accessed on 11 January 2017.

enforcement of tax laws. Among them the important ones are the CBDT[4] and the Central Board of Excise and Customs (CBEC). However, there are various other regulatory authorities undertaking supervision and policing. They include the Enforcement Directorate (ED), Financial Intelligence Unit (FIU), Economic Offences Wing of the State Police, Central Bureau of Investigation (CBI), Serious Frauds Investigation Office (SFIO), and Narcotics Control Bureau, National Investigation Agency (NIA), and the High Level Committee (HLC), which also play animportant role in fighting the menace of black money.

This article discusses the role of government to curb black money in India. For the smooth functioning of the economy, the Government has introduced following measures to combat the menace of the parallel economy. Various Institutions Established by Government for Curbing Black Money India has following institutions for preventing, finding and investigating underground economy and black money.

1. **Central Board of Direct Taxes**

Itis a statutory authority functioning across India under the Central Board of Revenue Act of 1963. The Member (Investigation) of the CBDT exercises control over the Investigation Division of the Central Board of Direct Taxes. The Member is a high ranking IRS officer of the rank of Special Secretary to the Government of India.

2. **The Director General of Income Tax (International Taxation)**

It is in charge of taxation issues arising from cross-border transactions and transfer pricing. This organization, is primarily responsible for combating the menace of black money, has offices in more than 800 buildings spread over 510 cities and towns across India and has over 55,000 employees and even employees who are deputed from premier police organizations to aid the department.

3. **Enforcement Directorate**

It was established in 1956. It administers the provisions of the Foreign Exchange Regulation Act of 1973 (FERA), later updated to Foreign Exchange Management Act of 1999 (FEMA). It is entrusted with the investigation and prosecution ofmoney-laundering offences, confiscation of the proceeds of such crime, matters related to foreign exchange market and international hawala transactions. This India-wide directorate, with focus on major financial centers in India, has 39 offices and 2000 employees.

4. **Financial Intelligence Unit**

It has been operating as a separate investigative entity since2004.This government organization for receiving, processing, analyzing, and disseminating information relating to suspect financial transactions. It shares this information with other ministries, enforcement and financial investigative agencies of state and central government of India. Every month, it routinely examines about 700,000 investigative reports and over 1,000

[4]Central Board of Direct Taxes.

suspect financial transaction trails to help identify and stop black money and money laundering.

5. **Central Board of Excise and Customs (CBEC) and Directorate of RevenueIntelligence**

It is the apex intelligence organization responsible for detecting cases of evasion of central excise and service tax. The Directorate develops intelligence, especially in new areas of tax evasion through its intelligence network across the country and disseminates information across Indian government organizations by issuing Modus Operandi Circulars and Alert Circulars to appraise field formations of the latest trends in tax evasion. It routinely arranges for enforcement operations to research into the evasion of duty and taxes.

6. **Central Economic Intelligence Bureau**

It functions under India's Ministry of Finance. It is responsible for coordination, intelligence sharing, and investigations at national as well as regional levels amongst various law enforcement agencies to prevent financial crimes, generation and parking of black money and illegal transfers. This organization maintains constant interaction with its Customs Overseas Investigation Network (COIN) offices to share intelligence and information on suspected international financial transactions. The COIN offices gather evidence through diplomatic channels from the foreign custom offices and other foreign establishments to establish cases of mis-declaration to help identify and stop tax evasion and money laundering.

Various Committees set up by Government on Black Money[5]

1. Ayers Committee (1936)

Even in colonial India, numerous committees and efforts wereinitiated to identify and stop underground economy and black money with the goal ofincreasing the tax collection by the British Crown government. For example, in 1936 Ayers Committee investigated black money from the Indian colony. It suggested major amendments to protect and encourage the honest taxpayer and effectively deal with fraudulent evasion.

2. MC Joshi committee (2011) on Black Money

After a series of ongoing demonstrations and protests across India, the government appointeda high-level committee headed by MC Joshi the then CBDT Chairman in June 2011 to studythe generation and curbing of black money. The committee finalized its draft report on 30January 2012. Its key observation and recommendations were:

1. The two major national parties claim to have incomes of merely US$85 million and US$34 million. But this isn't "even a fraction" of their expenses. These parties spendbetween US$1.7 billion and US$2.6 billion annually on election expenses alone.

[5]http://www.incometaxindia.gov.in/Pages/about-us/central-board-of-direct-taxation.aspx.

2. Change maximum punishment under Prevention of Corruption Act from the present 3, 5 and 7 years to 2, 7 and 10 years rigorous imprisonment and also changes in theyears of punishment in the Income Tax Act.
3. Taxation is a highly specialized subject. Based on domain knowledge, set up all-Indiajudicial service and a National Tax Tribunal.
4. Just as the USA Patriot Act under which global financial transactions above athreshold limit (by or with Americans) get reported to law enforcement agencies,India should insist on entities operating in India to report all global financialtransactions above a threshold limit.
5. Consider introducing an amnesty scheme with reduced penalties and immunity fromprosecution to the people who bring back black money from abroad.

3. The Wanchoo Committee's Recommendations[6]

The Wanchoo Committee recommended a check on tax-evasion and proliferation of blackmoney.However, one aspect of tax-evasion was neglected by the Committee and it was simplification of tax laws. Unless the tax laws are simplified and rationalized, tax-evasion cannot be checked. Moreover, simple filing return procedure should be laid down so thateven a layman could file it without resorting to the help of lawyers and experts. Some of the recommendations of the Wanchoo Committee have been implemented by theGovernment. But a great deal of work still needs to be done in this matter. If therecommendations of the committee are implemented in the right earnestness, they wouldmitigate the magnitude of tax-evasion to a considerable extent. However the problem cannotbe solved unless we, the people of India, realize our moral responsibility of contributing ourefforts in the building of nation[7].This can be done only if hard work and honest enterprisebecome truly rewarding. Something more effective and meaningful should be done to stop the generation and proliferation of black-money.

4. The other committees[8]

The other committees were the Dangli Committee on Controls and Subsidies (1980), the Rajah Chelliah Committee, and the National Institute of Public Finance and Policy (1985) etc.

5-Special Investigating Team (SIT)

The Union Cabinet on May 2014 approved the constitution of a Special Investigating Team (SIT) to implement the decision of the Honorable Supreme Court on large amounts of money stashed abroad by evading taxes or generated through unlawful activities.

Other Measures

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[6]White paper/May 2012/ Black money/Ministry of finance, department of revenue. New Delhi.
[7]http://www.directorateofenforcement.gov.in.
[8]Sukanta Sarkar (2010). "The parallel economy in India: Causes, impacts & government initiatives". Economic Journal of Development Issues, Volume 11-12 no.(1-2) p.124-134.

1. Tax Information Exchange Agreements

To curb black money, India has signed TIEA with 13 countries -Gibraltar, Bahamas, Bermuda, the British Virgin Islands, the Isle of Man, the Cayman Islands, Jersey, Liberia, Monaco, Macau, Argentina, Guernsey and Bahrain where money is believed to have beenstashed away. India and Switzerland, claims a report, have agreed to allow India to routinelyobtain banking information about Indians in Switzerland from 1 April 2011.

2. Direct Tax Laws Committee' in June 1977 (DTLC)

With a view of bringing about simplification and rationalization of the direct tax laws, theGovernment appointed a committee of experts known as the "Direct Tax Laws Committee' inJune 1977. The recommendations of the Committee are being processed for implementation.In 1976 the Government imposed a statutory obligation on the management to carryoutphysical verification of its assets for the satisfaction of the auditors to ensure that no money iscreated through the sale of fixed assets. Management is also obliged to maintain a properrecord of the sale of scrap.

3. Voluntary Disclosure Scheme (VDS)

The Government has floated various voluntary disclosure schemes to determine the blackmoney. In 1951, a voluntary disclosure scheme with relaxation in panel provision was introduced. It resulted in total disclosures amounting to Rs.71 crores and tax collection of Rs.11crores only. Up to 1968 a total concealed income of the order of Rs. 519 crores was declared on which Rs.131 crores were paid as tax; this further highlights the failure of theGovernment to unearth black incomes. The wealth disclosed under the scheme will attractincome tax, but not wealth tax. Under the scheme, previously undisclosed income reported bythe declarant, will be subject to tax at the rate of 30% for individuals and 35% in other cases.Further, the Finance Minister has announced that the declarant will not be liable to payinterest or penalties and will be granted immunity from prosecution under the Income tax Act1961, Wealth tax Act, 1957, Foreign Exchange Regulation Act, 1973 and Companies Act, 1956.

VDS 1975

Under the voluntary disclosure scheme in 1975, No penalties were imposed on the personsdisclosing black-money voluntarily. Curbing of the smuggling activities in the country hasbeen the main concern of the Government, The conservation of Foreign Exchange andPrevention of Smuggling Activities Act was passed for this matter on 19th December, 1974.

VDS 1997-98. Finance Minister Mr. P. Chidambaram while presenting 1997-98 budgets announced aVoluntary Disclosure Scheme (VDS). Voluntary Disclosure Scheme which was extensivelyadvertised yielded tax revenue of Rs.10, 500 crores an unprecedented revenue gain fromany VDS scheme launched since the independence.

4. Income Declaration Scheme, 2016

Income declaration scheme,2016 was an amnesty scheme introduced by Narendra Modi led Government of India as a part of the 2016 Union budget to unearth black money and bring it back into the system. Lasting from 1 June to 30 September, the scheme provided an opportunity to income tax and wealth tax defaulters to avoid litigation and become compliant by declaring their assets, paying the tax on them and a penalty of 45% thereafter.The scheme guaranteed immunity from prosecution under the Income Tax Act, Wealth Tax Act, 1957, and the Benami Transactions (Prohibition) Act, 1988 and also ensured that declarations under it would not be subjected to any scrutinizes or inquiries.

5. Pradhan Mantri Garib KalyanYojana 2016 (PMGKY)

In this backdrop, an alternative Scheme namely, 'Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana, 2016' (PMGKY) has been proposed in the Bill. The declarant under this regime shall be required to pay tax @ 30% of the undisclosed income, and penalty @10% of the undisclosed income. Further, a surcharge to be called 'Pradhan Mantri Garib Kalyan Cess' @33% of tax is also proposed to be levied. In addition to tax, surcharge and penalty (totaling to approximately 50%), the declarant shall have to deposit 25% of undisclosed income in a Deposit Scheme to be notified by the RBI under the 'Pradhan Mantri Garib Kalyan Deposit Scheme, 2016'. This amount is proposed to be utilised for the schemes of irrigation, housing, toilets, infrastructure, primary education, primary health, livelihood, etc., so that there is justice and equality.

6. Demonetization

Demonetization is an act by which government of a nation strips the circulation of one or more than one currency unit of its status as a legal tender. The process of demonetization involves either totally withdrawing currency units and introducing new currency units of same denomination which are being demonetized or completely replacing the old currency with new currency of different denomination.

In 1946, demonetization was resorted to but the Direct Taxes Enquiry Committee in itssmallproportion of total notes in circulation was demonetized in 1946 and its worth was Rs.1, 235.93 crores. On January 16, 1978 demonetization of high demonetization notes was introduced. The high demonetization rates as on that day amounted to Rs. 146 crores. Notes tendered to Reserve Bank of India amounted to Rs. 125 crores as per data available till August 1981[9].Government of India announced that Five hundred and One Thousand rupee notes ceased to be legal tender from the midnight at 8 November, 2016.This process of demonetization is largely done keeping in mind to eliminate black money which cast a long shadow of parallel economy on our formal economy. 1946 and 1978 both public were aware that the demonetization will be introduced by the government sooner or later, therefore the demonetization at that time could not produce any substantial gain the economy. But the demonetization 2016, is different from the

[9]Lekhi, 2003, 195.

demonetization done in 1946 and 1978, is that it was kept very secret, so that the black money hoarders could not get any time to convert their black money into white money.

7. Measures to Check Tax Evasion

Dealing with tax evasion has always been one of the most difficult challenges forgovernments all round the world. Tax evasion is done by individuals belonging to differentstrata of the society in different ways. As per the surveys and reports, there are many peoplewho provide false income details to the tax authorities to reduce the amount of liability. The income tax evasion penalties can help the government recover maximum amounts in the formof tax and utilize the money for the benefit of the common public. Tax evasion is one of thebasic causes to generate the black income. Therefore, various measures were undertaken toplug the loopholes in tax evasion. Most of these measures were based on thee commendations of various committees and commissions *viz*, Taxation Enquiry Commission (1953), Administrative Reforms Commission (1969), Direct Tax Enquiry Committee (1971) etc. Most of these recommendations were an upgrading in tax laws (Charlie, 2010).

8. The Prevention of Money Laundering Act, 2004[10]

Section 3 of the Act makes the offense ofmoneylaundering cover those persons or entities who directly or indirectly attempt toindulge or knowingly assist or knowingly are party or are actually involved in any process oractivity connected with the proceeds of crime and projecting it as untainted property, suchperson or entity shall be guilty of offense of money laundering. Section 4 of the Actprescribes punishment for money laundering with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liableto fine which may extend to five lakh rupees and for the offences mentioned [elsewhere] thepunishment shall be up to ten years[11].

9. National Housing Bank Scheme

In July 1991, the Union Finance Minister projected a new scheme National Housing Bank Scheme to persuade black money back into the legitimate operations of the national economy. The scheme offered possessors of unaccounted for money an opportunity todeposit any quantity of money (with a maximum limit of Rs. 10000) with NHB withoutdisclosing the basis of funds. Some scholars have maintained that all these measures havetouched only the tip of the iceberg. All of schemes have hardly fetched Rs. 5000 crore over aperiod of fifty years. The main drawback in these schemes is that they touch the black money already created but they do not go into the root cause of generation of black money. Unless this problem is tackled, the menace of black money will continue to increase.

10. PAN Mandatory for High Value Transactions

[10]came into effect on 1 July 2005.

[11]Money laundering 2010.

Permanent Account Number (PAN) is now quoted compulsorily for all transactions above Rs. 2 Lakh from January 2016 and will be applicable on all sales and purchase of goods and services and for all modes of payment. PAN is already a must for almost all financial sector transactions, car purchases and to buy immovable property above a certain limit. Similarly, PAN is mandatory for the purchase of cash or prepaid cards amounting to Rs. 50,000 or more in year.

11. Benjamin Transactions (Prohibition) Amended Act, 2016

Though the Benami Transactions (Prohibition) Act, 1988 has been on the statute book since more than 28 years, the same could not be made operational because of certain inherent defects. With a view to providing effective regime for prohibition of benami transactions, the said Act was amended through the Benami Transactions (Prohibition) Amended Act, 2016. The amended law empowers the specified authorities to provisionally attach benami properties which can eventually be confiscated. Besides, if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

12. The Taxation Laws (Second Amendment) Bill, 2016

Concerns have been raised that some of the existing provisions of the Income-tax Act, 1961 (the Act) can possibly be used for concealing black money. The Taxation Laws (Second Amendment) Bill, 2016 ('the Bill') has been introduced in the Parliament to amend the provisions of the Act to ensure that defaulting assesses are subjected to tax at a higher rate and stringent penalty provision.

13. Cashless Economy

Cashless economy means more and more use of digital mode and less use of cash in transaction .In other words, it does not mean the shortage or less supply of cash but less use of cash and more use of digital transactions i.e.debit card, credit card, internet banking and through mobilephone app.The move towards a cashless economy or electronic transactions might help to curb black money by reducing tax evasion and ensuring transparent functioning of the economy. Digital payments bring in greater efficiency in welfare programmes as many is wired directly into the accounts of recipient's .Once the money is transferred directly into a beneficiary's bank account the entire process becomes transparent and black money can be controlled.

Conclusion

A comprehensive analysis of the factors leading to generation of black money in India along with the various measures attempted to counter it till date makes it apparent that there is no single panacea that can rid society of this menace. At the same time, it is not impossible to curb, control, and finally prevent the generation of black money in future as well as repatriation of black money, if a comprehensive mix of well-defined strategies is pursued with patience and perseverance by the central and state governments and put into

practice by all their agencies in a coordinated manner.It is to be noted here that though we have formulated different strategies and policies to combat black money, its effect is not reflected in implementation. The need of the hour is greater political will and global coordination to counter the issue.

Marriage and Divorce under Parsi Law

Dr. Pradeep Kumar[1]

Abstract

The objective of Parsi Marriage and Divorce Act, 1936 to amend the law relating to marriage and divorce among Parsis in India. A "Parsi" means a Parsi Zoroastrian. The word Parsi has only a racial significance and has nothing to do with religious professionals. It has amended & repealed the Parsi Marriage and Divorce Act, 1865 which was replaced by a new Act bearing the same caption in 1936. The new Act was amended in some respects in 1988. The repealed law was based on the English law of marriage-the Matrimonial Causes Act, 1858. Old law was suffering from many defects & there were very few grounds such as adultery etc. of divorce. On no other ground could marriage be dissolved under it. Under the new law, the Parsi Marriage is regarded as a contract though religious ceremony of Ashirvad by priest in the presence of two Parsi witnesses other than such priest is essential for its validity.[2]

Parsi law gives equal treatment to both the sexes. The rights as well as remedies prescribed under Parsi law are equally available to both husband and the wife. The Parsi Marriage and Divorce Act 1936 are unique in that it suggests a distinction between divorce and dissolution of marriage. The Act seems to have been framed on two underlying principles: Nobody should be allowed to use conversion to another faith for the purpose of defeating the provisions relating to monogamy in the law governing such person at present. A marriage essentially monogamous in its inception cannot become polygamous by change of faith. In the backdrop of said observations this article attempts to highlight the positive and negatives of Marriage and Divorce under Parsi Law. It also seeks to address the changing dimensions of gender justice and other allied issues in Parsi Law.

Keywords: Ashirvad, Divorce, Ceremony, Conversion, Marriage, Parsi

Introduction

The main object of the Parsi Marriage and Divorce Act, 1936 to amend the law relating to marriage and divorce among Parsis in India. That Act was enacted to bring the law of marriage and divorce in conformity with the conditions and views that were prevailing at that time of the Parsi Community. It amends and repeals the Parsi Marriage and Divorce Act, 1865 which was replaced by a new Act bearing the same caption in 1936. The new Act was amended in some respects in 1988. That law was based on the English law of marriage-the Matrimonial Causes Act, 1858.

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[2] Section 3(b) of The Parsi Marriage and Divorce Act, (Act no. 3)1936.

The Parsi Marriage and Divorce Act, 1865 was not a satisfactory piece the Parsi community. Then the Parsi Central Association appointed a Sub-committee in 1923. It suggested certain amendments with the approval of great personalities like *Rt. Hon. Sir D.F. Mulla* and *Sir Dinshaw E. Wacha*. As a result this Act was passed. It received the assent of the Governor-General of India on 23 April 1936 and was brought into force from 22 June 1936.[3]

In 1988 this Act was amended by the Parsi Marriage and Divorce (Amendment) Act, 1988 (Act 5 of 1988) in order to update or modernize it. The Act no. 5 of 1988 was passed on 25 March 1988 and was applied with effect from 15 April 1988. This Act may be called the Parsi Marriage and Divorce Act, 1936. It extends to the whole of India except the State of Jammu and Kashmir.

The Parsi Marriage is also regarded as a contract though religious ceremony of Ashirvad is essential for its validity. '*Ashirvad*' literally means blessing, a prayer or divine exhortation to the parties to observe their marital obligations with faith. This Parsi Marriage and Divorce Act, 1865, were based on the Matrimonial Causes Act, 1857, of England and its principal effect was to make Parsi marriage monogamous. Since then the circumstances altered. Moreover the Parsi Marriage and Divorce Act, 1865, was itself defective in many respects. Adultery by itself or adultery coupled with some other offence, were the only grounds for divorce under that Act.

On no other ground could marriage be dissolved under it. Again a section of the Act empowered only the wife to ask for judicial separation on the ground of cruelty, or because her husband brought a prostitute in his house; the husband had no remedy by way of seeking judicial separation. To remove these defects the present Act, i.e. the Parsi Marriage and Divorce Act, 1936, was enacted. In addition to this Act, the Parsi have their own separate law of inheritance contained in the Indian Succession Act, 1925, which is somewhat different from the rest of the Succession Act.[4]

Who is Parsi?

The word Parsi is derived from *Pers* or *Fars*, a province in Persia.[5] Parsi, also spelled Parsee, member of a group of followers in India of the Iranian prophet Zoroaster. The Parsis, whose name means "Persians", are descended from Persian Zoroastrians who immigrated to India to avoid religious persecution by the Muslims.

The Parsi Marriage and Divorce act 1936 defines a Parsi as Parsi Zoroastrian, professing Zoroastrian religion. The Act provides for solemnization of marriages between Parsis

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[3] Kumud Desai, *Indian Law of Marriage & Divorce*, Nagpur, Wadhwa and Company, Sixth Edition, 2004, p.317.

[4] M. P. Jain, Outlines of Indian Legal History, p. 491. (4th ed. 1981).

[5] Dr. Mohammad Shabbir and Justice S.C. Manchanda, "*Parsi Law in India*", (Allahabad, The Law Book Company (P.) Ltd., Fifth Edition 1991, p. 6.

only and also provides granting of matrimonial reliefs such as restitution of conjugal rights, judicial separation, divorce and nullity. There is no reference to the requirement of domicile in the whole of the Act for any purpose.

"Parsi" means a Parsi Zoroastrian.[6] A Zoroastrian is a person who professes the Zoroastrian religion. A Zoroastrian need not necessarily be a Parsi. The word Parsi has only a racial signification and has nothing whatever to do with his religious professionals

In *Dinshaw M. Petit v. Sir Jamsetji Jijibhai*[7]the word "Parsi" is derived from *Pers* or *Fars*, a province in Persia from which the original Persian emigrants came to Indian sub continent. The express "Parsi" has no religious connotation. It carries a more territorial connotation Doutbless the religion of every "Parsi" is Zoroastrian but every Zoroastrian is not a "Parsi".[8]

In *Dinshaw M. Petit v. Sir Jamsetji Jijibhai*[9] the Parsi community consists of Parsi who are descended from the original Persian emigrants, and who are born of Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia Professing the Zoroastrian religion who came to India either temporarily or permanently, and the children of Parsi father by alien mother who have been duly and properly admitted into the religion.

In *Jamshed Irani v. Banu Irani*[10], case it was held that the word "Parsi" as used in the Parsi Marriage and Divorce Act includes not only the Parsi Zoroastrians of India but also the Zoroastrians of Iran. Section 3 lays down requisites to validity of Parsi marriages. Sub-Section (1) (a) lays that no marriage will be valid if the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I.

