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Regulation of Electricity Sector and Role of Competition Commission in India

Dr. Surender Mehra[1]

Introduction

Due to protectionist nature of the Indian economy, economic activities were governed and dominated by the government-owned companies. Government also controlled the level of competition in the economy, such as price, entry, supply of goods, scale and location. The telecommunication services, oil exploration, drilling, refining and marketing were a government monopoly and other sectors such as automobile[2], banking and electricity sector were also dominated by government undertakings. This situation did not call for independent regulators as government was generally believed to be acting in the interest of the public. New economic reforms 1991 changed the manner in which business was conducted and market was got opened for foreign direct investment, consequently liberalization, privatization and globalization regime got started. As a result of these the need of having sectoral regulators became apparent.[3]

The regulatory bodies set up at times i.e., The RBI Act[4], The Telecommunications Regulator, the Telecom Regulatory Authority of India (TRAI)[5],Insurance Regulation and Development Authority Act (IRDA),[6]Petroleum and Natural Gas Regulatory Board (PNGRB)[7], Airports Economic Regulatory Authority (AERA)[8], Securities and Exchange Board of India (SEBI)[9], Central Electricity Regulatory Commission (CERC)[10], etc. While these regulatory bodies were being set up to tackle various issues emanating from actual and anticipated private player behaviour and other structural issues, of services which have to be provided to every customers, who need them.[11]The solution of these problemis to subject these sector to regulation, it involves setting up of a authority in shape of a sector regulator which will control prices, quality, minimum standards and other service

[1] ***Assistant Professor (Senior Scale), Faculty of Law, BHU, Varanasi.***
[2] Suzanne Rab. Indian Competition Law an international perspective, CCH a Wolters Kluwer business, Gurgaon, Haryana, 2012.
[3] Available at http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf. accessed on 05/5/2017 at 12:45 p.m.
[4] RBI Act, 1934.
[5] The Telecom Regulatory Authority of India (TRAI) 1997.
[6] Insurance Regulation and Development Authority Act, 1999.
[7] Petroleum and Natural Gas Regulatory Board (PNGRB) in 2006.
[8] Airports Economic Regulatory Authority (AERA) 2008.
[9] Securities and Exchange Board of India (SEBI) 1992.
[10] Central Electricity Regulatory Commission (CERC) 1998.
[11]Pradeep S. Mehta. Leveraging Economic Growth through Better Regulation, Competition and Regulation in India 2011.

conditions,[12]the same concerns like in improvement in free and fair competition among market players were also felt. This led to the setting up of the Competition Commission of India.

Competition law seeks to promote efficient allocation and utilization of resources, which are usually scarce in developing countries. A good competition law lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship.

Regulations can be categorized as under: (i) Economic Regulations involve directly controlling or specifically production technologies (other than those linked with setting common technical product standards); eligible providers (granting and policing licenses); terms of sale (i.e. output prices and terms of access); and standard marketing practices.[13] (ii) Technical Regulations involves setting and enforcing product and process standards designed to deal with safety, environmental and switching cost externalities.

The objective of a sector regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anticompetitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sector regulators to be more closely aligned with the interest of the firms being regulated, which is also known as "regulatory capture."[14]

Both sectoral regulators and the competition authority have objectives which converge. Both of them aim to improve economic performance by preventing market power and avoiding inefficient regulations.[15] Despite sharing common objectives, they have different goals and have different legislative mandates. They may also approach the same issue with different perspectives. The sector specific regulators are primarily concerned with attenuating the effects of market power whereas Competition Commission of India (CCI) basically focuses on reducing such power. The former typically impose and monitor various behavioural conditions whereas the latter is more likely to opt for structural remedies. In simple terms, competition regulator tells the incumbents what they should do whereas sectoral regulators tell them what to do. The regulatory interface problem is centered on the degree to which sectors being opened up to greater competition should also be subject to general competition laws and how and by whom such laws are to be

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[12]Vinod Dhall, *Competition Law Today Concepts, Issues and the Law in Practice*, (New Delhi: Oxford University Press, 2007).

[13] OECD, 1998 as cited in Competition Authorities and Sector Regulators: What is the Best Operational Framework?, Viewpoint, CUTS International.

[14]Seema Sharma, Sector Regulators and Competition Law, Project submitted to The Competition Commission of India, New Delhi.

[15]CCI News Letter, Vol. 21, April – June 2017, available at www.cci.gov.in accessed on 05/5/2017 at 14:12p.m.

administered.[16] So there exist overlaps and complementarities between the sector-specific regulators and competition authority.[17]

The Objective and approach of Competition law and Sector Regulators Laws

Competition law

1. Promote productive, allocative and dynamic efficiency[18].
2. Encourage free and fair competition in market.
3. Ensures abundant availability of goods and service of highest quality at lower price.
4. Offer wider choice to consumer.
5. Greatest use of material resources.
6. Competition Advocacy[19] tells businesses "what not to do"
7. Focuses upon the entire economy and functioning of the market.
8. *Ex post* – addresses behavioral issues after problem arises.

1. Focus upon consumer welfare and unfair transfer of wealth from consumers to firms with market power.
2. Competition legislation is usually more appropriate for affecting conduct and maintaining competition.

Sector Regulators

1. These prevent inefficient use of resources and protect consumer.
2. Technical Expertise necessary to determine access, maintain standard, ensures safety and determine tariffs, price fixing and regulation.[20]
3. Sector regulators have economics of scale in network industries
4. Tells businesses "what to do" and "how to price products"
5. Focuses upon specific sectors of the economy.
6. *Ex ante* – addresses behavioral issues before problem arises.
7. Focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare.

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[16] Available at http://oldwebsite.iica.in/images/Harmonising#20Regulatory$20Confilcts.pdf accessed on 8/5/2017 at 10:10 a.m.

[17]Introduction to Competition Law, (Part 5- Regulatory Bodies and Coordination between the Competition Commission and Sectoral Regulator), Competition Commission of India, available at www.cci.gov.in

[18] Dynamic efficiency occurs overtime and is strongly linked to the pace of innovation within a market and improvements in both the range of choice for consumers and also the performance, reliability and quality of products.

[19]Competition Advocacy

Section 49. [(1) The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on

competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.]

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government [or the State Government, as the case may be] in formulating such policy.

(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

[20] The Electricity Act, 2003.

8. Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry and opening up the market to effective competition.[21]

Electricity Act, 2003

Under the Electricity Act, 2003 SERCs and CERC have the mandate to ensure fair competition in the electricity sector. Section 60of the Electricity Act gives SERCs and CERC powers to take corrective action if a licensee or a generating company enters into an anticompetitive agreement, abuses its dominant position or enters into a combination which causes an adverse effect on competition in electricity industry. Also section 174 of the Electricity Act, 2003 gives overriding power to itself.

As seen above, there are areas of overlaps between the competition authority and the sector regulators. Overlaps are expected to either give rise to ambiguities resulting in stakeholders, regulated companies and consumers as they struggle to know which regulator is best suitable to deal with their grievances. Regulatory overlap can also give rise to, forum shopping,[22] delays and multiplicity of proceedings resulting in conflicting views of two regulators.

The Act lays down that the Central Government may notify any Government company as the Central Transmission Utility has to ensure development of an efficient, co-ordinate and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centers, to provide non-discriminatory open access to its transmission system for use by, any licensee or generating company on payment of the transmission charges; any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission.[23]

The Act provides that appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees. If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution be the Electricity Act, 2003initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission: Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of hearing.[24]

The Act lays down that Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall

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[21] *Supra* note 13.

[22] Forum shopping is a practice adopted by litigants to get their cases heard in a particular Court that is likely to provide a favorable judgment.

[23] Section 38 Electricity Act 2003.

[24] Section 57 Electricity Act 2003.

be guided by the following, namely:-the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees; the generation, transmission, distribution and supply of electricity are conducted on commercial principles; the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner; the principles rewarding efficiency in performance; multiyear tariff principles; that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]the promotion of co-generation and generation of electricity from renewable sources of energy; the National Electricity Policy and tariff policy.[25]

In ***Shri Neeraj Malhotra, Advocate* v. *North Delhi Power Ltd. &Ors*[26].** The information has alleged that Discoms are abusing their dominant position by imposing unfair and discriminatory conditions in purchase of goods (i.e. electricity meters) and also services, thereby leading to foreclosure of competition by hindering entry into the market.

It has been also alleged that the practice carried on and the decision taken by all these companies engaged in supply and distribution of electricity jointly and severally, has the effect of determining the prices of the services being supplied by them and being purchased by its consumers in as much as they are overcharging the prices more than what is actually due to them and thus their practice and decision has the effect of indirectly determining the sale prices of the services rendered by them, In addition to above, the arrangement, understanding and concerted action on part of the enterprises to supply and install the electricity meters themselves thereby prohibiting their consumer from purchasing and installing meters, also limits and controls the production and supply of goods (electronic meters) and provision of services in the market thereby having an appreciable adverse effect on competition within India. The same has the effect of driving existing competitors who are manufacturing and selling electronic meters out of the market and foreclosing the competition by hindering their entry into the market.

The informant has alleged violation of Section 4(1) and Section 4(2) (a) (i) namely 'Abuse of Dominance' whereby the Discoms are directly or indirectly imposing unfair or discriminatory conditions in purchase or sale of goods or services. The Discoms have also been allegedly violating section 3(1), 3(2), 3(3) (a) and (b) by entering into anti-competitive agreement or carrying on practices which are likely to cause appreciable adverse effect on competition.

The Competition Commission decided that fast running of meters is related to consumer disputes and has no bearing on the competition issues. DG has based his finding solely on the data of test results of meters of aggrieved consumers provided by the Public

[25]Section 61 Electricity Act, 2003.
[26][Case No. 6/2009] order Date: 11.5.2011 (CCI).

Gilevance Cell constituted by the Government of NCT (Delhi). It is also noted that this data is compilation of test results conducted during the period running from July, 2007 to November, 2009, on the complaints of those consumers who suspected that their meters were running fast. A total of 2014 meters were tested.

Therefore, the test results cannot be taken to be representative sample so as to draw a conclusion that more than 90% of the meters in Delhi are running on positive side. Similar view was expressed by the Committee constituted by the Ministry of Power in its report submitted in September, 2008. The Commission comes to the conclusion that no case of violation of Section 4 of the Competition Act is established against the Discoms.
Shri Anand Parkash Agarwal v. *Dakshin Haryana Bijli Vitrran Nigam*[27]

It has been held that *Dakshin Haryana Bijli Vitran Nigam* is stated to be an electricity distribution company owned by State of Haryana and is licensed by Haryana Electricity Regulatory Commission to exclusively supply electricity in nine (9) districts of the State of Haryana. Dakshin Haryana Bijli Vitran Nigam purchases power from approved sources of electricity that are in the business of generation of power and supplies the same to different categories of consumer such as domestic, agricultural, industrial and commercial.

Haryana Electricity Regulatory Commission is the Haryana Electricity Regulatory Commission, stated to be a statutory body corporate designated to function as an autonomous authority responsible for regulation of power sector within the State of Haryana. It grants license to electricity suppliers and is also empowered under the Electricity Act, 2003 to establish State Advisory Council for the purpose of advising Haryana Electricity Regulatory Commission on protection of consumer interest and responsible for power generation, transmission, distribution and trading in the State.

It has been, inter alia, alleged that OP-1 has been steadily increasing the FSA post 2008 even when the fuel costs have been steadily declining during the same period. Further, FSA charged by Dakshin Haryana Bijli Vitran Nigam has been more than the mandated ceiling prescribed under the Regulations framed by Haryana Electricity Regulatory Commission for such purpose. It has also been alleged that Dakshin Haryana Bijli Vitran Nigam has been imposing differential FSA based on the quantity of power consumed andthereby, besides discriminating between the consumers, it has also beencross-subsidizing the uncontrollable pass through costs as well as operating in an extremely uncompetitive and inefficient manner. The seconducts of Dakshin Haryana Bijli Vitran Nigam have been alleged as abuse of dominant position by Dakshin Haryana Bijli Vitran Nigam, in contravention of the provisions of Section 4 of the Act.

It is observed that Dakshin Haryana Bijli Vitran Nigam has been authorized to be the exclusive supplier of electricity in the areas licensed to it. Therefore, no other choice is

[27]Case No. 1 of 2016.Order Date: 10/02/16 (CCI) as available at www.cci.gov.in.

available to domestic consumers in the licensed area. Hence, Dakshin Haryana Bijli Vitran Nigam appears to enjoy dominant position in the relevant market in view of theexclusive license granted to it and the presence of regulatory restrictions for any other player to enter into the relevant market. However, it is relevant to keep in mind that the relevant market is a regulated one and the degree of commercial freedom enjoyed by Dakshin Haryana Bijli Vitran Nigam may be subject to limitation in matters such as tariff, area of distribution, etc. Further, Dakshin Haryana Bijli Vitran Nigam being a State owned entity may have social obligations and does not function on profit motive alone.

The issue highlighted by the Informant in the present case essentially relates to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission in respect of fixation of FSA; and no competition issue is discernible from the facts presented in the information. Any person aggrieved by the decision of a State Electricity Regulatory Commission could also appeal such decision before the Appellate Authority under the Electricity Act, 2003.

The Competition Commission is of the view that no case of contravention of the provisions of Section 4 of the Act is made out against OPs in the present case.

Legislative ambiguity or jurisdictional overlap[28]

Electricity Act 2003	Competition Act 2002
Section 60 "The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry."[29]	**Anti-competitive agreements** **Section 3.** (1) "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void. (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets,

[28] Augustine Peter. Interface between Competition Authority and Sector Regulators, Presentation_document available at www.cci.gov.in.
[29] Section 60, Electricity Act 2003,

	technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services."[30] **Abuse of dominance** Section 4. [(1) "No enterprise or group shall abuse its dominant position.] (2) There shall be an abuse of dominant position 4 [under sub-section (1),if an enterprise or a group].—- (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service."[31]

2. Interpretational bias.
3. Conflicts between two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase risk of investment.

The United Nations Conference on Trade and Development (UNCTAD) identifies five possible frameworks that can be used in resolving the conflicting mandates (UNCTAD, 2006). These are as follows:

(a) Combining technical and economic regulation in sector regulator and leave competition enforcement exclusively in the hands of the competition authority;
(b) Combining technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions;
(c) Combining technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority;

[30]Section 3, Competition Act 2002.
[31]Section 4 of Competition Act, 2002.

(d) Organising technical regulation as a standalone function for the sector regulator and include economic regulation within the competition authority:

(e) Relying solely on competition law enforced by the competition authority for all aspects of regulation.[32]

Conclusion and Suggestions

Consumers in India pay highest prices for electricity in comparison with China and Japan. Introducing competition into the electricity sector or market with object to lowering down the cost of electricity and enhancing more choice has been considered the only way to maximize social welfare. Electricity sector reform has been characterized with more and more competition in generation, distribution, decentralization, privatization, and transmission.

1. Sector regulator and competition authorities can enter into formal cooperation agreements.
2. Competition Commission can best examine behavioural issue while sector regulator can judge structural matters.
3. Consultation with stakeholders.[33]
4. Mandatory consultation under Section 21[34] for the sector regulator.

[32]Competition Authorities and Sector Regulators: What is the Best Operational Framework? Viewpoint, CUTS International.
[33]Principles for the Governance of Regulators, OECD, 2013.
[34]Section 21 of Competition Act, 2002.

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Protection of Working Women Rights in India: A Critical Study

Dr. Raju Majhi[1]

Abstract

Women have become equal participants in many respects at all level of society. The future would see more women venturing into areas traditionally dominated by men. This will lead to income generation and greater sense of fulfillment among women. In almost all the countries governments are providing special provisions for women's development and efforts are being made to extract maximum of their talent. In this modern world where the cost of living has increased significantly, it becomes necessary for women to undertake economic activity and support their families. Women are in vulnerable conditions from ancient society till today. Especially in working places. Various social reformers have tried to uplift the social conditions of women, various legislations and judiciary has played a significant role for her empowerment. Because of globalization, various sectors of government opened the gate for foreign corporate entities. Thousand of educated women working day and night in those service sectors, due to that the problems of working women's has taken another shape, they are harassed physically (sexually) and mentally, there fundamental and human rights are in threat. There is no specific legislation for protection of working women and their rights. Hence, the present article aims to study and throws light on Constitutional provisions and Judicial approaches for the protection of working women rights.

Keywords*:* Constitution, legislation, judiciary, globalization, empowerment, sexually harassment, working women, workplace etc.

Introduction

It is a harsh reality that women have been ill-treated in every society for ages and India is not an exception to this universal problem. The irony lies in the fact the in our country where women are worshipped as *Shakti*, the atrocities are committed against her in all sections of life. She is being looked down as commodity or as a slave, she is not robbed of her dignity and pride outside her house but she also faces ill-treated and other atrocities within the four walls of her house also. The women are being considered as an abject of male sexual enjoyment and reproduction of children. Ever since Indian opened its doors to liberlisation in the early 1990s, there has been a steady transformation in India's economy. Self-reliance helped in building great institutions of learning and taking strides in various field of life in keeping pace with the rapidly changing world, women who earlier stayed at home to attend their domestic duties how maintain both work and home simultaneously, participating in the process on an equal footing with men in social and economic development. Women have moved away from their traditional roles of homemaker and child rearing to social and business solutions. Women have become equal participants in many respects at all levels of society. The future would see more

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women venturing into areas traditionally dominated by men. This will lead to income generation and greater sense of fulfillment among women. In almost all the countries governments are providing special provisions for women's development and efforts are being made to extract maximum of their talent. In this modern world where the cost of living has increased significantly, it becomes necessary for women to undertake economic activity and support their families. In the best way to understand, the spirit of a civilization and its excellence is to study the history of its women and children and the treatment meted out to them.

Gender has always shaped the legal and cultural landscape of all countries. Each person is to an equal to the most extensive basic liberty compatible with and similar liberty for others. Social and economic inequalities are to be arranged so that they can reasonably be expected to be to everyone's advantage and in such a manner that the positions and offices to which they are attached are open to all. In India, women are entering the formal labour workforce in unprecedented numbers. In light of this development, there is more than ever before, a pressing need for rights of women to be respected, protected and fulfilled, particularly in the workplace. The right to work encompasses the right to work free from harassment. Women's rights in the workplace are important for many reasons. The obvious reasons that come to mind are of course, the right of women to be from sexual comments and advances and touching sexual and more. However, any kind of harassment at workplace extends for beyond individual women and their happiness. It extends to workforce productivity, economic development and much more.

Constitutional Provisions to Women Employment

A Constitution is the basic document of a country having a special legal sanctity. The Constitution aims at creating legal norms, social philosophy and economic values, which are to effected by striking synthesis, harmony and fundamental adjustment between individual rights and social interest to achieve the desired community goals. Indian Constitution provides for equality of opportunity to all, which includes, inter alia, equality of opportunity for both men and women. Article 16 specifically provides for equality of opportunity in matters of public employment irrespective of religion, race, caste, creed, sex, place of birth. The broader objective was to bring about democratisation of employment where everybody contributes and is benefits by the economic development of nations. It was argued that this would also help their social status. Socio economic development is necessary for the success of democracy. It is argued that employment among women would help improving their economic status, which in turn would facilitate more concentration on other social and p0litical matters of the society. Thus, to promote large-scale employment amongst women, incretion of job opportunities and appropriate working environment become crucial. This is a society-building task in which law has a role to play, though a limited one. In India, various legal measures have been taken to promote and protect women employment.

They afford protection at two levels; at the time of employment and post employment. The focus of the discussion is limited to critically examining three such measures: One is

the reservation. In the respect, the executive steps and judicial response will be scrutinized. Another is the general discrimination against women based upon sex in employment. The third issues would be a specific instance of sexual discrimination in the form of different wages to men and women.

Preamble of Indian Constitution clearly discloses that 'We the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to all its citizens, justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity, and to promote among them a fraternity. Assign the dignity of the individual and the unity and integrity of the nation. The source of the Constitution is thus traced to the people, i.e., men and women of India, irrespective of caste, community and religion. The framers of the Constitution were not satisfied mere territorial unity and integrity. If the unity is to be lasting, it should be based on social, economic and political justice. Such justice should be equal for all.[2]

Fundamental Rights and Directive Principles of State Policy provide matrix for development of human personality and elimination of discrimination. Constitution under Article 14 provides for equality before law and equal protection of laws. However, Article 14, which parses, prohibits discrimination between and among equals, permits class legislation through classification to give differential treatment. Classification must pass the test of intelligible differentia and nexus with the objective to be achieved. In that sense, men and women can be reasonably classified and classed separately and separate and different provisions can be made for each class. To give more strength to equality clause, Constitution specifically forbids State under Article 15(1) from discriminating in all State actions, on the grounds only of religion, race, caste, sex or place of birth. There is prohibition against discrimination but not against preferential treatment. Constitution of India specifically permits the State to make special provisions for women and children under Article 15(3). The purpose is to improve and strengthen the status of women by affording them the opportunities to participate in the socio-economic activities of the State.[3] Besides Article 14 and 15(1), 38, 39 and 40 lay down the public policy and constitutional philosophy to accord social and economic democracy to women as assured in the preamble of the Constitution. In other words, they frown upon gender and cultural rights on equal footing.

On sexual harassment, the provisions are available under Indian Penal Code, 1860 as amended till date, but this writing is concerned with the sexual harassment at workplace. In view of gender equality, fundamental rights and Human rights, it is moral and constitutional duty of every citizen, employers and State functionary to protect the dignity of women employee in any organisation irrespective of sector i.e. private, public, Joint or even the Government organisations. Sexual harassment of women at workplace results in

[2] Mamta Rao, 2005, *Law relating to Women and Children*, 1st ed. Eastern Book Company, pp.10-11.
[3] *Government of AP* v. *P.B. Vijayakumar* (1995) SCC 520.

violation of fundamental right of gender equality and right to life and liberty as enshrined under Articles 14, 15, 19 and 21 of the Constitution of India.

Judicial Approaches to Protection for Working Women

Economic dependence of women is the main reason for their marginalisation and exploitation. To promote economic independence women must engage themselves in productive employment. For this purpose, various steps have been taken at legal and political level. For example, Constitution of India ensures that there is an equal opportunity to both men and women and forbids discrimination against women at the time of recruitment. However, bare provision of equality of opportunity will not automatically attract the womenfolk to come out and work and become independent. They are in fact not capable and equipped to compete with men in recruitments. This incapacity is not necessarily related to their intelligence. It may be result of lack of opportunity due to socio economic conditions such as lack of willingness on the part of parents to educate girls or proper environment for educational or unavailability of nutritious food etc., under such unfavourable circumstances, it is crucial that women be given certain concession in employment at the time of recruitment. In *Vishaka* v. *State of Rajasthan*[4], judgement of the Supreme Court was delivered by Justice J.S. Verma on behalf Justice Sujata V. Manohar and Justice B. N. Kripal on a writ petition filed by Vishaka, a nongovernmental organisation working for "Gender equality" by way of Public Interest Litigation, seeking enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India. The Supreme Court upheld gender equality and right to work with human dignity in Articles 14, 15, 19(1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.

The legal provision for judicial intervention are: (a) Article 245, which says 'equality before law; (b) Article 19(1)(g) right to practice any profession or to carry on any occupation or business; (c) Article 15 Prohibition of discrimination on grounds of religion, race, caste, sex, place of birth; (d) Article 21 Right to life and personal liberty; and (e) Article 51(e) to promote harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce the practices derogatory to the dignity of women.

The Supreme Court, in absence of enacted law to provide for effective enforcement of basis human rights of gender equality and guarantee against sexual harassment laid the following guidelines.

(1) All employers or persons in change of work place whether in the public or private sector, should take appropriate steps to prevent sexual harassment of women employees.

(a) The rule or regulation of Government and Public Sector bodies relating to conduct a discipline should include rules prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

[4] 1997 (6) SCC 241.

(b) As regards private employers, steps should be taken to include the aforesaid provisions in the Standing Orders under the Industrial Employment Act, 1946.
(c) Appropriate work conditions should be provided in respect of work leisure, health and hygiene to further ensure that there is no hostile environment towards women at work place and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
(2) Where such conduct amounts to specific offences under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
(3) The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer. Hence working women who fact sexual harassment today shall seek protection under Article 21 and other supporting Articles mentioned above, in Indian Constitution to live with human dignity.

Judicial Approaches to Protection for Working Women from Sexual Harassment

The phrase "sexual harassment" is visualised, and recognised in our civilised society, though it is not clearly defined. In common parlance sexual harassment at workplace means to annoy or to tease the opposite sex on the issue of sex at workplace where women or girls are subjected to sexual and psychological abuse. Hon'ble Apex Court of India (Larger Bench) in "*Vishaka and others* v. *State of Rajasthan and others*[5] have elaborately defined the phrase as under:

For this purpose sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
(a) physical contact and advances,
(b) a demand or request for sexual favour,
(c) sexually coloured remarks,
(d) Showing pornography (obscene writing painting etc.)
(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts are committed in the circumstances where under the victim of such conduct has reasonable apprehension to the victim's employment or work, whether she is drawing salary or honorarium or voluntary, whether in Government Public, private enterprise, such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory also, for instance when the women employee has reasonable grounds to believe that her objection would disadvantage her employment or work including recruitment or promotion or when it creates a hostile work environment. Adverse consequences might be visited. If the victim does not consent to the conduct in question or raises any objection thereto.

The term "sexual harassment at workplace" has again been clarified in *Apparel Export Promotion Council* v. *A.K. Chopra*[6] that the conduct against moral sanctions which did

[5] 1997 (77) FLR 297.
[6] 1991 (81) FLR 462.

not withstand the test of decency and modesty and which projected unwelcome sexual advances would be covered by the term sexual harassment. Hon'ble Apex Court has emphasized the violation of Human Rights, international instruments and conventions on the subject specially the convention on the "Elimination of all forms of discrimination against women"- 1979 (CEDAW), the Beijing Declaration and ILO convention at Manila in 1993 etc. must be honoured and to be given due regard by the Courts for construing domestic laws of the country, more so when there is no inconsistency between them occupying the field.

Even Article 253 of the Constitution of India gives power to the Parliament to enact any law for implementing any treaty, agreement or convention with any other country or any decision made by any international conference, association or other body. This Provision must be read with Item 14 of Seventh Schedule under Article 246 of the Constitution of India. There are various decisions of such international organisation on the issue of gender equality which are to be honoured. Considering the gravity and seriousness of misconduct of sexual harassment and sexual exploitation at workplace Hon'ble Apex Court in *Chopra case* (supra) has declined to interfere in the penalty imposed on the guilty.

The ratio of above decisions has again been followed by Hon'ble High Court Allahabad (D.B.) in "*R.B.S. Chauhan* v. *Reserve Bank of India and others*,[7] has held that in the case of sexual harassment, actual assault of touch by offender is not essential. Outrageous remarks had sexual overtones and as such the offender cannot be condoned and as such Court refused to interfere under Article 226 of the Constitution of India. In view of the definition and *Vishaka* a guideline which is now law of the land under Article 141 of the Constitution of India. While decaling the case Hon'ble Apex Court has given serious remarks that justice for women is yet to be fully achieved in the country. The guidelines and norms have to be honoured in substance and spirit to make available safe and secure environment to women employee at workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect. Hon'ble Apex Court has further directed for proper implementation to the State functionaries to amend the Conduct Rules and Standing Orders certified under Industrial Employment (Standing Orders) Act, 1946. Even more the Hon'ble Court has taken a serious view on the issue and held that in case of non-compliance or non adherence to the *Vishaka* guidelines and orders of the Apex Court, it is open to the aggrieved person to approach the respective High Court for effective consideration and redressal of grievances of sexual harassment and sexual exploitation of women at work place.

For effective compliance regarding sexual harassment of women at workplace Hon'ble Apex Court in *Vishaka* case has given following norms and guidelines to be followed until a comprehensive legislation is enacted for the purpose in view of the definition given by Hon'ble Courts, Human Right under section 2(d) of Protection of Human Rights

[7] 2003 (97) FLR 359.

