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SURROGACY LAW IN MAKING: THE INDIAN SCENARIO*

B. C. NIRMAL**

ABSTRACT : Surrogacy Bill, 2020 in recent times has rekindled the discussion as to the legal and moral questions that remain relevant and contextual to a law that may be enacted to deal with the practice of surrogacy. The present paper explores some of the core issues pertaining to surrogacy from the perspective of constitutionality, and the practical implications that cannot be ignored. It deals with the various and varied aspects of surrogacy along with related legal predicaments. It concludes that the present Bill suffers from a plethora of ambiguities and vagueness and further there is an obscurantist and orthodox philosophy underlying it as it ascribes a restrictive and narrow definition to family in a patriarchal, heterosexual, and castist sense.

KEY WORDS : Surrogacy, Assisted Reproductive Technology, Insurance, Constitutional Perspective, Surrogacy Bill.

I. INTRODUCTION

Surrogacy, “a prefertilisation agreement to carry a child for another”¹, is a part and parcel of the assisted reproductive technology. Surrogacy is the process of carrying and delivering a child for another person.² According to *Britannica Online encyclopedia*, surrogate motherhood is a

* This research piece is a humble tribute to Late Prof. M.C. Bijawat, my teacher and colleague and former Head & Dean, Faculty of Law, Banaras Hindu University.

** Former Vice-Chancellor, National University of Study and Research in Law, Ranchi; Former Dean, Faculty of Law, Banaras Hindu University. The research input provided by Dr. Rabindra Kumar Pathak, Assistant Professor, National University of Study and Research in Law, Ranchi is acknowledged with thanks.

1. See, Sarah Mortazav, “It Takes a Village To Make a Child: Creating Guidelines for International Surrogacy”, 100 *Georgetown Law Journal* 2249 (2012)

practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually, because the wife is infertile or otherwise unable to undergo pregnancy.³ Surrogacy is the union of “science, society, services and person that make it a reality”; it leads to a “win win situation for both the infertile couple and the surrogate mother.”⁴ Ever since the first surrogate baby was born in 1980, surrogacy has now become an industry and India is no exception to this⁵ given the fact that it is estimated that there have been more than 3,000 such births over the last decade,⁶ and this indeed has 25 crores or more business in India. This in turn has encouraged large scale surrogacy tourism in this country.⁷ However, due to intricate legal issues such as nationality and custody of the surrogate child International Surrogacy is more problematic than domestic surrogacy. Therefore, there is a pressing need to explore and resolve the riddles that arise from surrogacy and rights of the interested parties, both at the national and international levels. As surrogacy gives rise to a plethora of ethical, moral, social, and legal issues, there has been a continuing demand for its regulation in India.⁸ In response to this demand the Indian Council of Medical Research published by ethical guidelines for biomedical research. It was followed by four versions of ART Bills in 2008, 2010, 2013, and 2014. In an important departure from

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2. *Black's Law Dictionary*, p. 349 (2007).
 3. Encyclopedia Britannica (online), <https://www.britannica.com/topic/surrogate-motherhood>
 4. R S Sharma, “Social, ethical, medical & legal aspects of surrogacy: an Indian Scenario”, *Indian J Med Res.* 2014 Nov; 140 (Suppl 1): S 13-S 16.
 5. Recently, in India, film actors Amir Khan and Shahrukh Khan were in news for having opted for surrogacy.
 6. *Supra* note 1 at 2249. Also see, Usha Rengachary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India”, 39 *Columbia Law Review* 15 (2008).
 7. See, Shalini Nair, “The Issues Around Surrogacy”, *The Indian Express*, (02.11.2016).
 8. For arguments in support of regulation see, Shahrukh Khan, “Need for Legislations to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy” 6 *NUALS Law Journal* 29 (2012), available at: http://www.nuals.ac.in/web/pdf/NUALS_LAW_%20Journal%20.pdf; S.V. Shiffrin, “Wrongful life, procreative responsibility, and the significance of harm” 5 *Legal Theory* 117 (1999); Janet L. Dolgin, Choice, “Tradition, and the New Genetics: The Fragmentation of the Ideology of Family” 32 *Conn. L. Rev.* 523, 540 (2000).

the previous versions of ART Bills, the Surrogacy Bill 2016 laid down a separate legal framework for the regulation of surrogacy in India by separating surrogacy from other Assisted Reproductive Technology (ART). A select committee of the Ministry of Health and Family Welfare reviewed that Bill in detail and made many variable recommendations for fine tuning it. But to our dismay, Surrogacy Amendment Bill 2019 incorporates the same provisions of the 2016 Bill. The Surrogacy (Regulation) Bill, 2019 as passed by the Lok Sabha on 5th August, 2019 was referred to the select committee comprising 23 members of Rajya Sabha on a motion adopted by the house on the 21st November 2019⁹ for the examination of the Bill¹⁰ and report thereon to the Rajya Sabha by the last day of the first week of the next session. The select committee under the chairmanship of Mr. Bhupendra Yadav examined the Bill and submitted its report to the Rajya Sabha on 4th February 2020.

Against this background, it is expedient and instructive to assess how far the proposed Bill responds to the major surrogacy issues in the context of social, ethical, and cultural realities in our country. The reference point for such an assessment is already set out in Report no. 228 of Law Commission which reads in part “non intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral ground without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technologies i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto.”¹¹ The Gujarat High Court also suggested that a sound and secure legislation should be enacted to deal with a situation created by reproductive science and technology. “Legislation has to address lot of issues like rights of the children born out of a surrogate mother, legal, moral, ethical, rights, duties

9. *Available at:* https://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20%28Regulation%29%20Bill%2C%202019.pdf

10. *available at:* https://www.prsindia.org/sites/default/files/bill_files/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf

11. Report No. 228: “Need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy” (August, 2009).

and obligation of the donor, gestational surrogate, and host of other issues.”¹² In this perspective, an attempt will be made to give a brief account of major surrogacy issues with the help of some of the landmark judgments of the Supreme Court and the High Courts. It will be followed by an overview of the steps that have been taken to regulate surrogacy. The next section of the paper will examine the provisions of the Surrogacy (Regulation) Bill 2019. As the Surrogacy bill of 2019 raises several legal and constitutional issues, an attempt will also be made to consider them in the light of the established constitutional jurisprudence. The paper will conclude that the Surrogacy (Regulation) Bill 2019 falls foul of important fundamental rights and is far removed from the current realities.

II. UNDERSTANDING SURROGACY AND ITS DIFFERENT KINDS

Families are getting created in modern times through various measures or options available to them.¹³ As noted by a perceptive commentator, “Today, babies can be ordered over email, created in Petri dishes from frozen genetic material and grown in wombs that are considered to be nothing more than gestational bases. Today, human eggs are traded like any other commodity and fertile women sell their eggs to sterile women for the creation of babies to whom they are not genetically related.”¹⁴ Thus what was once treated as complete natural process is now under the control of human beings, thanks to the technological advancement. Every man or woman has natural instinct and desire to have a biological child. This is more so in the case of a childless woman. Motherhood is a blissful event in a woman’s life. The Kerala High Court underscores this fact quoting Robert Brown in these words: “...all love begins and ends with motherhood, by which a woman plays the God. Glorious it is as a gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood. It is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on

12. *Jan Balaz v. Union of India*, AIR 2010 Guj 21, para 19.

13. MacCallum, *et.al.*, "Surrogacy families : parental functioning, parent-child relationship and children's psychological development at age 2" 47(2) *Journal of Child Psychology and Psychiatry* 213-222 (2006).

14. Gita Aravamudan, *Baby Makers* (Harper Collins, 2014).

occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now it is Law's turn to appreciate the dichotomy of divine duty, the spirit motherhood."

This fact is also recognized in Article 16, paragraph 1 of the Universal declaration of Human Rights 1948 which says that "men and women of full age without any limitation due to race, nationality, or religion have the right to marry and found a family". This right extends to every person concerning his or her reproductive autonomy. According to an estimate, about 15 percent of the couples in the world are infertile. Besides, LGBT community also cannot naturally pro-create.¹⁵ In order to ensure right to have a family to all, technology does provide us an alternative reproductive procedure.¹⁶ With changing times, technology has kept pace, and allowed people to have choices other than traditional method of procreation. Now there are array of options from IVF (*in-vitro* Fertilization), AI (artificial insemination), sperm donation and most recently favored option surrogate motherhood and so on.

Adoption is undoubtedly another option for a childless couple but with the steady decline in the number of children available for adoption and the increasing specialization of technology in human embryology. Surrogacy has emerged as the most preferred option for taking care of childlessness.¹⁷ Further, as stated by the Supreme Court, "in some cases surrogacy is the only available option for parents who wish to have child that is biologically related to them."¹⁸

The word "surrogate", from Latin *subrogare*, means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.¹⁹ Surrogacy is a well-known

15. Katarina Trimmings and Paul Beaumont (eds.), *International Surrogacy Arrangements : Legal regulation at the International Level* 12 (Hart Publishing, Portland, 2013).

16. Murray L. Manus, "The Proposed Model Surrogate Parenthood Act : A Legislative Response to the Challenges of Reproductive Techology: 29 *U. Mich. J.L. Reform* 671, 677-82 (2996)

17. Britannica Online Encyclopedia.

18. *Baby Manji Yamada vs. Union of India*, 2008 13 SCC 518 at 523.

19. In *Baby Manji Yamada*, the Supreme Court explained the different prevalent types or methods of surrogacy, supra note 18.

method, as observed by the Supreme Court, of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.²⁰

There are two types of surrogacy- traditional surrogacy and gestational surrogacy. Traditional surrogacy (also known as straight method) is one in which the surrogate's egg creates the embryo of the child she is going to carry. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic. In *gestational surrogacy* (also known as the *Host* method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier."²¹ To put in other words, in gestational surrogacy the intended parents create an embryo using their own egg and sperm or using donated egg or sperm. In the beginning, traditional surrogacy was the only way to complete surrogacy procedures, but over the past 30 years, gestational surrogacy has become more popular than traditional surrogacy for the following advantages: *firstly*, it allows both parents of a heterosexual couples to be biologically related to their child; and *secondly*, it helps eliminate "the legal and emotional struggles that come with a surrogate being genetically related to the child she's carrying".²²

Surrogacy may be altruistic or commercial. Altruistic Surrogacy *Altruistic surrogacy* is a situation where the surrogate receives no financial

20. *Ibid.*

21. *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518 at 523. Quoted with approval in *K. Kalaselvi s. Chennai Port Trust*, 2013, <https://indiankanoon.org/doc/28691523/>.

22. <https://surrogate.com>

reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses). *Commercial surrogacy* is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries²³ including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms like “wombs for rent”, “outsourced pregnancies” or “baby farms”.²⁴ Time and again, the Supreme Court has suggested ban on commercial surrogacy.²⁵

It is clear from the foregoing that in altruistic surrogacy the surrogate mother doesn't intend to receive expenses whereas commercial surrogacy is a practice wherein the surrogate mother receives full consideration. Commercial surrogacy is looked down in the sense of derision and women who agree to serve as surrogate mother are lightened with pregnancy machine or baby farms. It is not uncommon to refer the word “wombs for rent” and “outsourced pregnancies”. The use of these words for surrogate women are not only offensive and against their human dignity but also mock at their poverty and miserable condition.

In the absence of any law to the contrary, even commercial surrogacy is valid in India. Here the surrogacy arrangements are governed by the provisions of the Indian Contract Act, 1872. Such contracts need to deal with all important aspects of surrogacy such as consent of surrogate to bear child, agreement of her husband and other family members, medical procedures of artificial insemination, reimbursement

23. The United States, Ukraine, Russia, and Georgia have the most liberal laws in the world allowing commercial surrogacy including for foreigners. Wikipedia.

24. See, Justice B. S. Chauhan, “Law and Morality with Special Reference to Assisted Reproductive Technology” in B. C .Nirmal and Ajendra Srivastava (Eds.), *Science, Technology and Law Reforms*, 57 (2014).

25. See Amit Anant Chaudhari, “SC Suggests Ban on Commercial Surrogacy”, *Indian Express* (15/10/2015).

of all reasonable expenses for carrying child to full term, willingness to handover the child born to the commissioning parent(s).