Now it has been settled that the word "Parsi" as used in the Act includes not only Parsi Zoroastrians of India but the Zoroastrians of Iran also and that the court constituted under this Act has Jurisdiction over them.[11]

"***Marriage***" means a marriage between Parsis whether contracted before or after the commencement of this Act;[12]

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[6] Section 2 (7) of The Parsi Marriage and Divorce Act, (Act no. 3) of 1936.
[7] 11 Bom. LR 85 at p. 113.
[8] Dr. Mohammad Shabbir and Justice S.C. Manchanda, "*Parsi Law in India*", (Allahabad, The Law Book Company (P.) Ltd., Fifth Edition 1991, p. 6.
[9] 11 Bom. LR 85 at p. 128.
[10] (1967) Mh.LJ 33: 68 Bom. LR 794 as Quoted by V.C. Govindaraja and C. Jayaram (eds.), Lakshmi Jambholkar Conflict of Laws - Nature & Scope, Non-Resident Indians and Private International Law, 141 (ILI Hope Indian Publications, Gurgaon, 2008).
[11] Jaspal Singh, "*Hindu Law of Marriage and Divorce*", 1983, Pioneer Publications, Delhi, p. 481.
[12] Section 2 (6) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

"***Husband***" means a Parsi husband[13]; and "***wife***" means a Parsi wife.[14]

The word "***priest***" means a Parsi priest and includes Dastur and Mobed.[15] "Datstur" means a head priest and "Mobed" means an ordinary Priest.

Requisites to validity of Parsi Marriage[16]

1) No marriage shall be valid if
   a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule 1[17]; or
   b) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest ; or

[13] Section 2 (9) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[14] Section 2 (5) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[15] Section 2 (8) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[16] Section 3 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[17] **SCHEDULE 1** Table of prohibited degrees of consanguinity and affinity

A man shall not marry his-	***A woman shall not marry her---***
1. Paternal grand-fathers mother.	1. Paternal grand-fathers father.
2. Paternal grand-mothers mother.	2. Paternal grand-mothers father.
3. Maternal grand-fathers mother.	3. Maternal grand-fathers father.
4. Maternal grand-mothers mother.	4. Maternal grand-mothers father.
5. Paternal grand-mother.	5. Paternal grand-father.
6. Paternal grand-fathers wife.	6. Paternal grand-mothers husband.
7. Maternal grand-mother.	7. Maternal grand father.
8. Maternal grand-fathers wife.	8. Maternal grand-mothers husband.
9. Mother or step-mother.	9. Father or step-father.
10. Fathers sister or step-sister.	10. Fathers brother or step-brother.
11. Mothers sister or step-sister.	11. Mothers brother or step-brother.
12. Sister or step-sister.	12. Brother or step-brother.
13. Brothers daughter or step-brothers daughter, or any direct lineal descendant of a brother or step-brother.	13. Brothers son or step-brothers son, or any direct lineal descendant of a brother or step-brother.
14. Sisters daughter or step-sisters daughter, or any direct lineal descendant of a sister or step-sister.	14. Sisters son or step-sisters son, or any direct lineal descendant of a sister or step-sister.
15. Daughter or step-daughter, or any direct lineal descendant of either.	15. Son or step-son, or any direct lineal descendant of either.
16. Sons daughter or step-sons daughter, or any direct lineal descendant of a son or step-son.	16. Daughters son or step-daughters son, or any direct lineal descendant of a daughter or step-daughter.
17. Wife of son or step-son, or of any direct lineal descendant of a son or step-son.	17. Husband of daughter or of step-daughter, or of any direct lineal descendant of a daughter or step-daughter
18. Wife of daughters son or of step-daughters son, or of any direct lineal descendant of a daughter or step-daughter.	18. Husband of sons daughter or of step-sons daughter, or of :any direct lineal descendant of a son or step-son.
19. Mother of daughters husband.	19. Father of daughters husband.
20. Mother of sons wife.	20. Father of sons wife.
21. Mother of wifes paternal grand-father.	21. Father of husbands paternal grand-father.
22. Mother of wifes paternal grand-mother.	22. Father of husbands paternal grand-mother.
23. Mother of wifes maternal grand-father.	23. Father of husbands maternal grand-father.
24. Mother of wifes maternal grand-mother.	24. Father of husbands maternal grand-mother.
25. Wifes paternal grand-mother.	25. Husbands paternal grand-father.
26. Wifes maternal grand-mother.	26. Husbands maternal grand-father.
27. Wifes mother or step-mother.	27. Husbands father or step-father.
28. Wifes fathers sister.	28. Brother of husbands father.
29. Wifes mothers sister.	29. Brother of husbands mother.
30. Fathers brothers wife.	30. Husbands brothers son, or his direct lineal descendant.
31. Mothers brothers wife.	31. Husbands sisters son, or his direct lineal descendant.
32. Brothers sons wife.	32. Brothers daughters husband.
33. Sisters sons wife.	33. Sisters daughters husband.

c) in the case of any parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.

2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section (1) any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.

There are six essential conditions of Parsi Marriage:

1) Avoidance of degree of prohibited relationship
2) Performance of "Ashirvad" ceremony
3) Age of marriage
4) Child, Marriage
5) Consent of father or Guardian
6) Enforceability of contract to marry at minor's instance.

1) Avoidance of degree of prohibited relationship

Section 3 (1) (a) that the parties who contract marriage have to avoid certain degree of in relationship. Table of prohibited degree of consanguinity and affinity is set-forth in **Schedule-I**[18] of the Parsi Marriage and Divorce Act, 1936.

2) Performance of "Ashirvad" ceremony

The marriage is solemnized under Parsi Marriage and Divorce Act, 1936, according to the Parsi form of ceremony called 'Ashirvad' by the Priest in the presence of two Parsi witnesses other than the Priest himself.[19] In *Bhaurao Shankar Lokhande v. State of Maharashtra*[20] the Supreme Court held that in connection with marriage the world solemnize means to celebrate the marriage with proper ceremonies and due form. There is a Parsi form of ceremony known as Ashirvad. This word literally means blessings.[21] According to Section 2(8) there are two classes of Parsi Priests-Dasture and Mobed. Ashirvad may be performed by any one of them there must be two witnesses besides the priest. Both of these witnesses must be Parsi.[22]

3) Age of Marriage

Section 3 (1) (c), as amended in 1988, fixes the age for marriage as 21 years for man and 18 years for the woman. Before the Parsi Marriage and Divorce (Amendment) Act, 1988 for the purpose of valid marriage, any minimum age-limit regarding male and female is

[18] See Foot Note 17.
[19] Section 3 (1) (b) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[20] AIR 1965 SC 1564.
[21] Kumud Desai, *Indian Law of Marriage & Divorce*, Nagpur, Wadhwa and Company, Sixth Edition, 2004, p.329.
[22] *Ibid.*

not prescribed by this Act, and is, hence, left to be determined by the general law applicable to Indian Prasis.

Now for the validity of the Parsi marriage completion of twenty one year's age for a male and eighteen years of age for a female is required. The present requirement of age for the validity of a Parsi Marriage is in consonance with the prescribed age-limit for the validity is in consonance with the prescribed age limit for the validity of marriage under Section 3 of the Child Marriage Restraint Act, 1929.

4) Child, Marriage

The Parsi religion does not sanction child marriage, but the Parsis who migrated to India more than twelve centuries ago adopted certain Hindu custom in Natural process and one of which was child marriage. As now this Act is express about the age when marriage can be validity contracted, therefore, it ought to be determined in accordance with the amend law of the Parsi. The Child Marriage Restraint Act, 1929 is applicable to Parsis.

5) Consent of father or Guardian

The Act lays down that all persons under the age of twenty-one years, must in order to contract a valid marriage, obtain the consent of his or her father or guardian. If such consent has not been previously obtained, the marriage is invalid.

6) Enforceability of contract to marry at minor's instance.

A contract of any kind with a minor thought is generally void absolutely under law yet contract which are beneficial to minors and do not impose corresponding obligation on them have been held to be enforceable by a catena of decisions in this country.

So a Parsi minor who was over 18 and below 21 years of age was held competent to maintain of marriage had been by the minor's guardian and on the minor's behalf and for the minors' benefit. Such contract is a perfectly valid one and enforceable in law by the minor.

Registration of Marriage

Every marriage contracted under this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in **Schedule II**[23]. The certificate shall be signed by the said priest, the contracting parties and two witnesses present at the marriage; and the said priest shall thereupon send such certificate together

[23] **Schedule II Certificate of Marriage**

SCHEDULE II

Certificate of Marriage----------Date and place of marriage.----------
Names of the husband and wife ----------Condition at the time of marriage.
----------Rank or profession----------Age.----------Residence.
Names of the fathers or guardians.----------Rank or profession.----------

Signatures of the officiating priest.----------
Signature of the contracting parties.----------
Signatures of the fathers or guardians of the contracting parties under 21 years of age.----------
Signatures of witnesses.----------

with a fee of two rupees to be paid by the husband to the Registrar of the place at which such marriage is solemnized. The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for that purpose and shall be entitled to retain the fee.[24]

Appointment of Registrar

For the purposes of this Act a Registrar shall be appointed. Within the local limits of the ordinary original civil jurisdiction of a High Court, the Registrar shall be appointed by the Chief Justice of such Court, and without such limits, by the State Government. Every Registrar so appointed may be removed by the Chief Justice or State Government appointing him.[25]

Marriages register to be open for Public Inspection

The register of marriages mentioned in Section 6 shall, at all reasonable times, be open for inspection, and certified extracts there from shall, on application, be given by the Registrar on payment to him by the applicant of two rupees for each such extract. Every such register shall be evidence of the truth of the statements therein contained.[26]

Copy of certificate to be sent to Registrar- General of Births, Deaths and Marriages

Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the State Government by which he was appointed from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by such State Government a true copy certified by him in such form as such State Government from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals.[27]

Penalty for solemnizing Marriage (Remarriage when Unlawful)

Penalty for solemnizing marriage contrary to section 4 (Remarriage when Unlawful). Any priest knowingly and wilfully solemnizing any marriage contrary to and in violation of section 4 shall, on conviction thereof, be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.[28]

Penalty for priest's neglect of requirements

Any priest neglecting to comply with any of the requisitions affecting him contained in section 6 shall, on conviction thereof, be punished for every such offence with simple

[24] Section 6 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[25] Section 7 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[26] Section 8 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[27] Section 9 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[28] Section 11 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.[29]

Penalty for omitting to subscribe and attest certificate
Every other person required by section 6 to subscribe or attest the said certificate who shall willfully omit or neglect so to do, shall, on conviction thereof, be punished for every such offence with a fine not exceeding one hundred rupees.[30]

Penalty for making, etc., false Certificate
Every person making or signing or attesting any such certificate containing a statement which is false, and which he either knows or believes to be false, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both ; and if the act amounts to forgery as defined in the Indian Penal Code,(45 of 1860), then such person shall also be liable, on conviction thereof, to the penalties provided in section 466 of the said Code.[31]

Penalty for failing to Register Certificate
Any Registrar failing to enter the said certificate pursuant to section 6 shall be punished with simple imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.[32]

Penalty for secreting, destroying or altering register
Any person secreting, destroying, or dishonestly or fraudulently altering the said register in any part thereof, shall be punished with imprisonment of either description as defined in the Indian Penal Code (45 of 1860) for a term which may extend to two years, or if he be a Registrar, for a term which may extend to five years and shall also be liable to fine which may extend to five hundred rupees.[33]

Formal irregularity not to Invalidate Marriage
No marriage contracted under this Act shall be deemed to be invalid solely by reason of the fact that it was not certified under section 6, or that the certificate was not sent to the Registrar, or that the certificate was defective, irregular or incorrect.[34]

Provision of Remarriage
Liberty to parties to marry again in The Parsi Marriage and Divorce Act, 1936 when the time limited for appealing against any decree granting a divorce or annulling or dissolving a marriage shall have expired, and no appeal shall have been presented against

[29] Section 12 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[30] Section 13 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[31] Section 14 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[32] Section 15 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[33] Section 16 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[34] Section 17 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal a divorce has been granted or a marriage has been declared to be annulled or dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again.[35]

Monogamy- a condition of a valid marriage a Parsi husband or wife cannot remarry in the life time of his wife or husband as the case may be, until his or her marriage is dissolved by a competent Court of law, although, he or she may have become a convert to any other faith or religion.

Remarriage when unlawful

No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the lifetime of his or her wife or husband, whether a Parsi or not, except after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved, and, if the marriage was contracted with such wife or husband under the Parsi Marriage and Divorce Act 18654 (15 of 1865),or under this Act, except after a divorce, declaration or dissolution as aforesaid under either of the said Acts. Section 4 of the Act follows the policy of monogamous marriages only and bars a Parsi spouse, even if he/she has changed his/her religion, from remarrying except after the marriage is duly dissolved. [36]

Punishment of Bigamy

Section 494 and 495, IPC applicable to Parsis, every Parsi who during the lifetime of his or her wife or husband, whether a Parsi or not, contracts a marriage without having been lawfully divorced from such wife or husband, or without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code (45 of 1860) for the offence of marrying again during the lifetime of a husband or wife.[37]

Section 4 of the Parsi Marriage and Divorce Act, 1936 prohibits bigamy and declares it unlawful and Section 5 of Parsi Marriage and Divorce Act, 1936 makes Bigamy punishable. It states that every Parsi who during the life time of his or her wife or husband, whether a Parsi or not, contracts a marriage without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in Section 494 and Section 495 of Indian Penal Code 1860.

Divorce under Parsi Law

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[35] Section 48 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[36] Section 4 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[37] Section 5 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

The Parsi Marriage and Divorce Act, 1936 says if a husband or wife have been continually absent from his or her wife or husband for a period of seven years, and have not been heard of as being alive within that time by those persons who would have naturally heard of him or her, had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved.[38] The Parsi Marriage and Divorce Act, 1936, do not provide separate grounds of divorce for wife.

The Parsi Marriage and Divorce Act, 1936 enumerates Grounds for divorce and the ground mentioned are following:

a) the marriage has not been consummated within one year after its solemnization owing to the **wilful refusal of the defendant to consummate** it;
b) the defendant at the time of the marriage was of **unsound mind** and has been habitually so up to the date of the suit Provided that divorce shall not be granted on this ground, unless the plaintiff (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;
bb) the defendant has been incurably of unsound mind for a -period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant.[39]

Explanation of this section

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia,

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment; the defendant was at the time of marriage pregnant by some person other than the plaintiff: Provided that divorce shall not be granted on this ground, unless:

(c) the plaintiff was at the time of the marriage ignorant of the fact alleged,

The suit has been filed within two years of the date of marriage, and marital intercourse has not taken place after the plaintiff came to know of the fact;

(d) The defendant has since the marriage committed adultery or **fornication** or **bigamy** or **rape** or an **unnatural offence**:

[38] Section 31 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[39] Section 32 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

(dd) The defendant has since the solemnization of the marriage treated the plaintiff with **cruelty** or has behaved in such a way as to render it in the judgement of the Court improper to compel the plaintiff to live with the defendant:

Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;

(e) The defendant has since the marriage voluntarily caused **grievous hurt** to the plaintiff or has infected the plaintiff with **venereal disease** or, where the defendant is the husband, has compelled the wife to submit herself to **prostitution**;

Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years

(i) after the infliction of the grievous hurt, or
(ii) after the plaintiff came to know of the infection, or
(iii) after the last act of compulsory prostitution.

(f) That the defendant is undergoing a sentence of **imprisonment for seven years or more** for an offence as defined in the Indian Penal Code:

Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;

(g) that the defendant has **deserted the plaintiff for at least two years**;

(h) that an order has been passed against the defendant by a Magistrate awarding **separate maintenance to the plaintiff, and the parties have not had Marital intercourse** for one year or more since such decree or order;

(i) that the defendant has ceased to be a Parsi by **conversion to another religion**: Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.

(j) that the defendant has ceased to be a Parsi by conversion to another religion;

Non-resumption of cohabitation or restitution of conjugal rights within one year in pursuance of a decree to be ground for divorce: Either party to a marriage, whether solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, may sue for divorce also on the ground,[40]

[40] Section 32 A of The Parsi Marriage and Divorce Act, (Act no. 3) 1936 inserted by Act No. 5 of 1988, w.e.f. 15th April, 1988.

i. that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
ii. (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.[41]

No decree for divorce shall be granted under sub-section (1) if the plaintiff has failed or neglected to comply with an order for maintenance passed against him under section 40 of this Act or section 488 of the Code of Criminal Procedure, 1898 or section 125 of the Code of Criminal Procedure, 1973.[42]

Divorce by Mutual Consent

The Muslim law is the first legal system in India under which mutual consent as a ground of divorce has been recognized.[43] Under Hindu Law mutual consent as a ground of divorce came into being by the Marriage Laws (Amendment) Act, 1976.[44]

Parsi law has also recognized divorce by mutual consent. A suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act. 1988, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved: Provided that no suit under this sub-section shall be filed unless at the date of the filing of the suit one year has lapsed since the date of the marriage.[45]

The Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act and the averments in the plaint are true and that the consent of either party to the suit was not obtained by force or fraud, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.[46]

Registration of Divorces

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[41] Section 32A (1) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936 inserted by Act No. 5 of 1988, w.e.f. 15th April, 1988.
[42] Section 32A (2) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936 inserted by Act No. 5 of 1988, w.e.f. 15th April, 1988.
[43] Dr. Mohammad Shabbir and Justice S.C. Manchanda, "*Parsi Law in India*", (Allahabad, The Law Book Company (P.) Ltd., Fifth Edition 1991, p. 62. See also Tahir Mahmood, The Hindu Marriage Act, 1955, Allahabad, 1986, p. 120.
[44] *Ibid at p. 62.*
[45] Section 32B (1) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[46] Section 32B (2) of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.

When a Court passes a decree for divorce, nullity or dissolution, the Court shall send a copy of the decree for registration to the Registrar of Marriages within its jurisdiction appointed under section 7; the Registrar shall enter the same in a register to be kept by him for the purpose, and the provisions of Part II applicable to the Registrars and registers of marriages shall be applicable, so far as may be, to the Registrars and registers of divorces and decrees of nullity and dissolution.[47]

Conclusion

The Parsi Marriage and Divorce Act, 1936 makes an extremely important provision. It makes its makes clear that Parsi cannot marry a second spouse during the continuance of his first marriage by conversion to another religion and even under any other law.[48] Parsi law gives equal treatment to both the sexes. The rights as well as remedies prescribed under Parsi law are equally available to both husband and the wife. Thus, it is radically different from Muslim law where the wife has limited rights and remedies available to her as compared to the husband and is replete with gender discrimination in favour of Muslim male as against the Muslim female.

The Parsi Marriage and Divorce Act 1936 is unique in that it suggests a distinction between divorce and dissolution of marriage. The Act seems to have been framed on two underlying principles: Nobody should be allowed to use conversion to another faith for the purpose of defeating the provisions relating to monogamy in the law governing such person at present. A marriage essentially monogamous in its inception cannot become polygamous by change of faith.

[47] Section 10 of The Parsi Marriage and Divorce Act, (Act no. 3) 1936.
[48] Kumud Desai, *Indian Law of Marriage & Divorce*, Nagpur, Wadhwa and Company, Sixth Edition, 2004, p.332.

Law relating to Marriages in India: An Analysis

Vivek Kumar[1]

Introduction

It is said that marriages are made in heaven and celebrated on earth. The popular belief is true to many extents, because it is a special bond shared between two souls, who tie the wedding knot after promising to be companions for a lifetime. It is the physical, mental and spiritual unison of two souls. It brings significant stability and substance to human relationships, which is otherwise incomplete. It plays a crucial role in transferring the culture and civilization from one generation to the other, so that the human race is prospered. The institution of marriage is beneficial to the society as a whole, because it is the foundation of the family, which in turn is the fundamental building block of the society. While the concept of marriage remains the same across the globe, the way of solemnizing it differs extensively.

Different laws have been formulated to legalize the ceremony, which proves to be an important turning point in one's life. Apart from the laws of marriages[2], the rituals following during the ceremony are in total contrast to each other. Something that is seen in the western countries cannot be witnessed in other nations in the developing world, primarily due to the contrast in the lifestyle and religious beliefs.

One of the prime reasons for the paramount status of marriage is that it is the license for two individuals to live together in a society, without much limitation. Coming to the subcontinent of India, marriage encompasses a number of meanings, apart from being a legalized way of uniting two people. It bears a lot of social significance[3]. This is primarily because in India, marriage has been considered a way to bring the families of two individuals closer. Since the ancient times, marriages have been celebrated as ceremonious occasions, just like the religious festivals, wherein a number of rituals and customs are followed. A number of ceremonies are observed before, during and after wedding.

Marriage is an important occasion in the personal, religious and social life of man. Perhaps, the institution of marriage came into existence to control free sexual relationship

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[2] Prof. Kusum, Family Law Lectures "Family Law 1", LexisNexis Butter Worth Wadhwa Pub., 3rd edn., p.1.

[3] *Ibid.*

in the society. The institution of marriage was already established in the Vedic age. In the Vedic texts, we do not find mention of a society where there are free sexual relations.[4] With marriage, the married couples legalise their living together till the end of their lives.[5]

In traditional societies, marriage is essentially a private domain concerning the family and the community[6]. A marriage performed by pressurizing one or both the parties and without their free will and full consent is considered to be a forced marriage. This doesn't imply that all cultures where marriages are arranged are ones where a potential honour killing might occur; rather it is violence which is risk within culture where the consent of the individual is given less importance than the will of the parents and wider family and where marriages are considered a union of two families rather than of individuals. Seen in this context it may be considered acceptable to force an individual into marriage against their will keeping the interest of family in mind[7].

What is Marriage?

The legal status, condition, or relationship that results from a contract by which one man and one woman, who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of Husband and wife in law for life, or until the legal termination of the relationship. Marriage is a legally sanctioned contract between a man and a woman. Entering into a marriage contract changes the legal status of both parties, giving husband and wife new rights and obligations[8]. Public policy is strongly in favor of marriage based on the belief that it preserves the family unit. Traditionally, marriage has been viewed as vital to the preservation of morals and civilization. Marriage is a sacred institution; it is the very foundation of a stable family and civilised society. There are, however, certain prerequisites and conditions for a valid marriage. All personal laws lay down some conditions which need to be complied with to enter into or solemnise a legal marriage; but before the conditions the question is, does everyone have an absolute right to marry[9]?