Act, 1993 and the fundamental right enshrined under the Constitution of India regarding gender equality as well as right to life and liberty:

1. Preventive Steps

(a) Express prohibition of sexual harassment defined as above at workplace should be notified, published and circulated in appropriate wags.
(b) The rules, regulations of Government and public sector bodies relating to conduct and discipline should include rules and regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under Industrial Employment (Standing Orders) Act, 1946.
(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
(e) Awareness of the rights of female employees in this regard be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

2. Corrective steps

(a) Criminal proceedings should be taken where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular it should ensure that victims or witness are not victimized or discriminated against, while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.
(b) Disciplinary action must be initiated where such conduct amounts to misconduct in employment as defined by the relevant service rules.
(c) An appropriate complaint mechanism should be created in the organization for redress of the complaint made by the victim. Such, mechanism should ensure time bound treatment of complaints. Complaint committee should be headed by a workman and not less than half of the members should be women. Further to prevent the possibility of any undue pressure or influence from senior levels, such complaint committee should involve a third party, either NGO or other body who is familiar with issue of sexual harassment. Special counselor or other support services including the maintenance of confidentiality should be considered.

The Committee must make an annual report on the compliance to the Government department concerned. Even the employer and the person in charge will also report on the compliance to the complaint committee and to the Government department

(d) For proper performance-employees should be allowed to raise the issue of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in the employer-employees meetings.

3. Third Party Harassment

Should also be taken care some time the; incidence of sexual harassment may occurs as a result of an act or omission by any third party or outsider the employer and person in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

The gravity and seriousness of the guidelines and norms may be visualised by the directions given by Hon'ble Apex Court that the Central and State Government are to adopt suitable measures including suitable legislation to ensure that the guidelines must be followed by all sectors irrespective of Government, public and private sectors, in all workplace for the preservation and enforcement of the right to gender equality of the working women. It is further directed that these directions would be binding and enforceable in law until complete suitable legislation is enacted to occupy the field. It is noteworthy that the "Protection of Women against Sexual Harassment at Work Place Bill, 2010" is pending before the Parliament.

In this regard the provision of Article 51-A (e) of the Constitution of India is also relevant because this provision imposed a duty on every citizen of India to renounce practice derogatory to the dignity of women. It may be an important tool to protect the dignity of women irrespective of working or non-working. But n spite of all efforts and direction of Hon'ble Courts, constitutional mandate, various statutory provision, international conventions and treaties, lack of seriousness in implementing agencies are still to be strengthened and sensitized. It is felt that civil services conduct rules, service rule governing the service and working condition and standing orders on this important issue are still silent in most of the organisations. *Vishaka* guidelines have remained symbolic only. For effective implementation, the trade unions, social welfare organisations, N.G.O's and other social institutions working in the field can also play vital and an effective role on the subject to combat with this serious problem. But the author of this write up is of the view that the action in such cases must be initiated very honestly so that the opportunity of employment of women is not hampered in this male dominated society.

Norms and Guidelines Laid Down in Vishaka

In *Vishaka* v. *State of Rajasthan*,[8] J.S. Verma, CJ noted "the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate."[9] Realizing "the urgency for safeguards by an alternative mechanism in the absence of legislative measures" or "enacted law to provide for the effective enforcement of the basic

[8] (1997) 6 SCC 241: AIR 1997 SC 3011: (1997) 77 FLR 297.

[9] This was a case of alleged brutal gang rape of a social worker in a village of Rajasthan.

human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces", the Supreme Court laid down certain "guidelines and norms" for "due observance at all workplaces or other institutions, until a legislation is enacted for the purpose." The Court did so "in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights" and "emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution." The Court further made it clear that these guidelines and norms shall "govern the behaviour of the employers and all others at the workplaces" so as "to curb this social evil" of sexual harassment at work.

As per the Guidelines and Norms laid down by the Supreme Court in *Vishaka*, "It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required."[10] The Apex Court has also laid down, "Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority." The employers are also duty bound to take appropriate disciplinary action against the perpetrators of sexual harassment. They have to set up an appropriate complaint mechanism for redress of the complaint made by the victim. "Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner." Further, "where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action." The Supreme Court unambiguously and unequivocally directed that the guidelines and norms "would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field."

As already noted the law is well settled that Article 226 is couched in comprehensive phraseology and *ex facie* confers wide powers on the High Courts *to reach injustice wherever it is found. The High Courts can issue not only the prerogative writs, but also directions, orders or writs other than the prerogative writs.* The High Courts can mould the relief to meet the peculiar and complicated requirements of the situation. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words ‘any person or authority’ used in Article 226 are not to be confined to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the

[10] The preventive and remedial steps, which the employers, whether in the public or private sector, are obligated to take in this context, have already been discussed in Chapter II of Part Ill of this Book, “Preventative and Procedural Action by Employers”.

body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed; if a positive obligation exists mandamus cannot be denied. Ii is not necessary that the person or the authority on which the statutory duty is imposed need be a public official or an official body.

Further, mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. As noted by K. Jagannatha Shetty, J for a Division Bench of the Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*,[11] to be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even (statutory) contract. The Supreme Court in *Vishaka* has categorically and unambiguously declared that the directions laid down by the Court in that decision would be binding and enforceable in law until suitable legislation is enacted to occupy the field. Therefore, in terms of the directions laid down in *Vishaka*, employees have a legal right to demand strict compliance with the above directions on the part of their employers, and employers have a legal duty to implement those directions. In a given case, therefore, if an employer does not implement the guidelines, norms and directions as laid down by the Apex Court in *Vishaka*, employees concerned may be entitled and competent to invoke Article 226 for the issuance of appropriate writ, order or direction in that regard.

In the above context the decision of a Single Judge of the Delhi High Court in *Samridhi Devi* v. *Union of India*,[12] may be noted. In this case the victim of sexual harassment filed a writ petition under Article 226 of the Constitution of India challenging the order of compulsory retirement issued against the harasser on the ground that the same was inadequate having regard to the gravity of the misconduct and, hence, “disproportionate” in that sense. Both the victim and the harasser were employees of Delhi Milk Scheme and, thus, the provisions of the Administrative Tribunals Act, 1985 were applicable to them.[13] A Single Judge of the Delhi High Court rejected the contention that the petitioner could not maintain writ proceedings in view of provisions of the Administrative Tribunals Act. The Single Judge concluded that the petitioner could not question the impugned order before the Administrative Tribunal as an Administrative Tribunal is designed to adjudicate disputes raised by persons aggrieved by orders passed against them, or action taken against them, by designated employers, covered by the Act. The legislature did not visualize a situation where third parties could legitimately raise grievances against orders passed in disciplinary proceedings, against others. In the view of the Single Judge, "The judgment, and declaration of law, in *Vishaka*, to that extent, adds a new dimension, which

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[11] (1989) 2 SCC 691: AIR 1989 SC 1607: (1989) 2 LLJ 324: 1989 LIC 1550: (1989) 2 LLN 281, per K. Jagannatha Shetty, J.

[12] CWP No. 2269/2001, dated 7-11-2005, per S.R. Bhat, J. Source: IndLaw.

[13] The harasser, in the meanwhile, challenged his compulsory retirement by filing an application under the Administrative Tribunals Act, 1985. His application was dismissed by the Tribunal.

was never in the contemplation of Parliament, when it defined 'service matters' [under the Administrative Tribunals Act, 1951 and conferred specified jurisdiction, upon tribunals under the Act. Hence, the appropriate forum for determining disputes and controversies, of the kind raised in these proceedings, is the writ jurisdiction of the High Court, under Article 226 of the Constitution of India."

The Single Judge, S.R. Bhat, J also concluded that the petitioner had *locus standi* to move the High Court under Article 226 complaining that the penalty order passed against someone else, was illegal and arbitrary. The Judge took note that the normal rule in civil action is that the person directly aggrieved by the action complained against has the right to move the court. However, "this rule has undergone a substantial change, particularly in the field of public law, and public interest litigation". S.R. Bhat, J relied upon the decision of the Supreme Court in *Chairman, Railway Board* v. *Chandrima Das*[14] in which the Supreme Court held that a petition under Article 32 of the Constitution of India was maintainable, at the behest of a practicing advocate, on behalf of a woman who had been raped while travelling in a railway train. In that case the Supreme Court had observed, "There has ... been a spectacular expansion of the concept of *locus standi*. The concept is much wider and it takes in its stride anyone who is not a mere 'busybody'"[15]

S.R. Bhat, J concluded, "In the present case, the petitioner cannot be termed as a 'busybody'. Although in all other circumstances, a co-employee, at whose instance disciplinary action might be initiated, would not have *locus standi* to question the employer's decision, action or inaction, nevertheless, in the case of sexual harassment complaints, by their very nature, and the public interest element involved, the employer is under a duty to ensure that the workplace is kept safe, and free from sexual harassment. If action is not taken, or taken belatedly, or taken in a casual or inappropriate manner, the confidence and morale of female employees, as a class, would be undermined. The sufficiency, promptitude and appropriateness of the employer's response would be a matter of concern not only to the complainant/victim, but also to the whole class of female employees. The *Vishaka* mandated edifice was meant to address these issues."[16] S.R. Bhat J, therefore, held that the petitioner had *locus standi* to file and prosecute the writ petition.

Conclusion

All the wings and layers of government-legislature, executive and judiciary at Central, State and Local levels have the responsibility towards empowerment of women. Legislation has enacted many laws in bringing about equality between men and women to

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[14] (2000) 2 SCC 465.

[15] This case has been discussed in Part IV Chapter V of this Book, "Vicarious Liability of Employer for Sexual Torts of Employees".

[16] S.R. Bhat, J also took note that in the United States of America, Courts, in certain states (notably California), have ruled that even if a claimant/plaintiff has not herself been subjected to sexual harassment at the workplace, yet, action can be maintained by her to enjoin the employer to create a workplace free from hostility, and ensure protection from sexual harassment or abuse: *Fisher* v. *San Pedro Peninsula Hospital*, (1989) 214 Cal App 3d 590; *Mogilefsly* v. *Superior Court*, (1993) 20 Cal App 4th 1409. Such proceedings are termed "bystander" actions.

fulfill the obligation not only of the international conventions but also of the Constitution of India. A combined reading of Articles 14,15 and 21 of the Constitution of India categorically provides that no law can be made or can be applied which discriminates against law cannot remedy the inequalities and bring about justice, development and empowerment. It can act as a spring broad of doubt of all sections of society required to achieve the ends.

Women upliftment is a big task ahead of us. It has multifarious dimensions. The issues relating to women need to be addressed with exceptional sensitivity taking into consideration all the surrounding factors. Law, in this respect may prove to be useful and forceful instrument. By and large, the response of law has been positive and constructive in this direction. The legal steps taken however are not sufficient. Much more needs to be done in this field. In addition to this, it could be said that law can do part of the task for its inherent limitations. For the better and total results, the society needs to work at various other levels to do the complete task.

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Privileges of the Members of Parliament

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Introduction

Having discussed the evolution of the privileges of the Legislatures in India, we shall now consider the privileges in detail. At the outset it will be useful to draw a line of distinction between the privileges of the Members individually and that of the House collectively. Though both are complementary in nature and are like the warp and weft to each other, the latter is more or in the nature of the jurisdiction of the Courts of Law. Some of the privileges of the Members and Committees are specified in the Constitution, certain statutes and the Rules of Procedure of the House, while others continue to be based on precedents of the British House of Commons and on conventions which have grown in this country.[2]

Freedom of Speech

Freedom of speech is privilege essential Legislature or Council. The principal reason of such a privilege is that "Unless Parliament could keep its membership intact, from outside interference, whether or not the interference was with the motive of embarrassing its section, it could not be confident of any accomplishment."[3] The need for freedom of speech in democracies is all the greater. A democratic government is government by discussions and it is essential that parliamentary deliberations should be free frank and without any interference from extraneous agencies. In other words, unrestricted freedom of speech on the floor of the House is a valuable and constructive right, provided that it is not misused.

In so far as India is concerned freedom of speech was expressly granted to the members of the Indian Legislature for the first time under the Montagu-Chelmsford Reforms and was given statutory recognition.[4] Sub-Section (7) of Ssection 72 D of the Government of India Act, 1919 relating to Provincial Legislature provided: "Subject to the rule and standing orders affecting the Council, there shall be freedom of speech in the Governor's Legislative Council". The actual observance of this provision over the years revealed, however, that freedom of speech was burdened with a number of limitations. Freedom of speech under the Government of India Act, 1935 both as originally enacted and as adopted remained practically unchanged. The reason behind the non-extension of

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2. M.N. Kaul and S.L. Shakdhar, "Practice and Procedure of Parliament", 1972, p. 191.
3. White, English Constitution, p. 439.
4. *Supranote* 2, at p. 195.

freedom of speech to Indian legislators was the attitude of some Members in the House of Commons in England, who smelt a danger of abuse of authority by the freedom fighters. In the name of decorum and discipline of the Legislature privilege of speech was shackled with still more limitations.

After independence the Indian Constitution provided in Articles 105 (i) and (ii) and 194(i), (ii) that subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament/State Legislature, there shall be freedom of speech in the Parliament/State Legislature. The specific position was stated beyond doubt by using the words that no Member of Parliament/State Legislature shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament/State Legislature or any Committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament/State Legislature of any report, paper, votes or proceedings. These provisions were made with a view to allow the representatives of the people to express without fear or favor the view point of electorates in particular and those of the nation in general.

A comparative estimate of the above provision with that of the major constitutions of the world reveals that the standard of freedom of speech is at par with them. Article 1, Section 6(1) of the Constitution of U.S.A. reads – "The Senators and Representatives …. for any speech or debate in either House, they shall not be questioned in any other place". Similarly Article 51 of the Japanese Constitution says – "Members of Both House of Diet shall not be held liable outside the House for speeches, debates or votes cast inside the House. Freedom of speech in England which came to be settled since the Bill of Rights, 1689 is absolute for debates and proceedings in the House. "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Parliament ought not to impeached or questioned in any Court or place out of Parliament. Hence no action or proceedings lies for words spoken or written within the walls of Parliament, e.g.: (a) for defamation[5] (b) for contravention of the official Secrets; Act[6] (c) for uttering words which are criminal in nature and would have been punishable if uttered outside the House.[7]

The freedom of speech guaranteed by Article 105 (i), (ii) and 194 (i), (ii) of the Indian Constitution has been liberally construed on the ground that its object is to secure the freedom of the representatives for the public goods as distinguished from the protection of individual members. Thus it has been held that absolute immunity extends to anything said or any vote given by a legislator in the House or in any Committee thereof. Subject to the rules of procedure a member may state whatever he thinks fit, however offensive it may be to the feelings or injurious to the character of the individuals and he is protected by his privilege from any action for libel. The freedom of speech in Parliament is thus

5. *Dillan v. Balfour* (1888), 20 LR. Ir. 600.
6. Hood Philips, 2nd Edition, p. 147.
7. *Ibid.*

free from the restriction contained in Article 19(2) which are imposed upon the freedom of speech of an ordinary citizen. Hence no action civil or criminal would lie against a member for defamation or the like.[8] Here there is a point of distinction with English practice. In England, the freedom of speech in Parliament relates only to words spoken by a member in the performance of his duties as a Member of Parliament and cannot extend to casual conversation on private affairs.[9] But the words "anything said by him in Parliament" in clause (2) of Article 105 seem to be wide enough to cover even conservation on private affairs. So, under our Constitution a legislator insulted by legislation during casual conversation within the House, while he may have his remedy from the House itself, cannot get redress in a Court of Law.

The **Supreme Court has already observed**
"The Article confers immunity inter alia in respect of 'any thing said … in Parliament", they would "anything is of the widest import and is equivalent to everything". The only limitation arises from the words "in Parliament" which means during the sitting of Parliament and in the course of business of Parliament. Therefore words spoken or things done by a Member outside Parliament will not be protected unless these relate to some matter pending or expected to be brought before the House. Thus for example if a Member sends to a Minister the draft of a question he intends to put down or ask him as to the manner in which it should be framed, the privilege of freedom of speech will be available to him, but not otherwise. Similar is the position in United Kingdom. The immunity covers only "proceedings" in Parliament and does not extend to letters written by a Member of Parliament to a Minister containing allegations against third parties. In other words the Members will have to answer in Court for libelous contents in such letter if they are malicious.[10]

In *Strauss's case* the question arose whether a letter from a Member to a Minister about the administration of a nationalized industry could be treated as or included within the scope of proceedings in Parliament". The Committee of privileges came to the conclusion that the letter was well covered by the term "proceedings".[11] But the House of Commons after a good deal of debate on July 8, 1958 that Mr. Strauss's letter was not a "proceeding in Parliament.

After Strauss's case an attempt was made in our Parliament by a private member to include within the purview of proceedings, letters written to Minister by necessary legislation. But the bill was rejected.[12] So, neither in India nor in United Kingdom parliamentary privilege in respect of letter written to a Minister can be claimed, even if that relates to public matters.

8. D.C. Jain, Parliament Privileges under the Indian Constitution, 1975, p. 9.
9. Wade and Philips, Constitutional Law, 1956, p. 11.
10. Anson, Law and Custom of the Constitution, Vol. I, p. 163.
11. Fifth Report of the Committee of Privileges, 1956-57, p. VIII.
12. 1959 Privilege Digest, p. 13.

In United States of America the position is similar to that of United Kingdom and hence different from that of India. In the case of R.V. Bunting the Court held that having regard the fundamental purpose for which freedom of speech is guaranteed, a Member is not liable in ordinary Court for anything he may say or do within the scope of his duties in the course of Parliamentary business, for in such matters he is privileges and protected by less et consuetude parliament". So, freedom of speech does not extend to private conversations amongst Members.

Regarding disclosures of official secrets by the members, the position in India is similar to that of United Kingdom, since the Official Secrets Act of 1923 is similar to the English statutes the question arose in 1939 in *Duncan Sandy's case* as to how are a member disclosing official secrets in the House was protected by the privilege of freedom of speech. A Select Committee of Parliament laid down once for all the following proposition : "By reason of the privilege of freedom of speech in Parliament, disclosures by Members in course of debate or proceedings in Parliament cannot be made the subject of proceedings under Official Secrets Act."[13] The privilege of freedom of speech and the subsequent immunity from legal action for speeches made in the House also accrues to Members of the State Legislatures under Article 194(i) and (ii). The question of this privilege has been elaborately dealt with and considered in the case of *Surendra Mohanty v. N.K. Choudhary*, decided by the Orissa High Court.[14] Proceedings for contempt were started against the Chief Minister of Orissa in respect of a speech made by him in the Orissa Legislative Assembly on March, 8, 1966. The Orissa High Court observed,' "…..the language of clause (2) of Article 194 is quite clear and unambiguous and is to the effect that no law court can take action against a Member of the Legislature for any speech by him there."[15]

Limitations upon the Freedom of Speech

For the smooth transaction of business of a House of Legislature for maintain decorum, freedom of speech has been burdened with certain limitations. The privilege of freedom of speech is absolute so far as outsiders are concerned, but the House has the right to enforce its own discipline upon members. Rules of debate adopted by the House provide for the proper exercise of the right of the free speech. To quote Kaul and Shakdhar 'Speech and Action in Indian Parliament may be said to be unquestioned and free. However this freedom from external influence or interference does not involve any unrestrained license of speech within the walls of the House.[16] Some restrictions seem to have been contemplated by the words "Subject to the rules and standing orders regulating the procedure of the Parliament or Legislature in Articles 105(1) and 194(1).

13. Report of the Select Committee of the House of Commons, para 3, p. 1939.
14. A.I.R. 1958, Orissa, 168.
15. *Ibid.*
16. M.N. Kaul and S.L. Shakdhar, op. cit., 1972, pp. 195-96. Anson and May also give similar views in p. 170 and 53 respectively.

Limitations have been provided both by the Constitution and are self-imposed as well. The restrictive words of clause (1) "Subject to the provisions of the Constitution implies that the privilege is subject to such Articles as Articles 19(1) (a), 118 and Art. 121 (Articles 208 and 211 in case of State Legislatures).[17] But the restrictive words at the beginning of clause (1) have, however, omitted from clause (2). Hence the result is that while the freedom of speech within the House is subject to the restrictions imposed by Articles 19 and 121, no action in a Court of Law lies for violation of any of the foregoing provisions say for defamation of contempt of Court, etc.[18]

It follows that the limitations are largely self-imposed enforced by the rules framed by the House under its power to regulate its internal procedures. The relevant rules of the Lok Sabha imposing limitations upon the freedom of speech of a member are **Rules 352 to 356.** If a member violates these, the Speaker may take action against the Member by directing the withdrawal of the Member from the House.[19] Or his suspension or ordering expunction of the offending words from the proceeding of the House.[20] Thus even a Minister who once made a derogatory remark about a member was asked to withdraw his remarks.[21] It is, therefore, expected that a member while speaking shall not –

(1) Refer to any matter of fact which is sub judice;
(2) Make a personal charge against another Member;
(3) Use offensive expressions about the other House or a State Legislature;
(4) Reflect on the conduct of personnel in high authority except on a substantive motion :
(5) Utter treasonable, seditious or defamatory words :
(6) Make any allegations of defamatory or criminal nature against any person without previous intimation to the Speaker;
(7) Use his right of speech for the purpose of willfully and persistently obstructing the business of the House.

Again only such speeches which are published along with the reports of other Members are only privileged. The words "by or under the authority of other House of Parliament in clause (2) indicate that Articles 105 and 194 of the Constitution give protection to the publication of all reports, papers on proceedings under the authority of the House, i.e., to official publication only. In this respect the provision is the same as that of United Kingdom. However, that does not mean that Member of English or Indian Parliament has no right to publish his speech. It only means that if he does so he cannot claim any immunity from the ordinary law relating to publication of a statement to which ordinary citizens are subject.[22] Again publisher of a Parliamentary debate is protected if the whole debate is only published. According to May "Privilege does not protect, publisher

17. The Hindustan Times, "Limits of Privilege", October 2, 1964.
18. Sharma v. Sri Krishna, A.I.R., S.C., 395, 1050.
19. Rules of Procedure and Conduct of Business in Lok Sabha : rule 373.
20. *Ibid*, Rule 374.
21. Privileges Digest, 1960, Vol. IV, p. 4.
22. A.P. Chatterjee, Parliamentary Privileges in India (1971) p, 26.

publishing papers presented to Parliament and printed by order of the House except under statutory certificate or proof".[23]

Prior to the passing of the Parliamentary Proceedings (Protection of Publication) Act, 1956. Newspapers did not enjoy any power to publish parliamentary proceedings. But the situation changed after the passing of the above mentioned Act. In order to bring Section 499 of the Indian Penal Code, 1860 in conformity with Article 105 of the Indian Constitution, the Parliament has enacted the Act in 1956,[24] to protect substantially true reports of parliamentary proceedings by any person from any legal proceeding.

In 1976 Parliamentary Proceedings (Protection of Publication) Repeal Act was passed by the Parliament.[25] The intention of the Act was to make the Press exclusively responsible and ready to face defamation charges in the Court of Law about what a newspaper publishes about the proceedings in Parliament. In this way immunity of the Press was withdrawn in spite of bitter opposition by the Opposition Members.[26]

Now the position about Parliamentary Privilege of freedom of speech vis-à-vis the Press is reasonably clear. The duty of the Press is to report faithfully and not to distort events in Parliament. A departure from the right path may constitute a breach of the privileges of Parliament and in serious cases may even amount to contempt of its authority.[27]

Freedom from Arrest

The privilege of freedom from arrest, like other privileges is granted to Members of Parliament in order that they may be able to perform their duties without hindrance. The object of this privilege is "to secure the safe arrival and regular attendance of members on the scene of their parliamentary duties.[28] If the members do not enjoy freedom from arrest and have to work under a constant threat of arrest, they will scarcely feel free to express themselves frankly during the deliberations. In the absence of such freedom not only the Executive will be tempted to misuse its authority, but also the legislation will be depriving the best contribution of members. The principle upon which the freedom from arrest bases is that "service in parliament is paramount to all other claims". May accepts Hatsell's plea that "The Members who compose it (Parliament) should not be prevented by trifling interruption from their attendance on this important duty". May however observes that "Freedom from arrest has lost almost all its value since, as a result of Judgments Act, 1838, S.I. and subsequent legislation, imprisonment in civil process has been practically abolished".[29]

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23. E. May, Treatise on the Law, Privileges, Proceedings and Usages of Parliament, 1971, p. 80.
24. Act No. 24 of 1956.
25. Act no. 28 of 1976.
26. Press and Privileges of Parliament – A Problem, The Indian Express, Nov. 23, 1977.
27. Parliamentary Privileges: The Press and the Judiciary – M. Hidayatullah, p. 1.
28. S. S. More, Practice and Procedure in Indian Parliament, p. 160.
29. Sir Erskine May, op. cit., 1971, p. 90.

The privilege of freedom from arrest is of ancient origin and there are historical reasons for its emergence. Even as long ago as Anglo-Saxon times, members going to attend the Wittenagemot could be arrested during the session of it and forty days before and after the session. Later this was extended to sessions of Parliament and became the law in England. It is interesting to note that the period of forty days has never been decided upon by the Parliament. It is recognized by the Courts on the ground of usage.[30]

Position in India

Prior to 1919, representative institution in the nature of a Legislature was non-existent in India. Consequently the question of "Freedom from Arrest never troubled the minds of Indians". Even the Government of India Act, 1919 contained no such provisions and there was no popular demand for it. However the Reforms Enquiry Committee (Muddiman Committee) recommended that "(i) Members of Indian Legislative Bodies, constituted under the Act shall be exempted from servicing as Juror or Assessor, (ii) Arrest and Imprisonment during the meeting of Legislature for a period of a week before and after such meetings". As the period of 7 days was too short Act XXIII of 1925 raised it to 14 days. But exemption from arrest was not incorporated into the Government of India Act, 1919. Only the Code of Civil Procedure, 1908 was amended to insert the exemption.

Such qualified exemption from arrest granting a period of 14 days instead of the proverbial 40 days was an eye-opener for the Indian legislators. They struggled hard to transform this freedom from the Code of Civil Procedure to the Catalogue of Parliamentary privilege and equate it with that of House of Common. But it was of no avail.

The Government of India Act, 1935 brought no improvement to the existing provision. In fact the awareness of Indian legislators of their powers and privileges and their demand to get them made the alien Government uneasy. Many a member, who incurred the displeasure of the Government found themselves behind the bars.

However with the enforcement of the new Constitution on January 26, 1950 the scope and duration of the freedom from arrest was equated with that of United Kingdom i.e., forty days before and after a session of the House. It is interesting to note that the 40 days principles is absent in most of the other countries of the world. While providing for freedom from arrest Article 50 of the Constitution of Japan, 1946, says: "Except in cases provided by law members of both Houses shall be exempt from apprehension while the Diet is in session and member apprehended before the opening of the session shall be freed during the term of the session upon demand of the House. In view of Articles 105(3) and 194(3) and the interpretation placed on these articles by the Supreme Court in the *M.S.M. Sharma's case* the constitutional provisions ensuring the privileges of British House of Commons shall prevail over the ordinary legislation. So, the provisions in

30. D.C. Jain – Parliamentary Privileges under the Indian Constitution, p. 13, 1975.

section 135(A) of the Code of Civil Procedure stands void to that extent and should be suitably amended to comply with Articles 105(3) and 194(3). Now the legislators in India enjoy the privilege of freedom from arrest except in criminal cases.

The arrest of a Member of any of the Indian Legislatures in civil proceedings during the session of the Legislature and 40 days before and after the adjournment of the House is a breach of privilege. Any executive order passed for arresting a member in civil proceedings will constitute contempt of the House. Not only is a member immune from arrest in civil proceedings, a person who has been already arrested in execution of a civil process is entitled to be released if he becomes a Member of Parliament during the period of imprisonment. Again the exemption applies to a person who was a Member of the old Parliament but is not a member of the new one. This practice inheres from United Kingdom. Thus May states that where it is a case of dissolution of the House "the privilege even after dissolution is still enjoyed for a convenient time for returning home[31]. Further a member accused of a bailable offence and arrested in connection therewith is to be released for attending the meetings of the Assembly".[32]

The privilege, however, cannot be claimed when the Legislature has been prorogued or has as yet not been summoned for the next session. As regards methods of enforcing this privilege, precedents are yet to be established. In India, so far there has been no occasion forcing Parliament to use its authority to get the release of an illegally detained Member of the House. The method of issuing writs of privilege or orders of the House direct to the jail authorities is absent in India. As in the case of freedom of speech, the privilege from arrest has been extended to witnesses summoned to attend before the House or any Committee thereof and also the officers of the House in immediate attendance.

In the sphere of the privilege of freedom from arrest two problems still remain inconclusive for want of precedents.[33] The first problem posed is that as to what shall happen if a member standing surety for an ordinary citizen is ditched and the citizen concerned jumps bail. Secondly whether privilege of freedom from arrest accrues to the employees of the member, particularly when they are acting under the instructions of the member helping him in the discharge of his parliamentary duties.