Turning to the question as to who can opt for surrogacy, a woman may opt for it if she is unable to bear and bring up a child on account of various reasons such as hysterectomy, uterine malfunction, recurrent pregnancy loss, or poor health condition making it dangerous for her to be pregnant. If the prevalent practice is any guide, the intended parent may be a single male or a male homosexual couple. The Supreme Court, explaining the prevalent practice, has observed that “Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.”²⁶ Alternatively, the intended parent may be a single male or a male homosexual couple.²⁷ Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.²⁸ Surrogates may be friends or relatives; they may be previous strangers too. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for free.

*Baby Manji Yamada v. Union of India*²⁹ is one of the landmark judgements as regards the issue of surrogacy in India. Baby Manji Yamada was given birth by a surrogate mother, who entered a surrogacy agreement in 2007 with the biological father and biological mother. The child was born on 25-7-2008. In the meanwhile, the genetic father returned to Japan due to expiration of his visa. Local municipality issued a birth certificate

26. *Ibid.*

27. *Id.* at 524

28. *Ibid.*

29. *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518 at 521

indicating the name of the genetic father. Habeas Corpus petition was filed for the custody of the child by the grandmother of the child under article 32 of the Indian constitution. Here, it is important to note that the Commissions for Protection of Child Rights Act, 2005 had been enacted for the constitution of a National Commission and the State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.³⁰ The Supreme Court held that in the present case, if any action is to be taken that has to be taken by the Commission. It has a right to inquire into complaints and even to take *suo motu* notice of matters relating to: (i) deprivation and violation of child rights, (ii) non-implementation of laws providing for protection and development of children, and (iii) non-compliance with policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with the appropriate authorities.³¹ One of the major arguments put forth before the Supreme Court was that there is no law governing surrogation in India and in the name of surrogation a lot of irregularities are being committed, and in the name of surrogacy a money-making racket is being perpetuated.³²

III. CONSPECTUS OF CRITICAL LEGAL ISSUES RELATED TO SURROGACY

Surrogacy raises a number of ethical, moral, social, and legal issues. Some of the legal issues related to surrogacy can be better understood with the help of landmark judgements of the Supreme Court and the high courts. Thus in, *Baby Manji Yamada v. Union of India*³³ is one of the landmark judgements as regards the issue of (commercial) surrogacy in India. Baby Manji Yamada was given birth by a surrogate mother, who entered a surrogacy agreement in 2007 with the biological father and biological mother. The child was born on 25-7-2008. In the meanwhile, the genetic father returned to Japan due to expiration of his visa. Local

30. *Id.* at 521

31. *Id.* at 524

32. *Ibid.*

33. *Baby Manji Yamada v. Union of India* (2008) 13 SCC 518

municipality issued birth certificate indicating the name of the genetic father. A Habeas Corpus petition was filed for the custody of the child by the grandmother of the child under article 32 of the Indian constitution. What is noteworthy about this case is that Manji could not receive a Japanese passport because the Japanese Civil Code recognizes the birth mother's nationality when determining the nationality of the child. Manji was also ineligible for Indian citizenship because she had no Indian parents. Without a legal mother, Manji was stateless.

Here, it is important to note that the Commission for Protection of Child Rights Act was enacted in 2005 for the constitution of a National Commission and the State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.³⁴ The Supreme Court held that in present case, if any action is to be taken that has to be taken by the Commission. It has a right to inquire into complaints and even to take *suo motu* notice of matters relating to: (i) deprivation and violation of child rights, (ii) non-implementation of laws providing for protection and development of child children, and (iii) non-compliance with policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of children and to provide relief to such children, or to take up the issues arising out of such matters with appropriate authorities.³⁵ In the long run, Manji Yamada was issued an identity certificate without a nationality or a mother listed, and the Japanese authority granted the humanitarian visa, promising to grant the citizenship once paternity was established. However, one of the important issues raised in the case deserves deliberation, and is argued before Supreme Court that there is no law governing surrogation in India and in the name of surrogation a lot of irregularities are being committed, and in the name of surrogacy money-making racket is being perpetuated. In *Baby Manji*, Supreme Court upheld the validity of surrogacy in India.

In *Jan Balaz v. Union of India*,³⁶ German national, petitioner in this case, was the biological father of two babies given birth by a surrogate mother by name -Marthaben Immanuel Khristi- a citizen of India.

34. *Id.* at 521

35. *Id.* at 524

36. AIR 2010 Guj 21

Petitioner's wife, also a German National, was unable to conceive. Petitioner and his wife had entered into an agreement with the second respondent-surrogate mother. After full discussion with a doctor at the clinic at Anand, Gujarat, surrogate mother was made known about the method of treatment. She had also agreed to handover the child to the petitioner and his wife on delivery. "The trouble began when Mr. Balaz collected children in India and tried to take them to his native Germany. The Indian government, which had initially issued children passports based on a ruling of the Gujarat High court, withdrew the documents because the children had no relation to an Indian citizen. Germany similarly grant citizenship based on descent; however, because the German government does not recognise the legality of surrogacy, the German government refused to grant the Balaz children passports for public policy reasons." When the matter came before the High Court, it made the following observation raising few important questions in respect of surrogacy:³⁷

"We may at the outset point out that lot of legal, moral and ethical issues arise for our consideration in this case, which has no precedents in this country. We are primarily concerned with the rights of new born innocent babies, much more than the right of the biological parents, surrogate mother, for the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance. Surrogate mother is not genetic mother or biological related to the baby, but, host of an embryo or a gestational carrier? What latest status of the ova (egg) donor, which in this case and Indian national but anonymous. Is the ova not the real mother of the gestational surrogate? Are the babies motherless, can we break and then as legal orphans or stateless babies? So many ethical and legal questions have come for consideration in this case for which there are no clear answers, so far, at least, in this country. True, babies conceived through surrogacy encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Can we brand them as illegitimate

37. *Supra* note 36, para. 9

babies disowned by the world?

As noted earlier, the court observed that:³⁸ “A comprehensive legislation dealing with all these issues is very eminent to meet the parents situation created by the reproductive science and technology.” Moreover, there are few other questions that need to be answered in order to have an effective framework to deal with challenges that arise in case of surrogacy, notably: “A child born through surrogacy agreement in case of gestational surrogacy may have three mothers; intentional mother, mother who has given her eggs (donor) and mother who carries the child in her womb for nine months and give birth to him (surrogate). The question that arises in such situation is who is considered as the legal mother?”³⁹ And how is the nationality of the surrogate child to be decided in view of Article 7 of the Convention on the Rights of the Child, 1989?

In recent times, the Courts have developed a sound framework that ensures that only the child, but even the mother’s rights and need are taken care of, as in *Hema Vijay Menon v. State of Maharashtra*.⁴⁰ In the instant case, the Bombay High Court observed that:⁴¹

"A women cannot be discriminated as far as maternity benefits are concerned, only underground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of baby’s life that the baby learns a lot too. Also

38. *Id.* at para 19

39. Anupama Agarwal and Kumar Ankit, “Lost Citizenship of a Surrogate Child”,(2012) 6 SCC J-7

40. Judgement dated 22 July 2015 of this Court (Coram: Smt. Vasanti A. Naik & A.M Badar, JJ) in Writ Petition No.3288 of 2015.

41. *Id.* at para 7. Also see, *Mrs. Amisha Girish Ramachandani v. The Divisional Manager (Personnel Branch) Mumbai CST CST & Ors*, 2016 SCC OnLine Bom 71.

the bond of perfection has to be developed. A mother, as already stated herein above would include a commissioning mother or a mother securing a child through surrogacy. Any father interpretation would result in frustrating the object of providing maternity leave to a mother who has begotten the child."

It has been held that

"To distinguish between a mother who bears a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of women to bring up a child gotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as a natural mother. Motherhood never ends on the birth of the child and the commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the grounds that she has obtained the baby through surrogacy."⁴²

In the year 2015, on 14-10-15 Hon'ble Supreme Court in the case of *Union of India vs. Jan Balaz and others* enumerated certain issues regarding legislation on surrogacy which are as follows⁴³:

- "1. Whether in commercial surrogacy the surrogate mother is the only mother of surrogate child. The Petitioner raises this issue in view of the pain and suffering the mother undergoes for 9 months and the risk along with all the psychological and emotional problems.
2. Whether a lady who donates her egg in connection with a commercial surrogacy mother can be said to be mother.

42. *Dr. Mrs. Hema Vijay Menon v. State of Maharashtra*, 2015 SCC OnLine Bom 6127. It relied on *Rama Pandey v. Union of India and Others* July 2015 In *Dr Mrs Pooja Jignesh Doshi v. The state of Maharashtra* in writ petition no. 1665 of 2015 dated 03-07-2019 www.indiankanoon.org the bombay high court held that the parents who lent the ova and sperm would be entitled to maternity and paternity leave; *K. Kalaselvi v. Chennai port Trust* 2013; *P.R. Radharamani v. State* (www.indiankanoon.org), 30 Nov 2015; *K. Abhirami v. Assistant Elementary School* (2015), available at <https://indiankanoon.org/doc/175035884/>.

43. www.indiankanoon.com 2015

3. Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be mother of the surrogate child.
4. Whether commercial surrogacy involved sale of a child in view of the fact that surrogate mother relinquishes her parental rights for money.
5. Whether commercial surrogacy amounts to renting of a womb.
6. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void u/s 23 of the Contract Act.
7. Whether commercial surrogacy as practiced in India amounts to economic and psychological exploitation of surrogate mother.
8. Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article 21 of Constitution.
9. Whether commercial surrogacy involves trafficking in human beings as it involves sale of a surrogate child, relinquishment of the surrogate’s parental rights for money and involves rent of womb thus violating Article 23 of the Constitution.
10. Whether commercial surrogacy should be prohibited.
11. Whether import of human embryo amounts to commoditization of human life and thus violates article 21 Whether notification dated 2.12.2013 of the GOI issued under S.5 of the Foreign Trade (Development & Regulation) Act is violative of Articles 21 & 23.
13. Whether human rights of a surrogate child born out of commercial surrogate are violated and as such child would face psychological & emotional problems.
14. Legal system does not seem to have answer to the following questions:
 - (a) What happens if surrogate dies during child birth.
 - (b) What can surrogate do if commissioning couple refuse to take child on the ground that it is abnormal of physically/mentally challenged.
 - (c) Case when surrogate refuses to hand over child.
 - (d) remuneration of surrogate.

- (e) Who will bear the medical bills if surrogate falls ill.
- (f) What happens to unused eggs or embryos and who supervises their fate.
- (g) Should surrogacy arrangements be disclosed to child. If so, when.”

In this case, solicitor general told the Supreme Court that the matter will be placed before the parliament. And the result was the Surrogacy Regulation Bill 2016, passed by the Lok Sabha. Three years later, when the matter came before the supreme court, the government told the court that they were going to present the bill in the coming session of the parliament and prayed for the adjournment for the matter. As per that assurance with the union government introduced the Surrogacy (Regulation) Bill 2019 in the Lok Sabha and got it passed by it.

IV. SURROGACY REGULATION IN INDIA: A HISTORICAL PERSPECTIVE

As said before, surrogacy was sought to be regulated by the Indian Council of Medical Research through its guidelines of 2000. It was followed by the four versions of assisted reproduction technologies Bills ART, 2008, 2010, 2013, and 2014. The common thread of these bills was treatment of surrogacy as one among several reproductive technologies available to the needy persons. They also define infertile couples, donors, surrogates, and vendors such as semen banks. The ART (Regulation Bill) 2008, defined couple in a liberal sense to mean “persons living together and having a sexual relationship that is legal in the country/ countries of which they are citizens or they are living in.” The Bill restricted the number of surrogacy attempts for a surrogate mother to three live births in her life time. In addition to this, it sought to impose a ban on surrogacy services for parents for whom it would normally be possible to carry the baby to the term. The ART (Regulation Bill, 2010) allow surrogacy only to infertile couples. It defined couples to mean persons having a sexual relationship that is legal in India. What is striking about this is permission it granted to surrogacy services for foreign couple on the fulfillment of certain conditions. Now coming to the ART Regulation Bill 2013, it laid down the following criteria regarding eligibility of couples: 1) person should have a sexual relationship, 2) live in a shared household, 3) have a relationship in the nature of marriage which is legal in India.