Right to Marry

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[4] In the Mahabharata, however such a society of past is described. See MBh l.ll3.4-7On this, Kane (1941:428) opines: "These passages cannot be relied upon for proving promiscuity of intercourse." further states: "The theory of an original state of promiscuity once advanced by several sociologists has now ceased to be respectable."

[5] Westermarck (l92lii:433) says: "The most general social object of marriage to give publicity to the union."

[6] Prof. Kusum, Family Law Lectures "Family Law 1", LexisNexis Butter Worth Wadhwa Pub., 3rd edn., p.2.

[7] *Ibid.*

[8] Prof. Kusum, Family Law Lectures "Family Law 1", lexis nexis butter worth wadhwa pub., 3rd edn., p.3.

[9] *Ibid.*

The right to marry is a component of the right to life under Art. 21 of the constitution of India which says- 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' This right has been recognised even under the

Universal Declaration of Human Rights, 1948. Article 16 of the same states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and it its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. In the context of the right to many, a mention may be made of a few Indian cases. ***Mr. 'X' v. Hospital 'Z'***[10], is a significant, though unfortunate in the facts and circumstances of the case judgment. The Supreme Court ruled that right to marry is not an absolute right. The appellant, a surgeon in the Nagaland state Health Service donated blood to a surgery patient in a hospital in Madras. His blood sample taken by the respondent hospital revealed that he was HIV+. This was in June, 1995. In August, 1995 the appellant proposed marriage to Ms. Y and the marriage was scheduled to be held in December, 1995. There-was nothing to indicate that he was even aware of his HIV+ status when he proposed. The marriage, however, was called off because of the disclosure of his blood report. Why, when, how and to whom the disclosure was made is also not clear. However, cancellation of his marriage and disclosure of his HIV+ status obviously caused a lot of embarrassment and agony to the appellant. He was ostracised by the community and had to leave his home state.

He approached the consumer disputes redressal commission claiming damages against the hospital for disclosing his blood test reports and breaching confidentiality. The same was dismissed. He then approached the Supreme Court. On the point of ethics of confidentiality, duty to maintain secrecy and the patient's right to privacy, the court held that these were not absolute. The court emphasised that mental and physical health of spouses is very important in marriage, and that is the reason why all divorce laws entitle a spouse to obtain divorce if the other party is suffering from any communicable disease. The right to marry, according to the court, is not absolute and remains suspended until the afflicted person is cured.

Referring to the provisions of the Indian Penal Code, 1860, the court observed that had the appellant married the lady, he would have committed offences under sec. 269 and 270 of the same. i.e., negligent act likely to spread infection of disease dangerous to life, and malignant act likely to spread infection of disease dangerous to life.

[10] AIR 1999 SC 495.

The Judgment on whole was very insensitive to the victim, and also inexpedient and unwarranted. True, public health policy considerations do warrant measures and provisions to prevent the spread of any disease, but a blanket ban and suspension of the right to marry cannot solve the problem. The judgment also overlooks the fact that divorce laws entitling a spouse to relief on the ground of the respondent's medical condition do not debar a person from entering into a marriage. They only entitle the non-afflicted person to seek dissolution of the marriage if he/she so desires. Thus if parties, with full knowledge and informed consent and without concealment of the fact enter into a marriage, there is no-law which can prevent them from doing so.

Fortunately, a-three-judge bench of the Supreme Court partly overruled this judgment in *Mr. 'X' v. Hospital 'Z'*[11] in 2003. The issue whether there can be complete bar for marriage if a healthy Spouse gives an informed consent to marriage with a spouse found to be HIV+? The court held that the two-judge Bench in the 1999 judgment had gone further that was warranted by declaring generally that in the event such persons marry, they would commit an offence under law or as to suspension of the right to marry, during the period of illness. Thus, it is implied that the right to marry is not taken away; any afflicted person can marry a non afflicted person, or any two afflicted persons can marry each other without any legal bar, provided there is knowledge and informed consent for the same. Needless to say, such partners need to adopt precautions and safe practices in the interest of children, the society and also in their own interest.

In *Lata Singh v. State of Uttar Pradesh*[12], the Supreme Court viewed the right of marriage as a component of right to life under Art. 21 of the Constitution of India. The facts that gave rise to the litigation were violent reactions following an inter-caste marriage between two adults. There were complaints, arrests, threats and criminal cases against the girl's husband and his family members. The girl (wife) filed a writ petition under Art. 32 of the Constitution of India with a prayer for issuing a writ of certiorari and/or mandamus for quashing the trials in the lower courts, against her husband and his relatives. The petition was allowed and the police/ administration was directed to protect them from harassment, threats or acts of violence, and take stern action against those-who do so, by instituting criminal proceedings against them. The court observed:

"This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter caste or inter-religious marriage".

[11] AIR 2003 SC 664.
[12] AIR 2006 SC 2522.

Both the partners in the case were adults and so free to marry of their choice. The court further observed that there is no bar to an inter-caste marriage under the Hindu Marriage Act, 1955 or any other 1aw .Inter-caste marriages are in fact in the national interest as they will result in destroying the caste-system.

Conditions for a Valid Marriage under different Personal Laws

Hindu Law

If two Hindus want to perform a Hindu marriage, then they have to perform it under the Hindu Marriage Act. Hindu Marriage Act, 1955 has reformed Hindu law of Marriage. It is a landmark in the history of social legislation. It has not simply codified the Hindu law of marriage but has introduced certain important changes in many respects. The Hindu marriage contemplated by the Act hardly remains sacramental. The Act has brought in some changes of far reaching consequences which have undermined the sacramental nature of marriage and rendered it contractual in nature to a great extent. Under the Hindu Marriage Act, 1955, the following are the conditions for a marriage:

Sec. 5. Conditions for a Hindu marriage- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not Sapindas of each other, unless the custom or usage governing each of them permits of marriage between the two;

It is significant to note that vide section 2(1) (b) of the Act, this Act applies to any person who is a Buddhist, Jaina or Sikh by religion. The term "Hindu" is comprehensive and includes Buddhists, Jains and Sikhs. Infact, Explanation II to Article 25 of the Constitution, which provides for freedom of religion, elucidates that the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina and Buddhist religion. In this context, a reference may be made of a Public Interest Litigation (PIL)[13] filed by a Sikh seeking amendment in the Constitution to declare that

[13] Prof. Kusum, Family Law Lectures “Family Law 1”, LexisNexis Butter Worth Wadhwa Pub., 3rd edn., p.7.

the Sikh community should be out Of the purview of the Hindu Marriage Act, 1955. The Supreme Court Bench, Headed by Chief Justice K.G. Balakrishnan, however turned down the petition. The court held that it cannot entertain the subject as it has to be looked into by the appropriate authority in the government.

S.7. Ceremonies for a Hindu marriage.-

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the-bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

It is not, however, necessary to prove the performance of ceremony of Saptapadior any other ceremony, in order to determine the validity of a Hindu marriage, In *Chandrabhagbai Ganpati v. S.N. Kanwar*[14], the issue whether Saptapadi was mandatory for a legal marriage arose in connection with a property dispute. The parties had got married in customrary form following certain ceremonies but not Saptapadi. After the death of the husband property disputes emerged between the widow and her children on one side and the husband's brother on the other who challenged the very validity of the marriage between the widow and his deceased brother on the ground that there was no Saptapadi. While the trial court upheld the challenge, the first appellate court as well as the High Court held that the marriage was legal notwithstanding the fact that the marriage ceremonies did not include Saptapadi. Nor is Kanyadana mandatory ceremony for a valid marriage[15]

A marriage is presumed to have been duly solemnized if it is shown that performance of some of the ceremonies usually observed on the occasion of marriage has taken place. In other words, if the marriage is shown to have in fact taken place, ceremonies are presumed to have been duly performed[16], provided of course that neither force nor fraud was practiced. Where all witnesses deposed in the same manner about the performance of the marriage and the wife herself gave a vivid description of the ceremonies, certain discrepancies in evidence of witnesses in regard to *Saptapadi or Kanyadan* were held not to be significant enough to displace the presumption of a valid marriage[17]. However, mere fact of joint living for a long time without any ceremonies would not constitute a valid marriage[18]. An intimate relationship without any ceremonies, entered into between a man and a woman by a registered agreement before a statutory authority like sub-registrar, was held not to constitute a valid marriage[19].

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[14] 2008 MLR 21 (Bom.).
[15] *Laxmi Devi v. Satya Narayan* (1995) 1 DMC 298.
[16] *Bai Diwali v. Moti* 22 (Bom.) 509 (1898) , *Kastoori Devi v. Chiranji Lal* AIR 1960 All. 446
[17] *Ranjan Kumari v. Santosh Kumar Singh,* AIR 2010 Ori. 62.
[18] *Surjeet Kaur v. Garja Singh,* AIR 1994 SC 135.
[19] S.*M. Syed Abdul Basith v. Asst. Commr. Of Police, Ernaculam,* AIR 2009 (NOC) 2413 (Ker).

For a valid marriage under the Act, both the parties need to be Hindus at the time of marriage. Thus, where a non-Hindu by birth (a Christian lady by birth in this case) converts to Hinduism before marriage, and all facts and circumstances indicate that the converted spouse practiced Hinduism, the plea of absence of proof of conversion or *shudhi karan* ceremony cannot be raised to seek declaration of nullity of marriage on the ground that the other spouse was a non-Hindu[20].

In *Vijay Kumari v. V.K. Devabalan*,[21] however, the issue involved was whether a son born to a Hindu converted to Christianity and a Christian lady could become a coparcener in the joint Hindu family. It was held that the marriage of the parents was not valid under the provisions of the Hindu Marriage Act, 1955 as both the parties were not Hindus at the time of marriage, and so the son born to them, would not be governed by the concept of coparcenership under the Hindu law.

So also in *Margaret Palai v. Savitri Palai*,[22] where a marriage between a Hindu male and a Christian female was alleged to have been performed vide a "deed of marriage agreement", the court held that it was not a valid marriage as per Hindu law as there was no evidence to prove that the wife had converted to Hindu faith before the alleged marriage.

Parsi Law

The requisites for a valid marriage under the Parsi Marriage and Divorce Act, 1936 are:

Sec. 3 Requisites to validity of Parsi Marriages.[23]

(1) No marriage shall be valid if-

a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or

b) such marriage is not solemnized according to| Parsi form of ceremony Called "Ashirwad" by a Priest in the presence of two Parsi witnesses other than such Priest; or

c) (c)[24] in the case of any Parsi (whether such Parsi has changed his or her
   i. religion of domicile or not) whole, if a male, has not completed
   ii. twenty-one years of Age, and if a female, has not completed eighteen
   iii. years of age.

[20] *Madhvi Naresh Dudani v. Ramesh K. Dudani*, AIR (2006) Bom 94.
[21] AIR 2003 Ker 363.
[22] AIR 2010 Ori 45.
[23] Sec. 3 renumbered as sub Sec. (1) thereof by Act 5 of 1988.
[24] Clause (c) subs. By Act 5 of 1988.

(2)[25] Not withstanding that a marriage is invalid under –any of the provisions of sub sec. (1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.

Special Marriage Act, 1954

Section 4 of the Special Marriage Act, l954 lays down conditions for solemnization of special marriages. It states:

Sec.4.Conditions relating to solemnization of special marriages.-

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this act if at the time of the marriage the following conditions are fulfilled, namely:

(a) neither party has a spouse living;

(b)[26] neither party-

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity.

(c) the male has completed the age of twenty-one years and the female the age of eighteen Years;

(d)[27] the parties are not within the degrees of prohibited relationship: provided that where a custom governing at least one of, the parties permits of a marriage between them. such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship: and

(e)[28] where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Explanation[29].-In this section, "custom", in relation to a person belonging to any Tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family: Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied-

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[25] Ins.by Act 5 of 1988.
[26] Subs. By Act 68 of 1976.
[27] Subs.by Act 32 of 1963.
[28] Subs. by Act 33 of 1969.
[29] Ins. By Act 32 of 1963.

(i) that such rule has been continuously and uniformly observed for a long time among those members;
(ii) that such rule is certain and not unreasonable or opposed to public policy; and
(iii) that such rule, if applicable only to a family, has not been discontinued by the family.

Christian Law

In order to constitute a valid marriage under the act, it is a requirement that either one or both parties are Christians. Unless one of the parties to the marriage is governed by its own personal law which forbids such a marriage on the grounds of prohibited degrees of relationship, thereby rendering the marriage as void and redundant under the act. To constitute a legitimate marriage under the act the following factors have to be complied with:-

Under the Indian Christian Marriage Act, 1872, the conditions for certification of a marriage of Indian Christians have been provided in Sec. 60 of the Act. These are:

(1) the age of the man intending to be married shall not be under twenty one years and the age of the woman intending to be married shall not be under eighteen years;
(2) neither of the persons intending to be married shall have a wife or husband still living;
(3) in the presence of a person licensed under Sec. 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other-

I call upon these persons here present to witness that I, AB, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, CD, to be my lawful wedded wife or husband' or words to the like effect.

Muslim Law

Free consent of the parties is absolutely necessary for a valid marriage .If there is no free consent a Muslim marriage is void. Under the Muslim Law, a marriage of a Mohammedan who is of sound mind and has attained puberty is void; if it is brought about without his consent the marriage of a girl who has attained puberty and is of sound mind would be void if her consent is not obtained. When the consent to the marriage has been obtained by force or fraud, the marriage will be invalid, unless it is ratified. When a marriage was consummated against the will of the women, the marriage is void. The person who has been defrauded can repudiate the marriage. 'The legal age' to consent for marriage, it means the concerned marriage laws have been codified at least regarding the minimum permissible age for the marriage of a Muslim girl. It is submitted that the age factor as an essential element of a Muslim marriage is linked up with "Puberty". . Puberty means the age at which a person becomes capable of performing sexual intercourse and procreating children. Puberty and Majority are in Muslim Law One And The Same Thing.

The presumption is that a person attains majority at the age of 15 but the Hedaya lays down the earliest period for a boy is 12 years and for a girl 9 years. However, Majority under the Hanafi's law is on the completion of 15 years in the case of both males and females, unless there is any evidence to show that puberty was attained earlier. In the case of a SHIA girl the age of puberty begins with Menstruation. The recent news item puts the minimum age of a Muslim girl for marriage as 15 years. This is true to some extent in the case of Hanafi school[30].Under the Muslim law, a marriage, which is not sahih i.e., valid, may be either batil, i.e., void, or fasid, i.e., irregular.[31]

Batil

Such marriage being void does not create any rights or obligations, and the children born of such union are illegitimate. A marriage will be void if it is with a mooharin, i.e., prohibited by reasons of: (a) consanguinity, (b) affinity, or (c) fosterage. A marriage with the wife of another man or remarriage with a divorced wife when the legal bar still exists, is also void. Such marriage being void, there are no rights and obligations between the parties. A wife has no right to dower unless there has been consummation, in which case she is entitled to customary dower. Besides, if one of the parties dies, the other is not entitled to inherit from the deceased.

Fasid

Such marriage is irregular because of the lack of some formality, or the existence of some impediment which can be rectified. Since the irregularity is capable of being removed, the marriage is not unlawful in itself. Marriage in the following circumstances is fasid, viz., a marriage that is:

(i) without witnesses;
(ii) with a fifth wife by a person having four wives;
(iii) with a woman undergoing iddat;
(iv) prohibited by reason of difference of religion;
(v) with a woman so related to the wife, that if one of them had been a male, they could not have lawfully intermarried.

In the above situations, the prohibition against such marriages is temporary or relative or accidental, and can be thus rectified:

(i) by subsequent acknowledgement before witnesses;
(ii) by divorcing one of the four wives;
(iii) by expiration of the iddat period;
(iv) by the woman becoming a convert to Islam, Christianity or Jewish religion, or the husband adopting Islam;

[30]http://www.lawyersclubindia.com/forum/Legal-age-of-muslim-girl-to-get-married--62108.asp#.VW6569Kqqko, accessed on 28.02.15.

[31] The Shia law does not recognised the distinction between irregular or void marriage. A marriage is either valid or void. Marriage is irregular under the Sunni law , is void under the Shia law-Text book of Mohmmedan Law by Aqil Ahmad, edn.2003, pp.124 &125.

(v) by the man divorcing the wife who constitutes the obstacle.

ln *Chand Patel v. Bismillah Begum*[32] the issue was whether a person professing Muslim faith who contracts second marriage with wife's sister during the subsistence of the earlier marriage is obliged to pay maintenance to such woman under the provisions of Sec. 125 of the Cr.P.C. The court held that such a marriage was not void but only irregular; if is a temporarily prohibited marriage and could always become lawful by death of first wife or by husband divorcing the first wife. "Since a marriage which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is in our view irregular (fasid) and not void (batil)", the court observed[33].

An irregular marriage may be terminated by either party, either before or after consummation. It has no legal affect before consummation. If, however, consummation has taken place, then:

(i) the wife is entitled to dower, prompt or specified, whichever is 1ess;
(ii) she is bound to observe iddat, the duration of which, in case of both divorce or death, is three courses;
(iii) children born of the marriage are legitimate.

It is significant to note that an irregular marriage, even if consummated, does not create mutual rights of inheritance between the parties.[34]

Sikh Marriage -Anand Karaj Act 1909 as Amended in 2012

Registration of marriages: (1) For the purposes of facilitation of proof of marriage ceremony (commonly known as Anand Karaj) customary among the Sikhs, the State Government shall, without prejudice to anything contained in the Hindu Marriage Act, 1955 or any other law for the time being in force, make rules providing that the parties to any such marriage [whether solemnized before or after the commencement of the Anand Marriage (Amendment) Act, 2012, may have the particulars relating to their marriage entered, in such manner and subject to such conditions as may be provided in the said rules, in a Marriage Register kept by such officer of the State Government or of a local authority authorised by the State Government, by notification in the Official Gazette, in this behalf. Thus for Sikhs the valid age of giving consent for marriage is the bridegroom has completed the age of twenty one (21) years and the bride the age of (18) at the time of marriage.

Registration of Marriage

There is no provision for compulsory registration of a marriage under the Hindu Marriage Act, 1955.[35] Section 8 of the Hindu Marriage Act, 1955 makes registration optional and

[32] AIR 2008 SC 1915.
[33] AIR 2008 SC 1921.
[34] Mulla, Principles of Mahomedan Law, edn.1972, pp 261-263.

Sec. 8(5) specifically states that validity of any marriage is not affected by failure to register it.

Thus in *Kamal Kant Panduranga Chibde v. Susheela Panduranga Chibde*,[36] the Bombay High court specifically held that any provision in the rules invalidating a marriage because of omission to enter the same in the marriage register would be repugnant to sub-Sec. (5) of Sec. 8 of the Hindu Marriage Act, 1955. However, all requisites for a valid marriage need to be complied with to recognise the validity of a marriage, registration notwithstanding. Also, it is significant to note that under this Act, the marriage is not solemnised by Registrar but certified to have been solemnised on the basis of application made to him. Requirement of physical presence of parties as laid down in Rules 3 and 4 of the Marriage Registration Rules, 1956 was held to be not mandatory in view of the advanced technology which provides suitable mechanism to facilitate requisite information from spouses who are separated-by long distances. The law needs to adapt to changing times and developments.[37] A plea for compulsory registration of marriages has been made by the courts in several cases.

In *Kangavalli v. Saroja*[38] the paternity of children born of a void marriage was challenged. The court lamented that the Hindu Marriage Act, 1955 neither lays down the procedure for solemnisation of marriage nor makes registration compulsory. Movies and visual media have added to this confusion and created an impression that exchange of garlands or tying of *thali* constitutes a valid marriage. This confusion, coupled with non-registration, has landed many women in a relationship which, while exacting from her all the duties of a wife, leaves her with neither the right under the law nor recognition in society. In divorce or bigamy proceedings, a Hindu male can admit or deny the first or second marriage depending on his whim and fancy. This puts the woman, who is denied the status, in a vulnerable position. Compulsory registration would check fraudulent marriages, apart from non-age and bigamous marriages.

This would also establish paternity of children. As observed by the court, 'if there is certificate of registration of marriage between his [child's] mother and father which though may not validate marriage otherwise void, will at least bear testimony to identify his biological parents'.[39]

In a recent judgment by the Supreme Court in *Seema v. Ashwani Kumar*,[40] the court has issued directions that the marriages of all persons who are citizens of India belonging to

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[35] However, various states have made amendment to the act and laid down rules for registration of marriage.
[36](1989) 2 HLR 154(Bom); *Sanjay Mishra v. Eveline Jobe*, AIR 1993 MP 54.
[37] *Charanjit Kaur Nagi v. Gov. of NCT, Delhi*, (2008) I DMC 45 (Del).
[38] AIR 2002 Mad 73.
[39] AIR 2002 Mad 77.
[40] AIR 2006 SC 1158.

various religions, should be made compulsorily registrable in their respective states where the marriage is solemnized. If the marriage is registered, the dispute concerning solemnisation of marriage is avoided; it protects the women's rights relating to marriage to a greater extent; it has great evidentiary value in the matters of custody of children, rights of children, and the age of parties to the marriage.

The Supreme Court has directed the states and Central Government to take concrete steps in this direction. While the Special Marriage Act, 1954, provides for registration of marriages, Sec. 16 thereof, which refers to procedure for registration does not require publication of the factum of marriage in a newspaper for the purpose of registration.[41] Under section 15 of this Act parties are required to have completed the age of 2l at the time of registration of the marriage. The Registrar cannot refuse to register a marriage on the ground that the marriage of the parties was solemnised when one of the parties was below the age of 21. If the parties are 21, the Registrar has to register it[42].

Special Marriage Act, 1954

Under the Special Marriage Act, 1954, a marriage is null and void under Sec. 4 read with Sec. 24, if:

(i) it is in violation of the minimum age requirement, which is 21 years for a boy and 18 years for a girl;
(ii) there is another spouse living;
(iii) the parties are within prohibited degrees of relationship, unless custom or usage permits such marriage;
(iv) any of the parties is incapable of giving valid consent due to unsoundness of mind, or though capable of giving consent, is suffering from mental disorder of such kind as to be unfit for marriage or procreation of children, or has been subject to recurrent attacks of insanity;
(v) The respondent was impotent at the time of marriage and at the time of filing of the suit.