Limitations upon the Freedom from Arrest

Freedom from arrest does not extend to criminal offences; following the position obtaining in the United Kingdom privilege of freedom from arrest in India "cannot extend or be contended to operate where the Member of Parliament is charged with an indictable offence."[34] The practice followed in U.K. gets evident in the historic case of *Bradlaugh v. Gosset.* Therein Mr. Justice Stephen held "he knew of no authority for the proposition

31. E. May, op. cit,. 1971, p. 74.
32. Report of the Committee of Privileges, Orissa Legislative Assembly on the Arrest and Detention of a Member, Maheswar Naik, for a civil liability, 1965, p. 1.
33. The Hindustan Times, "Limits of Privilege, October 2, 1964.
34. See in the matter of Venkateswarulu, A.I.R., 1951 Madras, p. 272 and K. Anandan Nambiar, A.I.R., 1952, Madras, 117.

that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice." The same view also prevails in U.S.A.[35] It is evident from the wording of article I.S. 6(1) that the exception takes away from the privilege of freedom from arrest all criminal offences. The privilege is confined to arrest in execution of civil decrees for it has been held that it does not give immunity from arrest in execution of a process in a civil case.[36]

The House will never allow even the sanctuary of its walls to protect a member from the process of criminal law. The Indian Constitution relies on the English principle: "Privilege of Parliament is granted in regard to the service of the Commonwealth and is not to be used to the danger of the Commonwealth". Even a member released on parole cannot attend the House.[37] In a case where the petitioner, a Member of the then Travancore-Cochin Legislative Assembly was under arrest in connection with two criminal cases pending against him, the High Court observed, "It is clear from May's Parliamentary Practice 'the privilege of freedom from arrest is not claimed in respect of criminal offences or statutory detention and that the said freedom is limited to civil cases and has not been allowed to interfere with the administration of criminal justice or emergency legislation.

So long as the detention is legal the danger of the petitioner losing his seat [under Article 190(4)] or the certainty of his losing his daily allowance cannot be the foundation for relief, against the normal consequences of the detention".[38] In short there is no immunity if a member is arrested under due process of law. Members of Parliament can claim no special status higher than that of an ordinary citizen in this regard.[39]

No privilege can be claimed in respect of arrest or detention without trial under Maintenance of Public Order Act. The privilege of freedom from arrest is no doubt of great importance but of still greater importance is State security. When the very existence of State is in danger, it becomes the supreme duty of the State to ensure security through maintenance of Internal Security Act or analogous Acts. When a legislator is arrested and detained without trial under any Preventive Detention Act, he cannot be permitted to attend the House. The question that arose in Desh Pande's case was whether the arrest of Sri V.G. Deshpande under the Preventive Detention Act, 1950 constituted a breach of privilege. The Committee of Privilege of Lok Sabha came to the conclusion that it did not. It was held that Preventive Detention in India is expressly authorized by Article 22.[40]

35. *Williamson v. U.S.A.* 1908.
36. *Long v. Ausell* (1934), U.S.
37. Lok Sabha Debate, 24-11-1965.
38. *Kunjan Nadar v. the State*, A.I.R., 1955, Also May op. cit., p. 78.
39. S.K. Singh, Privileges of M.Ps. against arrest, The Indian Journal of Public Administration, Vol. X, No. 4, October-December, 1964.
40. Lok Sabha, Committee of Privileges, July, 1952.

As regards permission to attend the sittings of Parliament the Supreme Court held : "Rights of a Member of Parliament to attend the session of Parliament, to participate in the debate and to record his vote are not constitutional rights in the strict sense of the term and quite clearly that are not fundamental rights at all. So far as a valid order of detention is concerned a Member of Parliament can claim no special status higher than that of an ordinary citizen"[41] However, the Indian Legislators demand permission to attend the sittings of the House even when arrested under Preventive Detention.[42] They suggest that the executive in possession of power can in effect avoid parliamentary control by interning all those who challenge its actions.

Again there is no privilege if arrest is made under section 151 of the Criminal Procedure Code. In *A.K. Gopalan v. State of Kerala*, it has been held that the discretion to exercise section 151 (Criminal Procedure Code) is that of the police officer and the High Court has no power to interfere unless it is shown that the exercise of power was fraudulent.

All arrests or detentions on account of seditious libel are criminal in nature and as such freedom from arrest does not extend to such cases. While accepting the reasoning of the British House of Commons in the case of Wilkes, the Committee of Privileges of Lok Sabha inter alia observed: "Privilege of Parliament does not extend to cases of writing and publishing seditious libels nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence".[43]

Immunity from arrest cannot be claimed in respect of contempt of a Court of Justice which is of a criminal nature. Though in India there is no existing precedent to guide us it can be inferred that like that of United Kingdom freedom from arrest cannot be claimed in respect of : (i) commitment of contempt of court for publishing articles calculated to prejudice the course of justice;[44] (ii) imprisonment for contempt in appropriating money received by a Member as Receiver.[45]

However the authorities concerned are expected to maintain certain niceties while arresting the legislators in view of their high status and prestige. Thus for example they are exempted from being handcuffed. The Committee of Privileges of Lok Sabha pressed the Ministry of Home Affairs to send a circular to the State Governments to the effect that handcuffing should not be a matter of routine.[46]

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41. *In K. Anaandan Nambiar*, A.I.R., 1966, S.C. 657.
42. The Hindustan Times, Nov., 20, 1968.
43. Privileges Digest, Vol. III, No. 1, p. 14, 1972.
44. Gray's case, 1882, (May, p. 83).
45. Davis's case, 1888 (May, p. 83).
46. Fourth and Fifth Report of the Committee of Privileges, Second Lok Sabha, p. 48.

Similarly when a member is arrested on a civil or criminal charge the House should be informed of the arrest.[47] The interning authorities should intimate the presiding Officer even when the arrested member is subsequently released on bail.[48] Rajya Sabha has treated it contempt of the House, if the House was not informed about the arrest of a Member.

A jailed legislator must be allowed to correspond with the Presiding Officer of his House or with the Chairman of the Privileges Committee about his detention and treatment meted out to him by the Jail authorities. The Committee of Privileges of Lok Sabha while examining the case of arrest of Kansari Haldar, M.P., observed that detent legislators should have the right to correspond freely with the Presiding Officer.

The legislators are immune from arrest and service of process within the precincts of the House. Keeping in line with the English Practice Rules 232 and 233 of the Rules of Procedure of Lok Sabha prohibit the arrest of and service of summons on any person within the precincts of the House without the permission of the Speaker. The reason why such an action is considered to be a breach of privilege is explained by the Select Committee of the British House of Commons in the following words: "not that such a service is an insult to the Member, but that it is deemed disrespectful to the House". The Canadian Parliament and the American Congress also preserve their sanctity and dignity in similar ways. However, the residence of the member is not covered under the definition of "precincts of the House".[49]

Minor Privileges of the Members

In addition to the privilege of freedom of speech and freedom from arrest, there are certain minor privileges which the members enjoy as concomitants of their onerous positions. These privileges are more in the nature of facilities and can only indirectly help the legislators in the proper discharge of their duties. It is for this reason that these privileges have been captioned as **'**Minor Privilege'. Nevertheless as privileges they have full recognition. So far neither individuals nor the Courts of Law have challenged their validity on account of their being minor or insignificant.[50]

Exemption from Attendance as Witness

First and foremost there is the privilege of exemption from attendance as witness. According to May, this privilege together with the privilege of exemption from jury service is only analogous privileges of freedom from arrest.[51] Following the British Practice the Indian legislators have the privilege of exemption from being summoned as

47. Rules of Procedure and Conduct of Business in Lok Sabha, Rule 229.
48. *Ibid.*
49. 'Precincts of the House' includes Chamber, Lobbies, Galleries, Central hall, Waiting Rooms, Committee Rooms, Library, Refreshment Rooms of Members, Lok Sabha Secretariat, Corridors and Passages leading to the various rooms, Parliament House Estate.
50. Caravan, August 11, 1974.
51. E. May, op. cit., p. 98 (16th Edition).

witnesses when the Legislature is in session. The raison d'être' behind such a provision is the principle that the attendance of a Member in the House takes precedence over all other obligations and that the House has the paramount right and prior claim to the attendance and service of its members.[52] In the words of Hatsell, "the Members should be at perfect liberty to attend the service of the House" and "no call of an inferior nature should be permitted to interfere with this duty".[53] Accordingly not only the members but aloes the presiding officers have been granted this freedom.

In India under section 133 of the Civil Procedure Code the Chairman of Rajya Sabha, the Speaker of Lok Sabha and that of State Legislatures have been totally exempted from personal appearance in Civil Courts. When a Member of the Madras Legislative Assembly was served with subpoena to attend a Court as a witness, the Chair observed that the member could claim privilege and remain in the House.[54]

However this privilege can be waived by the House granting leave of absence to its members in order to aid the administration of justice. In fact this privilege is now seldom asserted in United Kingdom as the non-attendance of a witness may impair the administration of justice. But no member is entitled to give evidence in relation to any debates or proceedings in the House except by its leave.[55] This rule corresponds not only to the English principle, but also with the American practice whereby no member or officer of the House of Representatives can produce before any Court any paper from the files of the House without the authority of the House or of a statute.[56]

Exemption from Jury Service

Another minor privilege enjoyed by the Indian legislators is exemption from jury service. It is based on the same principle that a Member's duties in the House have a prior claim over any obligation of attendance in the Courts of Law. This privilege was granted in Britain under the Juries Act, 1870. It was introduced in India in 1925 with the passing of Legislative Members Exemption Act, XXIII, 1925. After independence apart from the "importing" of English law by virtue of Articles 105(3) and 194(3), section 320 of the Indian Criminal Procedure Code under its clause (a) exempts Members of Parliament and State Legislatures from liability to serve as jurors. It is however, of no use after the system of jury trial gets abolished in all the States.[57]

Freedom of Access to the Head of the State

A necessary corollary to the important privilege of freedom of speech is that of freedom of access to the Head of the State. This privilege is to be exercised by a House as a body and through its Speaker. In England the Members of the House of Commons have access

52. Anson, Parliament-I, p. 173.
53. Lord Campion, An Introduction to the Procedure of the House of Commons, 3rd Edition, p. 64.
54. Madras Legislative Assembly Debates, 17-12-1959.
55. Rule 383 of the Rules of Procedure of the Lok Sabha.
56. Jefferson's Manual, 1957, p. 122.
57. D.D. Basu, Commentary on the Constitution of India, Vol. II, 1965, p. 604.

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to the Monarch only as a "body through their speaker". The right of access is denied to individual members. Since India is a Democratic Republic unlike that of United Kingdom the President freely meets citizens including legislators. But access to the President of India is a matter of courtesy and cannot be claimed as of right. Moreover, the President is not expected to take cognizance of speeches made by individual Members on the floor of the House. He is to function in consonance with the decisions of Parliament as a body.

Privilege of Favourable Construction of its Proceedings

The House of Commons in England has always claimed privilege of "favourable construction of common proceedings". This was a valuable right for the commons in dealing with Tudor and Stuart sovereigns, when the practice of addressing the Crown in words composed by the Speaker still existed. Now it is a little more than a formal courtesy as the proceedings of the House are guarded against any interference by the Crown. Precisely this is also the position in India by virtue of Articles 105(3) and 194(3), more so because President of India does not take notice of anything said or done in the House but takes cognizance of the report of the House as a whole only.

Besides these privileges, the Indian legislators enjoy certain other facilities. In recognition of their special status they are assigned places in warrant of precedence.[58] The Speaker of Lok Sabha has 7th place, Deputy Speaker/Deputy Chairman 14th position and members have the 23rd position in the warrant of precedence. They can fly national flag and get the stationery, telephone calls free of cost. They also have salary and allowances, etc., and free transit throughout India. However, the legislators felt that their living standard was very low as the salary and allowances are only "beggars" dole. In response to this grievance, Government of India moved the Salaries and Allowances of Members of Parliament (Amendment) Bill, by which better amenities both monetary and non-monetary were provided to the Members of Parliament.[59]

58. The Official Table showing the places assigned to those having important social status on ceremonial occasions.
59. Salaries and Allowances of Members of Parliament (Amendment) Bill, August, 1983.

Law Relating to Marriage and Divorce under Christian Law

Dr. Pradeep Kumar[1]

The three most important events of human life are equally devoid of reason: Birth, Marriage and Death.

……Austin O'Malley

Introduction

Men and ladies of complete age, without any trouble due to race, nationality, or faith, have the proper to marry and to located a family. They are entitled to identical rights as to marriage, for the duration of marriage and at its dissolution[2]. Marriage will be entered into only with the free and complete consent of the intending spouses[3]. And the own family is the herbal and essential group unit of society and is entitled to safety by means of society and the State[4].

India, being a assembly ground of all the fundamental religions of the world, has a multiplicity of own family legal guidelines[5]. Thus like Christians, Hindu, Jews, Muslims, and Parsis are also ruled through their non-public laws in their circle of relatives matters. The core objective of the Indian Christian Marriage Act, 1872[6] to consolidate and amend the law referring to the solemnization in India of the marriages of folks professing the Christian faith[7]. The Fifteenth record of Law Commission of India also relating to marriage and divorce amongst Christians in India.

Who is Christian?

A Christian is simply someone who follows Jesus, who calls upon Jesus Christ as his or her Lord as well as Savior. Similarly, Christianity is an ongoing journey of discipleship to Jesus. According to Section 3 of the Indian Christian Marriage Act, 1872 "Christians" means persons professing the Christian religion. And the expression "Indian Christians" includes the Christian descendant of a native of India to Christianity, as well as such converts.

- **Christian by Birth**

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[2] Article 16 (1) of Universal Declaration of Human Rights, 1948 (General Assembly resolution 217 A).

[3] Article 16 (2) of Universal Declaration of Human Rights, 1948 (General Assembly resolution 217 A).

[4] Article 16 (3) of Universal Declaration of Human Rights, 1948 (General Assembly resolution 217 A).

[5] M. P. Jain, 'Matrimonial Law in India', *J.I.L.I.*, Vol. 4, (1962), p. 71

[6] Act no. 15 of 1872.

[7] Preamble of the Indian Christian Marriage Act, (Act no. 15) 1872.

- **Christian by Conversion**
- **Who believes in Christianity**

Essentials of Christianity

There are over 1 billion Christians in the world today, making it the world's largest religion. Christians believe that a man born about 2,000 years ago called Jesus Christ was the son of god. Christians follow the teachings of Jesus Christ as well as the teaching of the various churches within Christianity.

What is Marriage?

Marriage is an imperative action born out of custom to define a legal relation & to have acceptance of general society. The law provides a certain right to the spouses. Marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife.

In common law the three elements of marriage are:

1. Agreement to be married,
2. Living together as husband and wife,
3. Holding out to the public that they are married.

One of the maximum crucial invariable consequences of marriage is the reciprocal support and the responsibility of renovation of the commonplace household, at the same time and severally. Marriage as an group has terrific criminal significance and diverse obligations and duties drift out of a marital relationship, as according to regulation, within the depend of inheritance of belongings, succession-ship, maintenance, and divorce, and so forth.

Marriage, therefore, includes legal requirements of formality, publicity, exclusivity and all of the prison effects waft out of that relationship. Marriage is an imperative movement born out of custom, to increase a felony relation & to have an attractiveness of general society. Marriage is the maximum important relation in life and is the inspiration of the family and society, however on the identical time, one can't forget about the transition of society from marriage to live in a lifestyle. Living collectively may be taken into consideration as a essential right under Article 21 of the Constitution of India; at the equal time these days there may be no specific statutory provision to alter such forms of relationships upon termination or disruption.

In the *Hyde v. Hyde*[8] The Indian Christian Marriage Act, 1872 provides for marriage in a monogamous form only. *Lord Penzance* gave the following definition of marriage, "I conceive that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and woman to the exclusion of all others".

[8] (1866) L I P & D 130.

In *Dawood and Another v. Minister of Home Affairs and Others*[9] laying down the importance of marriage as follows: "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge, obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into a marriage, therefore, is to enter into a relationship that has public significance as well.

Aims of Christian Marriage

Sexual delight establishment of family and companionship are the diverse gadgets of Christian marriage.

1. Sexual Satisfaction

Marriage is a method to regulate sex urge by way of leading a pious life. Christian marriage aims on the status quo of a solid intercourse relation between a man and a female. It is because of this that the Christians regard marriage as a lifestyles-long union of a person and lady.

2. Establishment of own family

Procreation of youngsters via the status quo of the family is another goal of Christian marriage.

3. Companionship

Another important cause of Christian marriage is to establish a existence-long companionship between a man and woman with such characteristics like love, sacrifice, and co-operation.

Marriage Ceremony

After the choice is over, the mother and father of the bride and bridegroom carry their consent to the priest, who in his turn conveys it to the council of Bishops for its consent. When the consent of the council is received, an afternoon is fixed for the betrothal. On that appointed day each the events meet collectively within the church and trade goodies, coconut, garments, finger jewelry, cash, and so on. As an expression of the reputation of the suggestion.

Once the betrothal is over, the boy and the lady are loose to meet each different. But on the same time, it's miles predicted that they have to not have a sexual dating previous to marriage. Three weeks prior to marriage a notice concerning a particular marriage is

[9] 2000 (3) SA 936 (CC).

published in the front of the church on each Sunday inviting an objection if any to the marriage. Anyone can document objection with the church, after filing the price for this cause.

The Indian Christian Marriage Act, 1872

India is a country which abounds in personal laws and each community has its own personal law.[10] The Indian Legal System is based in part on the English common law system. India, being a meeting ground of all the major religions of the world, has a multiplicity of family laws.[11] Thus like Hindu and Muslims, Christians, Parsis, and Jews are also governed by their personal laws in their family matters. The main object of the Christian Marriage Act was to provide the machinery for the solemnisation in India of marriages among Christians while leaving the question of essential validity to the personal laws of the parties.

The Indian Christian Marriage Act, 1872, was enacted on 18th day of July, (Act 15 of 1872), 1872 to consolidate and amend the law relating to the solemnization in India of the marriages of Christians. The whole Act Consisting total of 88 Sections, VIII Part and V Schedules. It was the British-Indian administration that enacted the law.

The Christians have their Christian Marriage Act, 1872 the Divorce Act, 1869 and the Indian Succession Act, 1925. These Acts deal with the laws of marriage, divorce, and succession for the Christians. The laws relating to marriage and divorce, being very old, do not fulfill the requirement of the Christian community in modern times. The Indian Divorce Act, 1869 has been amended twice in 2001. Once by the Marriage Laws (Amendment) Act, 2001[12] which amended Section 36 and 41 again by the Divorce (Amendment) Act, 2001[13]. The latter piece of legislation has brought about the wide speared amendment in the Act. It has omitted the word "Indian" from the title of the Act.[14] Now the name of the Act is "The Divorce Act". It would have made little harmonious with the title of the other Act, "Christian Marriage Act, 1872."[15]

The Christian church has always held that the universal institution of marriage has a special place in God's purpose for all human life. According to the constitution of the united church of Northern India, Marriage is a sacred institution and it has been blessed by God and it is a natural thing. It is a religious sacrament in which man and woman are bound for ill or well. Christian Personal Law or family law consists of Adoption, Divorce, Guardianship, Marriage, and Succession. The provisions of canon law concerning marriage are recognised as the personal law of Catholics in India (except in

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[10] Dr. Paras Diwan, Peeyashi Diwan: Family Law; Third Ed. 2.
[11] M.P. Jain, 'Matrimonial Law in India', *J.I.L.I.*, Vol.4, (1962), p. 71.
[12] No. 49 of 2001.
[13] No. 51 of 2001.
[14] Act no. 51 of 2001 Section 1 of the Divorce act, 2001 (w.e.f. 03-10-2001).
[15] Kumud Desai, *Indian Law of Marriage and Divorce*, Sixth Edition, 2004, Wadhwa, Nagpur, p. 379.

the state of Goa). Indian Christians (except in the state of Goa) are governed by the Indian Christian Marriage Act 1872.

Christian Personal Law is not applicable in the state of Goa. The Goa Civil Code, also called the Goa Family Law, is the set of civil laws that governs the residents of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single secular code/law governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.

Applicability of the Act

The Law extends to the whole of India except the territories which, immediately before the 1 November 1956, were comprised in the state of Travancore-Cochin, Manipur and Jammu and Kashmir[16]. Therefore, the act does not apply to marriages of Christians solemnised in the territories of the former states of Travancore and Cochin which now form part of Kerala and Tamil Nadu. However, civil marriages among Christians in the former state of Cochin are governed by the provisions of the Cochin Christian Civil Marriage Act. There is no statute regulating solemnisation of marriages among Christians in Jammu and Kashmir and Manipur, rather customary law or personal law prevails there.

In 1872 the Indian Christian Marriage Act was passed which determined the category of Christians who are eligible for marriage. The Act authorized the Central and State Government to appoint a Register for the purpose. The Act also made provision for a magistrate who could perform the same function.

Every marriage between persons, one or both of whom is a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section of the Indian Christian Marriage Act, 1872 and any such marriage solemnized otherwise than in accordance with such provisions shall be void.[17] The parties to the marriage must be Christian as defined under Section 3 of the Act or at least one of them must be Christian and the marriage must have been solemnized in accordance with the provisions of Section 5 of the Act by a person duly authorized to do so.

Persons by whom marriages may be solemnized

Marriages may be solemnized in India

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of which he is a Minister;
(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of Scotland ;

[16] Section 1 of the Indian Christian Marriage Act, 1872.
[17] Section 4 of the Indian Christian Marriage Act, 1872.

(3) by any Minister of Religion licensed under this Act to solemnize marriages;
(4) by, or in the presence of, a Marriage Registrar appointed under this Act;
(5) by any person licensed under this Act to grant certificates of marriage between Indian Christians.[18]

Grant and revocation of licenses to solemnize marriages-
The State Government, so far as regards the territories under its administration, may, by notification in the Official Gazette, grant licenses to Ministers of Religion to solemnize marriages within such territories and may, by a like notification revoke such licenses[19].

Marriage Registrars
The State Government may appoint one or more Christians, either by name or as holding any office, for the time being, to be the Marriage Registrar or Marriage Registrars for any district subject to its administration.[20]

Senior Marriage Registrar
Where there are more Marriage Registrars than one in any district, the State Government shall appoint one of them to be the Senior Marriage Registrar.[21]

Licensing of persons to grant certificates of marriage between Indian Christians
The State Government may grant a license to any Christian, either by name or as holding any office, for the time being, authorizing him to grant certificates of marriage between Indian Christians. Any such license may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the Official Gazette.[22]

Time for solemnizing marriage
Part II of the Indian Christian Marriage Act, 1872 deals with time place at which Marriage may be solemnized. Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening.[23]

A place for solemnizing marriage-
No Clergyman of the Church of England shall solemnize a marriage in any place other than a church where worship is generally held according to the forms of the Church of England, unless there is no church within five miles distance by the shortest road from such place, or unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.[24]

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[18] Section 5 of the Indian Christian Marriage Act, 1872.
[19] Section 6 of the Indian Christian Marriage Act, 1872.
[20] Section 7 of the Indian Christian Marriage Act, 1872.
[21] *Ibid.*
[22] Section 9 of the Indian Christian Marriage Act, 1872.
[23] Section 10 of the Indian Christian Marriage Act, 1872.
[24] Section 11 of the Indian Christian Marriage Act, 1872.

Part III of the Indian Christian Marriage Act, 1872 deals with Marriages solemnized by ministers of religion licensed under this act.

Notice of intended Marriage

Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act, one of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein-

a) the name and surname, and the profession or condition, of each of the persons intending marriage.
b) the dwelling-place of each of them,
c) the time during which each has dwelt there, and
d) the church or private dwelling in which the marriage is to be solemnized.[25]

Publication of such notice

If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.[26]

Issue of certificates to Indian Christians

When any Indian Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Indian Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Indian Christian into some language which he understands.[27]

Solemnization of marriage

After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt. But there is a provided the marriage be solemnized in the presence of at least two witnesses besides the Minister.[28]

Marriages when to be registered

All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act shall be registered in the manner hereinafter prescribed.[29]

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[25] Section 12 of the Indian Christian Marriage Act, 1872.
[26] Section 13 of the Indian Christian Marriage Act, 1872.
[27] Section 23 of the Indian Christian Marriage Act, 1872.
[28] Section 25 of the Indian Christian Marriage Act, 1872.
[29] Section 27 of the Indian Christian Marriage Act, 1872.

Registration of marriages solemnized by Clergymen of Church of England:
Every Clergyman of the Church of England shall keep a register of marriages and shall register therein, according to the tabular form set forth in the Third Schedule hereto annexed, every marriage which he solemnizes under this Act.[30]

Registration of marriages between Indian Christians:
The registration of marriages between Indian Christians under this Part shall be made in conformity with the rules laid down in section 37 (so far as they are applicable), and not otherwise.[31]

As regards the solemnization of the Christian Marriage Act provided that:

1. Marriage can be solemnized anytime between 6 A.M. to 7 P.M.
2. Marriage is solemnized in the church alone.
3. Either of the spouses shall inform the priest and fill-up the form given in schedule-1
4. The marriage proposal should be given the publicity and it should be notified on the notice board of the church every Sunday at least three weeks before marriage.
5. If a marriage is solemnized at some private place, the Register shall be informed thereof and he shall publicize the marriage.
6. If either of the spouses is a minor the fact should be brought to the notice of the Register.
7. In the case of a minor, the consent of the parents is essential.

The Indian Christian Marriage Act, 1872 provides for marriage in a monogamous form only. Section 60; of the Act lays down the following condition; Section 60(2) neither of the persons intending to be married shall have a wife or a husband still living. Section 4 of the Christian Marriage Act, 1872 states that every marriage between persons, one or both of whom is or are Christians, shall be solemnized in accordance with the provisions of the next following Section; and any such marriage solemnized, between a Christian and a non-Christian, otherwise than in accordance with such provisions shall be void.

Every marriage between Indian Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions are fulfilled, and not otherwise[32]

(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 section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other-

[30] Section 28 of the Indian Christian Marriage Act, 1872.
[31] Section 59 of Indian Christian Marriage Act, 1872.
[32] Section 60 of Indian Christian Marriage Act, 1872.

"I call upon these persons here present to witness that. 1, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [or husband]" or words to the like effect:

Divorce

The term 'divorce' comes from the Latin word '*divortium*' which means 'to turn aside', 'to separate'? Divorce is the legal cessation of a matrimonial bond. Divorce puts the marriage to an end, and the parties revert back to their unmarried status and are once again free to marry.[33] All rights and mutual obligations of husband and wife ceases. In other words, after a decree of dissolution of marriage, the marriage comes to an end and the parties cease to be husband and wife and are free to go their own ways.

Divorce (or dissolution of marriage) is the termination of a marriage or marital union, the canceling and/or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between a married couple under the rule of law of the particular country and/or state.

The main object of the Indian Divorce Act, 1869 than after 2001 called Divorce Act, to amend the law relating to divorce and Matrimonial Causes. The Act hovers around amendments to sections 10, 17 and 20 of the Indian Divorce Act, 1869 and the rest of the amendments are consequential in nature. The Indian Divorce (Amendment) Act, 2001, amended the said provisions suitably so as to remove the gender inequality as contained in section 10 and to do away with the procedural delays in obtaining a divorce.

The Act repealed the following British Statutes relating to Christian Personal Law which have become obsolete
(i) The Indian and Colonial Divorce Jurisdiction Act, 1926;
(ii) The Indian and Colonial Divorce Jurisdiction Act, 1940; and
(iii) The Indian Divorce Act, 1945.

The Divorce Act, 1869[34] to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial.

Part III of The Divorce Act, 1869 deals with Dissolution of Marriage under sections 10-17. Part III Section 10 to 17 of the Divorce Act, 1869 deals with Dissolution of marriage. A wife or husband may file a petition for dissolution of marriage before the District Court only[35]. The respondent has committed adultery.[36] Adultery is extramarital sex. It is

[33] Dr. Paras Diwan, "*Modern Hindu Law*", (Faridabad, Haryana: Allahabad Law Agency, 18th edn. 2007), p.128,
[34] Act no. 4 of 1869.
[35] Section 10 (1) of the Divorce Act, 1869.
[36] Section 10 (1) (i) of the Divorce Act, 1869.

consensual sexual intercourse between a married person and a person of the opposite sex not being the other spouse, during the subsistence of the former's marriage

The expression "Christian" means persons professing the Christian religion.[37] A person professing the Christian religion, even, if not baptized is a Christian.[38] The Indian Christian Marriage Act, 1872 denotes only the marriages of persons professing the Christian religion and its procedure. The relief of divorce for the Christian religion is a separate Act and it is known as the Divorce Act, 1869.[39]

The Act, 1869 is relating to the divorce of persons professing the Christian religion.[40] The Act is applicable to Christians only.[41] In *Pramila Khosla v. Rajesh Kumar Khosla*[42], case it was held that if one of the parties to the marriage is a Christian it is sufficient to give jurisdiction to decide the petition under this Act.