The 2014 Bill barred surrogacy services for foreigners⁴⁴ but allowed the same for overseas citizens of India (OCI), persons of Indian origin (PIO), Non Resident Indians (NRIs), and foreigners married to an Indian citizen. The Bill was surrogate mother friendly to some extent as it recognized the rights of surrogates for insurance to cover up any complication that may arise during the time of pregnancy/ delivery or that may continue for the rest of her live. The Bill also recognized the right of surrogate mother over the unborn child and assigned priority for protection of the surrogate mother over the child in case of any complication during child birth. It permitted one time surrogacy for a surrogate mother during her entire lifetime.

The Surrogacy Bill 2016 was a turning point in the field of surrogacy regulation in as much as it for the first time sought to establish a comprehensive regulatory framework on this subject. This Bill defines surrogacy as (a practice whereby one woman bears and gives birth to a child for an intending couple with the intension of having over such child to the intending couple after the birth. Thus, the Bill sought to impose a complete clampdown on commercial surrogacy and allowed only altruistic ethical surrogacy to intending infertile Indian married couple in the age group 23-50 (women) and 25-55 years (men). They should have been married at least for 5 years with no biological or adopted child of their own. So far as the surrogate is concerned, she should be a close relative of the intended couple. She should have been married and with a child of her own, is between 25 and 35 years at the time of implantation. The Bill allowed a woman to become a surrogate only once in her life time. The Bill also required that an order containing the parentage and custody of the child or application of the same should be produced before the surrogacy procedure. The Bill prohibited advertising, canvassing, publicizing, promoting or propagating of commercial surrogacy of any kind. The Bill also sought to establish a number of administrative procedures such as appointment of a state level authority to monitor that the rules are being adhered to by the surrogacy clinic.

The Standing Committee on Health and Family Welfare which

44. It has been aptly argued that simply “trying to shut out surrogacy for foreign nationals and single person may not be the Ideal way to stamp out the hopes of the persons wishing to be parents.” See, Anil Malhotra, “Ending Discrimination in Surrogacy Laws”, *The Hindu* (03.05.2014)

scrutinized the Bill made following suggestions for improvement in the Bill⁴⁵: 1) the eligibility criteria should be broadened and the ambit of persons who can avail surrogacy services should include live in couple, divorced women/ widows, 2) NRI, PIO, and OCI card holders should also be allowed to avail surrogacy services, 3) considering the ground realities of the society and well indicated medical reasons for infertility, the 5-year clause in the Bill for commissioning surrogacy should be changed to one year, 4) in circumstances where the need for surrogacy is absolute due to medical reasons, even the prescribed one year period should be waived off, 5) the requirement of having certificate for fertility from an appropriate authority should be waived off, instead medical reports and prescription of the couple certifying repeated failure in conception or inability to carry the baby to full term should be considered as a proof of their decision to commission surrogacy, 6) in whatever appears to be a welcome comment of the Select Committee is its observation that even altruistic surrogacy could be exploitative in nature and furthermore blanket banning of surrogacy would take away economic opportunities from women who are poor. The Select Committee therefore recommended that compensated surrogacy be allowed. The committee thought that women should be allowed to become surrogate only once in her lifetime and the compensation to surrogate should be guaranteed from the moment they begin any use of medication in connection with surrogacy procedures. The committee was of the view that the compensation money should be deposited directly in the bank accounts of the surrogate mothers by the commissioning parents, and 7) the select committee recommended that additional compensation of this kind be given to the surrogate mother in the case of her death in the course of surrogate pregnancy or while delivering the surrogate child.

V. SURROGACY (REGULATION BILL) 2019: A CRITIQUE

General Observations

Sadly, the above important suggestions of the Rajya Sabha Standing Committee of the Surrogacy Bill of 2016 was completely ignored when

45. Timms O., Report on the Parliamentary Standing Committee on the Surrogacy (Regulation) Bill 2016: A Commentary, *Indian Journal of Medical Ethics*, 2018 DOI: <https://doi.org/10.20529/IJME.2018.018>

the Surrogacy Regulation Bill, 2019 was introduced in and passed by the Lok Sabha. Its provisions are similar to those contained in the 2016 Bill. This bill is set to be a “step in that direction which seeks to regulate surrogacy procedure in such a way as to stop exploitation of the poor vulnerable women; to ensure protection of rights of the child born out of surrogacy and facilitate only needy infertile couple and widow and divorced women to have child to complete their family”. To achieve this objective, the Bill provides to prohibit commercial surrogacy and allow only altruistic surrogacy. Section IV (II) of the Bill reads thus:

...no surrogacy or surrogacy procedure shall be conducted, undertaken, performed, or availed of, except for the following purposes, namely: a) as when either or both members of the couple is suffering from proven infertility; b) when it is only for altruistic surrogacy purposes; c) when it is not for commercial purposes or commercialization of surrogacy or surrogacy procedures... The Bill defines altruistic surrogacy as one where “no charges, expenses, fees, remuneration, or monetary incentive of whatever nature.”

Section V of the Bill says, “No person including a relative, or husband of a surrogate mother, or intending couple shall seek or encourage to conduct any surrogacy or surrogacy procedures on her except for the purpose specified in Clause II of section IV.” In order to be eligible for being a surrogate mother the woman needs to be a close relative of the couple, is married with children of her own and does not donate her own gamut for the purposes of surrogacy. The eligibility for availing surrogacy is heterosexual relationship of a couple. They should be married for at least 5 years and have no child of their own. In addition to this, they should be medically certified to be an infertile couple in order to be eligible to commission surrogacy.

As we will discuss in some detail, the Bill is arbitrary, unjust, and discriminatory in as much as it excludes single men, women, and live in partners including same sex couples and transgender persons from the purview of eligible commissioning agents. As will be discussed in detail such exclusion is in violation of Article 14 of the Indian Constitution and the right to reproductive autonomy as an aspect of the Right to Privacy, guaranteed under Article 21 of the Indian Constitution. Further, by allowing only a close relative to the surrogate mother, the Bill reinforces castist notion by requiring preserving the purity of the family.

The Bill was scrutinized by the select committee of Rajya Sabha which made certain sound and sensible recommendation for the fine tuning⁴⁶ of the 2019 Bill. We will advert to these recommendations later. Suffice is to mention here two recommendations. First is the recommendation that the 5- year waiting period for availing surrogacy service should be waived of if there is a medical certificate to show that a childless married couple cannot possibly conceive. In what appears to be a welcome recommendation the Select Committee urged that the Assisted Reproductive Technology (Regulation Bill) should be brought before the Surrogacy Regulation Bill so that all the technical and medical aspects could be properly addressed in the Surrogacy (Regulation) Bill, 2019.

As noted before, the Surrogacy (Regulation Bill), 2019 needs to be tested on the touchstone of fundamental/human rights which are premised upon the principle of inherent sanctity of life and liberty and respect for human dignity. As surrogacy *per se* raises a number of crucial social, ethical, moral, and scientific issues, it is necessary to harmonize the conflicting interests in the process of surrogacy to ensure betterment of child while protecting rights of surrogate mothers. Any surrogacy Bill should, therefore, needs to be measured against this yardstick.

Before we proceed to consider the Bill from the constitutional perspective, three preliminary observations about the Bill may be made here: the Bill is based on misplaced optimism that women are so good and virtuous that they readily agree to be a surrogate mother to bear and deliver a child to one of her relatives⁴⁷ has been aptly observed by an activist the very idea of altruistic surrogacy portrays “child bearing as a noble cause that women should do not only for their husband but also for all eligible close relatives chosen and screened by the state.”⁴⁸ The very idea of altruistic surrogacy according to human rights activists is based

46. Avantika Ghosh, “Explains: Fine Tuning the Surrogacy Bill”, *The Indian Express* (18 June 2020)

47. Smita Sasidharan Nair and Rajesh Kalarivayil, “Has India’s Surrogacy Bill Failed Women Who Become Surrogates?”, *Antyajaa: Indian Journal of Women and Social Change*, 2018, 3 (1), 1-11

48. Arjeet Ghosh and Diksha Sanyal, “How Can Families be Imagined Beyond Kinship and Marriage?”, *Economic and Political Weekly* (online), Vol/ 54, Issue no. 45, 16 Nov, 2019. For further details see, B.C. Nirmal, “Human Rights and Genetic Engineering”, 42 (1) *BLJ*, 38-57 (2013).

on a premise according to which surrogacy should not involve any honorarium etc. The fact of the fact is that surrogacy involves a form of reproductive labour for which the surrogate mother should be adequately paid. The surrogacy bill is designed to ban commercial surrogacy in the name of prevention of exploitation of surrogates. But the element of exploitation may also be present in altruistic surrogacy because of the unequal circumstances of poverty and patriarchal exploitation of women within the family.⁴⁹ Another point which needs to be considered in this regard is that preventing poverty striking women from being a surrogate would in effect deprive her from having a better life. Commercial surrogacy is an idea whose time has come and therefore any attempt to impose a complete ban on it ignoring social realities is likely to boomerang and it may go on underground, leading to the use of illegal methods and ways to circumvent the law. Imposing a ban on commercial surrogacy will be like killing a hen when egg laying is required to be regulated. The purpose of any law should be to promote the best use of a beneficial technology and thereby bringing greatest happiness of greatest number. In nutshell this Bill is narrow and restrictive in its outlook and obviously will fail to serve its purpose.

Right to reproductive autonomy is an aspect of article 21 of the Indian Constitution. In the absence of compelling interest, one may be unable to understand why the state should mediate between a woman willing to be a surrogate and the commissioning party by imposing the restrictions that there shall be surrogacy only once during the lifetime of a woman. Extending this argument further, it may be humbly submitted that women should be allowed to determine in consultation with her physician whether and how many times should she agree to provide surrogacy services. The surrogacy bill takes a myopic view of family and ignores alternative perspectives of family gaining recognition in the constitutional jurisprudence of this country.⁵⁰ To put it more specifically

49. See, The Report of the Parliamentary Committee on the 2016 Surrogacy Bill, referred to in Smita Sadashivan Nair *et al.*, *op. cit.*

50. The Supreme Court in Justice K S Puttaswamy and others v. Union of India 2017, para 157 recognized the right to sexual intimacy as a core component of the right to privacy. Based on this framework the Supreme Court in *Navtej Johar v. Union of India*, 2018 para 240 not only struck down the draconian section 377, IPC but also observed that the manner in which individual used to exercise

the vision of the family under this Bill is traditional, orthodox, outdated and retrograde by confining it to hetero patriarchy and caste purity. Finally, the 2019 Bill makes a selling or buying the embryo or gamuts for surrogacy as cognizable, non bailable and non-compounding offence and prescribes the punishment of 10 years imprisonment and a fine up to 10 lakh rupees for it this provision is in accord with several international conventions and declaration.⁵¹

VI. CONSTITUTIONAL ASPECTS

As stated before, surrogacy has many dimensions that require to be tested on the touchstone of constitutionality. One such touchstone is to be found under article 14 of the constitution.⁵² There are certain rights which should be equally available to everyone. Article 14 of the constitution is a bulwark against acts that perpetuate unreasonable classification. Supreme Court in its formative years articulated the *intelligible differentia* doctrine.⁵³ The object behind enunciating the doctrine was to fortify the doctrinal and purposive foundations of article 14 which *inter alia* provides for “equality before the law”. It finds parallels under Fourteenth Amendment of the US Constitution, and embodies the English law principle of ‘rule of law’. Over the years, interpretation and construction of the *equality* clause has been instrumental in ensuring that people are not *unreasonably* denied their right to be treated *equally*. There have been a series of cases relating to the application of equality clause to varied fact-situations.

intimacy is beyond the legitimate interest of the state.