A marriage under the Special Marriage Act, 1954 is voidable if the same has not been consummated owing to wilful refusal of the respondent, or the respondent was pregnant by some person other than the petitioner, or the consent of either party to the marriage was obtained by coercion or fraud.[43]

Minimum Age for Marriage

A minimum age for marriage is prescribed under the Hindu law, Parsi law, Christian law as also under the Special Marriage Act, 1954. While a marriage, with a partner below the prescribed age is void under Sec. 24 read with Sec. 4(c) of the Special Marriage Act, 1954, and invalid under Sec. 3(c) of the Parsi Marriage and Divorce Act, 1936, such

[41] *Lorna Williams v. Dy. Com.-cum- Marriage officer*, AIR P&H 2007,62 (NOC).
[42] *Baljit Kaur Boparai v. State of Punjab*, (2009) I DMC 28 (P&H-DB).
[43] Special Marriage Act,1954 Sec. 25.

marriage under the Hindu Marriage Act, 1955 is neither void nor voidable. It is only punishable under Sec. 18 of the Act and under the prohibition of child Marriage Act, 2006 (6 of 2007). This Act is applicable to all irrespective of the personal laws. In the context of the status of non age, marriage, a reference may be made of a few cases under Hindu law.

In *P. Venkataramana v. State*,[44] the issue was whether a Hindu marriage governed by the provisions of the Hindu Marriage Act, 1955, where the parties to the marriage or either of them are below the prescribed ages set out in cl.(iii) of Sec. 5 is void-ab-initio. A wife filed a complaint against the husband and ten others, alleging that the husband had committed an offence under Sec. 494 of the Indian penal-code 1860 (viz., bigamy) by marrying another girl. The husband's defence was that his marriage with the complainant was void since he was 13 years and she was only 9 year old at the time of their marriage. This marriage being void, no offence was committed by his marrying another girl again, the husband argued. The Trial Court held the first marriage as legal and hence convicted the husband. The convictions were confirmed in appeal, though with slight modification.

Revision was filed against conviction. Ultimately, in view of the significance of the issue involved, the matter was referred to the Full Bench. After a detailed analysis of the statutory provisions and case law, the court came to the conclusion that such marriage is not void. Had the law makers intended that they would not have given to a wife a right to repudiate her marriage solemnized before the attainment of the age of 15 years. This indicates that the violation of cl. (iii) of Sec. 5 of the Hindu marriage Act, 1955 would not render the marriage either void or voidable. Also, if violation of each of the clauses in Sec. 5 were to have the effect of rendering a marriage void, the law makers would not have made different provisions for violation of different clauses. Neither under Sec. 11 nor under Sec. 12 of the Hindu Marriage Act, 1955, there is any mention of a marriage in contravention of Sec. 5(iii).

In *V. Mallikarjunaiah v. H.C. Gowramma*,[45] a husband sought declaration that his marriage was void since he had not completed the age of 2l at the time of marriage-that he was 20 years, one month and 12 days old. The issue whether such marriage was valid, void or voidable was discussed at great length. The trial judge dismissed the husband's petition on the ground that there was no cause of action. Hence, the husband filed an appeal. His argument was that Sec. 11 (void marriage) should be read with Sec. 5 and any marriage in breach of conditions laid down in Sec. 5 should be declared as null and void. It was further contended that the law should not be so interpreted so as to defeat its provisions. On the other hand. for the wife it was argued that the legislature specifically excluded Sec. 5(iii) from the purview of Sec. 11 (void marriage), Sec. 12 (voidable marriage) and Sec. 13 (divorce), and this exclusion was neither accidental nor by oversight, but deliberate.

[44] AIR 1977 AP 43(FB).
[45] AIR 1997 Kant 77.

After detailed arguments, the court came to the conclusion that the law does seek to discourage marriage of under-age boys and girls, but not to the extent of making them void or voidable. The socio-cultural conditions of the society and the consequences of invalidating such marriages on the girls specially were highlighted. The court observed:[46]

Having regard to the strata in which such marriages were likely to take place, the legislature was cautious of the fact that such provision should not have the result of rendering a large number of girls or young women virtually unmarried or destitute. The only security that a girl or woman in such a situation is entitled to is within the framework of the marriage and if the marriage can be loosely undone or if it is not recognised by the law, it would result is disastrous social consequences which is the only reason why this section was specifically excluded from sections 11 and 12 of the Act.

The court, however, suggested that in order to discourage such marriages, there is a need to provide for harsher penalties, particularly for those responsible for this. *In Gajar Narain Bhura v. Kanbi Kunverbai Parbat*,[47] where a husband sought to defeat a wife's claim for maintenance on the ground that the marriage being in contravention of the minimum age requirement; was void, the court held that child marriage by itself is not invalid nor a nullity, unless there has been fraud or force, in which case provisions of Sec. 12(1)(c) of the Hindu Marriage Act, 1955 would be attracted.

A recent judgment of the Delhi High Court viz., *Ravi Kumar v. State*,[48] on non age marriage evoked mixed response and debate on the issue of validity of marriages solemnized in contravention of Sec. 5 (iii) of the Hindu Marriage Act, 1955. Two girls, both about 16 years (below 18) married boys of their liking. The families of both filed criminal cases of kidnapping and enticement against the boys, and criminal proceedings against them commenced. The girls, one of whom was in the family way, refused to go to their parents so they were sent to the *Nari Niketan* much against their wishes. They filed applications for quashing the criminal cases filed against their husbands and for allowing them (the girls) to join their husbands. The two significant issues in the present context were:

(1) whether on account of the minority of the spouse, the marriage entered into is illegal and void-ab-initio; and
(2) whether young girls, who get married and have reached the age of discretion but not attained majority can be sent in protective custody to a remand home against their will?

[46] AIR 1997 Kant 77, p.82.
[47] AIR 1997 Guj 185, See also *Harvindar Kaur v. Gursevak Singh* (1998) AIHC 1013 (P&H).
[48] (2005) I DLT 124.

The court referred to, inter alia, *Seema Devi Alias Simran Kaur v. state of Himachal Pradesh*[49] where the petitioner girl aged 15 married the accused of her own accord. Criminal cases of kidnapping, etc, were registered against the accused. The additional chief judicial magistrate remanded the girl to protective custody in view of her minority and his nurturing doubts on the validity of the marriage. The High court held that the marriage in contravention of the prescribed age was neither void nor voidable. These contraventions did not fall within the scope of Sec. 11 or Sec.12 of the Hindu Marriage Act, 1955 (i.e. void and voidable marriage, respectively). It held that such a marriage would only be in contravention of Sec. 18 of the Hindu Marriage Act, 1955 which provides punishment. The observations of the additional chief judicial magistrate that the marriage was not a legal marriage, was held to be unwarranted and unsustainable.

It is pertinent to point out here that the prohibition of Child Marriage Act, 2006, vide section 3, provides that a child marriage shall be voidable at the option of the contracting party who was a child at the time of marriage.[50] Marriage of a minor is void under section 12 of this Act if deceit or forceful means are used or if a minor is sold for the purpose of marriage.

What is the Right Age of Consent to Marry?

This becomes a matter of interpretation and it can even vary from law to law. The sixth description of Article 375 of the Criminal Law (Amendment) Bill, 2013, states that "with or without her consent, when she is under eighteen years," if a man has sexual intercourse with a woman, it is rape. But under the Indian Penal Code, marital rape is an offence only when the wife is below 16 years, two years younger than the age of consent, according to Pocso.

Senior advocate and human rights activist BT Venkatesh says[51] the circumstances where the consent was given have to be taken into consideration, but also agrees that a case-by-case inquiry might create room for exploitation. "It isn't as if young people have a real choice. They can have consensual sex but the law is such that the boy can be criminalised if the girl or her family files a case. What about cases where a 12- or 13-year-old girl consents to sex? Is her consent valid? And what about cases where consent of the girl is manufactured like in most of the child sexual abuse cases?

This present judgment opens up a lot of issues," says Shakun Mohini, women's rights activist with Vimochana.If a minor girl has consensual sex and the law categorically calls it rape on the ground that people below the age of 18 aren't old enough to know right and wrong, then what about juvenile rapists? "For instance, in the Nirbhaya rape case, where

[49] (1998) 2 crimes 168.

[50] Thus, option of repudiating such marriage which hitherto was given only to a wife (Sec. 13 (2) (iv)) now extends to the husband as well.

[51] http://www.dnaindia.com/bangalore/report-what-is-the-right-age-of-consent-1881022, accessed on 28.02.15.

the culprit is a juvenile, everyone bays for his blood. While the observation that boys and girls below the age of 18 years have sexual rights too is valid, what is the "age for consent", ask rights activists. It is high time that state authorities, its machinery, NGOs and women groups make a determined and sustained endeavour to fix the age for consenting the marriage.

Insurgency in North East India: Issues and Challenges

Ponkhi Borah[1]
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"Better than a thousand hollow words is one word that brings peace"
--Lord Buddha

Introduction

Protecting human rights and strengthening democracy are essential for the upliftment of a nation. In a country governed by rule of law everyone is entitled to human dignity, peace and tranquility. The Constitution of India also strikes at violation of rights of every citizen in whatever form it may manifests itself, because it is violative of human dignity and is contrary to basic human values. The core values of our constitutional philosophy indicated in the Preamble to the Constitution are: dignity of the individual and unity and integrity of the nation. The rule of law in a true democracy demands protection and promotion of basic human values.

Terrorism, insurgency are some of the factors that put each nation in economically, socially, politically helpless condition. A country affected by these unlawful activities does not protect its individual's rights nor does it promote sovereignty, unity, integrity and prosperity of the nation. Challenges like terrorism and insurgency always used to aggravate the inequality and injustice. It is the constitutional obligation of each nation to take necessary steps for the purpose of interdicting violence and injustice caused by such evil threats.

Despite number of legislations and Government initiatives the situation remains unchanged in most of the parts. India was ranked 7th in the list of countries most impacted by terrorism in 2015, according to the Global Terrorism Index, 2016 Report.[3] It reveals that India is one of six Asian countries ranked in the top 10 nations most impacted by terrorism and North East India is not an exception to it. National Consortium for the Study of Terrorism and Responses has recently revels that India ranks 4th in terms of

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[3] Global Terrorism Index, Measuring and understanding the impact of Terrorism, Institute for Economics and Peace, available at www.economicsandpeace.org

total terrorist attacks in 2015 and ranks 14th in terms of total deaths.[4]Insurgency and such other forms of violence are a matter of great concern for each parts of the nation as it causes danger to the very existence of human values, the respect for peaceful co-existence, tolerance, pluralism, peace and prosperity of the whole nation. It is the paramount duty of the Central Government or the State Government to protect the sovereignty, security of the State and integrity of the nation.[5] To protect and promote its constitutional mandate the nation should fight with such violence not only with armed forces and financial powers but with the cooperation of its citizens.

Insurgency continued to plague the entire region except few parts and various insurgent groups have been trying to destabilize and weaken the entire nation from last few decades. In some parts like Manipur, the smallest and most militarized State in North-East India, the recent security situation can be compared to Palestine, Iraq, Afghanistan and Persia. For realization of their objective the insurgent groups have been indulging in violent activities, including killing of civilians and members of security forces.[6] The situation is not normal till date. In June 04, 2015, a group of insurgents ambushed a military convoy which killed at least 20 army personnel and injured 11 persons.[7] On December 16, 2016 a group around 70 terrorists attacked a police post in Manipur, stealing nine automatic weapons and leaving two policemen injured.[8]

One of the important aspects of terror attack is the death and injury of civilians who are unconnected with the terrorism or insurgency. These are the groups who are more vulnerable to any of such violence. The data, compiled by National Crime Record Bureau from 1988 to 2013 shows 18,710 civilians have been injured during incidents of police firing all over the country with States like Punjab, Andhra Pradesh, Maharashtra, Bihar, Assam and Jammu and Kashmir registering the maximum number of causalities.[9] It is the time to re-think, analyse and come out with proper solution of improving internal security, anti-insurgency operations and guarding the border areas of North-East. Combating terrorism under the rule of law is the demand of true democracy and each of us should think of new approach for its eradication in compliance of the constitutional mandate. The Supreme Court once observed that there will be peace, harmony and social progress only if there is equity, justice and dignity for everyone. Lawlessness and

[4] Country Reports on Terrorism 2015, available at www.stategov.
[5] *People's Union of Civil Liberties vs. Union of India* (1997) 1 SCC 301.
[6] *Extra Judl. Exec. Victim Families...vs. Union of India* & Anr. Decided on 4 January, 2013.
[7] Staff Reporter, 20 soldiers killed in Manipur militant ambush, The Indian Express, New Delhi, June 4, 2015, p.9.
[8] Ratnadip Choudhury, Terrorists attack police Post in Manipur, Escape with 9 Automatic Guns, December 17, 2016, available at m.ndtv.com
[9] Azaan Javaid, In India, two civilians get killed in police firing every day, July 2, 2015, available at www.dnaindia.com

violence in pursuance of insurgency and counter-insurgency proves the absence of constitutional wisdom.[10]

Objectives of the Study

1. To highlight the problem of insurgency in the North East India;
2. To discuss the violation of Human Rights of individual by insurgency and counter-insurgency operations;
3. To analyse the laws dealing with the insurgency in North Eastern region;
4. To suggest some measure for upliftment of individual suffering from insurgency and counter-insurgency operations;

Methodology

The study is based primarily on secondary data collected from Ministry of Home Affairs, Law Commission of India, National Crime Record Bureau and other relevant documents. Doctrinal research methodology has been adopted in arranging, ordering and systematizing current position of insurgency in North East India. Descriptive, analytical, informative methods are adopted in the analysis. The purpose of this paper is description of present insurgency situation that exists in North Eastern region. A brief case study was made to observe the present position of Tinsukia District of Assam, which is situated in between Assam-Arunachal border.

Terrorism Vs Insurgency

In the nineteenth century a terrorist was someone who engaged in a special kind of violence against the State. The term had a conventional and convenient, revolutionary usage, acknowledged as such by both perpetrators and their victims on targets. But this is no more applicable in today's system. Now a day's terrorism is the threat or use of extraordinary violence for political ends. Such acts of terrorism, however, are symbolic rather than instrumental and are undertaken for psychological rather than material effect. The late Raymond Aron, a French commentator and expert political scientist says it in the following way: An act of violence is labeled as "terrorist" when the psychological effects are out of all proportion to its purely physical result.[11] Justice S. B. Sinha defines terrorism as the systematic use of murder, injury, destruction or the threat of such acts aimed at achieving political ends- has the power to alter course of history. On the other hand, an insurgency is a movement within a country dedicated to overthrowing the government and it can be termed as a rebellion.[12] The ultimate goal of an insurgency is to challenge the existing government for control of all or a portion of its territory, or force political concessions in sharing political power. Doctrinally, Department of Defense[13]

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[10] Nandini Sundar & others Vs State of Chhattisgarh (2011) 13 SCC 46

[11] Eric Morris and Alan Hoe, Terrorism: Threat and Response, St. Martin's Press, New York, 1988, p. 25.

[12] Available on www.vocabulary.com accesses on 12 June 2016 at 12:30 P.M.

[13] Department of Defense is a federal department of United States responsible for safeguarding national security of the United States, created in 1947.

defines terrorism as "The calculated use of violence or threat of violence to inculcate fear; indeed to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological." Insurgency normally seeks to overthrow the existing social order and reallocate power within the country. They may also seek to:
(1) Overthrow an established government without a follow-on social revolution,
(2) Establish an autonomous national territory within the borders of a state.
(3) Cause the withdrawal of an occupying power,
(4) Extract political concessions that are unattainable through less violent means.

Terrorism may also simultaneously be an insurgent and some other forms of violence like guerrila. Depending upon the ideology that the terrorist wants to advance, regime change may be critical component of that effort. The security situation is volatile with inter-tribal differences and distrust becoming more pronounced than ever before.[14] Thus both terrorism and insurgency are similar in the sense that they want to destabilize the lawful Government of the nation by causing disturbance in various forms. Ambition is the main motto of both of them but the approaches adopted by them are different.

Insurgency in North East India: An Overview

The seven sister region of India is comprising of Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura and each of this place is world famous for its natural beauty comprising of mighty rivers like Brahmaputra, tropical rain forests, grasslands and numerous wetlands like kaziranga National Parks, Manas National Parks etc. It is the hub of more than 200 ethnic groups with distinct languages, dialects and socio-cultural identity. The NE Region covers 8% of the country's landmass and has 4% of the National population. About 99% of the 6387 Kms border of this Region is international border along Bangladesh[15] Myanmar[16] China[17] and Bhutan.[18]

The region has rich bio diversity, oil and natural gas, coal, limestone, hydro potential and forest wealth. Despite its natural beauty and natural resources the region is lagging behind from the main stream of the nation and insurgency can be said to be one factor for it's under development. Being a border area, the region is suffering from various problems and illegal cross-border movements, law and order scarcity, lack of security, insurgency, arm and drug smuggling etc. are more common among all of them. Basically in border areas the situation is very serious. The roots of insurgency in North Eastern Region are

[14] Pradip Singh Chhonkar, The creation of New Districts in Manipur: Administrative Necessity versus Naga Territorial Aspirations, December 23, 2016, available at www.idsa.in.
[15] 2,700 kms.
[16] 1,643 Kms.
[17] 1,345 Kms.
[18] 699 Kms. Government of India Ministry of Home Affairs Annual Report 2015-2016, Department of Annual Security, States, Home, Jammu and Kashmir Affairs and Border Management, available at www.mha.nic.in

embedded in its geography, history and ethnic feelings of each of the different tribes of the region.

One important reason of insurgency is its porous International border. The States of the region are surrounded by Bangladesh, Bhutan, China, Myanmar and Nepal. In fact, the region has a long international border of more than 4581 kms,[19] but no proper initiative has been taken in recent past to fence the areas. Thus presence of a long and porous border and a very inhospitable terrain have facilitated movement of militant groups as also inflow of illegal arms into the region, besides large scale influx of illegal migrants into the country. Inadequate economic development and employment opportunities in the region have also fueled induction of neo-literate youth into militancy. Pak-ISI has also been assisting the militancy in the region. Militants used to enter there and after attack crossed the border and no armed forces can detect them.

The multiple insurgencies of India's North East have seen dramatic deceleration and disintegration over the years, bringing violence across the region down to some of the lowest levels in the past two and half decades. According to the SATP data Union Ministry of Home Affairs has currently banned 13 terror groups and 30 other groups remain active in the region.[20] One another important reason of increase of insurgent activities is the availability of forest coverage in the entire region. The militants are well-acquainted with the thickly forested region but it is difficult for security forces to go on a full offensive. The militant groups can easily run away to their camps in nearby countries like Myanmar and Bhutan after the attack and took shelter therein. Cooperation of neighboring countries is very much necessary not only for resolving insurgency but also minimizing smuggling of drugs, arms etc across the Indo-Myanmar border. In recent past the Government of India could not take proper initiative due to some difficulties. These difficulties are difficult terrain, cultural affinity of the tribal people with the North East insurgents, drug trade and arms traffic in their areas of operation, poorly equipped and administered army, illiteracy, lack of proper communication facility, lack of cooperation of people, miss use of armed forces power in the name of counter insurgency etc.[21]

There has been extensive smuggling of arms and explosives among various militant groups. Today various kinds of sophisticates arms and explosives being brought into the North East illegally from nearby countries like Bangladesh, Bhutan, China and Myanmar. According to Law Commission Report, today most of the insurgent groups are of foreign

[19] Ministry of Development of North Eastern Region, Government of India Report on International Border, available at www.mdoner.gov.in.
[20] India Assessment-2016 available at www.satp.org.
[21] Reethika Sharma, Ramvir Goria and Vivek Mishra, India and the Dynamics of World Politics: A Book on Indian Foreign Policy, Related Events and International Organizations, Saurabh Printers, Chandigarh, 2011, pp.1112-1123.

origin. Mercenaries and fundamentalist terrorists from Afghanistan, Sudan, Pakistan and some other countries are being inducted increasingly into this movement.[22]
In North East region cold-blooded murder of innocent people in both insurgency and counter-insurgency operation is a major threat to human life. The murder of people who are totally unconnected with insurgency have shown that rule of law is not applied in this region in practical sense rather in paper only. Harassment to common people living in the vicinity of the insurgent affected areas by both armed forces and military groups could be said to have given rise to the insurgency in the entire region. Collateral damage to person and property is contrary to right to life and personal liberty guaranteed under the Constitution of India.[23] Observance of human rights and rule of law are democratic ideals but the present legal system and law enforcing agencies cannot protect its citizens from exploitation, illegal detention, extra-judicial killing and fake encounter relating to insurgency.

The incident of torture and death of Thangjam Manorama Devi by a team from the 17th Assam Rifles in July 2004 can never be forgotten. She was forcefully taken from her home on mere suspicion of having connection with militant groups in night at around 11 p.m. and in morning her bullet ridden body was found. This incident is one of the most shocking custodial killings of a Manipuri village girl. But till date no action was taken against the accused army personnel's. Immediately after the incidents ministers and M.L.A. used to say that they will look into the matter seriously and will take initiative against the accused army or military personnel's. But few of such incidents happen where the victim or his/her family gets justice. For instance, in 2006 a five-year-old child, Debojit Moran was killed in 'crossfire' by Indian army during an operation against militants at bordering No. I Mohong village under Pengeri police station in Tinsukia District of Assam. The incident sparked mass protests in the entire state, but till date government could not take action against the accused army personnel. After five years of the incident the Government has granted Rs. 2 lakhs and promised to give a Government job to the victim's elder sister Soonpahi Moran who was seriously injured by the bullet injury in the same incident and got relief after undergoing long treatment in AIIMS, Delhi. But till date no further step has been taken by the Government. The victim's mother herself has said that giving money is not adequate, because it cannot be termed as justice which could not give satisfaction to the entire family. There are thousands of such incidents where the victims start thinking that God has shaped their own destiny in such way.

Most of the places of North Eastern region is situated in such remote areas that people of these regions don't know their other constitutional rights except right to vote. Border districts like Changlang district of Arunachal Pradesh, Tinsukia District of Assam has provided easy gateway to the insurgents seeking safe havens in Arunachal and Myanmar.

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[22] Law Commission of India 173rd Report on Prevention of Terrorism Bill 2000, available at www.lawcommissionofindia.com.
[23] Article 21 of the Constitution of India, 1950.

Due to the rugged terrain and thick forest coverage the armed forces cannot detect the insurgents and in all most all the time the counter-insurgency operation fails because of lack of good communication system and dense forest coverage. In the name of counter-insurgency operation the armed forces used to harass the innocent people living in the neighboring villages. The border between Arunachal and Assam is not well fenced and illegal activities like drug smuggling; arm smuggling is flourished in the entire region.