In *George Sebastian v. Molly Joseph*[43], case court held that Christian marriage can be dissolved only by decree of the Court passed under this Act.

When husband may petition for dissolution.-Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.[44]

In addition, the wife can also obtain a divorce on the grounds of 'rape' and 'sodomy' on the part of the husband. This was challenged as discriminatory against the man as the same grounds were not available to a Christian man against his wife for dissolution of marriage. The Court held that taking into consideration the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are similarly a husband can seek dissolution of the marriage if the wife is sexually corrupt. Section 17 of the Act provides that after a thorough examination of the charges leveled either by the husband or wife and satisfying itself about their veracity the District Court can grant a divorce. However, this is subject to an endorsement by the High court failing which the dissolution of marriage will not be valid.

Grounds for dissolution of marriage

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[37] P C. Pant, "*Law of Marriage Divorce*," (New Delhi: Orient Publishing Company, 2nd edn., 2001).
[38] *K.J.B. David v. Nilamoni Devi*, AIR 1953 Orissa, 10 cited in P C. Pant, "Law of Marriage Divorce," (New Delhi, Orient Publishing Company, 2nd edn., 2001), p.176.
[39] Available on http://shodhganga.inflibnet.ac.in/bitstream/10603/71410/12/12_chapter%203.pdf assess on 21 September, 2017 at 09:38 am.
[40] P C. Pant, "Law of Marriage Divorce," (New Delhi, Orient Publishing Company, 2nd edn., 2001), p.211.
[41] *G.S. Dhanamani v. G.S. Benerjee*, AIR 1985 AP 237 cited in PC. Pant, "Law of Marriage Divorce," (New Delhi, Orient Publishing Company, 2nd edn., 2001), p. 212.
[42] AIR 1979 Delhi 79.
[43] AIR 1995 Ker. 16 (FB).
[44] Section 10 of The Divorce Act, of 1869.

Both husband and wife can seek a divorce on the grounds of,

1. Adultery
2. Cruelty
3. Desertion for more than seven years
4. Insanity for more than two years
5. Incurable leprosy for more than two years
6. Conversion to another religion
7. Willful refusal to consummate the marriage
8. Not being heard of for 7 years
9. Venereal disease in communicable form for two years
10. Failure to obey the order for restitution of conjugal rights.

However, the wife has been permitted to sue for divorce on additional grounds if the husband is guilty of:[45]

1. Rape
2. Sodomy
3. Bestiality

Section 10 provides the same grounds for husband and wife for seeking dissolution of marriage.

Dissolution of marriage by Mutual Consent

Section 10(a) has been inserted allowing for divorce by mutual consent. However, a separation of 2 years has been provided as against other legislations which provide for one year separation period before filing a petition for divorce.[46]

(1) Subject to the provisions of this Act and the rules made there under, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of **two years** or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

[45] Section (2) of the Divorce Act, 1869.
[46] Section 10- A of the Divorce Act, 1869.

Adulterer or adulteress to be co-respondent

This is consequent to the amendment made in the Criminal Procedure Code, 1973. Section 125 has been amended and consequential changes under Section 127 of the Code of Criminal Procedure to remove the ceiling of maintenance allowance made to base on assets and income of the husband. This amendment which, is in line with the expectations of thousands of families waiting for alimony or the maintenance and education of their children provided immediate relief to them. In each case, the maintenance is also accompanied by litigation expenses[47]. This is intended to bring substantial relief to women who earlier had to wait for years to receive maintenance.

(a) that the spouse, being the respondent is main the life of a prostitute or the husband, being respondent is leading an immoral lifestyles and that the petitioner is aware of of no man or woman with whom the adultery has been dedicated;

(b) that the name of the alleged adulterer or adulteress is unknown to the petitioner despite the fact that the petitioner has made due efforts to find out it;

(c) that the alleged adulterer or adulteress is lifeless.

Now Section 11 with the addition of the phrases “or adulteress” covers instances in which the spouse sues the husband for divorce on the ground of adultery. Thus both, adulterer or adulteress could be co-respondent in case of the divorce petition.

The amendment is consequential to the amendments made in the grounds of divorce below Section 10. The adulterer/adulteress has to be named because the co-respondent except the requirement is waived by leave of the court on grounds unique in the Act. K. Kumar Raju v. K. Maheswari and Vijayan v. Bhanusundari have been petitions via husbands under the Indian Divorce Act, in which the adulterers were neither impleaded as co-respondents nor the courts, depart searched for such waiver. The High Court’s consequently refused to verify the trial courtroom's decree granting a divorce to the husband. In M.V. Ramana v. M. Peddiraju, in which the requirement of impalement of co-adulterer turned into no longer complied with, a husband's petition for divorce on the ground of adultery changed into disregarded.

The Act does away with the permitting provision for supplying a petition for dissolution of marriage to the High Court after this type of petition has been disregarded by means of the District Court and with the requirement of affirmation of decree of District Court by means of the High Court. At present, a petition for dissolution of marriage will be provided both to the District Court or to the High Court. In order to simplify the technique and obviate postpone and consequential difficulty to estranged couples, the Act has carried out away with the requirement of confirmation. (Section 17 & 20)

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[47] Section 11 of the Divorce Act, 1869.

Section 34 & 35 have been amended to provide for damages from adulterer or adulteress. Now the spouse is also allowed to assert damages and prices from the adulteress. This is consequential to the adjustments made in phase eleven of the Act. However, it is pertinent to mention right here that those provisions had been not noted beneath the Amended Act.

The maximum amount of preservation pendent elite has been amended and now the higher restriction is removed. It is left to the discretion of the court to decide the upkeep amount relying on the occasions of every case. And now provision has been made for the disposal of packages for provide of alimony pendent elite within sixty days from the date of application established through affidavit.

The Act allows an appeal from a decree of a District Judge for dissolution of marriage or nullity of marriage which was not provided under the parent Act. (Section 55) In all, the amendments carried out to the Indian Divorce Act have gone a long way in eliminating gender inequality. Finally, the Indian Christian women have got the much-needed respite and are on par with the women in other communities, at least in the matter of divorce and matrimonial relief, if not in all aspects.

Void Marriage

Section 19 of the Act declares a marriage void on the following grounds:

1. Impotency – Sterility and barrenness i.e. if at the time of marriage or at the time of litigation, the husband is impotent or the woman is sterile or unable to bear a child.
2. Blood Relation – If either of the spouses is a blood relation.
3. Insanity – If either of the spouses is mad or is an idiot.
4. If either party has previously married or the husband or wife of the previous marriage is alive.
5. Consent of either party was obtained by force or fraud.

Remarriage after Dissolution

According to section 57 of the Act, the spouse can remarry. Six months after the dissolution of marriage. Though Christianity considers marriage a sacrament and is indissoluble, the practice of divorce is quite common among Christian all over the world.

When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of' any decree of a high Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death. Provided that no appeal to the Supreme Court has been presented against any such order or decree. When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective

parties to the marriage to marry again as if the prior marriage had been dissolved by death.[48]

As remarriages are allowed by Divorce Act 1869, the widows and widowers are encouraged to marry but there is a system of child marriage among Christians. The divorce or marriage dissolution Act 1869 has created a glaring problem for Christian regarding the instability of marriage disregarding the sanctity of marriage.

Difference between Deficiencies of Divorce Act, 1869 and Amendments affected in the 2001 Act

The Indian Divorce (Amendment) Act, 2001 is a very substantial amendment. The parent Act i.e. The Indian Divorce Act was legislated in the year 1869 and this was the exact replica of the English Matrimonial Causes Act, 1857. England itself repealed that Act in the year 1923 because it had several provisions that were discriminatory for women, but it is only after 132 years of its inception that amendment has been made to this particular law in India.

Provision of the Act	**Deficiencies of India Divorce Act, 1869**	**Amendments affected in 2001 Act**
Title of the Act	The Indian Divorce Act, 1869	The Divorce Act, 1869
Section 10	Different grounds for dissolution of marriage to man and woman.	Equal grounds available to both husband and wife. S. 10 (a)- divorce by mutual consent.
Section 11	Adulterer to be co-respondent.	Adulteress also to be co-respondent.
Section 17	A petition for dissolution of marriage to be filed before the District Court or the High Court. Confirmation by High Court.	Petition to be filed before District Court. Confirmation by High Court not necessary.
Section 20	Decree of nullity of marriage by the District Court to be confirmed by the High Court.	Confirmation by High Court not necessary.
Section 22	Relief not of divorce proper, but only a judicial separation.	This lacuna has not been addressed in the Act.
Section 34	Claim for damages from adulterer.	This provision has been omitted.

[48] Section 57 Liberty to parties to marry again of Divorce Act, 1869.

Section 35	Claim for cost of litigation from the adulterer.	This provision has been omitted.
Section 36	Maintenance pending litigation not to exceed 1/5th of the husband's property.	The upper limit of maintenance amount removed consequent to amendment in the Cr. P. C.
Section 39	If adultery proved, wife loses her property in favor of the husband and children.	This provision has been omitted.
Section 55	No provision for appeal from decree of District Court.	Appeal is provided to High Court.

Conclusion

The Christians have their Christian Marriage Act, 1872 this act are not fulfill all provision of family laws it's also including the Divorce Act, 1869 and the Indian Succession Act, 1925. These Acts deal with the laws of marriage, divorce, and succession for the Christians. The laws relating to marriage and divorce of Christian are very old; do not fulfill the requirement of the Christian community in modern times. There is a need for more amendment regarding women's rights in Christian law in India. According to Indian Christian Marriage Act, 1872 every marriage between persons, one or both of whom is a Christian or Christians, shall be solemnized in accordance with the provisions of the Indian Christian Marriage Act, 1872 and any such marriage solemnized otherwise than in accordance with such provisions shall be void.[49] Even the persons[50], time[51] and place[52] by which marriages may be solemnized are fixed under the Indian Christian Marriage Act, 1872.

The Christian marriage is solemnized in the presence of at least two credible witnesses besides the Minister.[53] Also, consent of father, if living, of any minor, or, if the father is dead. the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India is compulsory under the Indian Christian Marriage Act, 1872.

False oath, declaration, notice or certificate for procuring marriage, Forbidding, by false personation issue of certificate by Marriage Registrar, Solemnizing marriage without due authority, Solemnizing marriage out of proper time, or without witnesses, Solemnizing

[49] Section 4 of the Indian Christian Marriage Act, 1872.
[50] Section 5 of the Indian Christian Marriage Act, 1872.
[51] Section 10 of the Indian Christian Marriage Act, 1872.
[52] Section 11 of the Indian Christian Marriage Act, 1872.
[53] Section 25 of the Indian Christian Marriage Act, 1872.

marriage without notice, Issuing certificate, or marrying, without publication of notice, etc. there are a penalties are given under the Christian Marriage Act, 1872.

The Christian community in India, particularly women, has expressed their happiness at the latest amendments made to the Indian Divorce Act, 1869 by the Parliament. Under the Indian Divorce Act, 1869, prior to its amendment in 2001, a wife could seek divorce if the husband had been guilty of cruelty couple with adultery. The husband could not take the plea of the wife's cruelty to obtain dissolution. Cruelty, however, was available as a ground for judicial separation to both the husband and wife. The Divorce (Amendment) Act 2001 has completely transformed the original Act and the ground for matrimonial relief has been brought almost at par with the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955. After the 2001 amendment, the ground of cruelty the husband and wife both became equally entitled to file a suit in the Court of law to dissolve the marriage and not only to file a case judicial separation.

The 2001 Amendment Act removes gross gender inequality existent in the Act. In conclusion, it would suggest that unified legislation would help settle issues relating to other aspects of personal law and bring about uniformity in the law within the Christian community in India[54]

[54] Available on http://www.manupatrafast.com/articles/popopenarticle.aspx?id=59a6ae72-53e3-4cd8-a620-38c292a1c6ee&txtsearch=subject:%20family%20law accessed on 10 July 2017 at 23:45 pm.

Role of Forensic Science in Solving Marital Disputes

Nandini Raizada[1]

Abstract

Marriage is a personal, physical, psychological, emotional and a spiritual bond between a man and a woman. But when this bond is broken, several issues including the legitimacy of the child, character of the spouse, sexual incapacity of the spouse and many more issues come into picture which require strict standards of decency to be followed and also require substantial evidence. These issues are sensitive in nature as they take into account the privacy and dignity of the individual which has also been safeguarded by our supreme law i.e., the Constitution of India. Taking into account the sensitivity of the issues, the traditional methods of collecting evidences and the testimony of witnesses seems to vulgarize the very auspicious marital bond. Thus, there is a need to involve forensic science techniques in settling such issues. Time and again courts have relied upon DNA testing and blood testing for settling Paternity issues and chastity of the spouse, forensic psychiatry has been used in settling the custody of the child and so on. The paper will be, thus, focused on the efficient role played by forensics in settling matrimonial issues without affecting the standards of a civilized society.

Keywords*:* Marriage, Forensic Science, Marital Disputes, DNA fingerprinting

Introduction

Marriage is a delightful relationship. Marriage on one hand is a personal, physical, psychological as well as emotional bond and on the other a spiritual bond between individuals of opposite sex. It is presumed in majority of the cultures that this union is created by the godly powers. The couple makes promises, in front of the Almighty or the sacred fire and they are one soul for life. Marriage is the most intimate union God makes between two human beings, indeed, the closest relationship human beings can ever possibly experience. This union is so close, so binding, so powerful, so comprehensive and far-reaching that, as long as one or both of the spouses live, it cannot be broken.[2]

The bond seems to be much stronger but just like a chain is only as strong as its weakest link; the strong marital bond may have weak links too. Sometimes such weak links even result in the breaking of the pious marital bond.

Such weak links are generally because of the fact that marriage is principally an institution that acknowledges sexual relationship between a man and his wife. Most of the grounds which are responsible for the breaking of the marital bond revolve around

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[2] Available at http://www.cprf.co.uk/articles/unbreakablebond.htm#.WZ5tAPgjHIU accessed on 20/08/2017 at 10:45 am.

this sexual activity. If we analyse in general the grounds for breaking up of marital tie and the issues related therewith, as per Hindu laws, Muslim law and other family laws in the context of cohabitation, we will find the following-

- Voluntary sexual intercourse with any person other than his or her spouse[3]
- Unchastity of the spouse, forced and painful intercourse, unbearable intoxication habits, amounts to cruelty[4]
- Impotency of the spouse[5]
- Virulent and incurable form of leprosy[6]
- Venereal disease in a communicable form[7]
- Pregnancy of wife before marriage[8]

  And when this bond is broken the issues which emerge are generally-
- The custody of the child
- The legitimacy of the child
- The chastity of the spouse for fixing the maintenance allowance etc[9].

Thus, the beautiful marital bond at the time of its dissolution depicts a vulgar reality. Such issues not only diminish the standards of society but also by revealing bitter truths ruin all the future prospects of the individuals concerned. When it comes to the courts, for settling such sensitive issues courts require substantive proofs. For that matter reliance is placed on witnesses including family members, friends, neighbours, servants and vendors and also evidences including photographs, tapes, letters, messages etc.

The discussions in the Court room are offending for both the parties as well as the family members too. This situation calls for the involvement of such methods and techniques which are fool proof and thus require no indecent deliberations for reaching the conclusions. Forensic science can play pivotal role in solving such matrimonial disputes in the same way as it plays in solving criminal cases. Much reliance is placed on scientific methods of investigations in solving complicated criminal issues be it, Nithari case, Arushi Talwar case, Abdul Kareem Telgi case, Sister Abhaya murder case, Tandoor murder case and many more.

Forensic Science: Meaning and Scope

The term ‘forensic’ is derived from a latin word ‘forensis’ which means belonging to ‘court of justice’ or to public discussion and debate. Forensic science would therefore, means the science which is used in that court of justice. Forensic science means the application of scientific knowledge to legal problems. The term forensic science refers to

[3] Section 13(1) (i) of the Hindu Marriage Act, 1955.
[4] Section 13(1)(ia) of the Hindu Marriage Act,1955 & Section 2(viii) of The Dissolution of Muslim Marriages Act,1939.
[5] Section 12(1) (a) of the Hindu Marriage Act, 1955 & Section 2(v) of The Dissolution of Muslim Marriages Act, 1939.
[6] Section 13(1) (iv) of the Hindu Marriage Act, 1955 & Section 2(vi) of The Dissolution Of Muslim Marriages Act, 1939.
[7] Section 13(1) (v) of the Hindu Marriage Act,1955 & Section 2(vi) of The Dissolution Of Muslim Marriages Act,1939.
[8] Section 12(1) (d) of the Hindu Marriage Act,1955.
[9] Section 125(4) of the Code of Criminal Procedure, 1973 & Section 25 of Hindu Marriage Act, 1955.

a group of scientific disciplines which are concerned with the application of their particular scientific area of expertise to law enforcement: criminal, civil, legal and judicial matters.

Thus, in brief, Forensic science is the application of scientific techniques in solving legal problems. Thus it can solve matrimonial problems too. Many countries in the world have recognised the utility of forensics in solving matrimonial issues. Time and again Courts in India have also placed reliance on Forensic science in solving matrimonial issues and where ever the contention regarding privacy was raised Courts have rejected it and allowed the application of forensic techniques for arriving at the conclusion taking in to account the interest of justice. Like in *Md Majid Hussain v. Md Aqueel*[10] it was held that a person who is alleged to have been suffering with HIV disease, can be subjected to medical examination even against his will as it is necessary to know his medical condition since it is likely affect life of others also.

Similarly, in personal law concerning relationship of husband and wife and the children born to such wedlock, the right to privacy is invaded to ascertain whether the marriage was consummated properly, whether the spouses to the marriage are suitable to live together or suffering from any disease which disentitles them to live as husband and wife. In matters where a marriage is sought to be nullified also it may be necessary to ascertain the health of one of the spouses of the marriage etc. To ascertain the birth of a child to the couple, DNA test can be ordered. Similarly, when it comes to the custody of a child, the mental condition of the spouse is also necessarily to be ascertained before Court orders the custody of the child to one of the parents. In all such circumstances, subjecting a person to medical examination does not amount to violating right of privacy. These are exceptions to normal rule. This paper aims to present a picture of how Forensic science disciplines help in settling matrimonial issues:

1. **Cyber forensics:** Cyber forensics is the application of investigation and analysis techniques to gather and preserve evidence from a particular computing device in a way that is suitable for presentation in a court of law. Cyber forensics may be used to investigate and identify hidden assets, frequent visits to a hotel or place, frequent fund transfers, chats and calls creating an impression of extramarital affairs. Electronic evidence like videos, recordings, watsapp and facebook chats as well as photos forming the proof of unchastity of either spouse also come under the ambit of cyber forensics which has time and again been relied by the courts while formulating their opinions.

2. **Forensic handwriting Examination:** Forensic handwriting Examination/ Dactylography is technique of identifying handwritings. Courts have placed reliance on the testimony of forensic handwriting experts while analysing the handwritings in love letters written to a spouse from a third person for ascertaining the character of the spouse.

[10] Civil Revision Petition No.2129 OF 2014 available on https://indiankanoon.org/doc/145727372/ accessed on 24/08/2017 at 12:45 pm.

3. **Forensic psychiatry:** Forensic psychiatry is a potent and powerful weapon in the armoury of administration of justice. It is a subject speciality of psychiatry, which, generally, deals with the application of psychiatry in law and its knowledge to legal issues. Forensic psychiatry has played a major role in ascertaining the unsoundness of the spouse which is a ground for divorce as in *Pankaj Mahajan v. Dimple*[11]where the wife was affected with Bipolar Affective Disorder and for that reason husband successfully got divorced .

   Forensic psychiatry is also applied in ascertaining the custody of a child. In *Sheila B. Das v. P.R. Sugasre*[12] the parents of the child were asked to go through psychological evaluation and to submit a report. On such report the custody of the minor child was granted. In another case *Simran Ahluwalia v. Vikas Ahluwalia*[13]the psychological evaluation of the child was ordered by the Court in order to ensure that the child is in the custody of right parent or not.

4. **DNA testing:** DNA is a nucleic acid generally regarded as a blueprint, a recipe or a code of an organism. The blueprint contains instructions which enable development of cells in to the body. And also controls the characteristics featured in a fully functional living structure through genes. DNA fingerprinting is a technique which helps forensic scientists and legal experts solve crimes, identity thefts, legal suits and terrorism cases. DNA samples are been collected for analyzing whether person is guilty or innocent. DNA analysis is also of utmost importance in determining the paternity of a child in the cases of civil disputes. Need of this evidence is most significant in the criminal cases, civil cases, and in the maintenance proceeding in the criminal courts under section 125 of the Code of Criminal Procedure, 1973.In India DNA fingerprinting and analysis has been widely used in paternity cases. However it was made clear in *Gautam Kumar Kundu v. State of WB*[14] that the courts cannot order such scientific tests where the result will be 'Branding The Child As Bastard And Mother As An Unchaste Woman'. But in case of *Sharda v. Dharampal*[15], where the core question was, whether a party to a divorce proceeding can be compelled to a medical examination. The three Judge Bench of the Hon'ble Supreme court held that: "If for arriving at the satisfaction of the Court and to protect the right of a party to the lies who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being volatile of Art. 21 of the Constitution of India would not arise."

[11] Civil Appeal No.8402 OF 2011 (Arising out of S.L.P. (Civil) No. 29641 of 2009) available at https://indian kanoon.org/doc/55665/ accessed on 26/08/2017 at 18:10 pm.
[12] Appeal (civil) 6626 of 2004 available at https://indiankanoon.org/doc/1143841/ accessed on 22/08/2017 at 11:20 am.
[13] CM(M) 1604/10 & C.M.APPLs.22481/10, 13683/11 & 4721/11 available at https://indiankanoon.org/doc /96966349/ accessed on 22/08/2017 at 15:45 pm.
[14] 1993 SCR (3) 917.
[15] AIR 2003 SC 3450.

The victory of DNA testing in solving the paternity issue can be clearly seen from the recent case of *Rohit Shekhar v. Narayan Dutt Tiwari*[16] where DNA test played a pivotal role in settling the paternity issue.

5. **Lie Detector Or Polygraph Test:** A polygraph, popularly referred to as a lie detector, measures and records several physiological indices such as blood pressure, pulse, respiration, and skin conductivity while the subject is asked and answers a series of questions. The use of polygraph is prevalent in India as means of detecting lies during investigation but its admissibility in the court of law is a debatable issue as being considered violative of Article 20(3)[17] of the Indian Constitution by virtue of *Selvi v. State of Karnataka*[18].

Chastity of wife has been a serious issue since times immemorial. In Ramayana, Lord Ram ordered Sita to go for Agni pareeksha in order to prove her chastity. But now science has evolved the technique of polygraph, no more requirement for agneepareeksha. Times of India have reported the incident of Chennai where couples are approaching private forensic labs for polygraph tests to resolve suspicion of infidelity.[19]

6. **Blood test and medical tests:** In *P. Ravikumar v. Malarvizhi @ S.Kokila*[20] the divorce petition on the ground of wife being infected from veneral disease in communicable form was ascertained with the help of blood test of both wife and husband by the medical college hospital Chennai.

Similarly medical tests proved the impotency of the wife in the case of *Jyotsnaben Ratilal v. Pravinchandra Tulsidas*[21] and the husband was successful in getting the decree of divorce.

Again in the case of *Sonia Kumar v. Dr. Harshit Kumar*[22] the Court held that the respondent was impotent at the time of marriage and continued to be so at the time of filing of the present petition on the basis of medical report and therefore divorce was granted.

Conclusion

It may be concluded that in the present scenario where though forensic has been admitted as a new discipline in the justice delivery system in almost all spheres yet the technique is applied in each and every case after so many hiccups. Primarily, courts tend to rely on

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[16] (2012) 12 SCC 554.
[17] ARTICLE 20(3).- No person accused of any offence shall be compelled to be a witness against himself.
[18] AIR 2010 SC 1974.
[19] Available at http://timesofindia.indiatimes.com/city/chennai/Couples-take-lie-detector-test-to-save-their-marriage/articleshow/6141239.cms accessed on 12/08/2017 at 10:12 am.
[20] CMSA.No.40 of 2008 and M.P.No.1 of 2010 available at https://indiankanoon.org/doc/51340102/ accessed on 15/08/2017 at 14:14 pm.
[21] AIR 2003 Guj 222.
[22] Available at https://indiankanoon.org/doc/352814/accessed on 15/08/2017 at 15:20 pm.

testimonial evidences and consider such scientific evidences as a weak one. It's the greatest irony of our judicial system that in our day to day life, we rely on science more than any other fact, but when it comes to imparting justice; we consider scientific evidence weak evidence and require corroboration.

Moreover, from the application of the scientific technique till the admissibility of the scientific evidence, at every stage a fundamental right is there as an impediment in the application of scientific technique. The fundamental rights violation leads to the rejection of forensic techniques in the justice delivery system. However, time and again courts have relied upon these techniques by diluting the ambit of fundamental rights in the interest of justice when there is no reasonable means available to arrive at the conclusion. Matrimonial issues are of the kind where private matters are actually discussed and the veils of decency are torn out in front of everyone. Moreover, parties themselves bring their personal issues in the court to be sorted out. All kinds of personal matters ranging from sexual activities to the legitimacy of children are discussed in the court of law. Then what sort of privacy shall be violated if DNA testing, blood testing etc. shall be ordered by the court. If a witness is called to prove the adulterous character of the spouse, or the husband or the wife are called to describe the problems of their relationship in the witness box, what privacy shall be left behind. On the contrary it would be safer and modest to rely on scientific technique without going into vulgar deliberations.

However in Matrimonial cases, Courts have relied on forensic techniques but with a hesitation and not as a matter of course. The need of the hour is to incorporate the forensic principles as a recommendatory or mandatory solution in our matrimonial laws for arriving at right conclusions quickly, keeping the self esteem of the parties intact.

End of Triple Talaq Tyranny

Vijay Luxmi Singh[1]

Abstract

The most pathetic form of mental torture to which Muslim women have ever been subjected to since historical times is the heinous practice of triple-talaq or more commonly known as "instant divorce". Not all Muslim women in India are affected by triple talaq. But triple talaq continues to be an issue where misogyny is deep-rooted, is practised in areas where fundamentalist organisations are strong and where women are not educated. This practice of triple-talaq has recently been declared unconstitutional by a judgement of Supreme Court in the famous Shayara Bano v. Union of India case[2] *popularly known as "Triple-talaq case". The majority opinion of the five judge's multi faith constitution bench held that triple-talaq is not integral to religious practice and violates constitutional morality. This landmark decision of the Apex court has put an end to the organised exploitation of Muslim women in the name of religious code of conduct. This paper attempts to analyse the recent developments with regard to triple-talaq and the historical backdrop of this inhuman practice.*

Keywords*:* Talaq, Triple Talaq, equal rights, Talaq-ul-Sunnat, Talaq-ul-Bidaat, nikah, nikahhalala

Introduction

India is a nation which proudly heralds to be the world's largest democracy, ensuring the protection of equal rights to all its citizens. However, thereliesa domain of some cruel and discriminatory practices among sections of Indian society which tear apart the foundation of equality which has been guaranteed by the Indian Constitution. Triple-talaq is one such practise which gives right to a man to divorce his wife anytime and in the manner he thinks fit, which becomes void and irrevocable. This not only violates Muslim women rights but also makes them inferior in the eyes of society as well as in the eyes of men. Although, this practise of triple-talaq was neither recognized nor sanctioned by The Holy Book Quran and The Holy Prophet, still it has become prevalent amongst the Indian Muslims since time immemorial.

Over a period of time, this practice has been misused by many Muslim mans which severely affected the lives of many Muslim women. There has always been a strong contention that religion cannot take away the basic human rights and natural rights of any human being which this practice does and the most barbaric thing about this type of divorce is that it will be completed even in the absence of wife and even if the wife does not have any knowledge of such divorce. In addition to this, the worst aspect of this insensitive practise is that the consequences are being faced solely by the women folks.