In India, the Domestic Violence Act, 2005 recognizes live in relationship but it does only between men and women (Indra Sarma v. B.S.V. Sharma, 2013, para 37). Further, these relationships must be as marriage like as possible, *D. Velusamy v. D. Patchaiammal* 2010: para 33

51. The same is supported by Article 21 of Convention for the Protection of Human Rights and Dignity of Human Being with regard to Biology and Medicine, 1997. Also, Article 5 of The Convention on Elimination of all forms of Discrimination against Women, 1979. Also see Bernard M. Dickens, “Ethical and Legal Issues in Reproductive Health Legal Developments in Assisted Reproduction”, *available at*: <http://ssrn.com/abstract=1263903>
52. *See generally*, Uday Raj Rai, “Right To Equality - Reasonable Classification Rule Versus Rule Against Arbitrariness: A Note”, (2019) 8 SCC J-12.
53. *See, State of W.B. v. Anwar Ali Sarkar*, 1952 SCR 284: AIR 1952 SC 75 : 1952 Cri LJ 510. Also see, *Chiranjit Lal Chowdhuri v. Union of India*, AIR 1951 SC 41

Under proposed law, there are certain provisions that create classifications that seem untenable in view of the *intelligible differentia* doctrine as applicable in the context of the application of article 14. Under Clause 4, the proposed Bill provides that “no woman, other than an ever married woman having a child of her own and *between the age of 25 to 35 years on the day of implantation*, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise.” It also requires that “the age of the intending couple is *between 23 to 50 years* in case of female and *between 26 to 55 years* in case of male on the day of certification”. Moreover, under the same provision, it is stated that “no person, other than a close relative of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy”, and that “the intending couple are married for at least five years and are Indian citizens”. The provision that “no person, other than a close relative of the intending couple, shall act as a surrogate mother” is also exclusionary in nature, and creates a classification as to may be a surrogate mother.

It is worth-noting that the aforesaid provisions are such that they create classification on the basis of age, marriage, and time-period of marriage. Such a classification is patently arbitrary and unreasonable. It fails the *intelligible differentia* test. In *Anwar Ali Sarkar*, the Supreme Court notably observed:⁵⁴

Mere classification, however, is not enough to get over the inhibition of the Article [14]. The classification *must not be arbitrary* but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an *intelligible differentia* which distinguishes those that are grouped together from others and (2) that that differentia must have a *rational relation* to the object

54. *Id.* para.55. Emphasis added. Also see, *Joseph Shine v. Union of India*, (2019) 3 SCC 39; (2019) 2 SCC (Cri) 84; *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1; *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

Supreme Court in *Harbhajan Singh v. State of Punjab*⁵⁵, further added to the above judicial dictum on *intelligible differentia* in scores of judgments observing thus:⁵⁶

A classification would be justified unless it is *patently arbitrary*. If there is *equality and uniformity in each group*, the law will not become discriminatory, though due to some fortuitous circumstance arising out of peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, *the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation*.

Therefore, the provisions that classify intending couples as well as the surrogate mothers on the basis of age excluding other who do not fall within the same age group does not seem to have rational basis that may be justifies as serving the object of the proposed law on surrogacy. Similarly, exclusion of people on the basis of being married or unmarried is patently arbitrary and constitutionally unfounded. Duration of marriage cannot be a basis for deciding who may be an ‘intending couple’. There is an innate and inherent inconsistency in the provisions that fail the test of *intelligible differentia*.

The right to life and liberty under article 21 of the constitution has been interpreted over the years by the Supreme Court to entrench some of the basic rights that have within the ambit of life and liberty such as *right to privacy* and *reproductive rights*, two rights that bring to fore few uncomfortable questions in the context of the new surrogacy bill. Section 2(zc) under the Bill describes surrogacy as “a practice whereby one woman bears and gives birth to a child for an intending couple with the intention

55. (2020) 2 SCC 659

56. *Id.* at 668. Emphasis added. Also see, *State of A.P. v. Nallamilli Rami Reddi*, (2001) 7 SCC 708 : AIR 2001 SC 3616.; *Rajasthan SRTC v. Danish Khan*, (2019) 9 SCC 558.

of handing over such child to the intending couple after the birth.” This brings into focus the reproductive rights of surrogate mother. It is one such right that is inseparable from right to privacy. Reproductive autonomy of a woman is an autonomy that is protected by Article 21, which includes the right to motherhood.⁵⁷ The entangled and intricate issues of motherhood, reproductive rights and right to privacy should have been pondered upon cautiously before rushing to delineate the rights of the intending couple (mother) and the surrogate mother under the Bill. This has to be seen in view the following observation made by the Madras High court:⁵⁸

The right to autonomy to the woman and to decide what to do with their own bodies, including whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to delivery the child, i.e. the right to motherhood is towards their empowerment and it is in accordance with the International Covenant on Human Rights.

It is notable that single parents are excluded from being ‘parents’ under the Bill which only entitles a married “intending couple” to have a child through surrogacy. It amounts to denuding ‘single parents’ of the rights which a married person has and they do not have. It also excludes the homosexuals from having a child through surrogacy. Such an exclusion falls foul of Article 21 of the Constitution. ‘Single parents’ is a term that includes within its fold people such those who are a part of a live-in relationship, a divorcee or a widow and so on. It is important to notice that such exclusion has to pass the “just, fair and reasonable” requirement laid in the *Maneka Gandhi* judgment. In *Suchita Srivastava v. Chandigarh Admn.*⁵⁹, the Supreme Court observed:⁶⁰

There is no doubt that *a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India*. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating.

57. *Hema Vijay Menon v. State of Maharashtra*, (2015)5 AIR Bom 370

58. *Marimuthu v. Inspector of Police*, (2016) 8 Mad LJ 418.

59. (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570. Also see, *Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462

60. *Id.* at 22. (emphasis added)

The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

It is important to note that there are certain rights that have been entrenched by way of Article 21 under two words of 'life' and 'liberty'. These two words are pivotal to the protection of many aspects of human life, more so in cases where a new life is to be brought into existence, as in the present context through surrogacy. Life has certain intrinsic value that should be respected. At the same time, the right of a mother has to be also protected within the ambit of these two words. Surrogacy presents a peculiar problem where the very idea of motherhood has to be looked into and defined with certitude as to the rights of the mothers—surrogate mother and the intending mother. Due care should be taken to ensure that surrogate mother has certain rights beyond her being a mere surrogate.

Any legislative measure should not be tinged with the elements of 'arbitrariness' and 'unreasonableness'. Both Article 14 and 21 frown upon these two vices that often creep the text and spirit of any legislative enactment.

VII. SURROGACY (REGULATION) BILL 2020

The *Select Committee on the Surrogacy Bill 2019* has made certain recommendations. One of the important changes suggested by the Committee is that the definition of "infertility" as provided under section 2(p) of the Surrogacy Bill, 2019⁶¹ be 'deleted', and that any intending couple who may have a "medical condition" that requires "gestational surrogacy" may be allowed to have recourse to surrogacy. Section 2(r) under the Surrogacy Bill, 2020⁶² has been modified and it reads thus:

61. Section 2(p) reads thus: "infertility" means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception."
62. Bhupender Yadav, 'The new surrogacy bill protects the interests of all', *Hindustan Times*, 6 February 2020, available at: <https://www.hindustantimes.com/analysis/the-new-surrogacy-bill-protects-the-interests-of-all/story-F4DJy6L5QsfYk57npKVB3H.html>, last accessed 11 June 2020. See also, Clauses 4.54 and 4.55 at page 31 of the Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019 presented to the Rajya Sabha on 5 February 2020, available at: https://www.prsindia.org/sites/default/files/bill_files/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf, last accessed 11 June 2020.

“intending couple” means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.” Section 2(p) under the 2020 Bill has been deleted.

Accordingly, the Committee suggested that clause 4(iii)(a) (I) should be ‘modified’ after deleting the word ‘infertility’ and it should be worded thus: “a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.”

Another issue that attracted the attention of the Committee was the requirement of “close relative” under the provision of the Bill that provides that “no person, other than a *close relative* of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures...” Interestingly, the expression “close relative” remains undefined under the Bill. The Committee observed that:⁶³

...suggestions have been received to define close relative in such a way that it includes not only blood relatives but also people from amongst extended families too. Various viewpoints have been received opposing the condition of close relative to be a surrogate mother as it may lead to many problems including property feuds as recommended by DRSC on Health and Family Welfare.... it drastically reduces the number of women who can potentially carry the pregnancy for the intending couple.

As regards the category of persons who may be allowed to avail surrogacy, the Committee was of the view that “eligibility criteria” needs to be wider so as to enable women who may be widows, divorcee and between the age group of 35-45. The Committee recommended that after section 2(r) that defines “intending couple”, a section, namely, section 2(r)(a) be inserted that would read thus: “Intending woman” means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail surrogacy.”⁶⁴ It would widen the ambit of women who may avail surrogacy, especially a widow or a divorcee.

63. Select Committee Report on The Surrogacy Bill, 2019,(presented to the *Rajya Sabha* on 05.02.2020).

64. Under the Surrogacy Bill, 2020, this is provided under section 2(s).

Section 2(q) defines “insurance” as an “arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for specified loss, damage, illness or death of surrogate mother during the process of surrogacy.” However, the above definition does not include ‘*medical expenses, health issues, and such other prescribed expenses incurred on such surrogate mother*’ during the process of surrogacy. These notable omissions were recommended by the Committee to be included in the definition of “insurance” under section 2(q).

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Section 2(q) of the 2020 Bill defines “insurance” as an “arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for specified loss, damage, illness or death of surrogate mother during the process of surrogacy.” However, the above definition does not include ‘*medical expenses, health issues, and such other prescribed expenses incurred on such surrogate mother*’ during the process of surrogacy. These notable omissions were recommended by the Committee to be included in the definition of “insurance” under section 2(q).

Under the Bill of 2020, it has been provided that “a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board” has to be obtained. This is an addition to the previous Bill that did not have such a mandatory requirement. Necessitating

67. Section 2(p) reads thus: “infertility” means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.”

the procurement of such a certificate and subsequent submission of the same in the public domain seemingly violates the right to privacy of the party or parties involved in the process of surrogacy. There is every possibility that such a disclosure of a given 'medical condition' condition may entail social stigmatisation or social discomfort for the party disclosing such kind of information. Our constitution text and spirit as has been interpreted by the courts jealously safeguards the right to privacy. The judicial pronouncement in *K S Puttaswamy v Union of India*⁶⁸ has recognised right to privacy within the textual framework of Article 21 of the Constitution. Informational privacy, more so when it relates to a medical condition, should be protected from being disclosed. Sometimes, that it is in the interest of the concerned person that information of such nature is not disclosed, and when such information is about a certain 'medical condition', there should be legally guarded by a protective cloak of privacy. Thus, it has been, and thus it should be. Any legal provision that tramples upon the right to privacy should be declared unconstitutional. The aforementioned provision falls in the same category of unconstitutionality. Notably, the Constitutional Court of South Africa in *NM v. Smith*⁶⁹ observed thus:⁷⁰

The right to privacy recognizes the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore interdependent and mutually reinforcing. We value privacy for this reason at least — that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.

68. (2017)10 SCC 1

69. (2007) 5 SA 250 (CC). This judgement was also relied upon in the *K Puttaswamy* judgement of the Supreme Court.

70. *Id.*, para.131

VIII. CONCLUSION

Surrogacy is a different kind of Assisted Reproductive Technology because of the third party intervention in it. It raises a multitude of social, economic, ethical, cultural and legal issues. This in turn requires that any surrogacy legislation should strike a harmonious balance between the conflicting interests of all stake holders in the surrogacy procedure. The landmark judgments of the Supreme Court and the High Courts have not only clearly and forcefully brought the surrogacy issues to the attention of legislators, policy makers, lawyers, judges, doctors and social activists but have also emphasized the need for enactment of legislation on the subject without any further delay. The Surrogacy Regulation Bill 2019 will, therefore, be seen as a right step. But the Bill not only suffers from a plethora of ambiguities and vagueness but also from an obscurantist and orthodox philosophy underlying it by ascribing a restrictive and narrow definition to family in a patriarchal, heterosexual, and castist sense. Rooted in the conventional morality as opposed to constitutional morality⁷¹, the Bill is by and large an exclusivist one in as much as it ignores the alternative perspective of family which lays emphasis on functionality⁷² and not on the form of relationship between two individuals.