In 2014, due to various terror attacks while 193 people died in Kashmir and 372 in Nexal areas, 413 died in the North East. Assam is the worst sufferer of human causalities in terror attacks among all Indian states.[24] In recent past regarding insurgency entire region has seen only two pictures: Promise of central government to combat such incidents and concealment of civilian deaths and injury in its yearly report. Inspire of more causalities and death of civilians than that of Jammu and Kashmir the recent Government of India Ministry of Home Affairs Report 2015-2016 has revealed that, barring a few incidents there is general atmosphere of peace in States like Arunachal Pradesh, Assam, Meghalaya, Mizoram and Tripura.[25] But in reality, it's only the North East where deaths in insurgent violence continue unabated. The focus of North East has been emphasized by the central government in meetings and national/international conferences, but it has been far behind both in terms of emotional and physical investments. In 2014, Assam accounted for 168 deaths in 246 insurgency incidents and as many as 144 of these deaths were at the hands of NDFB(S) cadres. In 2013 too, the similar outfit claimed maximum lives in Assam.[26]

Fatalities in Militants Violence in India's North East 2005-2015[27]

Years	Civilians	SFs	Militants	Total
2005	334	69	314	717
2006	232	92	313	637
2007	457	68	511	1036
2008	404	40	607	1051
2009	270	40	542	852
2010	77	22	223	322
2011	79	35	132	246
2012	90	18	208	316
2013	95	21	136	252
2014	245	23	197	465
2015	18	6	29	53
Total	2301	434	3212	5497

[24] Deeptiman Tiwary, Terror kills more in North East than elsewhere, 28th March 2015, available at www.toi.com.
[25] Government of India, Ministry of Home Affairs Annual Report 2015-2016.
[26] Supra Note 17.
[27] South Asia Terrorism Portal Data 2015, available at www.satp.org.

The above incidents have made the fact clear that each of the State Government of North East regions has relied more on security option to provide internal security and other options like cooperation of its citizens, humanitarian approaches like reformation of insurgent prisoners, skill development programmes for the insurgent victims have not taken priority in the entire region. Counter-terrorism laws to strengthen the hands of military forces had made the situation worse. The colonial approaches of 'overawing the people' with the use of force is still applicable in the region.

To fight against insurgency Government in recent past has done nothing except making of harsh laws which empowered the armed forces to shoot and kill common people in the name of counter-insurgency operation. Ultimately poor, illiterate and innocent people basically the village inhabitants are suffering a lot who even do not know the meaning of insurgency. Honourable justice P. N. Bhagwati once observed that "today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to (sic) about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across 'law for the poor" rather than law of the poor'. The law is regarded by them as something mysterious and forbidding: always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker section of the community.[28]

Legislation to Combat Insurgency in North East

Armed Forces (Special Powers) Act 1958 was enacted by the parliament for handling violent situation effectively and it was considered at the beginning as a very simple measure to control any insurgent affected area in North East. The Act is applicable only to the North East States. It allows the government to define at its discretion and without judicial review, an area as 'disturbed' and empowers the military to shoot to kill. But during the passage of time, it has been convinced that the Act is not precise and unambiguous and there is chance of miss use of certain provisions of this Act. Under this Act, army authority can arrest a citizen or individuals, male or female, without any invitation on the part of the police authority or without reference to the police authority of the State, wherever and whenever the Act is enforced. The Act is in force in most North East States, where clashes claimed 450 lives last year, according to South Asian Terrorism Portal. Lawmakers recently lifted the act in one State, Tripura that borders Bangladesh. The Act empowers armed forces personnel to shoot to kill is violate of Article 21 of the Constitution of India. In the year 1985, the Terrorist and Disruptive Activities (Prevention) Act was introduced to suppress anyone who raised a voice against nation's peace and prosperity. Prevention of Terrorism Act, 2002 was passed by the Parliament of India in 2002 with the objective of strengthening of anti-terrorism operations. Both of these two legislations have been repealed in the year 2004 and most

[28] *Hussainara Khatoon & Others v. Home Secretary, State of Bihar,* Patna AIR 1979 SC 1369

of their provisions live on in different versions of the Unlawful Activities Prevention Act, 1967 which has been amended twice in 2008 and 2012 respectively.

All these legislations in recent past could do nothing except resulting in harassment of innocent persons. Due to lack of cooperation and trust among people and armed forces groups, rule of law in the region has been transformed into socio-economic injustice. To fight with external terrorism India should make an effort to strengthen the human tie as we know that lots of persons involved in insurgent activities don't help security, unity and integrity of the nation, but destruct it and in such situation one country cannot destroy whole root of terrorism only with trained armed forces and financial power. This is the time of implementation of laws with the object of maintaining balance between individual rights and the rights of the society.

In order to attract misguided youth who joined the militancy in North East region Government of India has been implementing various schemes for Surrender- cum-Rehabilitation of militants in North East. The object of these schemes is very good and reformative as it tries to involve them in self employment. North Eastern Council has been conducting various skill developments and employment oriented training programmes for North East youths on fields such as beauty care, computer hardware/software, hospitality etc. Trainees are advised and encouraged to set up entrepreneurship units in the region.[29] The Constitution of India guarantees to all persons, equality before law; equal protection of the laws; guarantees against discrimination; freedom to peaceful agency; freedom to fair procedure; protection of life and personal liberty; freedom against exploitation and so on and so forth. Thus in enacting laws to combat insurgency legislature and government should concentrate on these rights.

Concluding Remarks

Despite number of legislations, rehabilitation schemes, cease-fire agreement and human rights initiatives, peace in the region can never be found. One of the basic reasons for complexity of peace process is that in recent past Government and all other law enforcing agencies could not deal with the problems taking into consideration of tribal aspirations, ethnic feelings, geographical remoteness, poverty and illiteracy prevailing in the region. Further inefficient Socio-Political and Constitutional Organizations like North Eastern Council, Bodoland Territorial Council and lack of Government response have contributing in strengthening the problem.

Rehabilitation of insurgency victims and upliftment of their educational and some other Constitutional rights relating to life, liberty, property and dignity are a matter of great concern as in preceding years the State Government has not shown proper care for their survival and upliftment. Law are there, but people of this region gradually lose confidence on all these laws because of its wide spread miss use. They used to claim that

[29] Year End Review: Press Information Bureau Government of India Ministry for Development of the North Eastern Region, 26th December 2016, available at www.pib.nic.in.

these are applied not for detecting militants but for harassing the common people living in nearby areas. The family members of the militants and people in vicinity are the worst sufferer of counter-insurgency operation. The Central as well as the State Government need to adopt some new practices and responses with careful and repetitive debate and discussion. Arrest without warrant, searching of premises, detention in police custody for unlimited period without producing before magistrate need to be scrutinized through implementation of humanitarian laws.

To fight with terrorism India should enhance its financial capabilities along with infrastructural security, community-oriented policing, crime scene investigations, explosive ordinance detection and countermeasures, forensics, cyber security and mega city policing.[30]

The state is to maintain a delicate balance between such state action and the human rights. Fight against terrorism should be respectful to human rights. The constitution has laid down clear limitation on state action within the context of fight against terrorism.

[30] Country Reports on Terrorism 2015, United States Department of State Publication, Bureau of Counterterrorism and Countering Extremism, June 2016 available at www.state.gov.

A Legal Perspective of the Challenges facing the reforms in the Indian Banking Sector

Anuranjan Sharma[1]

Introduction

THE GOD OF MAMMON has an important place in the lives of men. Nations flourish on the solid edifice of their economy. Banking has a key role in building this edifice. This is an humble attempt to study the reforms required and adopted by the Indian Banking System. Indian Banking came in to being to replace the outworn traditional Mahajan. Conventionally banking activity were limited to borrowing and landing. Post Independence Indian economy had place for both public sector as well as private sector. But the private sector was using its banks solely to its benefits. However, the govt. wanted to implement its welfare policies. This brought in the era of Nationalisation of Banks.[2] Then again came a time when the need for private and foreign banks was felt and were so allowed in the country.

Indian banking is constantly going through the process of change ever since, India embarked on the reforms path about two decades ago in 1991-92 [3].Now, Indian banks are as technology-savvy as any in the world. The banking sector is seeking to embrace the Basel II [4] regime, to benchmark with the global standards. Similarly, retail lending has

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[2] 1969 saw the Nationalisation of 14 Banks, in the regime of Mrs. Indira Gandhi. Again in 1980 Nationalisation of 7 Banks.

[3] In 1991, under the chairmanship of M Narasimham, a committee was set up by his name which worked for the liberalisation of banking practices.

[4] Basel II is the second of the Basel Accords, which are recommendations on banking laws and regulations issued by the Basel Committee on Banking Supervision. The purpose of Basel II, which was initially published in June 2004, is to create an international standard that banking regulators can use when creating regulations about how much capital banks need to put aside to guard against the types of financial and operational risks banks face while maintaining sufficient consistency so that this does not become a source of competitive inequality amongst internationally active banks. Advocates of Basel II believe that such an international standard can help protect the international financial system from the types of problems that might arise should a major bank or a series of banks collapse. In theory, Basel II attempted to accomplish this by setting up risk and capital management requirements designed to ensure that a bank holds capital reserves appropriate to the risk the bank exposes itself to through its lending and investment practices. Generally speaking, these rules mean that the greater risk to which the bank is exposed,

emerged as another major opportunity for banks. All these factors are driving up competition, which in turn forcing banks to innovate. A slew of innovative products, which could not be imagined even a few years ago, are a reality now. Even ordinary matters like Saving Account, Personal Loans and Home Loans have become subjects of innovation.

Banking – Reforms

The first mention in this regard should be of the Narashimam Committee,

Narashimham Committee[5]

In this context the report of Narashimham Committee is noteworthy. It sujested the following reforms:

1. Improving the financial viability of the banks;
2. Improving the macroeconomic policy framework for banks;
3. Increasing their autonomy from government directions;
4. Allowing a greater entry to the private sector in banking;
5. Liberalizing the capital markets;
6. Improvement in the financial health and competitive position of the banks;
7. Furthering operational flexibility and competition among the financial institutions.

Consequent to the above recommendations a number of reforms initiatives have been taken to remove or minimize the distortions impinging upon the efficient and profitable functioning of banks. These include the followings[6]:

1. Reduction in SLR & CRR
2. Transparent guidelines or norms for entry and exit of private sector banks
3. Public sector banks have been allowed for direct access to capital markets
4. The regulated interest rates have been rationalized and simplified.
5. Branch licensing policy has been liberalized
6. A board for Financial Bank Supervision[7] has been established to strengthen the supervisory system of the RBI.

It is certain that these and other measures that have been taken, have helped to regulate and provide better customer services.

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the greater the amount of capital the bank needs to hold to safeguard its solvency and overall economic stability.

[5] *Supra note 2*

[6] Banking Sector Reforms: Policy Implications and Fresh Outlook by R. K. Uppal D. A. V. College, Malout (Punjab), India.

[7] The Reserve Bank of India performs this function under the guidance of the Board for Financial Supervision (BFS). The Board was constituted in November 1994 as a committee of the Central Board of Directors of the Reserve Bank of India.

Background

On the basis of reforms the Banking sector can be divided into two groups:
(1) Pre-Reform Period.
(2) Post-Reform Period.

I. Banking in the Pre-reform Period

The Period of Financial Control:
The Indian financial system in the pre-reform period, i.e., upto the end of 1980s, essentially catered to the needs of planned development in a mixed economy framework where the government sector had a domineering role in economic activity. The strategy of planned economic development required huge development expenditures, which was met thorough the dominance of government ownership of banks, automatic monetization of fiscal deficit and subjecting the banking sector to large pre-emptions – both in terms of the statutory holding of Government securities (statutory liquidity ratio, or SLR) and administrative direction of credit to preferred sectors. Furthermore, a complex structure of administered interest rates prevailed, guided more by social priorities, necessitating cross-subsidization to sustain commercial viability of institutions. These not only distorted the interest rate mechanism but also adversely affected financial market development. All the signs of `financial repression' were found in the system.

The Period of Liberalisation
The decline of the Bretton Woods system[8] in the 1970s provided a trigger for financial liberalization in both advanced and emerging markets. Several countries adopted a 'big

[8]The Bretton Woods system of monetary management established the rules for commercial and financial relations among the world's major industrial states in the mid 20th century. The Bretton Woods system was the first example of a fully negotiated monetary order intended to govern monetary relations among independent nation-states.
Preparing to rebuild the international economic system as World War II was still raging, 730 delegates from all 44 Allied nations gathered at the Mount Washington Hotel in Bretton Woods, New Hampshire, United States, for the United Nations Monetary and Financial Conference. The delegates deliberated upon and signed the Bretton Woods Agreements during the first three weeks of July 1944. Setting up a system of rules, institutions, and procedures to regulate the international monetary system, the planners at Bretton Woods established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), which today is part of the World Bank Group. These organizations became operational in 1945 after a sufficient number of countries had ratified the agreement.
The chief features of the Bretton Woods system were an obligation for each country to adopt a monetary policy that maintained the exchange rate by tying its currency to the U.S. dollar and the ability of the IMF to bridge temporary imbalances of payments.
On August 15, 1971, the United States unilaterally terminated convertibility of the dollar to gold. As a result, "[t]he Bretton Woods system officially ended and the dollar became fully 'fiat

bang' approach to liberalization, while others pursued a more cautious or 'gradualist' approach. The East Asian crises in the late 1990s provided graphic testimony as to how faulty sequencing and inadequate attention to institutional strengthening could significantly derail the growth process, even for countries with otherwise sound macroeconomic fundamentals.

India, in this context, has pursued a relatively more 'gradualist'[9] approach to liberalization. The bar was gradually raised. Each year the Central Bank slowly, in a manner of speaking, tightened the screws. Nevertheless, the transition to a regime of prudential norms and free interest rates had its own traumatic effect. It must be said to the credit of our financial system that these changes were absorbed and the system has emerged stronger for this reason.

By mid-1997, the RBI reported that the reform process had started yielding results. But as observed by the NC[10] in its second report, the improvement has arrested the deterioration of the system earlier but there is still a considerable distance to traverse. There has been improvement in several of the quantitative indices but there are many areas in which weaknesses still persist. These include customer service, technological up gradation, improvement in house-keeping in terms of reconciliation of entries and balancing of books. This takes us to the second period of reforms in banking.

2. Banking In the Post Reform Period:

Second Banking Sector Reforms (1998)[11]

The second report was submitted on 23rd April, 1998, which sets the pace for the second generation of banking sector reforms. These include:

1. Merge strong banks, close weak banks unviable ones
2. Two or three banks with international orientation, 8 to 10 national banks and a large number of local banks
3. Increase Capital Adequacy to match enhanced banking risk
4. Rationalize branches and staff, review recruitment
5. De-politicize Bank Boards under RBI supervision
6. Integrate NBFCs activities with banks.

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currency,' backed by nothing but the promise of the federal government." This action, referred to as the Nixon shock, created the situation in which the United States dollar became the sole backing of currencies and a reserve currency for the member states. At the same time, many fixed currencies (such as GBP, for example), also became free floating.

9 First R.K. Talwar Memorial Lecture – 2007 By Dr. C. Rangarajan Chairman, Economic Advisory Council to the Prime Minister **&** Former Governor, Reserve Bank of India

[10] Narashimham Committee

[11] *Supra note 8*

However, many cities saw no purpose in setting up the second NC on banking sector reforms within six years and before the full implementation of the recommendations of the first report of 1991. Strictly speaking, there were no new recommendations made in the second report except two on:
1. Merger of strong units of banks
2. Adaptation of the "narrow banking" concept to rehabilitate the weak banks.

The Effectiveness of these Reforms:
No doubt, all these various reform measures introduced in India have indeed strengthened the Indian banking system in preparation for the global challenges ahead. Financial sector reforms encompassed broadly institutions especially banking, development of financial markets, monetary fiscal and external sector management and legal and institutional infrastructure.

Reform measures in India were sequenced to create an enabling environment for banks to overcome the external constraints and operate with greater flexibility. Such measures related to dismantling of administered structure of interest rates, removal of several pre-emptions in the form of reserve requirements and credit allocation to certain sectors. Interest rate deregulation[12] was in stages and allowed build up of sufficient resilience in the system. This is an important component of the reform process which has imparted greater efficiency in resource allocation. Parallel strengthening of prudential regulation, improved market behaviour, gradual financial opening and, above all, the underlying improvements in macroeconomic management helped the liberalisation process to run smooth. The interest rates have now been largely deregulated except for certain specific classes, these are: savings deposit accounts, non-resident Indian (NRI) deposits, small loans up to Rs.2 lakh and export credit. Without the dismantling of the administered interest rate structure, the rest of the financial sector reforms could not have meant much.

Greater Share of Private Investors
As regards the policy environment on public ownership, the major share of financial intermediation has been on account of public sector during the pre-reform period. As a part of the reforms programme, initially there was infusion of capital by Government in public sector banks, which was subsequently followed by expanding the capital base with equity participation by private investors up to a limit of 49 per cent. The share of the public sector banks in total banking assets has come down from 90 per cent in 1991 to around 75 per cent in 2006[13]: a decline of about one percentage point every year over a fifteen-year period. Diversification of ownership, while retaining public sector character of these banks has led to greater market accountability and improved efficiency without loss of public confidence and safety. It is significant that the infusion of funds by

[12] The R.B.I has very recently allowed banks freedom in allowing interest on saving bank accounts.
[13] *Supra note 9*.

government since the initiation of reforms into the public sector banks amounted to less than 1 per cent of India's GDP, a figure much lower than that for many other countries[14].

Greater Competition

Another major objective of banking sector reforms has been to enhance efficiency and productivity through increased competition. Establishment of new banks was allowed in the private sector and foreign banks were also permitted more liberal entry. Some new private banks are in operation at present. Yet another step towards enhancing competition was allowing foreign direct investment in private sector banks up to 74 per cent from all sources. In 2009, foreign banks were allowed banking presence in India either through establishment of subsidiaries incorporated in India or through branches[15].

Financial Supervision

Impressive institutional reforms have also helped in reshaping the financial marketplace. A high-powered Board for Financial Supervision (BFS), constituted in 1994[16], exercise the powers of supervision and inspection in relation to the banking companies, financial institutions and non-banking companies, creating an arms-length relationship between regulation and supervision. On similar lines, a Board for Regulation and Supervision of Payment and Settlement Systems (BPSS)[17] prescribes policies relating to the regulation and supervision of all types of payment and settlement systems, set standards for existing and future systems, authorise the payment and settlement systems and determine criteria for membership to these systems.

The system has also progressed with the transparency and disclosure standards as prescribed under international best practices in a phased manner. Disclosure requirements on capital adequacy, NPLs, profitability ratios and details of provisions and contingencies have been expanded to include several areas such as foreign currency assets and liabilities, movements in NPLs[18] and lending to sensitive sectors. The range of disclosures has gradually been increased. In view of the increased focus on undertaking consolidated supervision of bank groups, preparation of consolidated financial statements

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[14] *Ibid.*

[15] *Ibid.*

[16] The Board was constituted in November 1994 as a committee of the Central Board of Directors of the Reserve Bank of India

[17] BPSS was constituted by R.B.I on 10 March 2005.

[18] A non-performing loan is a loan that is in default or close to being in default. Many loans become non-performing after being in default for 3 months, but this can depend on the contract terms.

"A loan is nonperforming when payments of interest and principal are past due by 90 days or more, or at least 90 days of interest payments have been capitalized, refinanced or delayed by agreement, or payments are less than 90 days overdue, but there are other good reasons to doubt that payments will be made in full" as defined by IMF.

(CFS)[19] has been mandated by the Reserve Bank for all groups where the controlling entity is a bank.

The Legal Reforms

The legal environment for conducting banking business has also been strengthened. Debt recovery tribunals were part of the early reforms process for adjudication of delinquent loans. Then , the Securitisation Act[20] was enacted in 2003 to enhance protection of creditor rights. To combat the abuse of financial system for crime-related activities, the Prevention of Money Laundering Act was enacted in 2003 to provide the legal framework. The Negotiable Instruments (Amendments and Miscellaneous Provisions) Act 2002[21] expands the erstwhile definition of 'cheque' by introducing the concept of 'electronic money' and 'cheque truncation'[22]. The Credit Information Companies (Regulation) Bill 2004 was enacted by the Parliament which was expected to enhance the quality of credit decisions and facilitate faster credit delivery.

Improvements in the regulatory and supervisory framework encompassed a greater degree of compliance with Basel Core Principles. Further initiatives in this regard include consolidated accounting for banks along with a system of Risk-Based Supervision (RBS) for intensified monitoring of vulnerabilities. All these legal reforms have contributed to safer banking activities.

Effect of financial liberalisation on the improvement and functioning of institutions and markets

Prudential regulation and supervision has improved; the combination of regulation, supervision and safety nets has limited the impact of unforeseen shocks on the financial system. In addition, the role of market forces in enabling price discovery has enhanced. The dismantling of the erstwhile administered interest rate structure has permitted financial intermediaries to pursue lending and deposit taking based on commercial considerations and their asset-liability profiles. The financial liberalisation process has also enabled to reduce the overhang of non-performing loans: this entailed both a ‘stock’ (restoration of net worth) solution as well as a ‘flow’ (improving future profitability) solution.

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[19] The R.B.I has recently instructed banks to issue passbooks free of cost to their customers besides CFS.

[20] An Act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.

[21] Earlier , bouncing of check was made a cognizable offence in the Negotiable Instrument Act through an amendment.

[22] Cheque truncation is the conversion of physical cheque into electronic form for transmission to the paying bank. Cheque truncation eliminates cumbersome physical presentation of the cheque and saves time and processing costs.

Risk Conscious

Financial entities have become increasingly conscious about risk management practices and have instituted risk management models based on their product profiles, business philosophy and customer orientation. Additionally, access to credit has improved, through newly established domestic banks, foreign banks and bank-like intermediaries. Government debt markets have developed, enabling greater operational independence in monetary policy making. The growth of government debt markets has also provided a benchmark for private debt markets to develop.

Access to Information

There have also been significant improvements in the information infrastructure. The accounting and auditing of intermediaries has improved. Information on small borrowers has improved and information sharing through operationalisation of credit information bureaus has helped to reduce information asymmetry. The technological infrastructure has developed in tandem with modern-day requirements in information technology and communications networking. It goes without saying that the above reforms have brought in a sea-change in the banking sector.

Bank Liability and Profitability

These are important issues crucial for banking. While the NPL is declining after the reforms the profitably is reported to be automatically rising[23].

Conclusion

Though much has been done, but still much more remains to be done. Let us hope, in the years to come, the Indian financial system will grow not only in size but also in complexity as the forces of competition gain further momentum and as financial markets get more and more integrated. As globalisation accelerates, the Indian financial system will also get integrated with the rest of the world. As the task of the banking system expands, there is need to focus on the organizational effectiveness of banks. To achieve improvements in productivity and profitability, corporate planning combined with organizational restructuring become necessary. Issues relating to consolidation, competition and risk management will remain critical. Equally, governance and financial inclusion will emerge as key issues for India at this stage of socio-economic development.