Concept of Talaq

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[2] In The Supreme Court of India Original Civil Jurisdiction Writ Petition (C) No. 118 of 2016 *Shayara Bano v. Union of India and others.*

Talaq is an Urdu word which implies the dissolution of marriage in the Muslim community. The rules of talaq among Muslims are governed by Shari'ah and they differ depending on the interpretations by different legal Islamic schools. There are different modes and types of talaq in Islam, some initiated by the husband and some initiated by the wife. Further, from the point of view of the mode of pronouncement and effect, there are two kinds of Talaq one is Talaq-ul-Sunnat or revocable Talaq, and another is Talaq-ul-Bidaat or irrevocable Talaq.

- **Talaq-ul-Sunnat** has been regarded as the approved form of Talaq in Islam. It is called as Talaq-ul-Sunnat because it is based on the Prophet's tradition (Sunna). The Prophet had always considered talaq as an evil and opined that if at all this evil was to take place, the best formula was one in which there was possibility of revoking the effects of this evil. There is a possibility of compromise and reconciliation between husband and wife. Only this kind of talaq was in practice during the life of the Prophet. This mode of talaq is recognised both by Sunnis as well as by the Shias. Talaq-ul-Sunnat may be pronounced either in Ahsan or in the Hasan form.

- **Talaq-ul-Bidaat** (Irrevocable), also known as Talaq-ul-Bain, is a disapproved mode of divorce. A peculiar feature of this talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. This form of Talaq ends the union between husband and the wife immediately. The Prophet never approved a talaq in which there was no opportunity for reconciliation. Therefore, the irrevocable talaq or triple-talaq was not in practice during his life time.

Triple Talaq and Muslim Laws

Muslim laws rests on the four-fold pillars of the fiqh, namely[3]: the Quran, the Sunnah (Hadiths)[4], the Ijma[5] and Qiyas[6]. Above mentioned sources must have a reference for some principle to be decleared as law in Muslim religion.Now as concerned to the practise of triple-talaq, there stands no Quranic basis to establish that three divorces on a single occasion will amount to an irrevocable divorce. In fact the Prophet despised divorce[7] and described marriage[8] as his Sunnat. The Quran lays down only two kinds of divorces i.e. Talaq-Ahsan and Talaq-Hasan the same being in conformity with the dictates of Prophet. The third form i.e. Talaq-ul-Bidat (Triple Talaq), is considered to be

[3]MULLA, *Principles of Mahomedan Law*, (New Delhi: Lexis Nexis-Butterworths 19th edn, 15th reprint,), Section 33 at p. 22.

[4]Meaning the percepts, actions and sayings of the Prophet Mohamed, not written down during his lifetime, but preserved by tradition and handed down by generations.

[5]Meaning the concurrence of opinion of the companions of Mohamed and his disciples.

[6]Being analogical deductions derived from comparisons of the first three sources.

[7][Abu Dawud 9: 2173] - Narrated by Abdullah ibn Umar "Allah's Messenger (PBUH) said: Divorce is most detestable in the sight of God; abstain from it";

[8]Tahir Mahmood, *Muslim Law of India* (New Delhi: LexisNexis-Butterworths, 3rd ed., 2002) at p. 48.

the most sinful, innovated form of divorce as it is against the letter and spirit of Quran[9] and was disallowed by the Prophet himself. Though Shias and Sunnis have different views regarding triple talaq, it is provided in the Holy Quran that there must be efforts towards reconciliation between the parties to divorce[10].The Supreme Court in *Shamim Ara v. State of U.P. and Anr.*[11] has upheld this view of Quran stating that there must be valid reasons for divorcing someone and there must be an attempt to reconcile. This view has further been upheld by many High Courts[12] including the Kerela HC in *Kunimohammed v. Ayishakutty*[13].

The origin of Talaq-ul-Biddat can be traced back in the second century of the Islamic-era. Although, it was not in practice during the span of first caliph but the second caliph brought this concept of instant divorce. It came into existence to meet some emergency situation and was not made a law permanently. Later on the Hanafis jurists on the basis of the administrative order of second caliph declared this form of divorce as valid[14]. But, Hanafi School[15], recognizing and giving effect to this form of talaq, is actually not a part of the original Islamic law which puts a big question mark on the validity of triple-talaq system in the eyes of Muslim laws itself.

Wrath of Triple Talaq on Muslim Women

For a section of Muslim men, their wives are just an object devoid of any sentiments and feelings. They can marry them anytime at their pleasure as well as can get rid of them whenever they wish by just uttering three simple words "TalaqTalaqTalaq". But the plight of those women, who have been deserted by their husbands just by the way of 'instant talaq' without any justification and reasonable cause, is just unimaginable. Triple-talaq has been executed throughmany mediums which include telephone, telegram, letter, whatsapp,text messages or speed post. These are the things that make this practise patriarchal. As in the case *Rashid Ahmad v. AnisaKhatoon*[16], man pronounced the triple talaq in the presence of witnesses, though in the absence of the wife. Four days later, the talaqnama was executed which stated that the three divorces were given. The intolerable concept of triple talaq has made husband very robust and a wife very paralysed. It is rightly said by Justice Krishna Iyer in case *Yusuf v. Sowramma*that "It is a fallacy that Muslim men enjoys under muslim-quranic law".[17] According to a survey conducted by

[9]Alamgir Muhammad Serajuddin, Shari'a Law and Society: Tradition and Change in the Indian Sub-continent (Dhaka: Asiatic Society, Bangladesh, 1999) at p. 201.
[10][Surah An-nisa 4:34, 35] as cited by Faizur Rahman, "Instant Divorce is alien to Islam's spirit", Indian Express, Kochi ed., June 17th, 2008; An Enlightenment Commentary into the Light of the Holy Quran (The Scientific and Religious Center, Iran, 2nd edn., 1995).
[11](2002) 7 SCC 513; cites with approval: *Sri Jiauddin Ahmed v. Mrs.Anwara Begum* (1981) 1 GLR 358; *RukiaKhatun v. Abdul KhaliqueLaskar* (1981) 1 Gau. L.R. 375.
[12]*RiazFatma v. Mohammed Sharif* I (2007) DMC 26; 135 (2006) DLT 205; *Ummer Farooque v. Naseema* 2005 (4) KLT 565; *Nur Ali (Md) v. Thambal Sana Bibi* 2007 (1) GLT 508.
[13]2010 (2) KHC 63.
[14]Aqil Ahmed: Mohammedan Law; p.175 (2013) Central Law Agency Allahabad, Allahabad.
[15]Muslim Law of India, Third Edition, 2002.
[16]*Rashid Ahmad v. Anisa Khatoon*,(1932) 59 IA 21 (Alld): 1932 PC 25.
[17]*Yusuf v. Sowramma*, AIR 1971 Ker. 261.

Mumbai-based Bhartiya Muslim MahilaAndolan, nearly 92 per cent of Muslim women want a total ban on oral unilateral divorce[18] because of the adversities faced by them.

Triple Talaq in Other Countries

Interestingly, more than 20 Islamic countries have banned this inhuman practice of triple-talaq including neighbouring countries like Pakistan, Bangladesh, Sri Lanka, etc. Egypt was the first ever country to declare triple-talaq as invalid and it provides 90 days procedure for divorce. In 2006, Sri Lanka amended its Marriage and Divorce Act, 1951, which does not extend validity to the concept of triple-talaq. The new Sri Lankan law requires a husband wishing to divorce his wife to give notice of his intention to a Qazi (Islamic judge), who should attempt a reconciliation between the couples over the next 30 days.

In the case of disagreement after the devised period, the husband can give talaq to his wife only in the presence of the Qazi and two witnesses. Many people who understand and study Muslim Law rates the Sri Lankan law as the "most ideal legislation on talaq."[19] The abolition of triple-talaq in Pakistan took place in 1951 and they also have a system of validating a talaq after a period of 90 days only and not before that. Tunisia and Algeria both adopted Tunisian code of personal status and banned instant talaq. In 1959, Iraq, contrary to most Arab countries, has banned the triple-talaq. In spite of all above countries, who have a majority of Muslim population residing in their countries, banned the archaic and intolerable practice of talaq-ul-biddat, the practise continued to prosper among Indian Muslims.

Constitutional Perspective of Triple Talaq

The Muslim Personal Law (Shariat) Application Act of 1937 is the foremost legislation that deals with application of the Shari'ah, which is the religious legal system governing Muslims in India. As per Section 2 of the Act of 1937, Shari'ah applies to talaq as well. Among the different modes of talaq, Talaq-ul-Biddat is the most disapproved detestable and draconian forms of divorce. This form of talaq is invalid and unconstitutional as it is repugnant to natural justice and various fundamental rights enshrined under Part III of the Constitution of India.

- Equality as enshrined in Article 14 is the essence of democracy and a basic feature of the Constitution and it has been expanded to include concepts of non-arbitrariness and principle of natural justice[20]. It is a necessary corollary of Rule of Law[21] and its underlying object is to secure everyone equality of status and of opportunity[22]. If any

[18]Ban Triple Talaq- an abhorrent practice of unilateral divorce in India, Available on https://www.change.org/p/government-of-indiaban-triple-talaq-an-abhorrent-practice-of-unilateraldivorce-in-india, accessed on August 9, 2017 at 09:30 am.

[19]Jayati Godhawat, 5 Major Muslim countries that abolished triple talaq long before, Available on <http://www.indianwomenblog.org. accessed on August 9, 2017 at 11:15 am.

[20] *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

[21]*Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34.

[22]Natural Resources Allocations, In Re Special Reference No. 1 of 2012, (2012) 10 SCC 1.

law is arbitrary or irrational it would fall foul of Article 14.The husband in the case of giving triple talaq has unequivocal right to divorce the wife while the wife cannot do the same. Pronouncing of triple talaq is manifestly arbitrary as it does not recognize equality of status of Muslim women with that of men. Hence, triple-talaq which promotes gender inequality is very much unconstitutional. Further, Article 21of Indian constitution lays down that "no person shall be deprived of his right to life and personal liberty except according to the procedure established by law."[23] The Due process mentioned above has two forms: Substantive due process, wherein the law must be just and fair and not arbitrary or oppressive[24] and Procedural due process, wherein the aggrieved is given a fair right of hearing. This personal liberty of a person cannot be taken away by a law which is arbitrary, unfair or unreasonable. There must be some semblance of reasonableness when a law is trying to restrict someone's right to personal liberty.[25]

- Another barbaric practise that is of halala takes place once the wife is irrevocably divorced by her husband and they can remarry each other only when the wife marries another man (also should consummate such marriage) and her new husband divorces her irrevocable.[26] This was the case in *NagmaBibi v. State of Orissa*[27]. In a civilized society no lady can be compelled to marry another man and consummate that marriage in order to remarry her former husband after talaq. This condition is humiliating and against the dignity of women as protected under Article 21.[28]

- The Constitution of India under Article 25 confers Right to freedom of conscience and free profession, practice and propagation of religion. The protection under Articles 25 and 26 extend guarantee to rituals, observances, ceremonies, modes of worship etc. which are integral to the religion.[29] But for such practices to be considered as a part of the religion, it is necessary that such practices be regarded by the said religion as an essential and integral part.[30] The Court has the power to decide as to what practices constitute an essential and integral part of a religion.[31] Triple-talaq has no validity either under the Holy Quran or the Hadiths. Moreover a Muslim man is neither professing nor propagating his religion by giving triple-talaq. Thus triple-talaq can be classified as a non-essential and non-integral part of Islam.

The fact is that inequality in what has come to be known as personal laws exists across all religious communities. All personal laws are capable of being challenged on the ground

[23]Article 21 of the Constitution of India, 1950.
[24]*Delhi Airtech Services Pvt. Ltd. v. State of U.P.*, (2011) 9 SCC 354.
[25]*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.
[26]Sahih-Bukhari 63:186]; [Abu Dawud 12: 2302].
[27]Is a Special leave petition to protect the fundamental rights of a husband and wife who wish to reside together and are not being permitted to do so by the local community.
[28]*Francis Coralie v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.
[29]*N. Adithyan v. Travancore Devaswom Board*, (2002) 8 SCC 106.
[30]M P Jain, Indian Constitutional Law (LexisNexis, New Delhi, 2014), 7th ed., at p. 1248.
[31]H. H. SrimadPerarulalaEthirajaRamanujaJeeyar Swami v. State of Tamil Nadu, AIR 1972 SC 1586, at 1593.

that they violate fundamental rights regardless of whether they are based on religion or custom, are codified or un-codified. The broader constitutional issue of importance is whether unlike any other laws that are amenable to constitutional challenge for being violative of rights to equality and dignity, are personal laws – be it of Hindus, Muslims, Parsis or Christians – immune from constitutional checks and can they continue to be practiced despite being discriminatory, patriarchal and against fundamental rights of women or any other person for that sake?

Judicial Response to Triple Talaq

Abolition of triple talaq has been long overdue and the Muslim women were demanding it vociferously. There are many cases pending before different family courts across the country. In past, the courts in India have held that "triple-talaq" is "most demeaning", which "impedes and drags India from becoming a nation".[32] In the case *A.S. Praveen Akhtar v. The Union of India*, the court held that the triple-talaq is illegal as the so-called triple-talaq or the talaq-ul-biddat, is clearly an innovation and is treated as less than ideal.[33] The 'Talaq' must be for reasonable cause[34] and there must be an attempt to reconciliation between the two by the arbiters, one from the wife's family and other from the husband's family. If the attempts fail, then they can recourse to talaq.[35]

In the case, *Mohammad Faroor v. Chief of Army Staff and ors.*[36], the court directed that four steps should be taken in order to take talaq reasonably. First, the husband should talk about the differences with his wife. Second, if misunderstanding still exists, both the spouses should sexually distance themselves from each other so that temporary physical separation may stimulate them to unite. Thirdly, if this also does not work then husband should discuss the problems arising between them again with his wife and try to bring reconciliation between them. And finally, if the dispute still remains unresolved, the matter should be placed before arbiters, one from the family of each spouse.

The practice of giving divorce by triple-talaq is declared unconstitutional and violative of rights of women by Allahabad high court also. Further, the Supreme Court, regarding the right of a husband to unequivocally divorce his wife, has laid down that such a divorce, if contested by wife, will not be valid if it was not given for a reasonable cause and there was no attempt for reconciliation between the parties.[37]Further, we are aware of over half a dozen judgments including the Bombay High Court judgment in *Daqdu Pathan v. Rahimbi* in 2002 and the Supreme Court verdict in Shamim *Ara's case* in 2002 over-ruling the validity of triple talaq but those have not led to the curbing of this practice.

Latest Verdict on Triple Talaq

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[32]Available on <http://indianexpress.com/article/india> accessed on August 1, 2017 at 14:34 pm.
[33]*A. S. Praveen Akhtar v. Union of India*, Available on www.indiankanoon.org, accessed on August 9, 2017 at 14:55 pm.
[34]Supra, note 21.
[35]As cited in *Shamim Ara v. State of U.P and Anr.* AIR 2002 SC 3551.
[36]Manu/AF/0094/2016.
[37]*Shamim Ara v. State of Uttar Pradesh*, (2002) 7 SCC 518.

Shayara Bano v. Union of India case[38]

Shayara Bano is a 35-year-old woman from Uttarakhand's Kashipur area and was married for 15 years before she was divorced. Shayara Bano approached the Supreme Court in 2016, challenging the validity of the divorce practices against women followed by Muslims, after her husband gave her triple talaq in October 2015. In her petition, Shayara asked the apex Court to declare talaq-e-bidat, polygamy and nikahhalala illegal and unconstitutional on the grounds that they violate the rights guaranteed by the Constitution under Articles 14, 15, 21 and 25. However, her husband opposed Shayara's plea on the ground they were governed by Muslim Personal Law and all three practices are sanctified provisions under the very same law.

The Constitution bench headed by Chief Justice JS Khehar heard seven petitions, including five separate writ petitions filed by Muslim women, challenging the practice of triple talaq prevalent in the community and terming it unconstitutional. The apex court had on its own taken cognizance of the question whether Muslim women faced gender discrimination in the event of divorce or due to other marriages by their husbands. Five judges from five different communities [i.e. Chief Justice JS Khehar (Sikh), Justices Kurian Joseph (Christian), RF Nariman (Parsi), UU Lalit (Hindu) and Abdul Nazeer (Muslim)] heard the triple talaq case in the Supreme Court. On May 15, the apex court refused to hear all the three cases of polygamy, nikah and halala together, saying "it will focus on one matter at a time.

In its verdict, the 5-judge bench of Supreme Court has barred the controversial Triple Talaq practice, asking the Centre to bring legislation. The apex court put a six-month stay on the practice, directing Parliament to enact a law within the given time period. If law doesn't come in force in six months, then SC's injunction on Triple Talaq will continue. SC has asked political parties to keep their differences aside and help Centre in bringing out law on practice. The bench ruled in 3:2 majorities that Triple Talaq was void and illegal and 'unconstitutional'. SC referred to the abolition of Triple Talalq in Islamic countries and asked why India can’t get rid of it. While Chief Justice J S Khehar and Justice S Abdul Nazeer were in favour of putting on hold for six months the practice of triple talaq, asking the government to come out with a law in this regard, Justices Kurian Joseph, R.F. Nariman and U.U. Lalit held it as volatile of the Constitution. This could be a momentous decision that might herald the end of a law that Muslim women had long argued violated their right to equality.

Major Arguments

Triple-Talaq is a form of divorce followed by Muslims in India. The law allows Muslim men to divorce their wives simply by uttering the word "talaq" three times. Muslim women say they have been left destitute by husbands divorcing them through "triple-talaq", including by Skype and WhatsApp. It has been at the centre of the controversy for

[38] In The Supreme Court of India Original Civil Jurisdiction Writ Petition (C) No. 118 of 2016 *Shayara Bano v. Union of India and others.*

a long period, raising questions of human rights, secularism and gender justice. This practice is seen by a section of Muslims as regressive and many complaints have been lodged, citing how unjust the whole practice is towards women. Proponents of the Uniform Civil Code have often raised the issue and how it tends to go against the basic human rights. The campaign towards removing Triple Talaq gained more weight when instance of divorce by Skype and WhatsApp have come to the forefront. Progressive members have also shown how it has been denounced in an Islamic nation such as Pakistan. Various petitioners had knocked the doors of the apex court seeking to strike down triple talaq.

Following a petition, the Supreme Court for the first time reviewed whether Triple Talaq is fundamental to Islam and therefore legally binding upon women to adhere to the practice. The verdict was delivered by five senior most judges of different faiths. This is indicative of the secular nature of the ruling. The Supreme Court verdict was being awaited with great hope and enthusiasm among the women of the Muslim community. The verdict is expected to bring about a fundamental alteration to the Muslim personal law. The practice of Triple Talaq has been subject to arguments. Some Muslim groups see the issue as a matter of religious right while others, including the Centre, term it unconstitutional. Furthermore, there are also Muslim organisations which want to use these issues as an investment for their growth. Here's a primer:

- The ruling was followed by political parties, Muslim outfits and women's groups who have challenged the practice. Prime Minister Narendra Modi, on the occasion of 71st Independence Day, admired the courage of women who have been suffering due to Triple Talaq, asserting that nation is with them in their struggles. Pime Minister Narendra Modi, appealed to the Muslim community to do away with triple talaq and urged them to not politicise the matter. Then Union minister Venkaiah Naidu said the Muslim divorce system "hampered the right of equality and right of women to live with dignity." Another BJP leader Subramanian Swamy said triple talaq as a “practice is not present in the Quran and any Shariat can be modified.

- Muslim organisations like the All India Muslim Personal Law Board (AIMLPB) opposed the court's adjudication in Islamic matters, maintaining that these practices stemmed from the Holy Quran and were not justiciable as issues such as divorce, inheritance and marriage is governed by Muslim Personal law (Shariat) Application act, 1937. The AIMPLB told the apex court that pleas challenging such practices among Muslims were not maintainable as the issues fell outside the realm of the judiciary. Some Muslims scholars have said that it is an attempt to meddle with their personal laws which are not acceptable in a secular country. Votaries of personal laws have often tended to defend the practices of Triple Talaq and Nikah Halala to safeguard an archaic practice.

- On May 22, the All Indian Muslim Personal Law Board (AIMPLB) filed an affidavit in the Supreme Court and said it would advise the Qazis to tell the brides and grooms to not resort to "triple talaq in one sitting." The All India Muslim Personal Law Board (AIMPLB) told the apex court that marriage in the Muslim community is a contract and in order to protect their interests, they can put special emphasis on certain clauses in 'nikahnama'. The board further said that a Muslim woman had every right to pronounce triple talaq in all forms, and also ask for very high 'mehr' amount in case of talaq. The board's reply came after CJI J.S. Khehar asked AIMPLB counsel Kapil Sibal if it was possible to give bride the right to not accept instant triple talaq. The board also showed the court a resolution passed on April 14, 2017 which stated triple talaq as a sin and that the community should boycott the person doing such an act.

- Today's Muslim woman has understood that she is being discriminated by falsely using the name of religion. The Constitution allows for both gender justice as well as religious freedom. Unilateral triple talaq can hardly be passed off as exercise of the right to religious freedom. As a matter of fact, the right to religious freedom is given equally to male as well as female citizens and it cannot be interpreted to mean a licence to men to subjugate women. Besides, why should the husband be allowed an unfettered right to instant divorce? Why should the husband not be brought under the ambit of law? Why should it be the wife's burden to go to court and challenge triple talaq and in the meantime the husband continues to enjoy normal life? Such disparity can hardly be allowed to continue in a democracy. The modern Muslim woman knows that it is patriarchy masquerading as religion. She knows that gender justice is a fundamental principle of Islam. She is demanding her Quranic rights as well as her democratic rights.

Thus, the Supreme Court's verdict on triple talaq naturally entails further discussion on the necessity of a Uniform Civil Code (UCC) for the country. This is not far-fetched since, in a liberal, democratic and secular society, gender justice based on a sense of equality can only be ensured by a common civil code.

Conclusion

In a civil society, marriage has been considered as a very sacred relationship and hence if need arises it should be dissolved in a very sacrosanct manner irrespective of religion. But the sinful practice of Talaq-ul-Biddat popularly known as "Triple-talaq" violated the basic human rights which are enshrined to each and every human. Hence, as stated in the above paragraphs, the practice of triple-talaq has been arbitrary and irrational. It was oppressive in nature as it tried to limit the rights of Muslim women subject to such discrimination.

The aggrieved women in such a case do not have recourse to any judicial proceedings. This has totally been exercised at the whims and fancies of Muslim men. Therefore, considering the facts that triple-talaq has been un-Islamic, negated by highly regarded

Islamic scholars and blatantly violative of the provisions of Constitution of India, the decision of the Supreme Court to ban triple-talaq is to be welcomed by all sections of Indian society as a long needed respite for Muslim women. The verdict should be seen with a wider aspect of principles of equality and humanity.

However, there must not grow any false illusion that Indian women of other religion, be they Hindu or Christian or Parsi have attained absolute freedom and equality, but as a matter of fact Muslim women face more legal discrimination due to the absence of a codified personal law. Parliament has passed new laws and amended existing laws which govern personal matters of Hindus and Christians. Whereas the Shariat Application Act, 1937 gives no protection to the Muslim women from triple talaq, nikahhalala, polygamy etc. It is a collective failure of the political class towards the constitutional obligation of gender justice and gender equality which has allowed a practice such as triple talaq to continue unhindered. The answer lies in comprehensive reform in Muslim Personal law. Abolition of triple talaq is the first step that must be followed by a widespread social reform movement. Triple talaq must come to an end.

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Constitutional Safeguards to Religious Minorities in India

Chandra Shekhar Rai[1]

The problem of minorities is a universal phenomenon. There is no state in the world today without some kind of minorities. In the words of Henery K. Junckerstorff: "The permanence of minorities is one of the fact on which we have to start our research."[2]India has a composite population. The Indian society lacks homogeneity in so far as there exist numerous religious, cultural, and linguistic groups. There are followers of the Hindu, Muslim, and Christian religions. There are Parsis, Sikhs, etc. each major religion comprises within itself a number of religious denomination and sects. The Constitution has given recognition to a number of languages in the Eighth Schedule. Each state has linguistic minority groups. The pattern of culture varies from place to place.

Since the rise of democracy, in the late 18th century the problem of minorities has become a serious political question and has played a great role in national and international affairs. In the opinion of Prof. Humayun Kabir: "There can be no question of minorities except in a democracy. Unless there is democracy the problem would not arise in that form at all."[3] The first criterion of a democratic system is the recognition of equal rights and duties for all, irrespective of religion, race, caste or language. So it is only democracy that recognises different minorities and provides them equal treatment. It also often stated that the efficiency of democracy lies in giving fair treatment to minorities.Providing safeguard for the various minorities in India can be traced back to the discussion over the philosophy of the Constitution which took place in the assembly at the time when Constitution was drafted. The problem of minorities engaged considerable attention of the drafting committee because of its complicated character and unpleasant history behind it. Now proceed to examine the relevant provisions, as they stand in the final shape today, in the fundamental law of the land. I divided these provisions into two categories; one is general and other is specific, in the former category I shall discuss these provisions which are enjoyed by the minority and majority alike and in the latter those provisions which are meant specifically for certain groups of people.

Principle of Non- Discrimination and Common Citizenship

One of the earliest tasks to which the founder of the Indian Constitution addressed themselves, was to declare the guiding principle to be kept in view in the process of constitution-making. This was achieved by the Objectives Resolution, which ultimately

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[2]K.J.Henery, World Minorities. Calcutta, Bookland, 1961.
[3] H. Kabir, Minorities in a Democracy. Calcutta, Firma K.L. Mukhopadhyay, 1968.

formed the basis of the 'preamble' to the constitution. Which the substance of the resolution was to draw a constitution which would guaranteed and secure to all the people of India justice-social, economic, and political, equality of status, of equal opportunity , and equality before law, and freedom of thought, expression, belief, faith, and worship. The mover of the resolution declare in unequivocal terms: "The future of India that we have envisaged is not confined to any group or section or province or other, but it comprises all the four hundred million people of India."

Try to examine the different provisions of the Constitution which are calculated to ensure the achievement of these ideals and inspirations of the founding and a positive guarantee to the minorities, were aided to be realised through the following Articles of the

Constitution of India, 1950
Article 14-Equality before law
Article 15- Prohibition of discrimination
Article 16- Equality of opportunity in matters of public employment
Article 29(2) - Equality of educational opportunity.
Article 325 and 326- universal adult suffrage
Article 44- uniform civil code for the citizens.

The principle of non-discrimination and the concept of common citizenship are enshrined in all the above provisions. Article 14, 15 and 16 of the Constitution of India guarantees equality and non-discrimination on the basis of religion. Art. 14 say: "The state shall not deny any person equality before law and equal protection of law within the territory of India." The article is very short and very simple, although its significance and scope is very wide and comprehensive. The guarantee under this article extends to all persons-the residents, aliens as well as Indian citizen alike.

The term state in this article refers to government and parliament of India and the government and legislature of the states and all local and other authorities within the territory of India or under the control of the government of India.[4] Article 14 embodies a concept which is hallmark of democracy. In India, Articles 15 and 16 of the Constitution prohibit the state from making any discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them either generally i.e. every kind of state action in relation to citizens (Article 15) or in matters relating to employment or appointment to any office under the state (Article 16).

However, the provisions of these two articles do take adequate cognisance of the fact that there had been a wide disparity in the social and educational status of different sections of a largely caste-based, tradition bound society with large-scale poverty and illiteracy. The words 'class' and 'caste' are not synonymous expressions and do not carry the same meaning. While Articles 15 and 16 empower the state to make special provisions for

[4]Article 12 of the Constitution of India.

other constitutional safeguards backward "classes", they prohibit discrimination only on the ground of 'caste' or 'religion'. In other words, positive discrimination on the ground of caste or religion coupled with other grounds such as social and educational backwardness is constitutionallypermissible and therefore, under a given circumstance, it may be possible to treat a caste or religious group as a "class". Therefore even though Article 15 does not mention minorities in specific terms, minorities who are socially and educationally backward are clearly within the ambit of the term "any socially and educationally backward classes" in Article 15 and "any backward class" in Article 16. Indeed the central government and state governments have included sections of religious minorities in the list of Backward Classes and have provided for reservation for them.

The Supreme Court, in *Indira Sawhney & Ors. v. Union of India*,[5] has held that an entire community can be treated as a 'class' based on its social and educational backwardness. The court noted that the Government of Karnataka, based on an extensive survey conducted by them, had identified the entire Muslim community inhabiting that state as a backward class and have provided for reservations for them. The expression 'backward classes' is religion neutral and not linked with caste and may well include any caste or religious community which as a class suffered from social and educational backwardness. In Article 15 two notable exceptions are made in its application. Clause (3) of the Article permits the state to make special provision for the benefit of women and children and similarly Clause (4) allow the state to make any special provision for the advancement of any socially and educationally backward class of citizens or for the schedule castes and schedule tribes.