For those who believe in the traditional, conservative, and orthodox conception of family, the bill may be satisfactory to some extent but it is certainly disappointing for all those who expected a legislation consistent

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71. Bruce P. Frohnen & George W. Carey, "Constitutional Morality and the Rule of Law", 26 *Journal of Law & Politics* 497, 498 (2011). Also see, Andre Béteille, "Constitutional Morality", 43 *Economic and Political Weekly* 40, 36(2008); Pratap Bhanu Mehta, "On triple talaq, court must say: Religious practice cannot trump modern constitutional morality", *The Indian Express* (18.05.2017); Pratap Bhanu Mehta, "What is Constitutional Morality?", Seminar, available at https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm(last accessed on 10.082020). In recent times, the Supreme Court has invoked the idea of constitutional morality in a number of cases, notably in *Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly*, (2020) 2 SCC 595; *Joseph Shine v. Union of India*, (2019) 3 SCC 39 : (2019) 2 SCC (Cri) 84; *Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1; *Shiv Sena v. Union of India*, (2019) 10 SCC 809; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501; *Manoj Narula v. Union of India*, (2014) 9 SCC 1.
72. Arijeet Ghosh and Diksha Sanyal, "How can Families be Imagined Beyond Kinship and Marriage?" *Economic & Political Weekly* (Online), Vol. 54 (45), 16 Nov, 2019.

with fundamental rights of intending parents and women who agree to provide surrogacy service. The Bill *prima facie* fails to satisfy the requirements of Article 14 and 21 of the Indian Constitution by excluding certain categories of persons from the ambit of the persons eligible for surrogacy and reproductive right of surrogate and the commissioning persons. The bill places high reliance on the bureaucratic set up for the elimination of commercial surrogacy in all its forms and manifestations and the regulation of altruistic surrogacy. This bureaucratic model has already failed in prevention of pre-sex determination, abortion, and decline in sex ratio simply because the social, economic, cultural and political factors responsible for pre sex determination have not been taken into consideration to the fullest extent. Now when the Bill's main purpose is to stamp out commercial surrogacy in all circumstances without taking into account the social, economic, cultural and political factors responsible for the rampant growth of national and international surrogacy, there should not be any doubt about the efficacy of the present model of surrogacy regulation. What is most surprising is that the Bill in its present form doesn't include even the salutary recommendations of the select committee of the Rajya Sabha. In conclusion, the Bill has failed in a varying degree all stakeholders in the surrogacy procedure.

As has rightly been said “science never ceases to surprise us; it always out wits us, outpaces us; and makes us either changed or become irrelevant.”⁷³ This is the reason why law generally lags behind the advances in the field of science and technology.⁷⁴ This mismatch or hide and seek between law and science is discernable not only in the case of surrogacy but also in almost all other branches of science and technology. It is said and rightly so that law should try to match the advancement in science, as otherwise, it would become irrelevant. Judging by this standard, the journey of surrogacy legislation in India is tardy, troubled, and tortuous. It is high time that parliament rises to the occasion and put in place without any further delay, comprehensive, progressive, and farward looking surrogacy legislation.



73. *M. Asiya Begum vs The Union of India & Ors.* 18 June, 2019. Para 13

74. B C Nirmal and Ajendra Srivastava, *Science, Technology and Law Reforms*, 18 seq. New Delhi: Satyam International, 2014

THE POWER OF THE ATTORNEY-GENERAL TO ENTER A *NOLLE PROSEQUI* UNDER THE 1999 CONSTITUTION OF NIGERIA: AN ANALYSIS OF THE ISSUES INVOLVED

ANDREW EJOVWO ABUZA*

ABSTRACT : The 1999 Nigerian Constitution bestows on the Attorney-General the power to enter a nolle prosequi in criminal proceedings. This article analyses the issues involved in the constitutional power above. The research methodology adopted is mainly doctrinal analysis of applicable primary and secondary sources. It is the author's view that the exercise of the constitutional power above for the selfish interest or political considerations of the Attorney-General is unconstitutional. The author suggests the subjection of the exercise of the constitutional power above to the permission of the court in line with the approach in other countries, including the United States of America (USA) and Kenya.

KEY WORDS : Attorney-General, Nolle prosequi, Public interest, Interest of justice, Abuse of legal process.

I. INTRODUCTION

The Constitution of the Federal Republic of Nigeria 1999 (the Constitution)¹, hinged on the presidential system of government, came into effect on 29 May 1999, signaling the beginning of Nigeria's fourth Republic. 'Attorney-General' can be defined 'as the Chief Law Officer of a State responsible for advising the government on legal matters and

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1. Cap C 23 Laws of the Federation of Nigeria (LFN) 2004.

representing it in litigation'.²

Many constitutions of States, including the USA, from where Nigeria copied its presidential system of government as well as a country practicing the common law, the United Kingdom (UK) a nation practicing the common-law as well as the cabinet or parliamentary system of government, and Nigeria a country practicing the common-law establish the Office of Attorney-General as the Chief Law Officer of the country or a Region or State in a country as well as a Minister or Secretary of the Government of the country or Commissioner for Justice of the Government of the Region or State. While the National Attorney-General's jurisdiction dovetails to all the nooks and crannies of the country, the Regional or State Attorney-General's jurisdiction is confined to the Region or State in which he is serving. To be specific, Section 150(1) of the Constitution provides that:

There shall be an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.³

Needless to emphasise that the baton of office held by an Attorney-General is dual in capacity in many States, as indicated above. His appointment is a mixture of professionalism and politics. In actuality, he performs in many countries legal functions as the Chief Law Officer of the country or a Region or State, Chief Prosecutor and guardian of the public interest as well as political functions of the Minister or Secretary of Justice or Commissioner for Justice of a Region or State as the Chief Legal adviser of the government of the day with responsibility for criminal justice policy. Thus, he acts as law officer as well as a politician and member of the Executive Council.⁴

The common-law and constitutions of many countries, including Nigeria provide for the legal functions of the

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2. See BA Garner (ed), *Black's Law Dictionary* (St Paul: 8th edn, West Publishing Co., 2004) 139.
 3. See, also, s 195(1) of the Constitution which creates the office of Attorney-General of a State who shall, also, be the Chief Law Officer of a State and Commissioner for Justice of the Government of a State
 4. FO Damola, 'The Position and Power of an Attorney-General in a Democracy: An injustice in the Administration of Justice in Nigeria' (2016) 2(1) *Port Harcourt Journal of Business Law* 243.

Attorney-General. For example, section 174 of the Constitution, which contains the legal functions of the Attorney-General of the Federation of Nigeria,⁵ provides as follows:

(1) The Attorney-General of the Federation shall have power-

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any Act of the National Assembly;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

(2) The powers conferred upon the Attorney-General of the Federation under sub-section (1) of this section may be exercised by him in person or through officers of his department.

(3) In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of Justice and the need to prevent abuse of legal process.⁶

A note-worthy point that has been indicated before is that the Attorney-General is the Chief Prosecutor in many countries. As Chief Prosecutor, the Attorney-General is, also, imbued with the authority to discontinue at any stage before judgment is delivered any criminal proceedings instituted by him or any other authority or person. This is the power to enter a *nolle prosequi*, as can be clearly discerned from the provisions of section 174(1)(c) above. The expression *nolle prosequi* which is abbreviated to *nol or nolle pros* is a legal Latin expression.⁷ In the

5. Note that s 211(1) of the Constitution contains the legal functions of the Attorney-General of a State.

6. S 174(1), (2), & (3) above is the same in wordings with s 211(1), (2), & (3) of the Constitution which contains the legal functions of the Attorney-General of a State, except that he is empowered to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any law of the House of Assembly of his State and the same is to operate within his State.

7. <<https://en.m.wikipedia.org/wiki/>> accessed 23 April 2020.

Nigerian case of *The State v Adakole Akor and Others*,⁸ Idoko, J defined *nolle prosequi* as meaning: 'I am unwilling to prosecute or unable to proceed or continue with prosecution'. Needless to mention that the Attorney-General exercises the power of *nolle prosequi* by stating personally in court that the Crown or State intends that the criminal proceedings shall not continue or by giving information to the court in writing that the Crown or State intends that the criminal proceedings shall not continue.⁹

It is disappointing that since the coming into force of the Constitution on the date above, some Attorneys-General in Nigeria have hidden under the Constitution to free persons standing trial in court for serious criminal offences through the exercise of the constitutional power of *nolle prosequi* for their selfish interest or political considerations or selfish or vested interest of Nigerian leaders or other interest other than the interest of justice, contrary to section 174(3) or section 211(3) of the Constitution above.

The National Assembly of Nigeria (NAN) is to blame for allowing this problem to emerge, as its enactment, that is the Constitution does not expressly subject the exercise of the power of *nolle prosequi* by the Attorney-General to the control or permission of the court or anybody or authority. This Lacuna in the Constitution would not augur well for the system of administration of criminal justice in Nigeria, as it is prone to abuse as has been the case since the coming into force of the Constitution. The entering of a *nolle prosequi* in criminal proceedings by Attorneys-General has adverse effect on some victims of crime or complainants or accused persons or private prosecutors or close relatives of the victims of crime. For instance, it has led to loss of time and money of the complainant and accused person or persons, already expended at the time when the accused person or persons was or were discharged upon the entering of a *nolle prosequi* in the criminal proceedings by the Attorney-General, contrary to the fundamental right of a citizen of Nigeria, including an accused- Nigerian citizen, to own property, as guaranteed under sections 43 and 44(1) of the Constitution.

Also, it has engendered the denial of the fundamental right of the

8. [1981] 2 SCNLR 410, 414 or [1981] 2 NCLR 410, 718.

9. Damola, see n 4 above, 248.

complainant and accused person or persons to a fair hearing, contrary to the right to a fair hearing guaranteed by the common-law rules of natural justice, namely *audi alteram partem*, meaning ‘hear the other side of a case’ and *nemo judex in causa sua*, meaning ‘no man should be a Judge in his own cause or case’, section 36(1) of the Constitution, Article 7 of the African Union (AU) African Charter on Human and Peoples’ Rights (ACHPR) 1981 and Article 14(1) of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) 1966.

Furthermore, it has brought about the denial of the right of some Nigerian private prosecutors to participate in the Government of Nigeria directly through accessibility to the court, take part in the conduct of public affairs directly, and participate freely in the government of their country directly in accordance with the provisions of law, contrary to sections 14(2)(c) as well as 17(2)(e) of the Constitution, Article 25 of the ICCPR, and Article 13(1) of the ACHPR, respectively. A lot of people are actually upset by this ugly situation. Worse still, the Attorneys-General who exercise the constitutional power above wrongly are not being dealt with or removed from office by the Nigerian Government.

This article analyses the issues involved in the power of the Attorney-General to enter a *nolle prosequi* under the Constitution. It analyses applicable laws. It takes the position that the exercise of the constitutional power of *nolle prosequi* by the Attorney-General in Nigeria for his selfish interest or political considerations and so on is amoral, against legal ethics or unethical, unconstitutional, and unlawful and, therefore, ought to be subjected to the permission of the court in Nigeria. It highlights the practice in other countries. It offers suggestions and recommendations, which, if implemented, could eradicate the problem of some Attorneys-General in Nigeria exercising the constitutional power of *nolle prosequi* for their selfish interest or political considerations and so on rather than in the public interest, the interest of justice and the need to prevent abuse of legal process.

II. BRIEF HISTORY OF THE POWER OF THE ATTORNEY-GENERAL TO ENTER A *NOLLE PROSEQUI* IN NIGERIA

In this segment, the discussion shows that the exercise of the power of the Attorney-General to enter a *nolle prosequi* in Nigeria dates back to

the period when Nigeria was under British colonial rule. Nigeria came into being on 1 January 1914, following the amalgamation of the Colony of Lagos and Protectorates of Southern and Northern Nigeria to constitute the Colony and Protectorate of Nigeria by Lord Fredrick Lugard who was appointed the first Governor-General of Nigeria by the British colonial master of Nigeria.¹⁰ The Law Officer Ordinance 1951 provides that the Crown Legal Advisers are entitled to practice in courts of Nigeria, ex officio from 1 October 1936.¹¹ Indeed, the Offices of the Attorney-General, Solicitor-General, Regional Attorney-General and Crown Counsel were created under the Law Officer Order¹² 1951 and Law Notes¹³ 1955. It was on 1 October 1960 that Nigeria was granted independence by Britain under the Parliamentary Nigeria (Constitution) Order in Council¹⁴ 1960. In 1963, the country became a Republic. The nation's first Republic can be considered to have started on 1 October 1963 under the 1963 Parliamentary Republican Constitution. It is note-worthy that the 1960 Nigerian Parliamentary Constitution and Regional Parliamentary constitutions removed all the common-law powers of the Attorney-General with respect to the prosecution of criminal cases and the discontinuance of the same and bestowed the said powers on the Federal and Regional Directors of Public Prosecutions, respectively.¹⁵ Owing to this development, the Director of Public Prosecutions (DPP) became the only civil servant imbued with such enormous powers. Fortunate enough, they could not be removed from office without following some long and cumbersome process under the Civil Service Rules.¹⁶

On its part, the 1963 Parliamentary Republican Constitution removed

10. See AE Abuza, 'A Reflection on the Regulation of Strikes in Nigeria' (2016) 4 (1) *Commonwealth Law Bulletin* 6.

11. See Cap 100 Laws of the Federation of Nigeria and Lagos (Revised Edition) 1958.

12. No 47 of 1951.

13. No 1 of 1955.

14. No 1652 of 1960.

15. See, for example, s 97 of the 1960 Parliamentary Constitution of the Federation, s 48 of the Parliamentary Constitution of Northern Region and s 47 of the Parliamentary Constitutions of Western and Eastern Regions.