Studies[24] reveal that allowing banks to engage in non-traditional activities has contributed to improved profitability and cost and earnings efficiency of the whole banking sector, including public-sector banks. By contrast, investment in government securities has

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[23] Bank profitability levels in India have also trended upwards and gross profits stood at 2.0 per cent during 2005-06 (2.2 per cent during 2004-05) and net profits trending at around 1 per cent of assets.

[24] Assessment of India's banking sector reforms from the perspective of the Governance of the banking system by Sayuri Shirai Associate Professor of Keio University.

lowered the profitability and cost efficiency of the whole banking sector, including public-sector banks. Lending to priority sectors and the public-sector has not had a negative effect on profitability and cost efficiency, contrary to our expectations. Further, foreign banks (and private domestic banks in some cases) have generally performed better than other banks in terms of profitability and income efficiency. This suggests that ownership matters and foreign entry has a positive impact on banking sector restructuring.

The above results suggest that the current policy of restructuring the banking sector through encouraging the entry of new banks has so far produced some positive results. However, the fact that competition has occurred only at the lower end suggests that bank regulators should conduct a more thorough restructuring of public-sector banks. Given that public-sector banks have scale advantages, the current approach of improving their performance without rationalizing them may not produce further benefits for India's banking sector. As more than10 years have passed since the reforms were initiated and public-sector banks have been exposed to the new regulatory environment, it may be time for the government to take a further step by promoting mergers and acquisitions and closing unviable banks. A further reduction of SLR and more encouragement for non-traditional activities (under the bank subsidiary form) may also make the banking sector more resilient to various adverse shocks. However, it may be noted that the Reserve Bank of India has in the recent months hiked CRR and SLR more than once to counter inflation.

Medically Assisted Procreation and Personal Law

Jitendra Kumar[1]

Ever since the beginning of human history and society religion and science have been two very important coordinate of the human evolution, they have always been interrelated and both have exerted a great influence, thus when it comes to assisted reproduction we must take into consideration the religious point of view. At present time Assisted reproduction are worldwide practiced medical procedures, which must answer regulations and ethical standards established by each state's legislation, sometimes the state's laws allow more than religion would, especially when it comes to helping patients who don't respect the typical pattern- heterosexual married couple. Single women, lesbians, unmarried couples, also are allowed to access now a day assisted reproductive techniques in spite of religious general discontent.

Social factors, religious pressure groups and legislation differs from one state to another when it comes to dealing with controversial issues like: the genetic material donation, the use of surrogate mothers, the reproductive age-limitation, genetic diagnosis of the embryo, the selective embryo reproduction and even cloning.[2] In spite now a day's society tendency towards separation from churches old practice, civil groups are still manipulated by the various religious influence groups when it comes to important issues related to human reproduction such as contraception, abortion, and infertility therapy.[3]

The recent development of biology and today medicine challenge once again the religious dogmas and further more raise serious questions related to reproduction which not always have the clearest answers. Bioethics has been created to deal with the different religious groups' attitude towards the new fields of assisted reproduction but it cannot set the border line between ethical and unethical when it comes to assisted reproductive technologies.[4] It is of a great importance for those who are confronted with infertility issues, both the scientists and the couple who deals with this medical problem, to acknowledge the importance of the religious aspects of the medical approach of infertility, to understand and to make a choice weather it is one which respects the practices of their religion or not.

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[1] ***Research Scholar, Faculty of Law, Banaras Hindu University, Varanasi, India.***

[2]Religion and assisted reproduction, The Hindu, online edition, 17 Feb.2005.

[3] Religion and assisted reproduction , http://in-vitro-fertilization.eu/religious-and-ethic-aspects-of assisted-reproduction, Last accessed 12 april2012.

[4] Stephen J. Werber, *Cloning: A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions,* 30 Seton Hall l. Rev. 114, 1156(2000).

Islam and Medically assisted Procreation

Assisted reproductive techniques are widely spread worldwide and are able to treat most types of infertility. Islamic world has been enclosed to modern techniques for many years, delaying thus the implementation of modern reproductive technologies due to the prejudice that Islamic teachings would disapprove assisted reproduction. Islamic laws are extremely strict when it comes to sexual intercourse; sex is the privilege of the married couples, premarital and extramarital sex is strictly forbidden.[5] Sex must be avoided with all costs during menstruation, after the birth, after diseases or disabilities. Homosexual intercourse is strictly forbidden.[6] Adultery is still severely punished, starting with house detention, public dispraise and verbal humiliation.

The Islamic belief associates marital sex with family values and procreation, therefore it supports only the sexual act which involves man's penis penetrating woman's vagina, as it is the only sexual act which can lead to pregnancy, moreover oral and anal sex as well as masturbation are strictly forbidden.[7] With the passage of time Islam offers its support to assisted reproduction, when natural procreation fails, the treatment is seen as the couple's duty and the Islamic laws forbid adoption. Assisted reproductive techniques are only permitted between husband and wife, a third party, the donor is not accepted weather it is a sperm donor, or a surrogate mother, an embryo, or an oocyte. In the case of divorce or the death of the husband, artificial insemination cannot be made with husband's sperm. Any medical procedure which involves donor is considered adultery. [8]

The Islamic view on certain assisted procreations

Artificial Insemination

Artificial insemination has been in use for a long time. As long as it is the husband's semen that is used to impregnate the wife, intrauterine insemination ("IUI") is permissible.[9] Permissibility, however, is conditioned upon insemination occurring while the marriage remains intact. Thus, the husband's frozen semen cannot be used after divorce, or after the husband's death.[10]

In vitro fertilization

IVF is a process by which a woman, through hormonal manipulation simultaneously produces several ova. These ova are needle aspirated at the proper time under ultrasonic guidance. In the lab, sperm fertilize these ova. Successfully fertilized ova (zygotes)

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[5] *Islam: A Brief Introduction at* www.islam101.com./dawah/IslamBrief.html (last visited March 11, 2011).

[6] Supra note 4.

[7] IVF and Islam, http://in-vitro-fertilization.eu/religious-and-ethic-aspects-of-assisted-reproduction, last accessed 12 april2012.

[8] Hossam E. Fadel Assisted Reproductive Technologies: An Islamic Perspective, 25 J. Islamic Med. ASS'N 14, 17 (1993).

[9] Supra note 7 at 17.

[10] *Ibid.*

reaching the four to eight cell stage are transferred into the uterus. At this point, the uterus has been prepared by hormones in order to begin implantation of the transferred zygotes (pre-embryos). The current success rate, measured by fertilizations resulting in a live birth, is between twenty and thirty percent. IVF, with its various modifications, i.e., GIFT (Gamete intra-fallopian transfer), ICSI (intracytoplasmic sperm injection) etc., has been declared islamically permissible,[11] only if the following conditions are satisfied. *First*, the IVF must involve a married couple. *Second*, the sperm must be from the husband, and the eggs from the wife. *Third*, this must occur within the context of a valid marriage. *Fourth*, the procedure must be conducted by a "competent team" in order to reduce the chances of failure.

Donor eggs, donor sperms, and donor embryos are unlawful:

The Quran states: "Then has He established relationships of lineage and marriage...." The use of donor sperm, eggs, or embryos will result in the biological father or mother being different from the "married couple." In Islamic law, this is similar to adultery in confusion of the lineage. [12] Unclear lineage may cause one to marry a brother, sister, or a close relative, even with the strictest guidelines in place to prevent this from happening.

If donor gametes are used despite the prohibition, islamically, the following applies: in the case of donated sperm, the "husband" would be considered the legal father, although he is not the biological father. Moreover, if a donated egg is used, the birth mother is considered the legal mother, although she is not the biological mother.

Surrogacy

Another form of assisted reproductive technology is surrogacy. There are two types of surrogacy, partial and complete. In partial surrogacy, a couple will solicit or commission a woman to be artificially impregnated by the "husband" semen. In a complete surrogacy, the commissioning couple will undergo IVF. The embryo created by IVF is transferred then to a surrogate woman. The surrogate gives the baby to the soliciting/rearing couple at birth. There are several objections to surrogacy from an ethical standpoint. The primary objection is that it results in the commoditization of motherhood. Motherhood is reduced from a value to a price. As a result, children become a commodity and the process of procreation becomes a business enterprise.[13] There are also many legal problems associated with surrogacy. The main problem is deciding who the parents are, and who is legally responsible for the rearing of the resulting child.

Under Islamic law, surrogacy is prohibited. Linguistically and Islamically, the Arabic word for "to give birth" is Walad, and for "mother" it is Walidah, or the "one who gives

[11] M. Partowmah, Biotechnology Issues in the Opinion of Islamic Scholars, 25 J. ISLAMIC MED. ASS'N 9, 10-11 (1993).
[12] Maher M. Hathout, Surrogacy: An Islamic Perspective, 21 J. Islamic Med. ASS'N 106, (1989);
[13] Supra note 12.

birth." [14] A verse from the Quran states that, "None can be their mothers except those who gave them birth."[15] Even if there is an agreement between the parties, the confusion of lineage, which is inevitable in these surrogacy arrangements and which is of major importance in Islamic law, prohibits surrogacy. If surrogacy is still done despite the prohibition, it is the consensus of Islamic scholars that the birth mother is the "real" mother.[16]

Cloning

The successful cloning of Dolly the ewe in 1997 created worldwide excitement, bewilderment, and controversy. Cloning is the creation of almost genetically identical organisms. For ordinary purposes, clones can be treated as genetically identical to the organisms from which the nuclear DNA is taken. Since Dolly, several scientists have cloned other animals, including cows and mice. The recent success in cloning animals has sparked fierce debates among scientists, politicians and the general public about the use and morality of cloning plants, animals and possibly humans.[17]

The Holy Quran governs every aspect of Muslim life and is believed to contain the words of God. It covers a wide range of issues including law, ethics, genesis, and instruction into everyday life. There are several interpretations regarding human cloning.

- Cloning affects kinship, a major concept in Islamic Law. As such, cloning would result in loss of kinship since created children may not have either a mother or a father and this is contrary to Islamic laws. Loss of kinship will also affect identity of the clones and therefore their dignity. The consequences here are looked upon as to what happen when the clones want to marry or how and what they are going to inherit from their mothers or fathers.[18]
- Cloning affects the “soul” since the soul belongs to God and He is the one who gives life and takes it. In the cloning process the “soul” is given by other creators.
- “God plans and writes the future of individuals” and since cloning can guarantee eternal life of clones this is considered “interference in God's writings and God's will”. Only “God determines life and death”.[19]
- Human cloning is similar to “playing God”. As such, it would be a manipulation of God’s creation because the cloning scientist should not become God or replace God.

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[14] *Ibid.*
[15] Holy Quran 58:2 (Abdullah Yusuf Ali trans., 1982).
[16] Barbara katz Rothman, recreating motherhood 158 (1989).
[17] Stephen J. Werber, Cloning: A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions, 30 SETON HALL L. REV. 114, 1156(2000).
[18] Schenker JC. Assisted reproductive practice: religious perspectives. Reprod Biomed Online 2005; 10: 310-19.
[19] *Ibid.*

- Islam recognizes that human conception can only take place after sex and that "semen" (i.e. sperms) is involved in the processes. As such, cloning is looked at as a departure from instructions of God.
- Furthermore, the moral status of the life of the embryo must also be respected.
- Cloning is against social and family life since a birth of a child will be outside "the recognition of marriage" as a basis and nucleus for growth of families and societies.

Nonetheless, there are also many Islamic thinkers who believe that "there should be no limits to research since knowledge is bestowed on us by God". Research must therefore be encouraged and this is a fundamental issue in Islamic teaching. Furthermore, many Islamic jurists distinguish between reproductive and therapeutic cloning.[20] This recognition of therapeutic cloning is interpreted positively since it is directed to alleviate human suffering from diseases.

Assisted procreation and Hinduism:

Hinduism, the religion of the old Indo-European population, and the predominant religion of nowadays Indian–subcontinent, is based in the teachings of the sacred Vedas. However Hindu believes cover a large range or religious ideologies and philosophic systems starting with polytheism, atheism, pantheism and monotheism. They believe in reincarnation and karma as well as in human's personal duty called dharma. In the Hindu world view, the human soul is eternal, it has to live many earthly lives in order to purify itself, to reach perfection and a higher state of existence called mokasha.[21]

Hinduism exerts its influence through the power of its thought over society and not by formal institutional authority. The important concepts of the Hindu religion relating to the problem of infertility are as follows:[22]

A. Marriage is considered sacred and permanent.
B. Male infertility is not a cause for divorce.
C. The emphasis in reproduction is not just on having children, but on having a male offspring.
D. It is a religious duty to provide a male offspring. Therefore, the wife of a sterile male could be authorized to have intercourse with a brother in-law or another member of the husband's family for the purpose of having a male offspring.

Hindu religion agrees with most of the assisted reproduction techniques, but it demands that the oocyte and the sperm used in the procedure to come from a married couple, this religion also accepts sperm donation but sets the condition that the donor be a close

[20] Larigani B, Zahedi F. Islamic perspectives on human cloning, Health Law Rev 2002; 11: 62-6.
[21] Rita Basuray Das, *In-Vitro Fertilization and Embryo Transfer in India*, 16 ICMR BULL. 41 (1986)
[22]Joseph G. Schenker, Religious Views Regarding Treatment of Infertility by Assisted Reproductive Technologies, Journal of Assisted Reproduction and Genetics, Vol. 9, No.1,1992.

relative of the infertile husband. Abortion is not prohibited and the adoption of a child which usually comes from a numerous family is also practiced.[23]

Artificial insemination by donor (AID)
According to the Hindu view, in the case of male infertility the wife can be authorized to have intercourse with a brother in-law or another member of the husband's family in order to conceive a male offspring **(**only after 8 years of infertility or after 11 years of delivering only female offspring). According to the above statement this may lead to the conclusion that sperm donation can be practiced according to the Hindu view, with the restriction that the sperm donor must be a close relative of the husband.[24]

Ovum Donation
According to Hinduism, it is suggested that oocyte donation can be practiced on the same grounds as sperm donation.

Surrogacy
In cases of infertility due to uterine factors, when the woman is unable to carry the embryo, the ovum is fertilized with the sperm of her husband, after which it is implanted in the uterus of another woman, who gives birth as a "surrogate mother," it is complete surrogacy. In the process of Partial surrogacy is when the surrogate mother is inseminated with another woman's husband's sperm and, therefore, donates her oocyte and leases her uterus. Following birth the child is given to the infertile couple for adoption.

According to Hinduism, there is no prohibition of the practice of surrogacy, but as in Buddhism, it may raise dilemmas regarding family ties and legal and moral issues. Special problems can arise when the surrogate mother delivers a female offspring, since according to Buddhism; there is an obligation to provide a male offspring. [25]

Cloning
In the Hindu world, objections to human cloning arise from a different religious tenet. All cloning research violates a fundamental principle of Hinduism: doing no harm to other creatures. Animal cloning experiments, during which a large percentage of the clones die prematurely or have serious birth defects, obviously violate this principle. Human cloning, many experts say, would involve the same failure rate. As a result, most Hindus reject all cloning, including animal cloning.

Conclusion
To sum up it is essential that any debate on assisted procreation should not rest on scientific merit alone. By the same token, advances in science should not be regarded as a

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[23] *Ibid.*
[24] Supra note 21.
[25] Sandhya Srinivasan, *Surrogacy Comes out of the Closet*, Sunday, Times of India, online edit. July 6, 1997, at p.1.

threat to religious belief or as being in opposition to human values and culture. Research and science drive innovation for human development. It is important that when creative science and technology begin to impact on deeply rooted concepts of theology and culture, science and religion should engage in constructive dialogue and come to an informed consensus for the good of the public at large. Religions and Religious belief have been planting a significant role for regulating the various aspect of human life. In the era of scientific technological advancement there is a need to balance between fundamental and radicals.

Scenario of Private Placement after the Sahara Housing Finance Case

Kaushlendra Singh[1]

Introduction

There is a constant need for every company needs to increase its share capital. When it decides to increase its capital, speed and fewer procedural requirements are two factors which are always of concern. This becomes even more crucial when foreign shareholders are involved and time has to be factored for potentially securing internal approvals at various levels for those investments by such foreign shareholders.[2] There are various methods to increase the paid-up capital as companies often take recourse to private placement for allotting shares and increasing their capital. Private placements can be made by both private and unlisted public companies in accordance with the provisions of the Companies Act, 2013. Under new Companies Act 2013, the procedure for private placement has become well structured, time oriented and transparent.[3]

The Private Placement (non-public offering) of securities is a popular way of raising capital by small businesses or corporations, through making offer for subscribing to their securities by some select investors forming a small number. The funds thus raised through making private placements of securities, can then be used for expansion or growth of their businesses. Such private placements are opposite to the public offerings, in which securities are made available for sale to the public at large on the open market. The private placements are commonly regarded as being quite cost-effective and time-saving because of requiring no brokers or underwriters for small corporations for raising funds, without going public and making initial public offerings (IPOs). Again, these private placements could be the only source of gathering capital by start-up firms or for risky business ventures.

However, there are also some disadvantages associated with private placements of securities, such as scarcity of and difficulty in finding suitable and congenial investors; low buying prices of privately placed securities as compared to the market value of those;

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[1] Ph.D. Scholar, Dr. Ram Manohar Lohia National Law University, Lucknow.

[2] http://www.psalegal.com/upload/publication/assocFile/ENewslineJanuary2015.pdf

[3] http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Private_Equity_Investments_In_Indian_Companies.pdf

offering companies may need to relinquish more equity to compensate the risks and illiquid positions of the prospective investors.[4]

In order to ensure greater control and compliance over the private companies, the Act, 2013 has withdrawn most of the exemptions as available under the Companies Act, 1956 (Act, 1956). The Act, 1956 did not define the term 'private placement' rather certain offers of shares or debentures/invitation to subscribe for shares or debentures to any section of the public were not regarded as public issues under section 67(3) the Act, 1956 i.e where shares or debentures are available for subscription or purchase only to those receiving the offer/invitation and offer/invitation is a domestic concern of the issuer and those receiving the offer/invitation, were termed as private placement. However, as per the proviso to section 67(3) of the Act, 1956, when a company made an offer or invitation to subscribe for shares or debentures to 50 or more persons, such offers was treated as made to public. Under the Act, 1956 the conditions relating to private placement were applicable only to public companies. On the contrary Act, 2013 provides various conditions for private placement of shares and debentures which apply to both private companies and public companies. From companies' standpoint, there are enough reasons why private placements are preferred over a rights or a bonus issue. In the latter, a company can issue only shares, whereas in a private placement, it can issue securities i.e. shares, debentures and even hybrid instruments like compulsorily convertible debentures. Further, they can issue shares to persons other than shareholders too.

Changes Introduced By the Companies Act, 2013

The 2013 Act provides four modes of increasing share capital by Public issue, Rights issue, Bonus issue and Private placement. A Public issue can either be an IPO or a FPO. In IPO, an unlisted public company can make either a fresh issue of securities or offer its existing securities for sale for the first time to the public while an FPO allows an already listed company to make a fresh issue of securities to the public. Both IPO and FPO are governed by stock market regulator, SEBI, and the corresponding laws and regulations. A public or a private company can also increase its share capital base through a rights issue where it can issue fresh securities to existing shareholders in a particular ratio depending on the number of securities held prior to the issue. This route is best suited for companies who intend to raise capital without diluting stake of their existing shareholders. Under a bonus issue, a company can issue fully paid-up bonus shares to its members out of its free reserves, security premium account or capital redemption reserve. With bonus issues, the total number of issued shares increases *i.e.* to say that the shareholder base of the company increases but, the ratio of number of shares held by each shareholder remains the same. A private placement of securities is an offer by a company, to a select group of persons to subscribe its securities. The law for private placement of securities is codified under sections 42 and 62 of the 2013 Act and the Companies

[4] 'A Short (Sometimes Profitable) History of Private Equity' by John Steele Gordon, accessed at http://online.wsj.com/ article/SB10001424052970204468004577166850222785654.html at 5 pm on 24-9-2016.

(Prospectus and Allotment of Securities) Rules, 2014 ("Rules"). Essentially, section 42 and the Rules contain the complete code for private placement. However, rule 13 of the Companies (Shares Capital and Debentures Rules), 2014 prescribes certain mandatory secretarial compliances in case of various modes of issue of shares under section 62 (which, in addition to ESOPs and rights issue by unlisted companies, include private placements too). Therefore, a company making private placements must comply with section 62 of the 2013 Act too.[5]

Offer Procedure

Before initiating private placement, a company must ensure that it's articles of association authorize increase of share capital by private placement. If that's not the case, the first step will be to amend the articles which will involve approvals both at the Board and shareholder levels. If the articles authorize, the company should get the shares valued and take it up in their board meeting. Once the board decides to go ahead with private placement, it must put forth the proposal of increasing the capital through private placement before the shareholders. The shareholders must approve the proposal through a special resolution before a company can proceed with private placement.[6]

Section 42 and the Rules provide that a company proposing to make a private placement cannot propagate the same through advertisements. It mandates companies to issue an offer letter which spells out the terms of offer of securities. Such terms should typically mention the nature of securities on offer, timelines for acceptance of the offer, mode of accepting or rejecting the offer etc. Company can make offers only to such persons whose names are identified prior to the invitation to subscribe. The law makes no distinction between an Indian citizen and a foreign shareholder *i.e.* to say, private placement can be made to any person except for qualified institutional buyers and ESOP holders. Normally, a company would prefer approaching its existing shareholders over any other person. If they do not accept the offer or if the company is not able to raise the required amount of capital from existing shareholders, then it may consider approaching its key managerial personnel, kith and kin of the directors etc. Basically, the underlying element of the provision is that private placements cannot be made to persons who are not even remotely acquainted with the company.

Further, there are fixed timelines for execution. A company must allot the securities within sixty days from the date of receipt of the subscription money and if it cannot do so within that period it must repay the application money with interest. Where the companies fail to adhere with the mandates prescribed under section 42, the directors, promoters and the company shall be liable to bear a penalty up to INR 20 million (USD

[5]http://www.mondaq.com/india/x/305626/Securities/PRIVATE+PLACEMENT+UNDER+COMPANIES+ACT+2013

[6]http://www.mondaq.com/404.asp?action=login&404;http://www.mondaq.com:80/india/x/348150/Securities/SAFER%20AND%20TRANSPARENT%20PRIVATE%20PLACEMENTS%20IN%20INDIA.