Clause (5): added by Constitution 93rd amendment Act, 2006; related to reservation of backward and S.C.&S.T. classes including Private Educational Institutions whether aided or unaided by the state, other than the minority educational institutions referred to in Clause(1) of the Article 30. The above amendment has been enacted to nullify the effect of three decisions of the Supreme Court cases *T.M. Pai Foundation v. State of Karnataka*[6], *Islamic Academy v. State of Karnataka*[7] *and P.A. Inamdar v. State of Maharastra*[8]. This amendment enables the state to make provisions for reservation for the above categories of classes in admission to private educational institutions. The amendment, however, keeps the minority educational institutions out of its purview while Article 15 prohibits discriminations on the ground of religion.

Equality of Educational opportunities

Another area to which the principle of non-discrimination is applied in India is that of education. Art. 29 (2) confer on the citizens equal opportunities in matters of admission into educational institutions. It reads: "No citizen shall be denied admission into any

[5]AIR 1993 SC 477.
[6]AIR 2003 SC 355.
[7]AIR 2003 SC 3724.
[8]AIR 2005 SC 3226.

educational institution maintained by the state or receiving aid out of state fund on grounds only of religion, caste, race, language or of them". Art. 29(2) are quite general and wide in terms and applied to all citizens whether they belong to majority or minority groups. Therefore school run by majority, if it is aided by the state funds, cannot refuse admission to boys belonging to other community.

Universal Adult Suffrage

The concept of non-discrimination as enshrined in the chapter of fundamental rights of the constitution. But apart from this, there are a number of other provisions in the constitutions that guaranteed the treatment of non-discrimination among the citizens and the government. The adoption of the principle of universal adult suffrage is one example. The meaning of the adult suffrage is that all citizens, whether male or female, are entitled to vote if they have completed a specified age and there must be complete equality among all electors, irrespective of religion, race and caste. J.A. Laponnce: "any limitation of franchise usually works to the detriment of minorities …and…universal suffrage is protective of minorities."[9]

Uniform Civil Code

Directive principle of state policy as laid down in the Constitution under Art. 44 for having a Uniform Civil Code for all citizens. The Article reads: "the state shall endeavour to secure for the citizen a uniform civil code throughout the territory of India."[10] With the enactment of such code the discrimination in the area of civil law including marriage, divorce, inheritance and succession, etc. will be done away with. In the words of D.E. Smith: "The existence of different persona laws contradicts the principle of non-discrimination by the state."[11] So the secularisation of law is essential to the emergence of a modern state, foundation of which stand on the twin principle of democracy and secularism.

Religious Minority and Constitutional Law

Right to freedom of religion

In India all religions are given equal recognition and protection. There is no state religion in India. Art. 25 of the Constitution of the India ensure religious freedom and equality of all religions thereby promoting secularism and concept of secularism is implicit in in the preamble of Constitution of India. It was as early as 1962 when the Supreme Court of India express its views on the secular nature of the Constitution of the India *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*[12] holding religious tolerance that has been characteristic feature of Indian civilization from the start of history. The constitution of India under Article 25 unequivocally assures 'freedom of conscience and free profession, practice and propagation of religion' with two exceptions. The scope of this Article is very wide and meaningful. Apart for so many other things, it declares, "the state

[9]J.A. Laponce, *The Protection of Minorities*, pp.111-112.
[10]Article 44 of the Constitution of India.
[11]D.E. Smith, *India as a Secular State.* London, Princeton University Press, 1976. P.116.
[12]AIR 1962 SC 853.

or the government cannot aid one religion or give preference to one religion as against another. Article 25 conferred individual rights to freedom of religion while Article 26 gives group right like denominations, which provides freedom to manage religious affairs subject to public order, health and morality. Article 27 states freedom from taxes for promotion of any particular religion and Article 28 provides provision as to prohibition of religious instruction in state aided institutions.

Cultural and Educational Rights

India is a country of vast distances, inhibited by peoples belonging to different races and religions and speaking different languages. Since the right and interests of divergent population could be adequately safeguarded by provisions guaranteeing their rights in the constitution, so Article 29 and 30 of the Constitution of India provide protection exclusively to Cultural and Educational Rights of the minorities. Article 29(1) is assumed to relate to minorities, from the text of the article we infer that the emphasis is on the word 'conserve'. It intends to preserve the special traditions and characteristics of the minority which distinguishes it from the dominant group.

In this reference **Dr. D.K. Sen** remarks: "The right to conservation includes the following rights (i) the right to profess, practice, and preach its own religion, if it is a religious minority; (ii) the right to follow its own social, moral and intellectual way of life; (iii)right to impart instruction in its tradition and culture; (iv) the right to perform any other lawful act or to adopt any other lawful measure for the purpose of preserving its culture."[13] Since the wording of section start with "any section of citizen within the territory of India ……,"it may thus include majority. Whereas Article 29(1) is wider in its scope as it can be invoked by any section of Indian citizen, Art. 30 are applicable only to religious or linguistic minorities. Article 30(1) which says that all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their own choice. This right is further protected by Article 30(2) which prohibits the state in granting aid to educational institutions from discriminating against any educational institution on the ground that is under the management of a minority whether based on religion or language. This right is however subject to clause (2) of Article 29.

There is distinction between Article 15(1) and Article 29(2)

Art. 15(1) of the constitution prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. However, it differs from Article 29(2) in many respects such asone is available to citizen against state while other protects against state or anybody else who denied the rights conferred by it.

Rights of minorities to establish and manage educational institutions

Article 30(1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institution of their one choice the right is

[13]Comparative study of the Indian Constitution. p.638.

conferred by this clause on two types of minorities –religious and linguistic minorities. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institutions. The administration connotes management of the affairs of the institutions. In *St. Xaviers College v. State of Gujarat*[14] the court held that the management must be free of control so that the founder of their community can mould the institution as they think fit in accordance with their idea of how the interest of the community in general and the institution in particular will be served.

In Re Kerala Education Bill[15], case the court held that the choice of the minority to establish such educational institutions as will serve both purpose of giving through general education to their children in their own language.

By the Constitution 44th Amendment Act, 1978 Right to Property as a fundamental right guaranteed by Article 19(1) (f) and 31 of the Constitution has been abolished. For removal of the Right to Property from the fundamental right would not affect the right to minority to establish and administer educational institution of their choice. For this purpose, the amendment has inserted a new Article 30(1-A) of the Constitution-which state that , state shall ensure that the amount fixed by or determined making any law providing for the compulsory acquisition of such property is as would not restrict or abrogate the right guaranteed under that clause.

There are number of controversies came before the court regarding 'establishment and administration' to resolving the issues such as (a) whether state government can confer or renew minority status for a particular period or not? (b) Whether government declaration is necessary for claiming minority rights? (c) Whether receiving grant in aid from Government alter the nature of the minority character? (d)Who has a right to appoint teacher and principle? (e) Right to have a choice of the medium of instruction etc. In *TMA Pai case, PA Inamdar case and Islamic Academy case*has try to resolve the various issues but the number of the matter still today remain unsettled and are open before the court.

[14]AIR 1974 SC 1389.
[15]AIR 1958 SC 956.

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The Free Trade: Whether Sovereignty and Social Justice are being sacrificed?

Shridul Gupta[1]

Abstract

Free trade is a controversial subject. It brings anxieties and insecurities in people. NGO's and groups are raising protests against free trade. They consider world trade organization as a nexus which is serving interests of developed countries rather than of the people of developing countries or less developed countries. They claim that workers are being laid down by closing of small manufacturing industries; health services and health products have become costly because of TRIPS Agreement and multinational corporations are violating environmental regulations. World trade organization and multinational corporations undermines a country's sovereignty. Sovereignty has shifted from their elected representatives at home to faceless and unaccountable bureaucrats at corporate headquarters in foreign land. This article explains both the classic theory and the theory of comparative advantages which substantiates the economic advantages of foreign trade. In reply to environmentalists, who worry about free trade's impact on the environment and their belief that free trade results in greater environmental degradation, this article explain that environmental problems stem from the failure to clearly establish and enforce private or public property rights. Article explain that the benefits of free trade are substantial as the higher incomes that come with free trade not just allow consumption of more goods, but also help people to afford better food, better access to health care & medicines, better education, better affordable housing and better technologies that improve environment. In fact, free trade promotes democracy. Free trade also contributes to peace indirectly, by promoting political reforms and democratization. Countries that are more open to trade tend to be less corrupt, and trade restrictions breed corruption.

Keywords: Free Trade, Social Justice, Comparative Advantages, WTO.

Introduction

Thomas Babington Macaulay almost two hundred years ago in the year 1824 declared that the free trade is one of the greatest blessings which a government can confer on its people.[2] However, even after two centuries free trade is a controversial subject, which brings anxieties and insecurities in people. NGO's and even individual groups whether concerned with environment, human rights, society betterment, or labour rights are raising protests against free trade. They consider world trade organization as a nexus which is serving interests of developed countries and their multinational corporations rather than of the people belonging to developing countries or less developed countries. They complain that global corporations are causing harm to people by falsely inducing them to purchase wasteful consumer products and to consume costly packed food products. They claim that workers are being laid down by closing of small manufacturing industries; health services and health products have become costly because of TRIPS Agreement and in their operations these multinational corporations are violating

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[2] Macaulay, Thomas Babington. (1900), *The Complete Writings of Lord Macaulay. Vol. 18, Speeches and Legal Studies. Boston: Houghton, Mifflin.*

environmental regulations. WTO and MNCs not only undermines a country's sovereignty but are causing adverse effect on a country's culture and society as a whole.

They complain that free trade forces painful economic adjustments for workers and their families because of closure of factories and lay-offs. Charges are also being made that free trade has over used natural resources, polluted the water and air, made work places less safe, lessened the jobs, and depressed wage levels. MNCs are accused off violating labour and human rights by colluding with the politicians of the host countries and have eliminated the small family firms and have no care of consumer protection.[3] People believe that free trade has caused broken homes with more divorces, uprooted families from native place to cities resulting in mushrooming of slums. Vandalism and crimes are hidden costs of free trade.[4] Devastation caused by the WTO policies has generated immense pain worldwide which is growing in social and political backlash and in demonstrations at WTO summits.[5]

Why hostility against the World Trade Organization?

The rapid increase in global trade and international integration has accelerated the pace of economic change causing painful economic adjustments. The working of World trade organization have crossed trade barriers overruling all regulatory policies enacted for health, safety, labour laws and the environment. All those who are disturbed by vigorous changes are raising legitimate concerns in ways commerce and social values are dealt. To them it appears sovereignty has shifted from their elected representatives at home to faceless and unaccountable bureaucrats at corporate headquarters in foreign land.

Few questions need answers that why Free Trade is demystified and complex? What is the necessity of free trade? Whether the economic realties of developing countries qualify for free trade? Whether free trade has caused adverse impact on the employment, health and environment? And Whether the WTO has eroded a country's sovereignty?

Why Free Trade has rapidly increased?

Neither any sector of the economy nor a country has been left unaffected from international markets. Just like trade of goods within a country, the trade between countries is considered mutually beneficial for people. International trade has increased rapidly because costs and facilities which were previously restricting international trade are now much lower, like transport & transportation costs, transaction costs, and costs imposed by government.

Costs of transporting goods between markets have not only lessened, but also have changed in qualitative ways. Containers, bulk shipping, and other innovations have not

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[3] Nader, Ralph, ed. (1993) *The Case against Free Trade: GATT, NAFTA, and the Globalization of Corporate power.* San Francisco: Earth Island Press.p.1.

[4] Buchanan, Patrick. (1998) *The Great Betrayal: How American Sovereignty and Social Justice are being sacrificed to the gods of the Global Economy.* Boston: little, Brown, p.286.

[5] Wallach, Lori, and Patrick Woodall. (2004) *Whose Trade Organization*? New York: New Press, P.283.

only cut loading times but also resulted in more efficient transportation. The air fright-transport has cut delivery times of perishable goods. Technological innovations have made delivery mechanism easy.

Transaction costs – costs/ expenses incurred on acquiring knowledge – are much lower. Before the revolution in information technologies, it was difficult to know about distant markets; or information about tastes and demands; and information about the spending power of the inhabitants. Now, not only the companies but consumers can have information about the products available in foreign markets.

International trade has also expanded because government's tariffs and trade restrictions, import-tariffs, import quotas and foreign-exchange control have been greatly reduced. Custom & excise rules have been relaxed. Few non-tariff measures are there to protect domestic manufacturing & markets from foreign competition; in general trade barriers are almost non-existent.

Why We Need Free Trade?

Classic theory

The basic theory for trade is based on specialization and exchange. A person earns an income by specializing in certain activities and than use that earning to purchase required goods and services like, food, clothing, housing, and health care – which are produced by others. It simply means that one 'exports' the goods and services that he produce and 'import' goods and services produced by others which he wants to consume. This division of labour enables one to increase his consumption which would not be possible if he try to be self-sufficient and produce everything for himself. Thus, specialization allows people to enjoy higher standards of living and give access to a variety of goods and services. In a similar way, trade between countries is an international extension of the division of labour& specialization. So, if a state has no reason to limit the free exchange of goods within a country without a justification; it has no reason to limit trade between countries without compelling reasons.

Adam Smith in his magnificent work *The Wealth of nations* first published in 1776, specified justifications for free trade which is applicable even today. Smith explained, that 'All commerce that is carried on between any two countries must be advantageous to both the countries, and therefore all duties, customs, and excise should be abolished, and free commerce and liberty of exchange should be allowed with all nations."[6]

Adam Smith believed that free trade increase competition in the home market and checks exploitation of consumers through high prices and poor services. Wealth of any society depends upon division of labour and this division of labour enhances productivity – the basis for rising living standards. Adam Smith believed that free trade enables small

[6] Smith, Adam (1978) *Lectures on Juris*prudence, Oxford; Clarendon Press, pp. 511, 514.

countries, to extend the size of their market. International trade allows such countries to achieve a more refined division of labour, and therefore reap a higher real income.[7]

Theory of Comparative Advantages

David Ricardo discovered the theory of '*comparative advantage'*.[8] Comparative advantage means that a country could find it advantageous to import certain goods even if it could itself produce those goods more efficiently than other countries. Conversely, a country would be able to export goods even if other countries could produce them more efficiently. In both cases, countries stand to benefit from trade.

But why would a country ever import goods that it could produce more efficiently than another country? Answer is Comparative advantage. Ricardo stated that international trade is not driven by the absolute costs of production, but by the opportunity costs. What determines a country's comparative advantage? It has no single answer. Sometimes specialization is based on climate or natural resources, or skills and capital, or cheap labour or government promotion of a particular industry. Some sources are immutable, while others can evolve over time – based on technology, education and workers' skills. Entrepreneurship and the business environment are also critical factors. For example, a country may have an ideal climate for producing wine, but without capital and skills necessary for production, that advantage remains unexploited.[9]

The Gains from Trade

John Stuart Mill in his, *The Principles of Political Economy*,[10] pointed out three principal gains from trade:

1. Direct economical advantages of foreign trade;
2. Indirect effects which are benefits of high order;
3. Economical benefits of commerce are surpassed in importance by effects which are intellectual and moral.

Direct Economical advantages

The "direct economical advantages" are gains from specialization. Mill stated that by exporting in exchange for imports, countries uses its limited productive resources (such as land, labour and capital) more efficiently and thus achieve a higher national income. This higher national income makes the country able to afford more goods and services than would not be possible without trade. Free trade allows the firms to sell in a larger market. Firms are also able to reduce average costs of production by expanding output. These economies of scale are passed on to consumers.

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[7] For a complete discussion of Smith's ideas about trade and trade policy see; Irwin, Douglas A. (1996) *Against the Tide: An Intellectual History of Free Trade.* Princeton: Princeton University Press.

[8] To see how Ricardo discovered the theory, see Ruffin, Roy J. (2002) "David Ricardo's Discovery of Comparative Advantage." *History of political Economy* 34(winter): pp. 727-48.

[9] *Ibid.*

[10] Mill, John Stuart, 1909. *Principles of Political Economy*, London: Longmans p. 580.

Free trade also improves economic performance by increasing competition in the domestic market. This benefit comes through a change in the pricing behavior of imperfectly competitive domestic firms. Without free trade, firms with market power tend to restrict output and raise prices thereby harming consumers while increasing their own profits. But international competitions force these firms to behave competitively. Another gain is benefit to consumers from exposure to a large variety of goods. Variety in goods is just as valuable for producers as it is for consumers. Free trade also expands the range of intermediate goods available for domestic firms to use as inputs. These inputs increase the productive efficiency of the industry that produces the final goods.[11]

Indirect effects: Productivity Gains

Mill's second gain from trade is its "indirect effects." He stated that trade improves economic performance not only by allocating a country's resources to their most efficient use, but also by making those resources more productive. Extension of the market improves the process of production. A country which produces for a larger market than its own, introduces a more extended division of labour, make greater use of machinery, and make inventions and improvements in the process of production. Thus, trade promotes productivity growth. The higher is an economy's productivity level, the higher is that country's standard of living.[12]

Mill mentioned that international trade contributes to productivity gain in two ways:

1. It serves as a conduit for the transfer of foreign technologies that enhance productivity; and
2. It increases competition that stimulates industries to become more efficient and improve their productivity, these forces less productive firms out of business and allow more productive firms to expand.[13]

Trade as a conduit for the transfer of foreign technologies operates in several ways. One is through the importation of capital goods. Because imported capital goods embody technological advances, they enhance economy's productivity. Trade barriers raise the prices of imported capital goods and hinder country's ability to benefit from technologies that could raise productivity. Growth in productivity is also the result of investment in R&D. Importation of foreign ideas can be a spur to productivity. Foreign research can be imported directly or its benefits can be secured by importing goods that embody it. Countries that are open to free tree gain more from foreign R&D expenditures because trade in goods provide knowledge generated by R&D.[14]

Import of specialized intermediate goods that embody new technologies, as well as reverse engineering of such goods are sources of R&D. Developing countries, which do

[11] *Ibid.*
[12] Mill, 1909, 581.
[13] Mill, (1909), 583.
[14] Keller, Wolfgang. 2004. "International technology Diffusion" *Journal of Economic Literature* 42 (Sept), 752-83.

not conduct much R&D themselves, can benefit from R&D done elsewhere because trade makes the acquisition of new technology less costly.[15]

The second channel by which trade contributes to productivity is by forcing domestic industries to become more efficient. Trade increases competition in the domestic market, diminishing the market power of any firm and forcing it to behave competitively. Competition also stimulates firms to improve their efficiency; otherwise they face risk to go out of business.[16]
John Stuart Mill's third and final principle was that "the economical advantages of commerce are surpassed in importance by those of its effects which are intellectual and moral."[17]

The idea of *doux commerce* observed by Montesquieu's in *The Spirit of laws* is that "commerce cures destructive prejudices."[18] Trade brings people into contact with one another, and breaks down the narrow prejudices that come with insularity. Commerce forces merchants to be more responsive to customers. There is a long-standing belief that trade promotes peace among nations because two nations that trade with each other become reciprocally dependant. Most of the research affirms that there is a positive link between trade and peace.[19]

Democracies are more peaceful than autocracies. Overwhelming evidence shows that democracies rarely go to war against one another. Chile, Taiwan, South Korea and Mexico after being integrated into the world economy have moved to more democratic political systems. Thus, trade contributes to peace indirectly, by promoting political reforms and democratization. Trade indeed promotes democracy.[20] Countries that are more open to trade also tend to be less corrupt, trade restrictions breed corruption, particularly if bureaucracies are responsible for allocating import licenses.[21]

Free Trade and the Environment
The most vocal critics of free trade are environmentalists who worry about its impact on the environment. They believe that free trade results in more economic activity, and the more economic activity leads to greater environmental degradation. Environmental disasters, horrible air and water pollution, killing of lakes and streams with toxic

[15] Keller, Wolfgang. 2002. "Trade and the Transmission of Technology.' Journal of Economic Growth 7: 5-24.
[16] See Sivadasan Jagadeesh. 2003. "Barriers to Entry and Productivity: Micro-evidence from Indian Manufacturing Sector reforms." Working Paper, University of Chicago Graduate School of Business, November.
[17] Mill, 1909, 581.
[18] Montesquieu. 1989. *The Spirit of Laws* Translated by A.M. Cohler, B.C. Miller and H.S. Stone. New York: Cambridge University Press, p. 338.
[19] Oneal, John, Bruce Russett, and Michael L. Berbaum. 2003. "Causes of Peace: Democracy, interdependence, and international organizations, 1885-1992." *International Studies Quarterly*, 47 (Sept), pp. 371-91.
[20] Mansfield, Edward D; *Helen v. Milner, and B. Peter Rosendorff*. 2000. "Free Trade: Democracies, Autocracies, and International Trade." *American Political Science Review* 94 (June): 305-21.
[21] Ades, Alberto, and Rafael Di Tella, 1999, "Rents, Competition, and Corruption." American Economic Review 89, pp. 982-93.

chemicals, oil split in seas, massive over-use of natural resources, all are result of free trade.

A question arises, is there a relationship between trade and the environment? And whether trade led to environmental damage or actually benefits it? Protectionists of free trade say that environmental damage results from poor environmental policies, not from free trade; Degradation has resulted from inappropriate use of natural resources in land, sea and air. The overuse of these resources is because of well-defined property rights.

When property rights are not well established – means no one has ownership rights and control over a resource – than it is open to all to access the resources. It leads to exploitation beyond social optimal level. Thus, environmental problems stem from the failure to clearly establish and enforce private or public property rights. Fisheries, agriculture and forestry provide illustrations.[22]

Fisheries: Ocean fishing is a common resource that is over utilized, and yet fishing is heavily subsidized. These subsidies led to excess capacities in fishing fleets, which in turn promotes over fishing. Thus, subsidies harm efforts to conserve fishing stocks and promote sustainable development. Many countries have pressed the WTO to discuss on international agreement to limit or abolish fishing subsidies to prevent further depletion of ocean fishing.[23]

Agriculture: Import restrictions, domestic price supports and export subsidies in the agricultural sector are widespread among industrialized countries. More a country protects its domestic agricultural producers; the more these producers rely on pesticides and fertilizers. They rely on chemicals to boost yields because those regions are not well suited for all types of agricultural production.[24] Use of farm chemicals results in contamination of soil, water and air and soil erosion. Thus, trade barriers and agricultural subsidies intensify land use, increase application of agrochemicals, intensify animal production practices and overgrazing, degrade natural resources, loss of natural wild life habitat and biodiversity, reduce agricultural diversity and expand agricultural production into marginal and ecologically sensitive areas.[25]

Countries that have a comparative advantage in agriculture, whether industrialized or developing, do not depend heavily on fertilizers and pesticides to maintain output. Liberalizing trade in agricultural products would benefit the environment by allowing countries with a comparative advantage in agriculture to expend production and forcing countries with a comparative disadvantage to import. Thus, an international relocation of

[22] Milazzo, Matteo, 1998, "Subsidies in World Fisheries: A Reexamination, World Bank Technical Paper no.406.
[23] *Ibid*.
[24] Anderson, Kym. 1998. "Agricultural Trade Reforms, Research Initiatives, and the Environment." In E. Lutz, ed., Agriculture and the Environment: Perspectives on Sustainable Rural Development. Washington D.C.: World Bank, p. 74.
[25] *Ibid*.

cropping production from high-priced to low-priced countries would reduce substantially, and quickly, the use of chemicals in world food production.[26]

Forest Trade: Environmentalists charge that liberalization of trade in forest products has accelerated an unsustainable rate of deforestation around the world. But as is the problem with all open-access resources, better forestry management is the only key to reduce the rate of deforestation. Eliminating trade restrictions would directly improve the efficiency of wood use. Timber trade will raise the value of forests by providing demand for its products. Low values give local users less incentive to conserve the forest resources. Thus, a ban on import of raw tropical forest lumber by developed countries would not only fail to stop deforestation, but might accelerate it due to the inefficiency of local processors.[27]

Industrial Pollution: There is relationship between the pollution emissions and country's per capita income. The relationship is like inverted "U": as per capita income rise, pollution increases; but beyond a certain point, further increases in income diminish pollution. The initial increase in pollution is due to industrialization, while the decrease is due to more effective environmental regulation and cleaner pollution technologies that come with higher incomes.[28]

Conclusion

Thus, the benefits of free trade are substantial. The higher real incomes that come with free trade not just allow consumption of more goods, but also help people to afford better food, better access to health care & medicines, better education, better affordable housing and better technologies that improve environment. Free trade is beneficial as it allows a country to take advantage of the opportunity to trade. But free trade is not the only determinant of whether a country's achieve economic prosperity. Free trade is not a 'magic' that can solve all economic problems. Many other economic problems like stable macroeconomic policies, the rule of law, and the protection of property rights enable the market mechanism to function properly, and they are the preconditions for reaping the full benefits of international trade.[29]

According to Adam Smith, "Commerce and manufactures can seldom flourish in any state which does not enjoy a regular administration of justice, in which people do not feel secure of the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not regularly employed in enforcing the payments of debts from all those who are able to pay. Commerce and manufactures can

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[26] Sampson, Gary P. 2000. *Trade, Environment, and the WTO: the Post-Seattle Agenda*. Washington, D.C.: Overseas Development Council, p.55.

[27] Anderson, Kym. 1992 "Effects on the Environment and Welfare of Liberalizing World Trade: The Cases of Coal and Food." In Kym Anderson and Richard Blockhurst, eds., the Greening of World Trade Issues. Ann Arbor: University of Michigan press.163.

[28] *Ibid*.

[29] *Ibid*.

seldom flourish in any state in which there is not a certain degree of confidence in the justice of the government."[30]

Thomas Macaulay stated in 1845 "that free trade is not single cause that makes nations either prosperous or miserable. Only an idiot can say that free trade is the only valuable thing in the world; that religion, government, police, education, the administration of justice, public expenditure, foreign relations have nothing to do with the well-being of nations.[31]

[30] Smith Adam, 1976, An Inquiry into the Nature and Causes of Wealth of nations. Oxford: Clarendon Press, p.910.
[31] Maculay, Thomas Babington, 1900, The Complete Writings of Lord Maculay, vol.18, Speeches and Legal Studies. Boston: Houghton, Miffin, p.89.

Critical Analysis of Amendments to Indian Companies Act 2013

Padma Aparajita Parija[1]

The Corporations are considered as the back bone of the society. Both in the domestic and in the international capital markets the corporations' invite capital from a larger investor base. As a result of the investment the investor vests his faith and trust in the ability of the corporation's management. The investor expects the board and the management to act as trustees and ensure safety of the capital invested by him and also assurance of a profit in return. Hence the management is expected always to act in their best interests and adopt good corporate governance principles and practices while doing their business.

Corporate governance has become a subject of immense importance in recent years. At the initial stages it was thought as a tool of management and taught as part of business equity by academic gurus of management. Lawyers, particularly the academic lawyers thought of it as an extended study of Company Law. But with the changing economy worldwide, due to the changes in Socio-Financial structure of unit economy and the change in the structure and composition of the corporate sector, the study of Corporate Governance has become a separate discipline of study. It is also important to note that the discipline is still in its nascent stage and drawing knowledge from various disciplines like sociology, economics and finance, culture, legal system, human psychology and behavioral patterns and so on and so forth.

However, over the last few years, regulatory bodies have taken numerous steps towards inculcating good corporate governance practices among Indian companies. Corporate Governance is a relatively new issue in the Indian industry. It has assumed greater importance in the context of what has happened to companies like Enron, Xerox, WorldCom, etc. The concept of corporate governance has been defined in several ways because it potentially covers the entire gamut of activities having direct and indirect influence on the financial health of corporate entities.

Noble laureate Milton Friedman defines[2] it as, "Corporate Governance is the procedure of conducting the business according to the desires of the stakeholders being ruled by the basic principles of the society enacted in law and embodied in local customs and to generate as much capital possible." The meaning of Corporate Governance suggests that

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[2] Opinion of Nobel Laureate Milton Friedman on Corporate Governance available at: https://books.google.co.in/books?id=al6zP7foCSEC&pg=PT37&lpg=PT37&dq=Nobel+laureate+Milton+Friedman+defines+it+as,+%E2%80%9CCorporate+Governance&source last accessed on 20/4/16.

it's the best to be done for the betterment of the management, to encourage healthy relations between companies and their shareholders; to improve the position and standards of outside Directors; to encourage and enhance long-term relations; to ensure informational satisfaction of all stakeholders with regard to any material inquiry and to ensure that the modus operandi of the executive management, in best the interest of shareholders and stakeholders is properly monitored.