16. See, for example, Rule 04107(1)-(XVII) of the Federal Civil Service Rules, as revised up to 1 April 1974 made pursuant to s 150(1) of the Constitution of the Federation 1960.

the control of criminal prosecutions from the hands of the DPP and returned it back to the Attorney-General, as was the case under the common-law. It goes further to make the hitherto, meaning before now, independent office of the DPP sub-ordinate to that of the Attorney-General.¹⁷ In fact, the Constitution above establishes the Legal Department to be headed by the Attorney-General with the DPP made responsible to the same.¹⁸ Sub-sections (2), (5), and (6) of section 104 of the Constitution above, with equivalent provisions in the Regional constitutions, are significant. Section 104(2)(a), (b) and (c) of the Constitution above are similar in wordings to section 174(1)(a),(b) and (c) of the Constitution, as disclosed earlier. Sub-section (5) of section 104 above is to the effect that the powers conferred on the Federal Attorney-General by sub-section (2)(b) and (c) shall only be exercised by him and any other person or authority is permitted to withdraw criminal proceedings instituted by the same at any stage before the person against whom the proceedings have been instituted has been charged before the court. While sub-section (6) of section 104 above is to the effect that in the exercise of the powers bestowed on the Federal Attorney-General by section 104 above, he shall not be subject to the direction or control of any other person or authority.

Also, the Presidential Constitution of the Federal Republic of Nigeria 1979¹⁹ makes provisions for the prosecution and discontinuance of criminal proceedings by the Federal and States' Attorneys-General.²⁰ It is significant to put on record that the 1979 Presidential Constitution is, in actuality, the same with the 1963 Parliamentary Republican Constitution, regarding the powers of the Attorney-General, except for minor differences in sub-sections (2) and (3) of sections 160 and 191 of the same. To be specific, sub-section (2) of section 160 above provides that the powers conferred on the Federal Attorney-General under section 160(1) may be exercised by him in person or through officers of his

17. See the Parliamentary Constitution of the Federation No 20 of 1963, s 104; Parliamentary Constitution of Northern Nigeria No 33 of 1963, s 49; Parliamentary Constitution of Western Nigeria No 26 of 1963, s 47; Parliamentary Constitution of Eastern Nigeria No 8 of 1963, s 49; and Parliamentary Constitution of Mid-Western Nigeria No 3 of 1964, s 47.

18. *Ibid.*

19. Cap 62 LFN 1990.

20. *Ibid.*, ss 160 & 191.

department. While sub-section (3) of section 160 above provides that in the exercise of his powers under section 160 above, the Federal Attorney-General shall have regard to the public interest, the interest of Justice and the need to prevent abuse of legal process.

Of course, the 1979 Presidential Constitution, unlike its predecessors, provides what seems to be a safeguard for the prevention of misuse of the Attorney-General's powers of prosecution and discontinuance of criminal proceedings in sub-section (3) of sections 160 and 191 above.

Furthermore, the Constitution makes provisions for prosecution and discontinuance of criminal proceedings by the Federal and State Attorneys-General in sections 174 and 211 of the same, as disclosed earlier. Indeed, it retains the provisions of sections 160 and 191 of the 1979 Presidential Constitution. In this way, the provisions of sections 174 and 211 above are the same with sections 160 and 191 of the 1979 Presidential Constitution.

It so happens that over the years the constitutional power of the Attorney-General to enter a *nolle prosequi* in criminal proceedings has been misused in that the same has been utilised by some Attorneys-General for their selfish interest or political considerations and so on. A cardinal point to make at this juncture is that the exercise of the constitutional power of *nolle prosequi* in criminal proceedings by some Attorneys-General for their selfish interest or political considerations and much more, as disclosed above is not peculiar to Nigeria. It is in accord with what obtains in other countries, including the USA, the UK and Kenya a country practicing the common-law and the presidential system of government.

III. ANALYSIS OF CASE LAW ON THE POWER OF ATTORNEY-GENERAL TO ENTER A *NOLLE PROSEQUI* UNDER THE 1999 NIGERIAN CONSTITUTION

The courts in Nigeria have discussed the power of the Attorney-General to enter a *nolle prosequi* under sections 174(1)(c) and 211(1)(c) of the 1999 Nigerian Constitution in so many cases. A discourse on a few selected cases would suffice in this segment.

One selected and important case in point is *The State v Adakole*

Akor and Others.²¹ In the case, the Attorney-General of Benue State had entered a *nolle prosequi* in writing to free 27 accused persons, that is the respondents/accused standing trial at the High Court of Benue State, relying on section 191(1)(c) of the 1979 Presidential Constitution (now section 211(1)(c) of the Constitution). After hearing arguments by counsel on both sides whom the Court above, suo motu, meaning 'on its own motion', invited to address it on the validity or otherwise of the *nolle prosequi* above, Idoko, J the trial High Court Judge in his Judgment delivered on 2 June 1980 held that the provision of section 191(3) of the Constitution above (now section 211(3) of the Constitution) is not a mere re-statement of existing principles, but a solemn provision to be complied with by the Attorney-General of a State and that evidence of such compliance must be shown. The learned Justice Idoko, further, held that, in the instant case, the Attorney-General of Benue State did not have regard to the provisions of section 191(3) of the Constitution above before he acted under section 191(1)(c) of the same and it followed that he had not properly entered a *nolle prosequi* to free the accused/respondents.

Being aggrieved by the Judgment of the trial High Court, the appellant/prosecution appealed to the Court of Appeal which reversed the Judgment of the trial High Court. The Court of Appeal (per Adenekan Ademola, JCA) held that section 191(3) of the Constitution above which governs the exercise of the power of the State Attorney-General, regarding matters stated in section 191(1) of the Constitution above (now section 211(1) of the Constitution), does not make any difference to the exercise of the power to enter a *nolle prosequi* by the same on the ground that the section was merely re-stating factors which the same would have borne in mind, at any rate, in discharging his legal functions, so that the directive contained in section 191(3) above are merely for the guidance of the same and not limitations of his powers. His Lordship concluded that the trial High Court Judge was wrong to have held that, in the instant case, the Benue State Attorney-General would have stated expressly under section 191(3) above, the reasons which had guided the same in entering a *nolle prosequi* in the case. According to the learned Justice Ademola, the *nolle prosequi* filed in the suit before the trial High Court Judge was in order and proper.

21. See note 8 .

Also, *the State v Samuel Ilori and Two Others*,²² is another selected and important case in point. In the case, the Attorney-General of Lagos State, relying on section 191(1)(c) of the 1979 Presidential Constitution, entered a *nolle prosequi* on 9 June 1980 to free one Samuel Ilori, the DPP of Lagos State as well as one Wodi and one Tano, the first respondent/accused as well as the second and third respondents/accused, respectively being prosecuted privately at the High Court of Lagos State by one Fred Egbe, the appellant a Lagos Lawyer for the offences of conspiracy to bring false accusations against him and conspiracy to injure him in his trade or profession, contrary to sections 125 and 518(4) of the Criminal Code Law of Lagos State.²³ This came about after the Court of Appeal had quashed an information filed by the first respondent/accused to prosecute the appellant for the offences of stealing and inducing delivery of money by false pretences, contrary to sections 390 and 419 of the Law above and the Attorney-General above had declined appellant's request to prosecute the respondents/accused, including the second and third respondents/accused who were the two Police officers that investigated the case against the appellant. The trial High Court upheld the *nolle prosequi*.

Being aggrieved by the decision of the trial High Court, the appellant appealed to the Court of Appeal, on the ground that the trial High Court should have taken evidence and examined his allegations against the Attorney-General of malice and extraneous considerations in pursuance of the provisions of section 191(3) of the 1979 Constitution (now sections 174(3) and 211(3) of the Constitution). Justice Kazeem, JCA (as he then was) delivering the leading judgment of the Court of Appeal with which the other two Justices of the Court who sat in the appeal concurred, dismissed the appeal of the appellant. His Lordship held that the *nolle prosequi* was in order and the appellant did not obtain the leave of the Judge of the High Court before filing his papers for private prosecution an issue which the Court of Appeal took up on its own. The learned Justice Kazeem, re-iterated the provisions of section 191 of the 1979 Presidential Constitution (now sections 174 and 211 of the Constitution) and expressed the opinion that the Nigerian courts in the exercise of their

22. [1984] 5 NCLR 52.

23. Cap 31 Laws of Lagos State 1973.

wide powers under section 6(6)(b) of the 1979 Presidential Constitution could question the Attorney-General's power of *nolle prosequi* and grant appropriate remedies when an aggrieved person, who had complained of an infraction of his fundamental right by the Attorney-General or that the same failed to have regard for the safeguards contained in section 191(3) above, could prove that the same had acted out of improper motive or ill-will.

Being aggrieved by the judgment of the Court of Appeal, the appellant appealed to the Supreme Court. Justice Kayode Eso, JSC delivering the leading judgment of the Supreme Court with which the other Justices of the Court who sat in the appeal concurred, dismissed the appeal of the appellant. His Lordship affirmed the decision of the Court of Appeal, but over-ruled its opinion expressed to the effect that the court could question the Attorney-General's power of *nolle prosequi* when it is proved that the same had acted out of improper motive or ill-will.

The Learned Justice Eso held that section 191(3) above had not altered the pre-1979 constitutional position of the Attorney-General, as the common-law pre-eminent and incontestable position of the Attorney-General is still preserved by section 191(1) above under which the same still had an unquestioned discretion in the exercise of his powers to institute or discontinue criminal proceedings. According to His Lordship, notwithstanding section 191(3) above, which the same considered to be a statement of the law up to 1979, the Attorney-General was still not subjected to any control in the exercise of his powers under section 191 above and except for public opinion and the reaction of his appointor, the Attorney-General was law unto himself, regarding the exercise of the said powers. Justice Eso concluded that the test to be adopted under section 191(3) above in examining the exercise of the Attorney-General's power of *nolle prosequi* under section 191(3) above, which the same likened to the test adopted in examining the exercise of his discretion prior to 1979, is subjective and it is the exercise of his discretion in accordance with his own judgment.

Finally, in the more recent case of *The State v Deepak Khilnani and Sushil Chandra*,²⁴ another selected and important case in point, the

24. (Unreported) Suit No. 1D/1544c/2015, ruling of Oluwatoyin Ipaye, J of the High Court of Lagos State, Ikeja delivered on 13 July 2017.