327,000) payable within thirty days. The Registrar of Companies takes cognizance of any contravention under sections 42 or 62. While the law is yet to be tested the theoretical penalty is quite prohibitive and should act as a deterrent for companies who would have to ensure due compliances in order to avoid possible complaints by aggrieved persons.

A few other noteworthy points **(a)** the subscription money should be paid through cheque or demand draft or other banking channels and not by cash, **(b)** in order to ensure accountability; companies must maintain separate bank accounts in scheduled banks to keep the subscription money; and **(c)** records of allotments must be reported to the RoC in PAS-4 with 30 days of allotment.

Size of offer

The minimum investment size cannot be less than INR 20,000 (USD 324), per person on the face value of the securities. Further, unlike a public offer where shares are offered to public at large, a private placement can be made to a maximum of 200 people (*and not more than 50 people per offer*) in a financial year. This number excludes qualified institutional buyers such as banks, financial institutions etc. and employees of the company to whom shares are allotted under ESOPs.

Changes in procedure

Some of the most significant and key provisions provided in the Indian Companies Act of 2013, for making private placement of securities in India, are the following. Here, it must be noted that the following provisions and guidelines are applicable, when the offer for subscribing to securities is being made to a person or investor who is currently not an equity shareholder in the issuer company. In case, when the offer is to be made to persons/investors who are already the equity holders of the issuer company, then another set of provisions and guidelines are applicable.[7]

- At present, the provisions and instructions given in the Section 42 of the Companies Act, 2013 regarding the private placements of securities, are common for all classes of companies, be it private limited companies, public limited companies, or the listed companies on stock exchanges. In addition to these provisions of Section 42, provisions given in the Rule-14 under the Companies (Prospectus and Allotment of Securities) Rules of 2014, are also applicable. Again, besides the SEBI Act, 1992, the Securities Contract Regulation Act of 1956 (SCRA), and the SEBI (Issue of Capital and Disclosure Requirements) Regulations of 2009, the SEBI has the power to prescribe additional provisions, processes, or disclosure requirements for making private placements of securities.
- Though these provisions, requirements, and procedural compliances are common to all above-mentioned classes of securities, there exist some additional requirements and compliances in the cases of the equity shares or the securities convertible into equity shares on preferential basis. These specific requirements and compliances are

[7]http://www.mondaq.com/404.asp?action=login&404;http://www.mondaq.com:80/india/x/369230/Securities/Private%20Placement%20of%20securities%20new%20laws%20better%20laws

presented in the Section 62 of the CA-2013, read with the Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014.

- The proposed offer of securities or invitation to subscribe securities to a select group of persons/investors by a company, must be duly and previously approved by its shareholders, by way of a special resolution, for each of the offers/invitations. The offer prices and justifications for these, must be disclosed to the shareholders of the issuer company.
- An offer or invitation for private placement shall be made to not more than two hundred persons/investors in the aggregate in any financial year, individually for each type of securities. This limit of 200, does not include the Qualified Institutional Buyers [QIBs] and employees of the issuer company, who are receiving securities under ESOP. These provisions are in compliance to the Section 62(1)(b) of the CA-2013, and the PAS Rule 14(2).
- An offer of securities or invitation to subscribe for securities shall be made through issue of a Private Placement Offer Letter [PPOL] in Form PAS-4. The PPOL shall be accompanied by an application form serially numbered and addressed specifically to the person/investor to whom the offer is being made, and must be sent to him either in writing or in electronic mode, within thirty days of recording names of such persons, in accordance with Section 42(7) of the CA-2013.
- In the cases a company makes offers for non-convertible debentures, it must pass a special resolution, at least once in a year, in respect of all such offers during the entire year.
- According to the Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules of 2014 [PAS Rules 2014], the value of the offer or invitation per person/investor shall not be less than INR-20,000/- of the Face Value of the securities. The payment for subscription shall be made through the bank account of the concerned person/investor; no cash transaction being permitted.
- Again, the application money shall be kept in a separate bank account by the company, which shall be utilized only for the purpose of adjustment against allotment of securities, or for repayment of the money, in case the company fails to allot securities.
- The complete and flawless record of private placement offers and acceptances shall be well-maintained by the issuer company in Form PAS-5. A copy of such record, along with the private placement offer letter in Form PAS-4, shall be filed with the concerned Registrar of Companies [RoC], together with the prescribed fee given in the Companies (Registration Offices and Fees) Rules of 2014; and with the SEBI if the company is a listed one; within a period of thirty days from the date of circulation of the private placement offer letter [same as the date of issue of the offer letter].
- Any advertisement or any other media-related activities, intended to inform the public at large about the placement offer, is strictly prohibited.
- The (punctual) allotment of securities must be completed within a period of 60 days, counted from the date of receipt of the application money. Somehow, if the company is not able to complete allotment within this period, then it shall refund the money

well within 15 days of the expiry of 60-day period; or else, the company shall repay the received money along with the interest @12% per annum, reckoned from the sixtieth day.

- No any fresh offer of securities or invitation for subscribing to securities shall be raised unless all allotments related with previous offers have been completed.
- A return of allotment of securities shall be filed by the company with the Registrar within thirty days from the completion of the allotments, in Form PAS-3, along with the requisite fee as provided in the Companies (Registration Offices and Fees) Rules of 2014, and including the complete list of all security holders, and their details [email IDs, addresses, date of allotment, etc.].
- The provisions related to a maximum of 200 persons and the minimal investment size of not less than twenty thousand rupees, shall not be applicable to –
  a) Non-banking Financial Companies [NBFCs], which are registered with RBI, under the RBI Act of 1934.
  b) Housing Finance Companies, which are registered with the National Housing Board [NHB], under the NHB Act of 1987.

However, if RBI or NHB has no specific provisions regarding the private placements of securities, then these companies also need to follow these provisions and processes for private placements.

Penalty for Contravention

The Section 42(10) of the Companies Act of 2013 contains harsh and fast provisions for preventing breach of the above-mentioned provisions and statutory compliances regarding the private placements of securities, and also for apt punishment to the culprits. The company, or its directors or promoters at fault, shall be liable for an onerous monetary penalty which extends to the amount involved in the offer of private placement, or INR-2 Crore, whichever is higher. Prompt refund of the money involved in such private placements to the subscribers is also mandated, within thirty days counted from the date of the order imposing penalty

Effect of Sahara Housing Finance Case

A classic case of menace under this provision is the Sahara scam. In the case[8] of Sahara scam, two unlisted companies, Sahara Real Estate Corporation Ltd. and Sahara Housing Investment Corporation Limited in the garb of private placement, issued optionally fully convertible debentures and raised approximately 3,243 million USD from the public. The two companies made private placements in multiples of 49 (in-line with the 1956 Act) and in essence, made a public issue through private placement! The Sahara lawyers contended that there is no prescribed limit for number of persons to whom private placement offers can be made. They also argued that they complied with the 1956 Act as

[8] *Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India & Anr*. (2013) 1 SCC 1.

the company had made offer to only close friends and relatives of the promoters and directors. Moreover, as unlisted companies they were not required to issue prospectus and make disclosures. The Supreme Court looked into the spirit of section 67 of the 1956 Act and interpreted it to hold that although the intention of the companies was to make the issue of debentures look like a private placement, it ceases to be so when the securities are offered to more than 50 persons and, hence, qualifies to be a public offer.

The conditions imposed in relation to private placements by companies seem to have been issued after the ruling of the Hon'ble Supreme Court of India in the case of Sahara Group wherein the companies Sahara India Real Estate Corporation Limited ('SIRECL') and Sahara Housing Investment Corporation Limited ('SHICL') issued unsecured optionally fully-convertible debentures ("OFCDs") amounting to about Rs 24,000 crores to more than 2 crore investors. When Securities Exchange Board of India ('SEBI'), had came to know of the large scale collection of money from the public by Sahara through issuance of OFCDs, it issued a show cause notice to SIRECL and SHICL inter alia stating that the issuance of OFCD's are public issue and therefore liable to be listed u/s 73 of Act, 1956 and also directed to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, since they had violated various other clauses of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 and also various provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

It was urged by the Sahara Group that OFCDs were issued in the nature of "hybrid instruments" as defined u/s 2(19A) the Act, 1956 and SEBI did not have jurisdiction to administer those securities since Hybrid securities were not included in the definition of securities under the SEBI Act, or the Securities Contract Regulation Act, 1956 (SCRA), but would be governed by the Central Government under section 55A(c) of the Act, 1956. The Supreme Court held that OFCDs issued by Sahara Group were public issue of debentures, hence securities and once the number 49 is crossed, the proviso to Section 67(3) becomes effective and it is an issue to the public, which attracts Section 73(1) of Act, 1956 and application for listing becomes mandatory which falls under the administration of SEBI u/s 55A(1) (b) of the Act, 1956. The Court upheld the proceedings of the SEBI and Sahara Group was ordered to refund the amount to investors along with interest.

In the case of Sahara scam, the Sahara lawyers argued that section 67 of the 1956 Act included shares and debentures under its scope. As optionally fully convertible debentures were hybrid instruments, they do not qualify to be "securities" under the SEBI Act.[9] Therefore, Sahara was never required to adhere with the disclosure requirements, pricing guidelines etc. required in case of a public offer. The provisions under the 2013 Act ensure that no such contention is ever made

[9] *Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India & Anr.* (2012) 10 SCC 603.

Conclusion

Thus, the government has taken step to protect honest investors from malpractices of securities market under Companies Act, 2013. The provisions under the new law are pro-investor. According section 42 of Companies Act, 2013, "if a company makes an offer or accepts money in contravention of this section, the company, promoters, directors of the company shall be liable for a penalty which may extent to the amount involved in offer or invitation or two crore rupees, whichever is higher, and company shall refund the money of all subscribers within the period of thirty days of the order imposing penalty". Fixed timelines for share allotment and levy of interest on late refund of subscription money with interest are some good steps towards safeguarding investors' interests. Companies cannot now promise share allotment, collect money from interested investors and then delay allotment and issue of share certificates. The primary advantage of the private placement is that it bypasses the stringent rules and procedures of public issue. It reduces the time and is much cost efficient. In order to ensure that private placements stay private, the 2013 Act clearly prohibits advertisements. As a result, unlike the practices under the 1956 Act, companies cannot utilize media, marketing channels, services of agents and brokers or other distribution channels to make a private placement. The mandate for maintaining separate bank accounts has introduced transparency and accountability. Further, with high quantum of penalty for violation of section 42 and detailed provisions, there should be no instance of misinterpretation by the companies.

UCC: Kingpin to Break Anarchy in Personal Laws

***Aditi Mukherjee*[1]**

Abstract

India is a land of diverse culture, traditions and communities who are governed by their respective personal laws but at the same time accommodated the concept of secularism and modernity of west. In India presence of these personal laws often raises the question of reconciling with distinct religious legacy and develops into sources of public clash among the individuals. The requirement of uniform civil code is carved under Article 44 of the constitution but in reality it remain as a desire only which India has yet to achieve. In today's society there exist numerous problems like break down of traditional joint family system, increase in cases of divorce, rise in domestic violence and practices of dowry, neglect of children and elderly. Thus the question arises how the society and system of law going to work hand in hand. This paper is an attempt to understand how a uniform civil code fits in a diverse society professing different personal laws and how judiciary harmonize among the customs, religion and issues of personal family laws and at the same time uphold unique characteristics of our constitution i.e. democratic, secular, sovereign, socialist republic. The research methodology adopted for this paper is doctrinal and source of information is secondary.

Keywords: Personal Laws, uniform civil code, secular, society.

Introduction

India is a nation with multi – ethnic population and each community is governed by their respective personal laws. Different law for different community in one country is not good for development and it cannot uphold the concept of unity and secularism. A uniform civil code means that all citizens have to follow the same laws whether they are Hindus or Muslims or Christians or Sikhs. In Article 44, our constitution clearly specifies this: "The state shall endeavour to secure the citizen a uniform civil code throughout the territory of India". A uniform civil code doesn't mean it will limit the freedom of people to follow their religion, it just means that every person will be treated the same. In India, it becomes one of the most controversial issues during the Shah Bano case in 1985.

Personal Laws were primarily framed during the British Raj, chiefly for Hindus and Muslims and left India with a variety of the personal laws. At present the Christians Marriage Act 1872, The Parsi Marriage and Divorce Act 1936, Jews have their unmodified standard marriage law, Muslims and Hindus have their own different personal laws. The Hindu personal law has undergone changes by a continuous process of codification but at the same time the Muslim personal law has been moderately left

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untouched by legislations, while the contemporary family law is still in a stage of confusion.[2]

There are no lex-loci in India in matrimonial issues, matters of family- relations and succession. The requirement for a uniform civil code was first put forward by different women activists in the beginning of 20th century, with the purpose of women's rights, gender equality and secularism. The main purpose for underlying a uniform common code is to establish the idea of national unification by disposing the inconsistencies occur due to different religious belief systems which will ultimately help the individuals of different group to remain on a standard stage on civil matters like marriage and divorce, and would not be administered by different personal laws. Goa has a common family law, which makes it the only Indian state to have a uniform civil code.

Personal Laws in India

India is a land of million cultures, traditions, groups and religions. Religious differences and religious flexibility are both built up in the nation by the law and custom. India is a nation that has secularism as a basic structure in its Constitution yet there is a difference in this entire idea of secularism, especially when it is translated in the personal laws of its subjects.

Every community in India has their very own laws relating to adoption, marriage, guardianship, succession, divorce etc. The present family law in India fails to fill the gap between different religions. The reason is that the traditions, social use and religious understanding of different groups are exercised in their lives depend closely on the religion they were conceived in.[3] Following are the individual laws identifying with marriage, separation, succession, guardianship and property are:

- 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 Parsi Marriage 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 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.,

[2] Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1421&context=facpub; last visited on 06.04.2017

[3] Available at: http://jcil.lsyndicate.com/wp-content/uploads/2016/11/Tanushree.pdf ; last visited on 06.04.2017.

- The Hindu Marriage Act, 1955, The Hindu Adoption and Maintenance Act , 1956, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act,1956 (appropriate to not simply Hindus, Buddhists and Jains but rather additionally to any individual who is not a Muslim, Christian, Parsi or Jew, and who is not administered by some other law).

Apart from these the Special Marriage Act, 1872 gave Indian citizens an option of a civil marriage but had a limited application because it required those involved to renounce their religion and was applicable only to Hindus. The later Special Marriage (Amendment) Act, 1923 permitted Hindus, Buddhists, Sikhs and Jains to marry either under their personal law or under the act without renouncing their religion as well as retaining their succession rights. Later the scope was further widened by the Special Marriage Act, 1954 to provide civil marriage to any citizen irrespective of religion, thus permitting any Indian to have their marriage outside the realm of any specific religious personal law.[4]

In addition, the Indian Parliament has enacted The Family Courts Act, 1984 for the establishment of family courts to promote conciliation and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organized, well regulated and established hierarchy of judicial courts in India, there exists certain unwanted interference by communal groups which hampers the essence of the Act. In today's society there exist numerous problems like break down of traditional joint family system, increase in cases of divorce, rise in domestic violence and practices of dowry, neglect of children and elderly. Thus it is high time to implement Article 44 of the constitution so that the society and system of law can go hand in hand and the unique characteristics of our constitution i.e. democratic, secular, sovereign, socialist republic can be preserved in their true sense.

Uniform Civil Code- An overview

The expression Uniform Civil Code (UCC) consists of three terms – 'Uniform', 'Civil', 'Code'. The term uniform refers to the form of a thing. Although the term 'uniform' is very often confused as a synonym of the term 'common', but , the former means one and same in all circumstances where as the latter refers to same in similar condition. The term 'Civil' when use as an adjective to the term 'Law', it means pertaining to the private rights and remedies of a citizen. The word 'Code' is derived from the Latin word 'codex' which means, a book. So, it refers to comprehensive work of legislation regulating an entire province of law. Thus, if the term 'civil code' read together with the adjective 'uniform' it connotes a code which shall be uniformly applicable to all citizens irrespective of their religion, race, sex, caste and creed.

[4] Available at: http://www.dnaindia.com/india/report-india-s-civil-code-conundrum-reflection-of-diversity-or-case-for-reform-2326723 ; last visited on 05.04.2017.

India have ratified the International Covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is bound to implement the relevant provisions and make sure gender equality under its national laws. However, women in India under Hindu, Muslim and Christian laws continue to suffer discrimination and inequalities in the matter of marriage, succession, divorce and inheritance. Thus the UCC becomes a need of the hour. The demand for a uniform civil code essentially means to unify all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. The main controversy revolving around UCC is secularism and the freedom of religion enumerated in the Constitution of India. The preamble of the Constitution states that India is a "Secular Democratic Republic" This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion.

A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It means that religion should not interfere with the mundane life of an individual. Rebecca J. Cook rightly points out that although the Indian Constitution contains articles mandating equality and non discrimination on the grounds of sex, strangely however, several laws exist that apparently violate these principles and continue to be there especially in personal laws of certain communities with provisions that are highly discriminatory against women.[5] Article 44 of the Constitution envisages a Uniform Civil Code for all citizens and lays down that, “The State shall endeavour to secure for the citizen a Uniform Civil Code throughout the territory of India.” One of the major problem is the provision calls upon the State to try to secure such a code but It is neither time-bound nor carries a compulsive need. The uniform civil code has become relevant in today’s context of our country to achieve national consolidation and integration and safeguard against political domination. It will provide clarity and intelligibility of personal laws. It creates linkage between justice and equality.

The Uniform Civil Code is required not only to ensure (a) uniformity of laws between communities, but also (b) uniformity of laws within communities ensuring equalities between the rights of men and women.[6] Attempts have been made from time to time for enacting a Uniform Civil Code after independence and the Supreme Court in various cases has been giving directions to the government for implementing Article 44 of the Constitution and to reform the personal laws specially those relating to the minorities and to remove gender bias therein but a uniform civil code is not particularly high on the national agenda.

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[5] Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/54472/11/11_chapter%204.pdf; last visited on 07.04.2017

[6] V.R. Krishna Iyer, “Unifying Personal Laws” The Hindu, 6 September 2003. Available at: http://www.thehindu.com/2003/09/06/stories/2003090600831000.htm; last visited on 07.04.2017

Our founding fathers have been cautious in their terminology while drafting Article 44. Initially the idea of Uniform Civil Code was raised in the Constituent Assembly in 1947 and it was incorporated as one of the directive principles of the State policy by the sub-committee on Fundamental Rights and clause 39 of the draft directive principles of the state policy provided that the State shall endeavour to secure for the citizen a Uniform Civil Code. The arguments put forward was that different personal laws of communities based on religion, "kept India back from advancing to nationhood" and it was suggested that a Uniform Civil Code "should be guaranteed to Indian people within a period of five to ten years"[7]

The Chairman of the drafting committee of the Constitution, Dr. B.R. Ambedkar, said that, "We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far as the marriage and succession ……. and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change."[8] Since the Uniform Civil Code was a politically sensitive issue, the founding fathers of the Constitution placed it under Article 44 as a directive principle of state policy. Even after 68th year of framing of the constitution, the ideal of uniform civil code under Article 44 is yet to be achieved. However, the judiciary is making effort in this direction.

Judiciary Activism and Family Law

In the personal laws of different communities injustice on the basis of gender is inbuilt. This is the reason that there is a need to change the individual laws or achieve a uniform civil code to guarantee balance amongst males and females as well as to realize gender equity. Females experience numerous troubles and experience serious distress in matters concerning their marriage, separation and succession. Triple talaq, Polygamy, renunciation, etc are only a couple of case to demonstrate the conceivable outcomes of harassing females. Indian women are given equal status in political rights through the Indian Constitution but because of the diverse personal laws, females experience inequality, hardship and cruelty. The personal laws are proposed to hold them continuously under the control of men. The Supreme Court in a couple of judgments has opined that enactment for a uniform civil code as conceived by Article 44 of India's Constitution ought to be ordered. Uniform civil code can be use as a weapon to eliminate gender biasness and to beat numerous social evils like bigamy, dowry system and so on which makes a female feel subordinate and weak.

[7]Subhadeep Sarkar, " Uniform Civil Code For India - A Need Of The Hour" The World Journal on Juristic Polity (2017).

[8] *Ibid.*

In *State of Bombay v. Narasu Appa Mali*[9] the question relating to personal laws was brought before the court. In this case a legislation prohibiting the polygamy only in Hindus in State of Maharashtra was upheld. The court though opined in favour of the Uniform Civil Code but it declined to strike down the discriminatory provision of personal laws. Similarly, in Sriniwasa Aiyar v. Saraswathi Ammal[10] keeping in view the philosophy of UCC upheld the Madras Hindu (Bigamy and Divorce) Act, 1949 and declares it constitutional.

In *Mohammad Ahmed Khan v. Shah Bano Begum*,[11] popularly known as Shah Bano's case, the Supreme Court held that "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter." Though this decision was highly criticized by Muslim Fundamentalists, yet it was considered as a liberal interpretation of law as required by gender justice. Later on, under pressure from Muslim Fundamentalists, the central Government passed the Muslim Women's (Protection of rights on Divorce) Act 1986, which denied right of maintenance to Muslim women under section 125 Cr.P.C. The activist rightly denounced that it "was doubtless a retrograde step. That also showed how women's rights have a low priority even for the secular state of India. Autonomy of a religious establishment was thus made to prevail over women's rights."

In *Sarla Mudgal (Smt.), President, Kalyani and others v. Union of India and others*,[12] Kuldip Singh J., while delivering the judgment directed the Government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that, "Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article 44, Therefore the Supreme Court requested the Government of India, through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for its citizens a uniform civil code throughout the territory of India."

However, in Ahmadabad Women's Action Group (AWAG) v. Union of India,[13] a PIL was filed challenging gender discriminatory provisions in Hindu, Muslim and Christian statutory and non-statutory law. This time Supreme Court became a bit reserved and held that the matter of removal of gender discrimination in personal laws "involves issues of State polices with which the court will not ordinarily have any concern." The decision was criticized that the apex court had virtually abdicated its role. The Apex Court followed the same line in Lily Thomas etc. v. Union of India and others[14] and held "The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only

[9] AIR 1952 Bom. 84.
[10] AIR 1952 Mad. 193.
[11] (1985) 2 SCC 556.
[12] AIR 1995 SC 1531.
[13] AIR 1997 SC 3614.
[14] AIR 2000 SC 1650, at 668.

when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."