In India, company legislation has until recently been the main instrument for improving corporate governance. Subsequently incorporating the recommendations of the Bhabha Committee,[3] this law, among other things, incorporated the abolition of the system of managing agencies, an institution that had served the country well during the early days of corporatization, but has fallen into disrepute through abuse malpractice in its application by its latter day exponents.

Governance initiatives through regulation have also made significant strides in the country. The Securities and Exchange Board of India (SEBI) has an ongoing programme[4] of reforming the primary and secondary capital markets. The Stock Exchanges in the country also mandate several salutary requirements through their Listing Agreements that every publicly traded company has to comply with. Among the professions, 'The Institute of Chartered Accountants of India' has emerged as a mature body regulating the profession of public auditors, and counts among its achievements the issue of a number of accounting and auditing standards.[5]

The acceptance of the inalienable rights of shareholders as true owners of the corporation by management and the role of managers as trustees on behalf of the shareholders proves the practice of Corporate Governance in the true sense. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of the company.[6] It is truth that the adequacy and the quality of corporate governance shape the growth and the future of any capital market and ultimately the economy. The concept of corporate governance has been attracting public attention for quite some time in India.[7]

With an intention to have stringent corporate governance principles and network for better management of the corporate sector, the Indian Companies Act 2013 was introduced after substituting the old Act of 1956. The ambit of this research work is pertaining to Directors Liability under Corporate Governance in India. Hence if we shift

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[3] Bhabha Committee Report on Corporate Governance available at: http://reports.mca.gov.in/Reports/ 22Bhabha%20committee%20report%20on%20Company%20law%20committee,%201952.pdf last accessed on 21/11/16.

[4] SEBI Circular on Corporate Governance available at: http://www.sebi.gov.in/cms/sebi_data/ commondocs/pt01_h.html last accessed on 2/11/16.

[5] Governance Document available at: http://111.93.33.222/RRCD/oDoc/egov_200027.pdf lasted accessed on 14/9/15.

[6] Report of Narayana Murthy Committee on Corporate Governance, 2003, available at : http://www.sebi.gov.in/cms/sebi_data/attachdocs/1357290354602.pdf last accessed on 20/10/16.

[7] SEBI Corporate Governance Committee Report available at: http://www.sebi.gov.in/commreport/ corpgov.html last accessed on 3/10/16.

the focus of overall governance development to directors' liability then it can be clearly stated that the law governing directors has been made more stringent through a series of amendments to the Company Law[8] in India and the directors' position is becoming one with more responsibilities and accountability. The Board of Directors is the most important decision-making body within the company.[9]

The concepts of corporate governance and chairmanship are interrelated and inextricably linked themes. This is because corporate governance is concerned with the system by which companies are directed and controlled[10], which is clearly the responsibility of their boards of directors. Equally clearly, it is the chairman who is responsible for the working of their boards. Thus, the way in which corporate governance principles are put into practice is primarily a matter for board chairman. The first Principle of *Combined Code* on Corporate Governance[11] states: "*Every company should be headed by an effective board, which is collectively responsible for the success of the company*." [12]

One of the greatest evils of contrived Corporate Governance is its deleterious impact on society by thwarting competition and encouraging undeserved economic rent-seeking. Chandrasekhar Krishnamurthy's paper on "The Two Sides of the Governance Coin: Competition and Regulation"[13], explores the casual relationships between competition and governance, and concludes that: Greater competition tends to show up in greater variations in standards of firm-level governance both within countries and among countries; Firms operating in a competitive environment need to display superior corporate governance quality in comparison to their peers in order to gain access to resources and to enhance their credibility; and it is this tendency to increase relative corporate governance scores that drives the observed divergence.

So far as the fixing of responsibility is concerned, a mechanism that has come into focus due to corporate governance crisis is that of audit committees. Legislations now require the formation of audit committees and stipulate the minimum proportion of independent directors in the committees. These committees are now expected to ensure that some of the malpractices of the past are no longer adopted. While the persons reporting wrongdoing can now approach Ombudsman chairman of the audit committee, according to section 177(9) of the Companies Act 2013 in several organizations, without being indentified, ensuring that they do not face harassment and victimization from those

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[8] Ministry of Corporate Affairs, Reports on Corporate Governance available at: http://www.mca.gov.in/ MCASearch/search_table.html last accessed on 20/11/16.
[9] Corporate Governance Concept available at : https://www.extension.iastate.edu/agdm/wholefarm/ html/c5-71.html last accessed on 20/11/16.
[10] Cadbury Committee Report available at: http://www.ecgi.org/codes/documents/cadbury.pdf last accessed on 2/5/16.
[11] The Combined Code on Corporate Governance available at: https://www.frc.org.uk/getattachment/ 1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Goverance.aspx last accessed on 2/5/16.
[12] Combined Code available at: http://www.ecgi.org/codes/documents/combined_code_final.pdf last accessed on 2/5/16.
[13] The Two sides of the Governance Coin- Competition and Regulation Available at: https://www.researchgate.net/publication/265533459_The_Two_Sides_of_the_Governance_Coin_ Competition_and _Regulation last accessed on 20/2/15.

involved in such actions and the protection is provided under section 177(10) of the 2013 Act, it still remains a ticklish issue.

Under the new law the listed companies are mandatorily required under the policy of whistle blowing and vigil mechanism, to constitute a vigil mechanism system which will strictly provide protection to directors and employees against victimization. While the role of institutional investors has also come into focus, given the size of their investments, their involvement has a significant impact on the quality of corporate governance only in some situations.

The scams and scandals in the corporate world which has disturbed the base of the economy has been a driving force for taking up the topic as an area of research. Work on directors' liability is a unique tool for comparing various legislative systems in our globalizing economies. Directors' liability is a source of knowledge of corporate legal works all over the world and a favourite topic of controversy and interest among the legal community. It is therefore not surprising that it is a subject frequently taken up by at international conferences of the legal profession.

No management worth its salt will ignore the effects of its operations on the society. But to say that they have more responsibilities beyond, means misapplication of its assets for unrelated objectives. It will lead to inefficiency in fulfilling the economic purposes. There have been amendments for spending the funds for social causes or bring reforms. But this in turn brings in more embezzlement of corporate funds and hence a "scam".[14] The beneficiaries in this will be the corporate executives and the political players as it will reduce their responsibility, we can say their liability actually.[15]

In the name of governance there is too much to talk about corporate social responsibilities, but least talk of corporate rights. In general, rights and responsibilities are two sides of the same coin. When a responsibility is entrusted to somebody, it is implied that the rights necessary to discharge that responsibility are also given to that person. It is not only logical, but a practical necessity.[16] Every individual has a responsibility to the society of which he is a part. Directors, being individuals, have also a similar responsibility. It is as individuals, not as directors. But there is no law prescribing that individuals shall discharge their responsibility to society. It is enough if they do not violate any law.[17]

The positive effect of corporate governance on different stakeholders ultimately is a strengthened economy, and hence good corporate governance is a tool for socio-

[14] Confederation of Indian Industry, "A Handbook on Corporate Social Responsibility - in India", Price Water Coopers Pvt. Ltd. last accessed on 20/11/13.
[15] Jasthi Jawarharlal, "The concept of Corporate Governance" Asia Law House,Hyderabad, 1st Edn., 2012. P-192.
[16] *Id* P-197.
[17] Jasthi Jawarharlal, "board of directors- under new companies act,2013" Asia Law House,Hyderabad, 1st Edn.,2014. P-101.

economic development.[18] The last few years have seen some major scams and corporate collapses across the globe, be it Enron, Arthur Anderson or WorldCom. All these events have made stakeholders realize the importance and urgency of good corporate governance. People are concerned how companies are being managed; after all it's the public money/investment which is at stake in most of these companies. International organizations like IMF, WTO and World Bank are also insisting on transparency. Efforts are being made to have a common set of disclosure policies and norms. All this has moved corporate governance and transparency up the public agenda.

While the principles of agency do apply to a large extent in their relationship with the company, a director has to use only such skill as may reasonably be expected from a person of his knowledge and experience. He is not an insurer of the success of the company. The directors will, therefore, not be held to be liable if they act honestly for the benefit of the company, and within their powers and with such care as is reasonably expected of them, having regard to their knowledge and experience.[19]

New standards for corporate governance have now emerged and companies will have to change their behavior and values in accordance with these standards. The new standards include Independent directors, external auditors, rotation of auditors, proper succession planning among others. If we talk about these corporate standards introduced by the new Companies Act 2013 there are many. No doubt it was actually a milestone, a new and bold step taken by the Central Government to change the age old Company law, though the result was partly effective such as on paper the law looked very effective but the practical implications and challenges faced by the abiders didn't match the expectations of the makers. No Act is helpful if it is not implemented in its spirit; similarly there is also a need to have unified laws for corporate sectors to remove ambiguities due to the existence of multiple acts and statutes. [20]

The Companies Act was enforced with an objective to reduce the administrative and regulatory burdens on the Companies and principles of Good Governance ensure that the companies move in a progressive manner, have a fair modern and effective framework of company law which is crucial to economic development. It is a modern legislation, which has a strong and modern regulatory mechanism which will have a substantial impact on the functioning of directors and officers within the effective Corporate Governance system.[21]

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[18] Vrajlal Sapovadia *Good Corporate Governance: An Instrument for Wealth Maximization* available at: https://papers.ssrn.com/sol3/papers.cfm?abstract-id=955289 last accessed on 14/11/16.

[19] Directors need to play an active role in the company available at: http://www.livemint.com/ Companies/Co3vIFRiSREca0o90nlgLP/Directors-need-to-play-anactive-role-in-a-company8217s-a.html last accessed on 2/5/15.

[20] IOSR Journal of Business and Management (IOSR-JBM), e-ISSN: 2278-487X, p-ISSN:2319-7668. Volume 16, Issue 5. *IOSR-JBM* Ver. IV (May, 2014),PP 26-32.

[21] Practical Challenges faced in the implementation of Companies Act 2013 available at: http://www.ey.com/Publication/vwLUAssets/EY-companies-act-2013-practical-insights/$FILE/EY-companies-act-2013-practical-insights.pdf last accessed on 20/11/16.

The new act also requires the board of directors of the company to discharge their corporate social responsibilities by way of stator regulations as part of their duties. It was observed that there are some difficulties and large number of issues needs to be addressed in the Companies Act, 2013.[22]

In order to remove these difficulties the Companies Amendment Act was passed. The act made significant changes and removed various practical difficulties in relation to insolvency, audit committee and Related Party Transactions in the line with the principle of "ease doing business". These changes pose issues in relation to meeting of the Companies etc. thus the Government is very serious in considering the voice of the stakeholders and is ready to go for the change if the suggestions are logical.[23]

Based on the experience of certain corporate executives whose opinion has been sort for in the collection of empirical data and who help and assist in the understanding and implementation of the Companies Act 2013, certain big Indian and multinational corporate houses,[24] have expressed their agonies and have shared the challenges, faced by them while implementation and practical application of the Act.[25]

These experiences are believed to be helpful and vital for numerous companies in India. Though the Companies Act 2013 was enacted by the Government as a bold step for the betterment of the Corporate Sector and ultimately for the development of the economy but very limited guidance was available from the regulators for its easy understanding and implementation. The knowledge gap towards implementation was tried to be bridged through certain training programs organized by certain institutions and financial organizations, which aimed at providing deep insights and understanding into several aspects of implementation challenges under the Companies Act 2013. [Certain important problem areas were referred such as;

- The concept of "related party transactions" and determination of related parties and transactions that will be covered under it.
- To carve out the approach is to be adopted for compensation and procedure to deal with transition impact around depreciation.
- Determining and defining internal financial control (IFC) to bring more clarity and to establish the procedure to be strategically followed for the assessment and implementation of IFC.
- The concept of Enterprise Risk Management (ERM) to elaborated and explained with determination of requisites for implementation of ERM.

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[22] *Supra* note 21.

[23] Practical Challenges faced in the implementation of Companies Act 2013 available at: http://www.ey.com/Publication/vwLUAssets/EY-companies-act-2013-practical-insights/$FILE/EY-companies-act-2013-practical-insights.pdf last accessed on 20/11/16.

[24] *Ibid*.

[25] Challenges Posed in Companies Act 2013 available at: http://corporatelawreporter.com/2014/04/08/ practice-passion-feara-mantra-facing-challenges-posed-companies-act-2013/ last assessed on 20/11/16.

- The requirement for determining the elaborate procedure for compliance and explain the concept of all laws and regulations.
- Determination of a strong procedure to be adopted for board evaluation process. Requisites Company needs to fulfill to implement a strong system.
- Determination of a stringent procedure to be followed for implementation of vigil mechanism.
- Determining the issues and practical challenges being faced by the corporate houses in implementing the CSR framework and procedure to deal with the same.
- Interpretation and determination of issues around loans and borrowings.[26]

From a study of the current legislative and regulatory regime of India, It is apparent that India has in place some laws and regulations pertaining to Disclosure, and professional and ethical standards. The present act of 2013 came into effect in two phases half of the provisions were given immediate effect in 2013 where as half was given effect in 2014, left dependent on establishment of National Company Law Tribunal.

1. Amendment under India's corporate laws only, will not help the sector to prosper but clarity in implementation and enforcement procedure has to be made, without ambiguity and leaving less chance of chaos in their understanding and enforcement.
1. Strengthening the responsibilities of audit committee, only making laws regarding the working procedure will not help but a supervisory body has to be constituted to keep vigil about their performance.
2. Reforms of the boards of directors, which have already been done by the 2013 Act, but also there should clear demarcation about their qualifications and position and need for constitution of a supervisory body and demarcating and determining the thin line of difference between the concept of management and governance, so that they should not override each other in their practical applicability.
3. Enhancing shareholders' activism and proper investors' protection.
4. Embracing new principle of corporate governance not only on paper but also in spirit; there is vital necessity for intensification of the responsibilities of audit committee, to seek the proper statutory auditor- company relationship so that there will be a proper maintenance of accounts and financial statement by the head of the corporate.
5. It's also advised that the functioning of audit committee to be free from all encumbrances.
6. In the 2013 Act Companies there are restrictions on Corporates from making investments through more than two layers of investment subsidiaries. Hence suggested that the removal of restrictions will ultimately lead to a positive development and restructuring of the Companies and benefits them in the long run as

[26] Practical Challenges faced in the implementation of Companies Act 2013 available at: http://www.ey.com/Publication/vwLUAssets/EY-companies-act-2013-practical-insights/$FILE/EY-companies-act-2013-practical-insights.pdf last accessed on 2/4/16.

they are hampering or obstructing the functioning, structuring and the ability of companies to raise funds.

7. The 2013 Act has removed the division of objects into 'main' and 'other' objects. But the result of the amendment was not fruitful for the companies as they faced difficulty in approving the name and getting Corporate Identity Number as it had numerous objects. Hence suggested to amend the provision 4(1) (c) and do the needful.
8. The next suggestion is with regard to the introduction of limitation on the scope and ambit of "pecuniary relation" of independent directors. Act though specifies that there should not be any pecuniary relation of an independent director with the company, or any of its holding, subsidiary or associate company or their promoters or directors, during a stipulated period of time. But has not specified the limitations hence even a minor pecuniary relation was also covered which ultimately created problem.
9. It has been restricted under the Act that an individual cannot be appointed as an Independent Director if during any of the preceding three financial years his relative is or was a KMP or an employee in the company, its holding, subsidiary or associate company. Hence it can be suggested to modify the restriction with respect to one level below board positions prior to the appointment of the person concerned. However, it can be clarified that the restrictions can be retained in case it is found that the power is being abused by virtue of the relation prevailing.
10. Next suggestion is with regard to the definition of sweat equity shares. Permission to raise the start up limit of issuance of sweat equity shares from twenty five percent and to fifty percent of the paid up equity share capital.
11. It is also suggested to simplify the private placement procedure and permission for to raising deposits for first five years without any upper limits. Specify the definition or measures as to concept of 'start-up.'
12. The issue of dropping the sections pertaining to the forward dealing by directors and insider trading, (Sections 194 and 195) raised by the stakeholders is a debatable one. The Act of 2013 provides that these provisions are applicable to both private and public company equally. But as the securities of a private company are not marketable hence they do not qualify under section 195 as securities. Thus the private companies are excluded from the above mentioned provision. Hence it is unjustifiable to apply the insider trading provisions to private companies, if one goes according to the opinions of stakeholders.

SEBI on the other hand being the capital market regulator has very comprehensive regulations in the concerned subject matter which apply to listed companies. So in the view of the difficulties faced by the stakeholders in their transactions, it can be said that the sections 194 and 195 can be omitted from the Act.

Logically it might be correct to omit the sections but if the fiduciary responsibility of the director is taken into consideration and if directors being in private and unlisted organizations abuse their power and use confidential information for to gain profit and do

not act in best interest of the organization there is requirement of law to check the wrong. Hence these are certain valid reasons for including the insider trading prohibitions in company law in addition to securities law.

2. The Government should also take into consideration certain problems faced in the practical applicability of the Act. The matters here in pointed out as follows:
    - The concept of "related party transactions" and determination of related parties and transactions that will be covered under it.
    - To carve out the approach is to be adopted for compensation and procedure to deal with transition impact around depreciation.
    - Determining and defining internal financial control (IFC) to bring more clarity and to establish the procedure to be strategically followed for the assessment and implementation of IFC.
    - The concept of Enterprise Risk Management (ERM) to elaborated and explained with determination of requisites for implementation of ERM.
    - The requirement for determining the elaborate procedure for compliance and explain the concept of all laws and regulations.
    - Determination of a strong procedure to be adopted for board evaluation process. Requisites Company needs to fulfill to implement a strong system.
    - Determination of a stringent procedure to be followed for implementation of vigil mechanism.
    - Determining the issues and practical challenges being faced by the corporate houses in implementing the CSR framework and procedure to deal with the same.
    - Interpretation and determination of issues around loans and borrowings.

3. The Companies Act 2013 is one of the key and important legislations in the country. Through notifications, circulars, amendment orders and clarifications, the Ministry of Corporate Affairs, has brought about approximately 140 changes to the original legislation since its inception. The number of amendments has caused hardships to companies and their advisors as the regulatory and compliance structure remains unclear.
4. It can be said so that there are lots of hardships to the companies, stakeholders including investors, as the Companies Act 2013 was amended with 2015 Act, so it can be suggested that we should not repeat the history by bringing amendments within short period of time but to give the new legislations ample amount of time to prove itself, with the situation prevailing. It should bring clarity in its structure through practice and proper implementation and clear the chaos and ambiguity state of affairs in the corporate sector.

Stalking: A Growing Menace in Society

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Abstract

There has been a surge of violent acts committed against women in society. The world has moved beyond acts of violence and discrimination meted out to various ethnicities. Now, it has been gender-based. Many centuries ago women were always relegated to a subordinate position in the social hierarchy. Violence is meted out to ensure and sometimes force women to remain in a subordinate position without challenging the bastion of male superiority. The Secretary-General of United Nations in a report of 2006 informed the world on a devastating statistics that one in every three women around the world are beaten, coerced into sex or otherwise abused in her lifetime by an abuser usually known to her and sometimes very closely. This paper would delve into the various violent acts often committed in the society against women but at the same time the thrust would be on a recent surge of stalking which has resulted in brutal deaths. More often it has been seen that women have been at the receiving end of this simple act of obsessive attention by an individual towards the other. Often celebrated in movies and music as a male obsessively wooing the female partner has taken proportions of harassment and intimidation. In judgments delivered by the courts of various countries including India, stalking is now a criminal offence. The research would thus highlight the categories of violence, the reasons for their increase in such pandemic proportions, stalking as a growing menace and recommending suggestions for the urgent need to control such crimes.

Keywords*: Stalking, Violent Act, Harassment, Criminal Offence, and Legislation*

Introduction

It is believed as per mythology, in the origin of human being that after creating man the almighty felt a void in his creation and thus from the shadow of man the creation was completed with the emergence of woman. Setting aside the veracity in the belief of this concept it is candid that a society cannot be conceptualised without taking woman alongside. Almost all epics speak high of the status of women in ancient culture. Down the stream history has witnessed up and down in the status of women. Manu, the legendary figure of Hindu mythology justified 'where women are honoured there reside the God'. The Hindu scriptures emphasise on the role of women in all sacred performance and rituals where they are taken alongside and thus the coinage of the adage "the better half" or "ardhangini". All epics of Hindu mythology speak high of the status of women in the society and also emphasise on what they ought to be. However, with the change of guards down the scrolls of history the socio-economic status of women varied. With the advent of Muslim rule women were deprived of their basic rights. Nonetheless they were made to stay behind Purdah or curtain and thus an unseen social barrier put around them. Even now some conservatively ruled countries today have continued that restriction.

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A shaft of sunrise set to change the scenario with the advent of the British Raj. The Christian Missionaries also undertook the burden of educating Indian men and women. Subsequently, the wave of freedom struggle spread to every corner of India despite the problem of transportation and communication. The movement/crusade initiated by social reformers like Raja Rammohan Roy to remove the social stigma like Sati, widow remarriage and evil sayings on women education gained momentum. Later on in response to the call of Gandhiji the women community left behind their veil and marched hand-in-hand to fight for the freedom of India. Consequently, the Constitution of India emboldened the rights of women by placing them at par to their male counterpart. The independent India has witnessed as to how the so-called weaker section i.e. the women society, has proved itself in every field, from onerous responsibilities to combating in the battleground. Sustainable development of human resources is universally acknowledged as the most effective means of a strong base of socio-economic transformation. Women bring half of the resources and act the back-bone of a family. Their contribution is counted upon for development of any society.

Despite the remarkable role played by the women population in the freedom movement the subsequent steps initiated by the social reformers to assert women's right upon different spheres gained a slower momentum. The gender bias from within the family played as the stumbling block for decades. Ironically the undermining of the women population still persisted in the society in a greater vigour. The urban women for being exposed to varied educational spheres gradually realized and tried to assert their rights and responsibilities. The rural women on the other hand remained under oppression to a sphere of unimaginative stage. It is evident from the prevailing conditions of society that the poorer the household the more burden the women have to bear. Further, it surmounts with illiteracy, abject poverty, social neglect and lack of basic ingredients to be picked up as a resource deprive women from the decision-making power. It is assessed that women contribute nearly 60% of world's labour but in turn receive 10% of its income. The subordinate position of women world wide has continued for ages across the globe. They have been often relegated to a socially irrelevant position despite their contribution both to the household and to the society. What is alarming is the increased phenomenon of the occurrence of violence against women.

In 1979, The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) included violence against women in its recommendations 12 and 19 and also the Vienna Declaration and Programme of Action but it was only in 1993 that the United Nations General Assembly passed a resolution on the Declaration on the Elimination of Violence Against Women to explicitly define it. Gender-based violence would then refer to any act of violence which makes women suffer physically, sexually, or psychologically because they are women. This would also suggest that the main perpetrators of such crimes are men. The prevailing notion for the reason of such violent crimes is notions of inferiority and subordination of women and superiority of men.

A woman is subjugated to violence in various facets of her life. The different types of violence inflicted upon her at various stages of her life can be classified as:

a) Pre-Birth- In a patriarchal society, sex-selective abortions are rampant and it is visible in the distorted sex-ratios in majority of states in India. This menace is in spite of stringent laws present in our legal system.
b) Infancy and Childhood- This stage is marred by occurrences of female infanticide; animal, sexual and psychological abuse; child marriage; incest; child prostitution and pornography.
c) Adolescence and Adulthood– There are serious challenges in this phase of a girl-child and harassment is aggravated with forced prostitution; sexual harassment at workplaces; date-rape, rape and marital-rape; stalking; acid-throwing; dowry deaths; honor killing.
d) Old Age– Forced suicide or homicide of widows for economic reasons; sexual, physical and psychological abuse is also reported to be committed on women at this stage of life.

What one can see from the above classification is that violence inflicted on women is not restricted to the traditional form of beating, raping or murdering. There are ever-changing modes and with the advent of media and technology unconventional modes of harassment have also been registered as complaints with the police. In recent times stalking and acid-attacks have become a common phenomenon of intimidation and harassment by a male whose ego simply could not accept rejection or disinterest.

There has been difficulty in defining stalking. Initially the term was used to describe poachers in English Oxford Dictionary. But the term gained relevance in the 20th century when the media described the word as 'obsessed'. Thereafter stalking was defined as 'the willful and repeated following, watching and/or harassing of another person'. The other crimes usually involve one act but stalking is a series of action that occur over a period of time. In USA the Violence Against Women Act of 2005 amended a statute of 1902 to define stalking as 'engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

a) fear for his/her safety or the safety of others
b) suffer substantial emotional distress

The Nirbhaya's case in India (the Delhi gang rape case) threw open the flood gates for the need of urgent criminal law amendments in India. Justice J.S. Verma and Justice Leila Seth sat down to research on the increased rate of crime against women in India and submitted their report to Government suggesting reforms in criminal laws. The Government took cognizance of the urgent need of such proposed reforms. The Ordinance was promulgated to put immediate redress mechanism in place till the time the legislature was ready with a law based on the reforms suggested.

The Criminal Law Amendment Act, 2013 was passed by the Lok Sabha on 19th March, 2013 and by the Rajya Sabha on 21st March, 2013 making certain changes in the

provisions of the Ordinance. After receiving the Presidential assent the bill came to force in April 2013. This new Act has recognized certain acts as offences which were dealt earlier under related laws. The new offences included acid attack, sexual harassment, voyeurism and stalking.

Stalking is discussed in Section 354D which protects women from being stalked by men. It restricts men from making any personal interaction repeatedly after getting a clear indication of disinterest. It also restricts such attempts even on internet, email or any other form of electronic communication. Though there are exceptions which include an act by state to detect crime or the act is in compliance of law which is just and reasonable. Thus any unwarranted intrusion to such privacy may amount to imprisonment of not less than one year but may extend to three years and the convict shall also be liable to payment of fine.

Cyber Stalking

Crime against women was not restricted to only physical domain as discussed the article. But with the advent of technology crimes were committed against women in cyber space which is full of personal information. Cyber stalking is the use of electronic communication like cell phones, emails, internet, and twitter to threaten, harass and intimidate a victim. These stalkers have the advantage of easily disguising themselves; adopt false identities; change servers often to create difficulty in locating them. Since the cyber space is full of personal information, often this type of stalking is deliberate, persistent and methodical. As discussed earlier, there was no formal mention of an offence called 'stalking' before the recommendations of Justice Verma committee. The first case of cyber stalking was reported in the case of *Ritu Kohli*, who filed a complaint against a person who was using her email id for chatting in the internet. Because of this misuse, she was getting calls at odd hours. Based on the complaint the police tracked the IP address of the accused and arrested him. A case was registered under Section 509 of IPC and thereafter he was released on bail. But what was important to note that the case was the reason behind the amendment done in 2008 to the Information Technology Act, 2000 to take stock of such crimes.

Case Studies

In the famous case of *Priyadarshini Mattoo*, the victim was stalked incessantly before her brutal rape and murder. It was shocking to see that a student of a premier law college, in the heart of Delhi, who had filed repeated complaints with various police stations, could not survive the brutal attack by the stalker in her own residence even when she was provided with a personal security officer by the state. The accused was a law student and the son of a very senior police official. The victim was constantly harassed and intimidated for two successive years before being killed brutally for expressing her disinterest in her stalker. The whole nation was shocked at this murder and the accused was charged by the state for murder and rape. There was no specific law then to take cognizance of the harassment caused to the victim for two years in which she had sought the help of the state. Had there been preventive measures in the law then, the situation

would have been different for the victim. The continuous stalking of the victim by the stalker in spite of police complaints, shows the utter disregard to the rule of law. The stalker did not care for the consequences of his activities and had no fear of law. The apologies tendered in the police stations were perceived as a method to avoid any registering of a formal case. This was in spite of complaints filed by the victim repeatedly.

The second case which shook Delhi in recent times to make us aware of the deteriorating law and order situation was the murder of nineteen year old *Meenakshi*. She was stabbed 35 times by two brothers living in her neighborhood. One of the brothers had been alleged to be stalking her for more than a year. The family had complained to the police for repeated harassment meted out to Meenakshi along with a threat of acid attack. The accused have been instigated by their mother to commit the crime. The crime was committed in broad daylight in full view of neighbors but unfortunately nobody came to her rescue. The girl had to pay a huge price for refusing the advances of her stalker. The law and the police could hardly come to her rescue.