Attorney-General of Lagos State entered a *nolle prosequi* to free the defendants/accused persons, Indians with British citizenship standing trial at the High Court of Lagos State for cheating, felony, making false statements, and stealing, contrary to sections 421, 422, 436(9) and 490 (7) of the Criminal Code Law,²⁵ respectively relying on section 211(1)(c) of the Constitution. They allegedly supplied some equipment to a company in Lagos, Greenfuels Limited, through Gentec Limited. The invoices for the said equipment were allegedly-inflated by the defendants/accused who failed to account for the difference. On 13 July 2017, Ipaye, J the trial High Court Judge struck-out the charges against the defendants/accused and discharged the same. The learned Justice Ipaye held that the Attorney-General reserved the statutory power to initiate and discontinue a criminal proceedings in Lagos State, and that the Court could not review the Attorney-General's discretion. It should be noted that one Rosiji, the Chairman of Greenfuels Limited who was the complainant in the case had briefed one Olayinka Ola-Daniels a legal practitioner who filed in the case a brief of an *amicus curiae*, meaning a friend of the court such as a legal practitioner. Ola-Daniels and 27 other civil society lawyers had protested in open court against the discontinuance of the case but to no avail.²⁶

The author is of the view that the decision of the Court of Appeal in the *Akor* case, the decision of the Supreme Court in the *Ilori* case as well as the decision of the High Court in the *Khilnani* case are not acceptable. It is the author's humble view that the Court of Appeal, Supreme Court and High Court above are wrong for the ensuing reasons. First, the power of *nolle prosequi* bestowed on the Attorney-General under sections 160(1)(c) and 191(1)(c) of the 1979 Presidential Constitution (now sections 174(1)(c) and 211(1)(c) of the Constitution) is not an unquestionable or absolute constitutional power as decided by the Supreme Court of Nigeria

25. Cap C 17 Laws of Lagos State 2011.

26. <<https://allafrica.com/stories>> accessed 29 April 2020. Note, also, that in *Attorney-General of Kaduna State v Umaru Hassan* [1985] NWLR (pt 8) 483, the Supreme Court of Nigeria (per Ayo Irikefe, JSC) held correctly that the Solicitor-General of Kaduna State could not validly exercise the power of the Attorney-General to enter a *nolle prosequi* in criminal proceedings under s 191(1)(c) of the 1979 Presidential Constitution in the absence of an incumbent in the office of the Attorney-General or when there was no substantive Attorney-General of Kaduna State.

in the *Ilori* case. This can be discerned from the express provisions of the 1979 Presidential Constitution or the stand point of constitutional supremacy.²⁷ It should be noted that section 1(1) of the Constitution above declares the same to be supreme and its provisions to have binding force on all persons and authorities, including the Supreme Court, throughout Nigeria. Put differently, the discretion the Supreme Court of Nigeria accorded the Attorney-General in the *Ilori* case is much too wide than the framers of the Constitution above had in mind.²⁸ It is true that when the Attorney-General begins a prosecution before a court he is not obliged to disclose to the court such reasons as are within matters specified in sections 160(3) and 191(3) of the 1979 Presidential Constitution or sections 174(3) and 211(3) of the Constitution or when the Attorney-General continues or takes -over a prosecution begun by someone else, he is not obliged to disclose to the court such reasons that have compelled him to take-over the prosecution, as pointed out by the Court of Appeal in the *Akor* case. In any event, the Court above was not correct to have held that the directive in section 191(3) above are merely for the guidance of the Attorney-General and not limitations of his powers.²⁹

A point to note is that under sections 6(6)(a) and 6(6)(b) of the 1979 Presidential Constitution (now sections 6(6)(a) and 6(6)(b) of the Constitution) the courts established for the Federation and a State, including the Supreme Court, Court of Appeal and State High Court are bestowed with all inherent powers and sanctions of a court of law and with powers to adjudicate over or hear all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto for the determination of questions

27. See OH Tobechukwu and SC Chukwuma, 'Rethinking the Power of *Nolle Prosequi* in Nigeria: The case of *State v Ilori*' (2014) 2(1) *Global Journal Politics and Law Research* 8

28. See EB Omorogie, 'Power of the Attorney-General over Public Prosecution under the Nigerian Constitution: Need for a Judicial Restatement', *University of Benin*, Faculty of Law, Lecture series No 4 November 2004, 7.

29. Note that the stance of the Court of Appeal is supported by some learned Nigerian writers. For example, see GO Etose, JU Aziegbemhin and PU Aghede-Ehikwe, 'An Appraisal of the Application of the Doctrine of *Nolle Prosequi* in Nigeria' (2018) 8(1) *Cranebrook Law Review* 13 and JO Akande, *Introduction to the Constitution of Nigeria* (Lagos: MIJ Professional Publishers Ltd., 2000) 321.

regarding the civil rights and obligations of that person, respectively.³⁰ The provisions of sections 6(6)(a) and 6(6)(b) as well as sections 160(3), 191(3), 174(3) and 211(3) above suggest that upon a complaint by the complainant or defendant or an *amicus curiae* or any aggrieved person that the Attorney-General in the exercise of any of his powers under sections 160, 191, 174 and 211 above acted in breach of any of the fundamental rights guaranteed to Nigerians under Chapter Four of the 1979 Presidential Constitution and the Constitution or out of improper motive or ill-will, the court can inquire into such complaint and grant relevant remedies if the Attorney-General could not satisfy the court that the exercise of any such powers in a particular criminal proceedings is in the public interest and so on.³¹ The Court of Appeal was, therefore, correct in stating in the *ILori case* to the effect that the court could question the Attorney-General's power of *nolle prosequi* when it is proved by an aggrieved person that the Attorney-General had acted out of improper motive or ill-will. The problem with the Supreme Court in the *ILori case* is that it placed heavy reliance on the common-law position, regarding the Attorney-General. It is argued that the apex Court above ought not to have placed such heavy reliance on the position under the common-law, where it is settled that the exercise of the power of *nolle prosequi* by the Attorney-General cannot be questioned by the court whether the Attorney-General acted wrongly or not,³² in its decision to over-rule the Court of Appeal on its position.

A significant point to bear in mind is that Nigeria has deliberately created the Office of Attorney-General under its Constitution. Also, it has deliberately bestowed the common-law powers of the Attorney-General with respect to prosecution of criminal cases and *nolle prosequi* on the Attorney-General under its Constitution. These implicate that Nigeria intends that its Constitution and not the common-law should be

30. See, also, *Musa Baba-Panya v President of the Federal Republic of Nigeria and Two Others* [2018] 15 NWLR (pt 1643) 395, 401-02, Court of Appeal (CA).

31. See the decision of the Supreme Court of Nigeria in *Mohammed Sanni Abacha v The State* [2002] 11 NWLR (pt 779) 437 or [2002] LPELR 16.

32. See, for example, *The Queen on the Protection of JD Tomlinson v Comptroller-General of Patents Designs and Trade* [1899] 1 QB 914; *London County Council v The Attorney-General* [1902] AC 165, 168-69; *The Queen v Allen* [1862] 121 ER 929; and *Alfred Njau and Others v City Council of Nairobi* [1982-1988] 1 KAR 229. 4. See, also, Akande, see n 29 above, 319-20.

the law with regard to the establishment of the Office of the Attorney-General as well as the prosecution of criminal cases and the exercise of the power of *nolle prosequi*.

Without doubt, the common-law, together with statutes of general application that were in force in England on 1 January 1900 and the doctrines of equity still form part of Nigerian Law.³³ This is by virtue of the reception laws.³⁴ However, where there is a conflict between the common-law and Constitution of Nigeria with respect to a subject-matter, the Constitution of Nigeria prevails. This is so, because there is a presumption that in providing in the Constitution different provisions on a subject-matter other than the position at common-law, Nigeria does not intend that the position under the common-law should be the governing law with respect to such a subject-matter. Besides, the Constitution is the supreme law in Nigeria by virtue of section 1(1) of the Constitution. Where any law, including the common-law is inconsistent with the Constitution, the Constitution prevails and that other law shall to the extent of its inconsistency be void, going by section 1(3) of the Constitution. This view is fortified by the decision of the Supreme Court of Nigeria in *Efunwape Okulate v Gbadamasi Awosanya*³⁵ and *Attorney-General of Abia State v Attorney-General of the Federation*.³⁶

The foregoing discourse reveals that both the Office of the Attorney-General and its legal functions in Nigeria are not derived from the common-law. Rather, they are derived from the Nigerian Constitution. If the Parliament in Nigeria had wanted Nigeria to stick to the position at common-law with respect to the power of *nolle prosequi* it would not have provided for the Office of Attorney-General and the legal functions of the same in the Nigerian Constitution. In this way, it is the provisions of the Nigerian Constitution that must be considered in determining whether the Attorney-General has an unquestioned discretion or unchallengeable authority in the exercise of his power of *nolle prosequi*. An important point to note is that the provisions of sections 191(3) and

33. See, for example, the Interpretation Act Cap 123 LFN 2004, s 32(1).

34. Note that the history of reception laws in Nigeria dates back to Ordinance No 3 of 1863 which introduced English Law into the Colony of Lagos.

35. [2002] FWLR (pt 25) 1666, 1671.

36. [2002] 6 NWLR (pt 763) 264.

211(3) above are mandatory with the compulsory 'shall'. On construction of the word 'shall' when used in a statute, the Nigerian Court of Appeal in the case of *John Echelunkwo and 90 Others v Igbo-Etiti Local Government Area*³⁷ stated as follows:

'Whenever the word 'shall' is used in an enactment, it denotes imperativeness and mandatoriness. It leaves no room for discretion at all. It is a word of command; one which always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning. It has the invaluable significance of excluding the idea of discretion and imposes a duty which must be enforced'.

In a similar manner, the Nigerian Court of Appeal stated in the *Baba-Panya* case thus:

'Whenever the word 'shall' is used in a statute and indeed the Constitution, it presupposes a compulsory action, conduct or duty. It admits of no discretion whatsoever'.

The pronouncements of the Court of Appeal above implicate that the Attorney-General in exercising his power of *nolle prosequi* must take into consideration the public interest, the interest of justice and the need to prevent abuse of legal process and that these requirements must be enforced by law enforcement agencies, including the court.

Public interest is cardinal to policy debates, politics, democracy and the nature of the government itself.³⁸ *The Black's Law Dictionary* defines 'public interest' as: 'the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake...'³⁹ In short, public interest has to do with the common well-being or general welfare.⁴⁰ Interest of Justice means in the furtherance of justice. The word 'Justice' can be defined to mean 'equity, fairness or impartiality'.⁴¹ It, also, means 'the quality of being fair or reasonable'.⁴²

37. [2013]7 NWLR (pt 1352)1, 8

38. Damola, see n 9 above, 254.

39. Garner, see n 2 above, 1266.

40. Damola, see n 38 above.

41. <<https://www.quora.com/what-does-interests-of-justice-mean>> accessed 27 May 2020.

42. P Philips et al (eds), *AS Hornsby's Oxford Advanced Learner's Dictionary-International Students Edition* (Oxford: 8th edn, Oxford University Press, 2010) 13.

The expression ‘interest of Justice’ refers generally to the cause of fairness, equity or impartiality or reasonableness.⁴³ While the expression ‘abuse of legal process’ refers to the use of legal process to accomplish an unlawful purpose or improper use of a civil or criminal legal procedure for an unintended, malicious or perverse reason.⁴⁴ It is argued that where it is proved by a complainant or defendant or an *amicus curiae* or any other aggrieved person that the Attorney-General had not taken into consideration the public interest and so on, but acted instead out of improper motive or ill-will, the court has the power to reject the exercise of the power of *nolle prosequi* by the Attorney-General in a particular criminal proceedings. It is mind-boggling why the trial High Court in the *Khilnani* case did not reject the exercise of the power of *nolle prosequi* by the Attorney-General of Lagos State in the case above. It has been indicated already that Ola-Daniels and 27 other civil society lawyers had protested in open court against the discontinuance of the case by the Attorney-General of Lagos State but to no avail. They, correctly, argue that the said Attorney-General did not take into consideration the public interest and the interest of justice, as mandated in section 211(3) of the Constitution in the circumstances of the case before he acted under section 211(1)(c) of the Constitution and therefore he had not properly entered a *nolle prosequi* in the case above.⁴⁵

Second, the apex Court in the *ILori* case had suggested that where the Attorney-General had abused the exercise of his power of *nolle prosequi* under the Constitution there is nothing the court could do about it but that he must be left to his appointor and public opinion. Indeed, this is a re-statement of the position at common-law. It should be noted that the Attorney-General’s appointor, the president or governor is not likely to remove or sanction the Attorney-General, as, often times, the power of *nolle prosequi* is exercised by the Attorney-General at the instance of the appointor. Also, unlike the situation in the developed nations such as the UK where public opinion may compel a public officer to resign his office, the situation in Nigeria is such that public officers

43. See n 41 above.

44. <[https://illegal-dictionary.thefreedictionary.com/abuse of process](https://illegal-dictionary.thefreedictionary.com/abuse+of+process)> and <https://definitions.uslegal.com/a/abuse-of-process> accessed 27 May 2020.