In *John Vallamatton and Anothers v. UOI*[15] the court took a very bold step towards UCC and held that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Article 25 and 26 of the constitution. A common civil code will help the cause of national integration by curbing the contradictions based on ideologies.

India is a unique merger of codified personal laws of Hindus, Christians, Parsis and to some extent of laws of Muslims. There exists no uniform family related law for all Indians which are universally acceptable to all religious communities who co-exist in India.

Conclusion and Suggestions

If we read thoroughly the above stated popular judgments, it is clear that the Court has absolutely no idea what a UCC looks like and what such a code should do. In each case, it has been offered as a solution for a particular issue with which the Court was faced because the only real problem with India's personal laws is not that it was outdated, but their lack of uniformity. The Court in all these cases stick to the Article 44, as if it were a clear expression of the idea of what a UCC is. Article 44 is itself is concise. It merely encourages the state to create a "uniform civil code" for the whole nation. No other part of the Constitution even mentions the UCC.

On the other hand, Articles 371A and 371G expressly exclude the applicability of parliamentary law on customary practices unless the legislatures of Nagaland and Mizoram, respectively, give their approval. Likewise, the Sixth Schedule of the Constitution gives exclusive lawmaking power regarding customs and family law to the regional and district councils in tribal areas of Assam, Meghalaya, Tripura and Mizoram. A UCC made by Parliament, therefore, cannot apply to whole of India.

The Hindu code, which wanted to create a uniform law governing all Hindus, is not uniform in some of the most essential aspects of family law. The validity of a marriage is related to the customs and ceremonies of the particular community, the inheritance rights of the members of the family is different for communities like in Kerala and Tamil Nadu, who is capable of being adopted also depends on the custom and usage.[16] It was always claim that "since Hindus are governed by a uniform law, why not others". But it fails at the very initial step because the law is not uniform for all Hindus. While, no doubt, the

[15] (2003) 6 SCC 611.

[16] Alok Prasanna Kumar, "Uniform Civil Code A Heedless Quest?" 25 *EPW* 10-11(2016).

Hindu code makes several portions of Hindu personal law uniform, it leaves custom and local practice undisturbed in several aspects.

If we see the much hyped example of a UCC, the Portuguese Civil Procedure Code, 1939 applicable to all communities in Goa, is not equally applicable to all communities. It has different rules for Catholics and different rules for all other communities. It even recognised a limited form of bigamy for Hindus.[17]If a UCC is about "uniformity" then it will remove the requirement of religious ceremonies for the validity of marriages, abolish the concept of coparcenary property, and it will remove all distinctions between converts and non-converts over the inheritance of property. And if this kind of uniformity is not pleasing, then it is useless to promote a UCC without understanding the true ideology behind it. If the goal is to address malice in personal laws of different religions, such malice must be addressed on their own terms instead of demanding a UCC. No one seems to have a clear conception about the actual look of UCC and those who are proposing the UCC as a weapon to promote gender equality in laws or national integrity are just blabbering about it. In reality on one is able to hold the main crux of the concept of UCC. Thus we have to understand what UCC is all about.

In recent times, some women groups have challenged the triple talaq in various Indian courts and thus, the Supreme Court is currently hearing a case for testing the legality of the triple talaq within the confines of the Indian Constitution and Islamic sources. However, keeping view of the community's sensitivity, the Court has decided to keep the debate for Uniform Civil Code out of this discussion and look at the legality of the practice alone. In the meantime, the Supreme Court has dismissed the petition of a Christian petitioner who wants permission to allow Christians to seek divorce through church courts. The Supreme Court overruled the 80-year-old's plea to equate Christian Personal Law with the Muslim Personal Law and tribal personal laws which allow a divorce on the pronouncement by community leaders.[18]Another recent issue which caught the attention is from the north-eastern state of Nagaland where the women are fighting for their 33% reservation in urban local bodies as provided by constitution.

The Naga Hoho, the apex body representing 16 main tribal groups, and others opposing, insist that the provision of 33% reservation for women violates Article 371A of the Constitution, according to which no Act of Parliament will apply to Nagaland if it goes against customary laws. They argue that they are not against women's representation in these bodies but against them standing for elections. They prefer to nominate women rather than have them stand for elections, but this isn't the only fight Naga women are fighting. Naga women are not allowed in the traditional village councils, they have no land rights, no property rights and no inheritance rights. Not a single woman has been

[17] *Ibid.*

[18]Available at: http://www.dnaindia.com/india/report-india-s-civil-code-conundrum-reflection-of-diversity-or-case-for-reform-2326723; last visited on 07.04.2016.

elected to the assembly in the state's more than 50-year-old history. The first legislative assembly election was held in 1964 and till the last election in March 2013, only 15 women candidates contested through the years.[19] Thus the arguments of those who oppose the reservation are on the same footing as those presented by the Muslim men and women who oppose the abolition of the practice of triple talaq.

The central government took a bold step of vouching for a UCC so that the lives of Muslim women cannot be allowed to be ruined by triple talaq and the rights of the women should not be encroached in the name of customs and usage. Recently, the Law Commission of India has prepared a questionnaire to solicit opinions and ideas of the public at large. The commission hopes to begin a healthy conversation about the validity of a uniform civil code and will focus on family laws of all religions and the diversity of customary practices, to address social injustice rather than plurality of laws.[20] Thus, the twenty-first century seems to be a new age for India's personal laws which are being increasingly challenged by members of its communities, civil rights activists and other citizen groups to introduce changes in a march towards equity and fairness among all its citizens.

The researcher in this paper wants to put forward some suggestion:

- To understand the real meaning of UCC the legislature themselves have to understand the real ideology behind it and for doing so they have to understand the need of the society and to study new age family system which is blend with the modernity of the west.

- For framing a universally accepted uniform civil code there is need to establish a committee which may include experts of different personal law so that each community should get chance to get represented. The committee must contain female representative of different community so that the women related issues can be curbed down.

- The members of the committee should try to outline the pros and cons of each personal laws existing in India and should list out the finest part of each personal law so that no community get impair but at the same time they have to keep their mind open to uphold unique characteristics of our constitution i.e. democratic, secular, sovereign, socialist republic.

From the above mention propositions it can be said that for India there is a need of one indigenous Indian law applicable to all its communities which should coexist with our

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[19] Available at: http://www.livemint.com/Politics/jGb6h5jVomZJwoXzW01PRM/Will-antiwomen-quota-stir-in-Nagaland-boost-BJPs-uniform-c.html; last visited on 07.04.2016

[20] Available at: http://www.lawcommissionofindia.nic.in/questionnaire.pdf; last visited on 05.04.2016

democracy. Codification of a unified civil code may be the ultimate solution because the Uniform Civil Code would carve a harmony between fundamental rights and religious ideology of people but the judicial verdicts will keep the momentum going.

It may take little time to accommodate personal laws of all religions in one code is a tedious task. Unity in India exists in its diversity. Thus religion has to keep pace with law. The courts in India perform a heroic task in carving out solutions on a case to case basis. Now it the executive and the legislature arms of the government in India to contribute to find out the solutions.

Alternative Dispute Resolution: A Salvager in Family Law

***Sthiti Dasgupta*[1]**

Abstract

Nothing is constant but change. It's effect can be seen in societal structure and its components like family.A family plays a major role in formation of social norms and attitudes. Today the nuclear family concepts are plagued by various ills leading to splits and knocking the door of courts has become a regular phenomenon. The traditional family laws couldn't imagine the coming complexities but with time this major setback to piles of family disputes are being tried to be resolved by alternative dispute resolution. But alternative dispute resolution cannot see the light unless citizens participate in it actively. Courts have already accepted it as a mode of redressing problems of people; even legislative provisions are there but more initiatives are required to make it the regular practice in family disputes. The various issues plaguing the promotion of ADR mechanism in family disputes will be analysed in the paper titled "Alternative Dispute Resolution: A salvager in family law". The paper is purely a doctrinal one and the sources used for the research are secondary.

Keyword: *Society, family, Dispute, Alternative dispute resolution.*

Introduction

India is a land of diverse religion and people having varied customs and culture. To keep the identity of each and everyone intact and also providing them equality, economic and social justice has been the aim of our Constitution. It has tried to ensure that all are entitled to justice at any cost. To deliver justice with due diligence goes through lot of equations. The legislative measures plus judicial system both should ensure equality and providing speedy justice is also a fundamental part of this justice system.

Family Law Legislations

As already been discussed India is a country with diverse communities, thus personal laws of all the communities is a significant part of the society. Although these personal laws have gone through codification process. It is notable fact that major codification has been seen in Hindu personal laws. The muslim personal laws has comparatively been left untouched.

The Hindus are governed by the Hindu Marriage Act,1955 which applies to hindu, Sikhs, jain and Buddhists.It excludes parsis, jew, Christian and muslims. Likewise in other personal law issues Hindus are governed by hindu Succession Act,1956,The Hindu Minority and Guardianship Act,1956,The Hindu Adoptions and Maintenance Act,1956.

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The Indian Succession Act governs testamentary and intestate succession unless parties opt out and choose to be governed by their respective personal laws which otherwise governs them. In respect of guardianship, there is Guardianship and Wards Act,1890 which applies to non-hindus.

Apart from personal laws, hindus or muslims both can also go under Sec.125 Cr.P.C for maintenance. The legislature has also enacted Special marriage Act,1954 which provides a right of marriage, divorce to people who want to opt out of ceremonial marriages of their personal laws. This Act governs people of all religions and communities irrespective of their faith. The Parsi Marriage and Divorce Act,1936(amended 1936) is related to marriage and divorce of parsis in India. The Indian Christian Marriage Act,1872 is related to Christians in marriages in India and the Divorce Act,1869(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 applies to Muslims living in India.

For any matrimonial disputes of different religious and non-religious communities under the respective legislations, designated judicial forum or court where these petitions can be lodged is prescribed in the respective enactments themselves. An organized system of civil and criminal courts is provided in the state which is under the overall jurisdiction of the respective high court in the state. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided. Along with these, Family Courts Act, 1984 provide for family courts for speedy disposal of family issues. Despite existence of such according to a study the findings of Daksh, an NGO which analyses the performance of the judiciary. Around 66% of all cases studied are property-related litigations, and 10%, the second largest chunk, are family matters.[2]

Alternative Dispute Resolution

In India there is a massive legal system across the country, it is the constitutional obligation of the judiciary to exercise its jurisdiction to reaffirm people's faith in the judicial set up. Because the gaping loophole of Indian judicial system is its backlog of cases. The large spectrum of cases deaing with family issues continues for long. The atrocious time taking period of these cases call for some alternative dispute resolution (ADR) mechanism to solve the cases in relatively lesser period. Thus evolution of new ADR mechanism is imperative; this has been reiterated in reports of expert bodies.[3]

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[2]http://timesofindia.indiatimes.com/india/Property-and-family-disputes-account-for-76-of-litigation/articleshow/51987414.cms April 26,2016 Times of India, accessed on 22.2.2017

[3] Report of the Committee on Legal Aid(1971)

Art.21 of the constitution of India brings in speedy trial as a part of right to life and liberty by the Supreme Court of India.[4]This can be said to be a fine quotient behind ADR mechanism in the judicial system. There are various statutes like Arbitration under Arbitration and Conciliation Act,1996;Settlement under Order XXXIIA of the CPC[suits relating to matters concerning the family],1908;Sec.89 in CPC read with Order X Rules I-A,I-B and I-C for settlement of Disputes outside court; establishment of Lok Adalat under The Legal Services Authority Act,1987;Reconciliation under Sec.23(2) and 23(3) of the Hindu Marriage Act,1955 and also under Sec.34(3) of the Special marriage Act,1954;duty of family courts to make efforts for settlement under the Family courts Act,1984.[5]

The CPC tries to make an effort to assist the parties at the first instance to arrive at a settlement in matrimonial cause in any matrimonial proceeding before a court of competent jurisdiction. Thus ,in any suit or proceeding for matrimonial, ancilliary or other relief in matters concerning the family, there is a separate and independent statutory provision providing for mandatory settlement proceedings, this is over and above the other statutory provisions applicable.

Lok Adalat system which is development under the Legal Services Authority Act is a major development because awards are final and important role of it is to settle the disputes outside the reguar court system. All the proceedings of a lok adalt are deemed to be judicial and the lok adalats are deemed to be civil courts.

The law commission of India in its 129th report has also recommended that alternate modes of dispute redressal be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate modes then the suit can proceed to the court.[6]

Under the family law statutes, reconciliation is mandatory under The Hindu Marriage Act,1955 and The Special Marriage Act,1954;other matrimonial statutes do not provide for it and there is therefore no statutory mandate to attempt settlement in other cases. Under Sec.23(2) of The Hindu Marriage Act,1955 it is envisaged that before proceeding to grant any relief under it, there shall be a duty of the court in the first instance, in every case to make every endeavour to bring about reconciliation between parties where relief is sought on most of the fault grounds for divorce specified in Sec.13 of the Act.Sec.23(3) empowers the court on request of the parties or if the court thinks fit to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation.

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[4] *Hussainara Khatoon(1) v. Home Secretary,State of Bihar,*(1980)1SCC 81

[5]Available at https://www.iafl.com/cms_media/files/alternative_dispute_resolution_in_indian_family_law.pdf visited on 1.03.2017

[6] *Ibid.*

As hindu marriage is a sacrament, thus even if divorce is by mutual consent ,it is the duty of the court to attempt reconciliation in the first instance.[7]

Sec.34(2) and 34(3) of the Special marriage Act are *pari materia* to the provisions of sec.23(2) and 23(3) of the Hindu Marriage Act. The mandatory duty on the court is thus on similar terms. Thus the provisions under both the statutes are almost similar and accordingly every endeavor to bring about reconciliation is mandatory.[8]

Sec.14 of the Hindu marriage Act which puts a deterrent from initiating divorce proceedings in the first year of marriage again brings the logic of advocating settlement and reconciliation between parties and avoid hasty divorces. It provides that court can entertain a petition for divorce in the first year of marriage on the ground of exceptional hardship or exceptional depravity.
Sec.14(2) of the Act provides that In disposing of any application under this section for leave to present a petition for divorce before the (expiration of one year)from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the (said one year).Sec.29 of the Special Marriage Act contains similar provisions with similar kind of bars.

Similarly for petition of divorce by mutual consent u/s 13 B of Hindu marriage Act and Sec.28 of the Special Marriage Act, it is not available instantly and a joint petition has to wait for six months but not longer than eighteen months to be confirmed for granting a divorce by mutual consent in the second motion. Thus it can be deduced that there is an inbuilt opportunity for reconciliation if parties wish to avail it.

In the case of *Hitesh Narendra Doshi v. Jesal Hitesh Doshi*[9], this period was held to be mandatory and court had maintained that it has no power to relax this period. While in *Mohinder Pal Kaur v. Gurmeet Singh*[10] it was considered that the six months waiting period can be brought down in cases where an existing divorce petition is already pending for more than six months and efforts for reconciliation have been made earlier but without any success. Thus, the waiting period cannot be curtailed in a freshly instituted petition for divorce by mutual consent if in an earlier petition on fault or other grounds, the parties have already been litigating for more than six months and reconciliation between them has been of no avail.

Under Sec.23(2) of Hindu Marriage Act and Sec.34(2) of Special Marriage Act it is the duty of the court at the first instance to make every effort to bring about reconciliation between parties where it is possible to do so consistently with the nature and

[7] *Ibid.*
[8] *Ibid.*
[9] 2000(2)Hindu LR(A.P.)(D.B)45:AIR 2000 (A.P)362
[10] 2002(1)Hindu LR(PB & Hry)537

circumstances of the case. Thus before the court takes up the case for hearing, it should make an effort at reconciliation.

Under the Family Courts Act, 1984 the main objective is to bring reconciliation between the parties. The Act does the following important steps which clarify the major motive behind the Act:

a) Makes it obligatory on the family court to bring reconciliation or settlement at first instance.
b) Provide for association of social welfare agencies, counsellors etc during conciliation stage and secure medical and welfare experts.
c) Provide that the parties to a dispute before family court shall not be entitled, as of right to be represented by lawyers, however the court may in interest of justice seek assistance of lawyers as amicua curiae.
d) Simplify the rules of evidence and procedure so as to enable a family court to deal effectively with a dispute.
e) Provide for only one right of appeal which shall lie to high court.[11]

Therefore it can be said that this piece of legislation is absolutely on reconciliatory side in family law disputes.

Judicial pronouncements

As legislature's efforts to bring beneficial provision of conciliation in matrimonial proceedings has been made; court should strictly interpret them and implement them. It is thus duty of the matrimonial courts to ensure that the mandatory settlement efforts are actually implemented. Supreme Court has also stressed on this reconciliation requirements. In Jagraj Singh vs. Bir Pal kaur[12], apex court confirmed settlement efforts in matrimonial matters as it held that reconciliation provisions under sec.23 of Hindu marriage Act and Order XXXII-A of the CPC are not empty or meaningless ritual to be performed by the matrimonial court.

In *Bini v. K.V. Sundaran*[13] honourble high court held that "the primary object is to promote and preserve the sacred union of parties to marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement may be made by way of settlement. In the case of *Baljinder Kaur v. Hardeep Singh* laid down that "stress should always be on the preserving the institution of marriage. That is the requirement of law. One may refer to the objects and reasons which lead to setting up of Family Courts under the Family Courts Act,1984.For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence."Para 15 of the judgement

[11] Available at http://www.academia.edu/3354551/Family_Courts_-_Objectives_and_Functioning visited on 2.03.17.
[12] JT 2007(3) SC 389.
[13] AIR 2008 Kerala 84.

says that "even where the family courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the civil courts trying matrimonial causes."

In the case of *Shiv Kumar Gupta v. Lakshmi Devi Gupta*[14]honourable high court found that the compliance with Sec. 23(2) of the Hindu Marriage Act, 1955 is a statutory duty of the judge trying matrimonial cases.The court in this case relied on the decision of *Balwinder Kaur v. Hardeep Singh*. In *Love Kumar v. Sunita Puri*[15]court held reconciliation procedure as mandatory process, the timing and stage at which it is to be implemented may vary depending on the facts and circumstances of each case. Simultaneously causing prejudice to the rights of one party by striking off the defence or dismissing the petition may actually work injustice to the rights of such party. Thus matrimonial court can use its discretion and apply the reconciliation proceeding without causing prejudice to substantive rights of the parties.

In *Rajesh Kumar Saxena v. Nidhi Saxena*[16] court called it the bounded duty of the family Court for making an attempt for conciliation before proceeding with the trial of the case. In the case of *Aviral Bhatla v. Bhavana Bhatla*[17]honourable Supreme Court appreciated the settlement brought by Delhi Mediation centre. Thus there is a growing movement towards adaption of reconciliation rather than litigating in matrimonial courts. However, the performance of this mandatory exercise ought not to be reduced to an empty ritual or a meaningless exercise. Otherwise, the utility of the beneficial provision will be lost.

ADR: a salvager

In family disputes whether it be divorce, maintenance and alimony case, it should not be a mere litigation and thus it should not be viewed in terms of failure or success of legal action but as a societal therapeutic problem. The amicable settlement of family disputes requires special procedures to help the people in distress, it must be viewed with a humanitarian approach. The Supreme Court has made an observation in *Gaurav Nagpal v. Sumedha Nagpal*[18] "It is a very disturbing phenomenon that large numbers of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act,1955 have led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them, this may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the section. The provisions relating to divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation

[14] 2005(1)HLR 483.
[15] AIR 1997 Punjab and Haryana 189:1997(1)HLR 179.
[16] 1995(1)HLR 472.
[17] 2009 SCC(3)448.
[18] AIR 2009 SC 557.

to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriages should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should been saving of marriage and not breaking it. As noted above it is more important in cases where the children bear the brunt of dissolution of marriage."

ADR can't be forced; but it should be a way before going into regular litigation process. In some family law cases ADR can be better than going to court as the parties can have more control over what happens in the case; it can be cheaper than a court case; it can be less upsetting than going to court.
However ADR may be a good way for parties to work out issues but is not recommended if:

- partner does not listen or respect each other;
- cannot talk to his/her partner;
- cannot work cooperatively with his/her partner;
- partner has been abusive or violent;
- partner has tried to bully or scare;
- partner can take advantage of;
- any one partner has more power.[19]

Conclusion

Family matters should not actually go directly into litigation procedure; unless grave necessity is there. Mandatory reconciliation procedures should take concrete shape so that a family issue gets solved conclusively without further challenge. Matrimonial issues carved out by reconciliatory measures will bring better results to society than adversary litigation through time, money, efforts and above all breaking up families.

More family courts should be created which will contribute to the resolution of family law disputes by ADR. How much important this ADR is can be deciphered through a look at the international legal atmosphere where it is seen that mediation and conciliation proceedings are very much appreciated to settle down family disputes. "As we know alternative dispute resolution processes include negotiation, conciliation, mediation, mini trials and arbitration….particularly in the fields of family and neighbourhood disputes because it is arguable that both in Australia and overseas, especially in the United States that mediation, conciliation has found entirety…."[20] In federal courts formed in the USA "Of all the types of ADR, mediation has emerged as the primary ADR process in the federal district

[19] Available at http://www.onefamilylaw.ca/en/adr/ accessed on 22.02.17

[20] Available at http://www.austlii.edu.au/au/journals/QUTLawJl/1991/6.html ADR — argument for and against use of the mediation process Particularly in family and neighbourhood disputes by Gay R. Clarke and Iyla T. Davies visited on 1.03.2017

courts." Most federal jurisdictions offer some form of mediation and many require it. Mandatory mediation either requires parties to engage in mediation in certain cases or creates disincentives for parties to decline it. The cases in which parties are often required to participate in mediation include family law cases such as divorce proceedings.[21]

Even in India the reconciliation proceeding which is opted by the courts is mostly mediation and conciliation. These mechanisms are there in the legislative codes but citizens should participate so that ADR in family issues can see the light. Constitutional spirit of speedy trial isn't possible if people have the habit of invoking traditional court's jurisdiction for family disputes; they should take resort to it although court tries to invoke this even after initiation of proceeding in its jurisdiction. But pre awakening of ADR mechanism by citizens themselves will definitely help them to get redressal quickly and disposal of issues can be more amicable. The initiative needs more self consciousness.

India has the laws to promote alternative dispute resolution modes in the existing limitative setup but the infrastructure, professional assistance and the medium through which these beneficial reconciliatory mediation procedures are to be implemented are lacking within India. Need is dire as burden of cases in the traditional courts are huge the sooner steps towards this is promoted the better.

[21] Available at http://cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states Brief History of Alternative Dispute Resolution in the United States visited on 2.03.17

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ISSN 2321 - 1059

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