Conclusion and Suggestions

Many scholars and analysts have linked various factors for the reason of such violent crimes committed against women. Sociologically, the un-equal status of women have been one of the primary reasons where the bodies of women are treated by men as battle-ground for fighting the battle to establish male-superiority. It is not uncommon therefore for women to be raped, stripped, battered and paraded naked to showcase the dominance of males. Morality is a burden to be carried only by women and hence the society would believe in extreme branding. Remedy lies in bridging the gap of such skewed power relations in the society to actually bring about changes. Mere formulation of laws will be lip-service to curb a disease of such magnitude.

Secondly, this change in power relations will not be successful until and unless women are given economic empowerment. The fear of abandonment by women by their husbands forces them to accept violence as a part of their life as they have no source of revenue to sustain themselves. With growing industrialization now there has been a upswing in women workforce but still they are subject to humiliation and harassment. But it is seen that an economically independent women will be in a better position to desist the occurrence of violence. Hence effective measures must be taken to encourage educating women and making them undertake economic activity.

Thirdly, there is no doubt that there is an urgent requirement of stringent laws. Many such laws are already in place but what defeats the purpose is the lack of implementation of such laws. Perhaps even the lacunae of awareness are also sometimes the reason why women are not able to take remedial measures and continue living with such harassment. The case of *Priyadarshini Mattoo* highlighted the urgent need on part of the state to formulate laws but *Meenakshi*'s case was an eye-opener that mere formulation of laws is not a necessary deterrent to the occurrence of such brutal crimes. What is required is the

stringent implementation of such laws. *Fourthly*, the police have to be sensitive to the reporting and investigation of such crimes. There is often a stigma attached in the reporting of such crimes. The need of the hour is to recruit more women in the police. This would help women repose faith in the legal system. A more pro-active women commission with a focus on out-reaches activities to create awareness among women to report such crimes will help the society in reducing future occurrences. *Lastly*, there is an urgent need for media to play a positive and constructive role in curbing such harassment. As mentioned in the very beginning that stalking begins as a simple act of obsession but takes violent turns. The Young minds in their age of curiosity are inspired by movies, advertisements, stories and plays which they try emulating in real life. The social responsibility lies in avoiding the spread of such content in media that could evoke negative perceptions and would do little to curb such menace.

Protection Provided to Indian Civil Servants: A Critical Analysis

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Abstract

Constitution specifically provides safeguards to civil servants under Article 311. However, Second ARC haverecommended for repealing of Article 311. The real problem is few civil servants can't be prosecuted even they found guilty of corruption. It must be ensured that civil servants can't make mockery of law if they are guilty and it is precisely for that reason, that the continued use of Doctrine of Pleasure is required in India. Civil Service Commission is instituted to regulate the employment and working conditions of Civil servants. It manages hiring /promotion and also works for assurance of the values of public service. The Commission consists of a Chairman and ten members. The Union Public Service Commission (Members) Regulation 1969 governs their service terms and conditions. As per the provisions of Article 309, Parliament is authorized to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union. State Legislatures are empowered to regulate recruitment and conditions of service of persons appointed to public service or posts in connection with affairs of the State. Important provisions provided for civil servants under Article 308 to 323 of Part XIV of the constitution.

Keywords: Civil Servant, Corruption, Constitution, and Protection

Introduction

Indian constitution has specific provisions for safeguards of civil servants. Constitution specifically provides safeguards to civil servants under Article 311. These safeguards were provided to them so that they can perform their duties without any interference from the government. But now in past couple of years we have observed that civil servants are using those safeguards to shield them from corruption. This situation has become a matter of concern. Although second ARC have discussed repealing of Article 311 and cited specific reasons in favor and against of it. The real problem is few civil servants can't be prosecuted even they found guilty of corruption. It must be ensured that civil servants can't make mockery of law if they are guilty and it is precisely for that reason, that the continued use of Doctrine of Pleasure is required in India. The present paper critically analyzing these safeguards we will briefly discuss the basic concept of doctrine of pleasure, its exceptions and judicial interpretation of the same.

Doctrine of Pleasure

In United Kingdom

The general practice is that a civil servant of the Crown holds office during the pleasure of the Crown and can be dismissed by the Crown. Moreover, it can be done without

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giving any explanation and without giving any compensation except where it is otherwise provided by a statute. However, the Crown is not bound by the contract of employment between it and a civil servant and therefore in the case of removal, a civil servant is not entitled to damages for premature dismissal of his services. So, in England, the doctrine of pleasure is practically based on the public policy. Nevertheless, its operation can be modified by an act of Parliament.

In India

Under Article 310 of the Constitution, the doctrine of pleasure has been explained. Article 310 of our Indian Constitution provides that except as expressly provided by the Constitution, each individual, who is a member of defense service or of a civil service of the Union or of an All India Service or holds any post connected with defense or any civil post under the Union, holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a state holds office during the pleasure of the Governor of the State.

Although, in the case of *Shyam v. Union of India*[3], it was held that Doctrine of Pleasure under Article 310 is not specifically required to be exercised by the President or the Governor on its own. It can be exercised by the President or the Governor acting on the suggestion of the Council of Ministers. However, in another leading case of *Union of India v.Tulsiram*[4],it was held that opinion or pleasure of the President or the Governor under Article 310 of our Indian Constitution is not subject to any contract and cannot be confined by contract, ordinary legislation or the rules made under Article 309.

The executive power of the Centre and of a state is vested with the President and the Governor of the State. The President has a fixed tenure and he does not hold office at pleasure. The Governor is the executive head of a state and has tenure of five years. But he can be removed or terminated from his office earlier because he holds his office during the pleasure of the president. This doctrine of pleasure has no specific safeguards and in a few of the cases the Governors have been removed by the president arbitrarily. There are no specific safeguards available to him.

The ministers of the Centre and of different States have real executive powers with respect to their ministers. But all the ministers hold office during the pleasure of the President or a Governor. Practically all Ministers hold office during the pleasure of the Prime Minister or the Chief Minister which is exercised formally in the name of the President or Governor. The Council of Ministers of Delhi holds office during the pleasure of the President though it is accountable or answerable to the Legislative Council. The Attorney General of India and the Advocate General of every state also hold office during the pleasure of the President or the Governor.

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[3] AIR 1987 SC 1137.
[4] AIR 1985 SC 1416.

There are certain exceptions to the doctrine of pleasure. This Doctrine of Pleasure is subject to other specified provisions of the Constitution. Like, Article 310(1) will not apply where the constitution expressly provides for secured term of services. Our constitution under Articles 124 and 217 guarantee a secured term of services to the judges of the Supreme Court and the High Courts. Correspondingly, the Comptroller and Auditor-General of India as per Article148, Chairman and Members of Public Service Commission as per Article 317 and the Chief Election Commissioner as per Article324 also have constitutionally secured term of services. However, Doctrine of pleasure does not apply to the holders of these offices. There can be removal from office on the ground of 'Proved misbehavior' or 'incapacity'. It can be done by following the procedure incorporated by the constitution.

Judicial Perspective

As we all know that rule emanating from the pleasure doctrine is that no servant of the Crown can maintain an action against the Crown for any arrears of salary. The assumption underlying this rule is that the only claim of the civil servant is on the bounty of the Crown and not for a contractual debt.The Judicial perspective on Doctrine of Pleasure can be discussed in the following cases:

The Supreme Court of India in *State of Bihar v. Abdul Majid*[5], refused to follow this rule of the Doctrine of pleasure. In this particular case sub-inspector of police was removed from service on the ground of cowardice, was later reinstated in service. But the government contested his claim for arrears of salary for the period of his removal. The Supreme Court in this particular case upheld his claim arrears of salary on the ground of contract or quantum merit i.e. For the value of the service rendered.

Similarly, Supreme Court reiterated the above judgment in *Om Prakash v. State of Uttar Pradesh*[6]where it was held that when removal of a civil servant was found to be unlawful, he was entitled to get his salary from the date of dismissal to the date when his dismissal was declared unlawful.Further in*State of Maharashtra v. BaishankarAvalram Joshi & Another*[7], it was held that a claim of arrears of salary was held to be based on contract. Further the judiciary has also acted as checks and balances on the arbitrary exercise of the power of conferred by the doctrine on the president and the Governor. The Supreme Court in *Jaswant Singh v. State of Punjab*[8]held that in spite of finality of Article 311(3) the "finality can certainly be tested in the court of law and interfered with if the action is found to be arbitrary or malafide or motivated by extraneous considerations or merely a ruse to dispense with the inquiry.

[5] AIR 1954 SC 245.
[6]AIR 1955 SC 600.
[7]AIR 1969 SC 1302.
[8](1991) 1 SCC 362.

In *Union of India v. Balbir Singh* on 5 May, 1998, the Supreme Court held that the Court can examine the circumstances on which the satisfaction of the president or Governor. If the Court finds that the circumstances have no bearing whatsoever on the security of State, the Court canhold that satisfaction of the president or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations.

Constitutional Safe Guards Provided to Civil Servants

Indian Constitution has specific provisions for civil servants under Article 308 to 323 of Part XIV of the constitution. But safeguards have been provided under Article 311. We will briefly discuss these safeguards with the help of bare act language and few case laws.

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed[9]

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.[10]

Article 311 is a fortification of civil servants. This is an important guarantee which severely restricts the doctrine of pleasure contained in Article 310 (1) of the Indian Constitution. Article 311 envisages three major penalties which may be inflicted on a civil servant. These penalties are dismissal, removal and reduction in rank. Dismissal and removal from service are grave penalties which end the services of an employee. Article 311 gives more protection to a civil servant against these penalties. Reduction in rank does not end the services of an employee and, has been treated differently.

Reasonable Opportunity of Hearing

A civil servant can't be dismissed, removed or reduced in rank unless an inquiry is made in which he is informed of the charges against him given a reasonable opportunity of being heard in respect of those charges. This provision incorporates the rule of natural justice which is one of fundamental principle of constitution. Procedural inconsistency or defect in the inquiry proceedings does not affect the order of dismissal or reduced in rank etc., and does not result in reinstating the employee. In such scenarios, the enquiry proceedings shall continue from the stage where it stood before the alleged vulnerability surfaced. The same was decided in the case of *Union of India v. Y.S. Sandhu*[11]&*UP State Spining Co. Ltd. v. R.S Pandey*[12].

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[9] The Indian Constitution, 1950, Article 311(1).
[10] *Id.,* Article 311(2).
[11] AIR 2009 SC 162.
[12] (2005) 8 SCC 264).

In *Superintendent of Post Offices v. R. ValasinaBabu*[13]the respondent secured Government Job by producing false & fabricated certificate. After inquiry the Collector cancelled the certificate. After disciplinary proceedings he was dismissed from service. It was decided that in case of this particular nature where there is criminal offence, employee could be dismissed without conducting any inquiry. However Departmental proceedings reinitiated only when a charge-sheet is issued (*Coal India Ltd. v. Saroj Kumar Mishra*[14]). Departmental proceedings and criminal proceedings are different in procedure and result both. Unless the charge in criminal trial is of grave nature with complicated facts and law, departmental inquiry can be done separately, held in the case of *NOIDA Entrepreneurs Association v NOIDA*[15].

Reasonable Opportunity

Reasonable Opportunity is basic principle &a facet of natural justice. The basic purpose and motive is to ensure fairness, impartiality and reasonableness which are fundamental to our constitutional principles. In *Uma NathPandey v. State of U.P.*[16]it was decided by the Supreme Court that the very purpose of the following principles of natural justice is the prevention of miscarriage of justice and any failure of justice.

The following points are generally kept in mind for ensuring reasonable opportunity

a) The civil servant against whom action is to be taken must be given notice of such charges.
b) The charges must be clear and precise without any ambiguity.
c) The delinquent civil servant must be informed of the evidence by which those charges are sought to be proved against him.
d) Copies of relevant document must be supplied to the employee before proceedings are started.
e) No evidence and witness should be taken in absence of delinquent employee.
f) Personal hearing if demanded by the delinquent civil servant, should be given;
g) The civil servant charged must be given an opportunity to cross-examine the witnesses produced against him;
h) All the witness should be examined in the presence of delinquent and he should be given an opportunity to cross-examine them; that is biparte rule should be followed.
i) The civil servant against whom an inquiry is being held has a right to argue his own case. It is a part of personal hearing;
j) Inquiry officer should not bias and rule against biasness should be followed.
k) The decision by inquiry officer must be reasoned one and must be substantiated by facts and evidence.
l) Inquiry officer can't be witness himself.

[13]AIR 2007 SC 1126.
[14]AIR 2007 SC 1707.
[15] AIR 2007 SC 1161.
[16]AIR 2009 SC 2375.

It was held in the case of *Secretary A P Social Welfare Residential Educational Institutions v Pindigee Sridher*[17], that hearing is not necessary where the employee has secured the employment by fraud. If a case is made out of after an inquiry for imposing penalty, the punishment, would be given on the basis of evidence adduced during such inquiry and the employee will not be entitled to make any representation against the penalty proposed. Swarn Singh Committee[18] made recommendations to have special tribunals for resolving the disputes of civil servants:

- This had resulted in backlog of cases in High Courts. Article 323-A was included and inserted in the Constitution as a follow-up measures by the Constitution (forty-Second Amendment) Act, 1976.
- The basic &primary purpose of service Tribunals is to deal exclusively with service matters and to provide to persons covered by them, speedy relief in respect of their grievances.
- Article 323-A is not self-executor. Parliament 'may', by law provide for the adjudication of or trial by administrative tribunals of disputes and complaints with respect to recruitment and condition of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
- By means of this authorization Parliament in 1985 has enacted The Administrative Tribunals Act providing for the establishment Central/State/Joint Administrative Tribunals.
- It is very clear from the language of Article 323-A that Parliament alone has power to establish such tribunals. The object was to equate these tribunals with the High Court so that the burden of the later could be reduced.

Exceptions

The proviso under Article 311provides for certain circumstances in which the procedure envisaged in the substantive part of the clause need not be followed. These are as follows:

a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his connection on criminal charge; or

b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry

c) Where the president or the governor as the case may be, is satisfied that in the interest of the security of the state it is not expedient to hold such inquiry.

These provisions have been briefly explained below in detail:

a) Criminal Charge

[17]AIR 2007 SC 1527.

[18]Swarn Singh Committee was formed in 1976 to study Constitution of India in detail.

The Hon'ble Supreme Court has emphasized under Art. 311(2) (a), the disciplinary authority is to regard the conviction of the concerned civil servant as sufficient proof of misconduct on his part. The authority is to decide whether conviction demands the imposition of any penalty and, if so, what penalty. For this purpose, the authority has to take into consideration the decision of the criminal court, the entire behavior or conduct of the civil servant, the gravity of the offense, the impact of the offence on the administration, whether the offence was of a technical or trivial nature, and extenuating circumstances if any. The disciplinary authority has to do ex-parte and without giving a hearing to the concerned civil servant. This particular power has not to be exercised arbitrarily and should be exercised following the judicial principles. Hearing need not be given while imposing the penalty after conviction on a criminal charge, but the right to impose a penalty the duty to act justly.

b) Impracticability

It is very important to know that this particular clause applies only when the conduct of government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. Before declining government servant his constitutional right to an inquiry, the important consideration is whether the conduct of the government is such as justifies the penalty of dismissal, removal or reduction in rank. In leading case of Tulsi Ram Patel the Hon'ble Supreme Court while explaining the scope of the clause has said "whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by cl. (b). What is requisite is that holding of the inquiry is not practicable in the opinion of a reasonable prudent person holding such opinion on the basis of such reasonable facts The Hon'ble Supreme Court further decided that the reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary as he is the best judge of the situation.

c) Security

Undercl(c) the satisfaction has to be that of the President or the Governor as the case may be. The satisfaction must be with respect to the expediency or inexpediency of holding an inquiry in the interest of the security of the State. Security of State being of paramount importance all other interests are subordinate to it, "Security of State may comprise a situation of disobedience and insubordination on the part of members of the police force". In leading case of *Tulsi Ram Patel*, the Supreme Court has clarified that the question is not whether the security of the State has been affected or not, for the expression cl(c) is "in the interest of the security of State". The interest of security of State may be affected by actual act, or even the likelihood of such acts taking place. So the Hon'ble Court has observed that "What is required or needed under clause(c) is not the satisfaction of the President or the Governor, that interest of the security of the State is or will be affected but his satisfaction in the interest of security of State, it is not expedient to hold an inquiry as contemplated by Article 311(2)".

The concerned Union or State Government is required to disclose to the court the nature of the activities of the employee on the basis of which such satisfaction of the President or the Governor was reached for the purpose of passing an order under Article 311(2) (c). In the absence of such activities, it would not be possible on the part of judicial authority to determine whether the satisfaction was arrived or not on the basis of relevant considerations. The Union or State Government as the case may be, is under obligation to place relevant material on the basis of which the satisfaction which though relevant are not admissible was arrived at subject to privileged communication under Sections 123 and 124 of the Indian Evidence Act, 1872.

Does an Article 311 Need a Revisit?[19]

From last so many years there is a difference of opinions between leading journalists, judges, legal luminaries and the like on the immediate need to re-lookat Article 311 of our Constitution. People with different opinions feel that there have been instances where these protective provisions are used as a shield by civil servants to misuse their official powers without fear of being dismissed. Disciplinary proceedings conducted by Government departments against corrupt officials are time taking one. The mandate of 'reasonable opportunity of being heard' in departmental inquiry encompasses the Principles of Natural Justice which is a wider and elastic concept to accommodate a number of norms on fair hearing. Violation of principles of Natural Justice enables the courts to set aside the disciplinary proceedings on grounds of bias and procedural defects. We have discussed both the opinions below in detail Arguments in favor of repealing top & leading journalists, judges, legal personalities consider Article 311 to be the biggesthurdlein making the corrupt public servants accountable for their misdeeds as it shields them from prosecution for an inordinate delay which only helps them further in doing whatever is possible under the sun to save their own skin.

This they feel should not be allowed to any longer and major action needs to be taken on this part. There should be zero tolerance for corruption at all levels but certainly at the same time we also have to ensure that the innocents are not punished for other persons wrong doings at all and so some safeguards have to be there in order to ensure that the amended provision does not become an arm in hands of political leaders to further their interest. These prudent people are in favor of revisiting constitutional provisions giving protection to civil servants for the following reasons:

m) Political leaders most of the time exploit the power in their hands to punish those civil servants who do not act as per their whims and fancies and dare to be upright and refuse to bend as their political bosses want them to.
n) It's very difficult to deny that all key posts in the States and the Centre are filled as per the whims and fancies of the Government in power.
o) It's very difficult to refute that there goes a long way in encouraging corruption as a long chain is formed in which every person has fixed share or percentage according to his/her status.

[19]SanjeevSirohi (2010) PL (Con) June S-8.

Even the country's premier investigating agency, CBI is made to function most of the times as the party in power at Centre.

p) There has been politicization of high-profile cases like bofors in which experts have expressed his deep anguish over the manner in which the entire Bofors case was handled lightly and accused were allowed to go scot-free in spite of having strong evidence.Political indirect or unofficial control of politicians to appoint, transfer, award or punish public servants as per their own whims and fancies must be taken away from them permanently because it goes a long way in mushrooming the tree of corruption.

q) The basic or primer root cause of most of the cases of corruption in our country is undue political patronage which must be checked and controlled.

r) We all unanimously agree that corruption discourages investment and so on and it's our political and economic necessity to emerge as a world or global player.

It is also very necessary to state here very categorically that corruption should not be tolerated anywhere and corrupt public servants cannot be allowed to take shelter behind any silly excuses because they themselves have been a willing party to the misdeeds which took place with their overt or covert connivance and for which they should pay through their nose as it is totally unacceptable. Former Chief Justice of India K.G. Balakrishnan categorically pointed at inordinate delays in granting sanction to prosecute corrupt civil servants or government officials, Law Minister M. Veerappa Moily said on September 31 that there was a need to relook or revisit constitutional provisions giving protection to civil servants. There is no gainsaying that the provisions of Article 311 have come in the way of bringing corrupt civil servants to book. Article 311 would require a revisit this need to be done. I am pursuing the matter with the Prime Minister and the Government, said our Law Minister M. Veerappa Moily.

Former Minister for Law and Justice, M. Veerappa Moily, have also said that the Centre would consider amending Articles 309, 310 and 311 of the Constitution thus removing protection and safeguards in prosecuting corrupt civilservants. Hewas of the view that prior sanction should not be necessary for prosecuting a public servant or civil servant "who has been trapped red-handed or found in possession of assets disproportionate to known sources of income." In his valedictory address at the National Seminar on 'Fighting Crimes Related to Corruption' he was responding to the suggestion made by Chief Justice of India K.G. Balakrishnan for amending the laws to provide for confiscation of properties of persons convicted in corruption cases.

In this seminar which was jointly organized by LNJN National Institute of Criminology and Forensic Science and the CBI, Mr. Moily said that "there is a feeling that the protection given to the public servants under Article 311 of the Constitution of India is being used to create obstacles for expeditious punitive action."(September 14, 2009, 'The Hindu' News Paper)

He also said that "Article 311 as interpreted by our courts has made it very difficult to deal effectively with corrupt civil servants." As per him "there is no gainsaying that the provisions of Article 311 have come in the way of bringing corrupt civil servants to book. Article 311 would require a revisit." Article 311 of the Constitution might be repealed along with the Article 310 and legislation should be passed under Article 309 to provide for the terms and conditions of service of public servants, including necessary protection against arbitrary action.

He believes that "the menace of corruption is an important issue that is bothering the policy makers, administrators and the general public for a long time. The prevalence of widespread corruption and ineffective anti-corruption interventions in this country has led to public cynicism."

Mr. Moily has rightly saidthat "the fight against corruption is not only a moral imperative but an economic & political necessity for a nation aspiring to emerge as a world player or a global player. Corruption discourages investment (foreign/ domestic), harnessing of best technologies, resources etc. that requires transparency, fair play and is an impediment for integration with global economy. The issue of fighting corruption and building good governance are of paramount importance for achieving rapid economic development." For this to happen, it is imperative that the corrupt public servants are not allowed to take refuge in any of the loopholes existing in our system in order to save themselves because usually it is seen that as nothing happens to such corrupt officials or most of the times they are let off after minor reprimand, a wrong message spreads around in not only our society and country but in the entire world so this has to stop immediately without any delay.

This again can only happen if our laws pertaining to public servants are amended and here is where Article 311 of our Constitution comes into play and needs to be immediately amended as it mostly serves in perpetuating the banal practice of delaying stringent action against the culprits and this therefore must be discontinued immediately. However, just amending Article 311 of our Constitution is not enough. Necessary amendments simultaneously will also have to be inserted in the Prevention of Corruption Act which also provides for necessary previous sanction for prosecution as contained in Section 19 of the Prevention of Corruption Act, 1988.

As per K.G. Balakrishnan, corruption in some cases can be a threat to national security. He quoted the example of how smuggled arms and explosives were used for the 1993 Mumbai blasts. He emphasized that it is not the quantum of punishment but the certainty of punishment which proves to be an effective deterrent against corruption and how it was important to address the issue of obstruction in the investigation and trial process. He said that there might be a case in near future for the higher judiciary to grant effective constitutional remedies in respect of instances of corruption, over and above the statutory remedies provided by PCA. He also pointed out that, in recent years, several instances of corruption by high-level officials have been recorded by the higher judiciary in the

exercise of their writ jurisdiction, but the same do not amount to convictions and hence effective punishments could not be given. Therefore, our deliberations should focus on how to strengthen the investigation and prosecution of corruption cases, so that the courts of first instance are able to improve the conviction rates. (PTI, New Delhi, September 13, 2009).

Quoting the Santhanam Committee[20] on Prevention of Corruption which remarked that Article 311 of the Constitution as interpreted by our courts has made it very difficult to deal effectively with corrupt civil servants, M. Veerappa Moily said, even after Article 311 was amended, the panoply of safeguards and procedures still available is interpreted in such a manner as to make the proceedings protracted, and therefore, effete in the ultimate analysis. He also lamented that there is a perception that public services have largely been exempted from the imposition of the penalties due to complicated procedures and that have arisen out of the constitutional guarantee against arbitrary and motivated actions. People who misuse public office for private gain at the Costs of the public and national interest are being shielded from facing swift and stringent punishments. Moily, also at great pains to point out that there is a feeling that the protection given to the public servants under Article 311 of the Constitution of India is being used to create obstacles for expeditious punitive action. Various jurisprudential precedents have further complicated that issue resulting in the distortion of real intent of the provision itself. There is need for rationalization and simplification of procedures to prevent the corrupt and dishonest elements in the system from cornering the benefits of the constitutional safeguards. Out of 153 cases for sanction, 21 cases were pending for more than 3 years, 26 cases between 2-3 years and 25 between 1-2 years. Departmental enquiries are soft-pedaled either of patronage or misplaced compassion.

While expressing his gravest concern over the poor rate of conviction in bribery cases, Moily said it reflects very badly on the country judiciary and investigating agencies. He lamented that in 1998, 0.07 persons per lakh population were convicted for bribery. In 1999, the figure was 0.07 it reflects very badly on our system, it reflects very badly on our judiciary and also on the law-enforcement agencies. He, however, also hastened to add that the figures he was quoting could not be up-to-date but indicate the conviction rate at the national level.

Former Chief Justice of India K.G. Balakrishnan correctly said that the procedural delays in granting sanction and difficulty in marshaling a large number of witnesses were the major hurdles to achieving meaningful convictions. Anti-corruption agencies were already finding it difficult to grapple with 9000 pending cases due to shortage of designated courts. It is necessary there should be a speedy manner of granting sanction. The prosecution becomes ineffective if the sanction is granted after 6-7 years. Hon'ble CJI Balakrishnan also agree with Moily's view that if anyone is caught red handed then there should be no need for compulsory departmental permission for filing a charge-sheet

[20]Santhanam Committee was formed in 1964 to combat corruption

against corrupt officials because that only gives them more time in manipulating the available evidence against them in their own favor as we have seen in the past also in many cases. But a safety clause must also be added. If some official is falsely implicated who suffers immensely for no wrong done then those who leveled false allegations must also be given swift, exemplary punishment to send a clear message to everyone that no one can play with the life of the other person without any concrete ground or on false grounds. To fulfill all these situations or condition, necessary amendments should be inserted in Article 311 of our Constitution.

As per the opinion of few prudent people there is no need of any amendment or repeal in the existing Article 311. According to them, the Constitution of India through Article 311, protects and safeguards the rights of civil servants in Government service against arbitrary dismissal, removal and reduction in rank very aptly. Such protection enables the civil servants to discharge their functions boldly, efficiently and effectively. The public interest and security of India is given predominance over the rights of employees. So conviction for criminal offence, impracticability and inexpediency in the interest of the security of the State are recognized as exceptions. Accordingly, the judiciary has given necessary guidelines and clarifications to supplement the law in Article 311. The judicial norms and constitutional provisions are very helpful to strengthen the civil service by giving civil servants sufficient security of tenure. As we all know civil servants are considered as the back bone of the administration. In order to ensurethe progress of the country it is essential to strengthen the administration by protecting civil servants from political and personal influence. So provisions have been included in the Constitution of India to protect the interest of civil servants along with the protection of national security and public interest.

Part XIV of the Constitution of India deals with Services under the Union and the State. Article 309 empowers the Parliament and the State legislature regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State respectively. Thus it can be said that the Constitution makers then at that time had known about the discrepancies like corruption to creep into the civil services, so in order not to grant immunity from summary dismissal to dishonest or corrupt government servants so that they continue in service for months together “at the public expense and to Public detriment”. Also at the same time the judiciary with its limited judicial review and departmental appeal has ensured that the power to dismiss has not been misused by the authority. With the lot many cases coming into light in relation to corruption among the civil servants or government officials and the linking of various government officials with anti-social elements the Article 310 and 311 of the Indian Constitution envisaged in the Part XIV act as a check and does not allow the civil servants or government officials to play with law and make mockery of Law.

Conclusion

Experience of democratic countries underlines the importance of an efficient and independent civil service. The Constitution of India assures reasonable security of tenure to civil servants. The recruitment to important civil services becomes vital for an independent, efficient and impartial administration. The values of independent, impartial and integrity are the basic determinants of the constitutional conception of Public Service Commissions and their rule and functions. It is mandatory for the Commission to present annual reports to the president or Governor as the case may be. Not only amendments required in constitution but other laws like Prevention of Corruption Act 1988, also needs necessary changes to control civil servants from taking shield of safeguards to abuse and disrupt judicial process initiated against them.