45. <<http://www.allafrica.com/stories>> accessed 20 April 2020 and <<http://www.vanguardngr.com>> accessed 20 April 2020.

hardly resign their offices in the face of adverse public opinion. Many Nigerian public officers actually take public opinion less seriously. In this way, public opinion may not weigh on the mind of the Attorney-General who wishes to abuse the power above. Besides, in Nigeria, the State is obligated under section 15(5) of the Constitution to abolish corrupt practices and abuse of power. This section is contained in Chapter Two of the Constitution, dealing with 'Fundamental Objectives and Directive Principles of State Policy'. Although section 15(5) and other provisions under Chapter Two above have been rendered non-justiciable by virtue of section 6(6)(c) of the Constitution,⁴⁶ it shall be the duty and responsibility of all organs of government, including the courts to conform to, observe and apply the provisions of Chapter Two above,⁴⁷ of which section 15(5) is a part.

Third, the Supreme Court can be vilified for taking the stance that the test to be adopted under section 191(3) above in examining the exercise of the Attorney-General's discretion with regard to the exercise of his power of *nolle prosequi* under the 1979 Presidential Constitution is subjective and it is the exercise of his discretion, according to his own judgment. It is contended that a decision that can negatively impact on the civil rights and obligations of a citizen of Nigeria, including any question or determination by or against any government or authority cannot be reached subjectively.

An important point to bear in mind is that the power to exercise a *nolle prosequi* in criminal proceedings under section 191(1)(c) of the 1979 Presidential Constitution or section 211(1)(c) of the Constitution is a quasi-judicial function which must be done objectively and in which the court of law should look into and that is the basic reason why it has been contended above that the Attorney-General in exercising the power of *nolle prosequi* bestowed on him by the sections above must in doing so have regard to the public interest and so on. This is so, because if the Attorney-General continues to enjoy this absolute or wide-discretionary power of *nolle prosequi*, as suggested by the apex Court in the *ILori* case

46. See the *Baba Panya* case. Note that the position above is in tune with what obtains in other countries. See, for example, art 37 of the Constitution of India 1949.

47. See s 13 of the Constitution and the *Baba-Panya* case. See, also, the Constitution of India 1949, art 37.

there is no gain-saying the fact that this can engender manifest misuse of power, contrary to section 15(5) above, as he tries to protect or shield relatives, friends and political associates.

In the *Ilori* case, for example, the right of the appellant to public participation in the Government of Nigeria through accessibility to the court, as guaranteed under sections 14(2)(c) and 17(2)(e) of the 1979 Presidential Constitution (now sections 14(2)(c) and 17(2)(e) of the Constitution) was denied. Actually, the prosecution of the respondents/accused for allegedly committing offences under the Criminal Code Law of Lagos State above is the public duty of the Lagos State Government which is to be exercised by the Attorney-General of Lagos State who is in-charge of public prosecution in Lagos State under section 191(1)(a) of the 1979 Constitution above(now section 211(1)(a) of the Constitution). The appellant in the *Ilori* case was merely engaging in public participation in the Government of Lagos State a Government of Nigeria to ensure that the officers above who were alleged to have committed offences under the Criminal Code Law above are prosecuted and punished if found wanton or guilty. It needs to be pointed out that the power to initiate criminal prosecution by a private prosecutor is a right recognised by the Constitution and other laws of Nigeria.⁴⁸

Also, the appellant's fundamental right to a fair hearing, guaranteed by the common-law rules of natural justice, as disclosed earlier, section 36(1) of the 1979 Presidential Constitution above (now section 36(1) of the Constitution), was denied. In other words, he was not allowed or given the opportunity to state his own case against the respondents/accused in the Lagos State High Court. In short, the apex Court failed to give due cognisance or regard to the fundamental right of a Nigerian citizen to a fair hearing, as embedded under section 36(1) of the 1979 Presidential Constitution.

A good admonition to make is that due cognisance or regard must be given to the right of access to the court guaranteed to every Nigerian by section 17(2)(e) above and the fundamental rights guaranteed to every Nigerian under Chapter Four of the Constitution of which the right to a fair hearing guaranteed in section 36 above is a part. Arguably, Chapter

48. See, for example, ss 174(1)(b) and 211(1)(b) of the Constitution as well as s 106 of the Administration of Criminal Justice Act 2015.

Two provisions, including sections 14(2)(c), 15(5) and 17(2)(e) above constitute the basis of the social contract between the citizens of Nigeria and governmental leaders. Little wonder, all governmental organs, including the courts are mandated to conform, observe and apply its provisions, as disclosed above. In addition to this, the provisions of Chapter Four of the Constitution, dealing with 'Fundamental Rights', of which section 36 is a part, are sacrosanct, hence; the Constitution provides for a difficult and tedious procedure for the amendment of any of the provisions in its section 9(3). The nation, in this light, must apply, and show respect for, the Constitution. The rights above are, also, guaranteed under international law. For example, the Charter of the United Nations (UN) 1945 guarantees human rights of persons, including the right to a fair hearing. Also, the Universal Declaration of Human Rights (UDHR) 1948 guarantees the right to a fair and public hearing and other fundamental rights in its Articles 3 to 20. Although the UDHR is a soft law agreement and not a treaty itself and thus not legally-binding on member-nations of the UN, including Nigeria, it has become customary international law that has been adopted across the world towards protection of human rights.⁴⁹

Furthermore, the UN International Covenant on Civil and Political Rights (ICCPR) 1966 guarantees to every person the fundamental right to a fair hearing and the right to take part in the conduct of public affairs directly in its Articles 14(1) and 25, respectively. It is argued that the ICCPR now has the effect of a domesticated enactment, as required under section 12(1) of the Constitution and, therefore, has force of law in Nigeria, since the same guarantees labour rights such as in its Article 22(1) and has been ratified by Nigeria.⁵⁰ Again, the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981 guarantees to every person the fundamental right to be heard and the right to participate freely in the government of his country directly in accordance with the provisions of law in its Articles 7 and 13(1), respectively. The Charter has, not only be signed and ratified by Nigeria but has, also been made a

49. See KM Danladi, 'An Examination of Problems and Challenges of Protection and Promotion of Human Rights under European Convention and African Charter' (2014) 6(1) *Port Harcourt Law Journal* 83.

50. AE Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2017) 7(1) *East African Journal of Science and Technology* 121-22.

part of National law, as enjoined by its provisions and section 12(1) of the Constitution.⁵¹ In *Sanni Abacha v Gani Fawehinmi*,⁵² the Supreme Court of Nigeria held that since the African Charter above had been incorporated into Nigerian law, it enjoyed a status higher than a mere international convention and the same was part of the Nigerian *corpus juris*, meaning body of laws.

Anyhow, as a member of the UN and AU as well as State-Party to the ICCPR and ACHPR, Nigeria is obligated to apply the provisions of the international human rights' instruments above. The nation, in this instance, must show respect to international law and its treaty obligations, as enjoined by section 19(d) of the Constitution.

In the final analysis, it is argued that the decision of the Court of Appeal in the *Akor* case, the decision of the Supreme Court in the *ILori* case and the decision of the High Court in the *khilnani* case on the matter are null and void. This argument is hinged on the insightful provision in section 1(3) of the 1979 Presidential Constitution or section 1(3) of the Constitution. Perhaps, the Justices of the Court of Appeal and Supreme Court as well as the Judge of the High Court would have come to a different conclusion, if they had adverted their minds to the points above.⁵³

One problem with the judiciary in Nigeria is that many of the judges

51. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 LFN 1990 (now Cap A9 LFN 2004).

52. [2000] 6 NWLR (pt 660) 228, 251.

53. For an incisive discourse on the *ILori* case and criticisms of the decision of the Supreme Court in the case, see Tobeckukwu and Chukwuma as well as Omorogie nn 27 & 28 above and BO Igwenyi, 'Jurisprudential Appraisal of *Nolle Prosequi* in Nigeria' (2016) 4 (4) *Global Journal of Politics and Law Research* 10-19. Note that Nigeria is not the only country practicing the common-law and constitutional democracy that still sticks to the position of the Attorney-General under the common-law, going by the decision of the courts above. This is, also, the position in Malaysia and Singapore. Both nations are, also, practicing the common-law and constitutional democracy. These States have, also, provided in their constitutions the power of the Attorney-General to enter a *nolle prosequi* in criminal proceedings. A relevant case to note is the Singaporean case of *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, quoted in GC KOK Yew, 'Prosecutorial Discretion and the Legal Limits in Singapore' (2013) 25 *Singapore Academy of Law Journal* 15, where the Court of Appeal (per VK Rajah, JA) upheld the unquestionable or absolute constitutional powers of the Attorney-General of Singapore to institute, conduct and discontinue any proceedings for any offence.

in Nigeria seem to be oblivious of the import and purport of the right of citizens of Nigeria to participate in their government in accordance with the provisions of the Constitution, such as having easy accessibility to the courts of law or justice and fundamental rights, including the right to a fair hearing, guaranteed to all citizens of Nigeria by the Constitution and international human rights' norms and treaties, as disclosed before. Also, the judges capitalise on the fact that the Constitution does not expressly subject the exercise of the power of *nolle prosequi* by the Attorney-General to the control or approval of the Court. Furthermore, the courts in Nigeria, particularly the Supreme Court of Nigeria are reluctant to reject the exercise of the power of *nolle prosequi* by the Attorney-General because the exercise of the same is considered an absolute or wide-discretionary power of the Attorney-General.

Lastly, many of the judges in Nigeria belong to the ruling capitalist class.⁵⁴ These judges administer justice in consonance with the capitalist jurisprudence.⁵⁵ In actuality, they exist to ensure that every citizen conforms with the requirement of bourgeois law which seeks to preserve and defend the capitalist relations which prevail in the society.⁵⁶

To sum-up on the issue of analysis of case-law on the power of the Attorney-General to enter a *nolle prosequi* under the 1999 Nigerian Constitution, it is not out of context to stress that the behaviour of an Attorney-General in entering a *nolle prosequi* in criminal trials for his selfish interest or political considerations and so on is, certainly, amoral, against legal ethics or unethical, unconstitutional and unlawful, going by the dictionary definitions of amoral, legal, ethics, unethical, unconstitutional and unlawful.⁵⁷

The following five problems associated with the exercise of the constitutional power of *nolle prosequi* by the Attorney-General may be relevant to note:

54. O Oni, *Towards a Socialist Political System for Nigeria* (Ibadan: Progress Books Nigeria Ltd 1996), quoted in AE Abuza, 'The Problem of Vandalization of Oil Pipelines and Installations in Nigeria: A Sociological Approach' (2007) 2(2) *Delsu Law Review* 276.

55. *Ibid.*

56. *Ibid.*

57. Philips, see n 42 above, 45, 500, 849, 1618, 1626 & 1631.

(i) The cumulative effect of entering a *nolle prosequi* in criminal trials by the Attorney General at common-law is not an acquittal but a discharge and does not operate as a bar to subsequent trial of the accused.⁵⁸ The effect is, certainly, unfair; particularly when the *nolle prosequi* of the Attorney-General is entered on the day of judgment or before judgment after all prosecution witnesses might have testified. No doubt, a lot of time and resources would have been expended or wasted by the accused person at that stage, given the nature of criminal trials in Nigeria which are characterised by frequent, and often unending, adjournment of cases.

(ii) It has been indicated above that the Supreme Court of Nigeria held in the *ILori* case that section 191(1)(c) above (now section 211(1)(c) above) confer absolute or wide-discretionary power of *nolle prosequi* on the State Attorney-General. Akanle, correctly, criticises the conferment of wide-discretionary powers on public officers.⁵⁹ This is so, mainly because such powers are susceptible to misuse.

(iii) It has been disclosed before that the constitutional power of the Attorney-General in Nigeria to enter a *nolle prosequi* in criminal proceedings is being misused. There are many illustrations to demonstrate this point. These include: (a) the case of Julius Makanjuola, former Permanent Secretary in the Ministry of Defence and four other accused who were Directors in the Ministry above, where, on 22 July 2002, the Federal Attorney-General entered a *nolle prosequi* to free the five accused persons who were standing trial in an Abuja High Court for fraud and embezzlement of public funds amounting to ₦420 million, relying on section 174(1)(c) above.⁶⁰ A great public outrage followed the action of the Federal Attorney-General in the case above;⁶¹ (b) the case of Mohammed Abacha son of late former Military Head of State of Nigeria General Sanni Abacha, where, on 20 June 2014, the Federal Attorney-General entered a *nolle prosequi* to free Abacha's son standing trial in the High Court of the Federal Capital Territory (FCT), Wuse over the role he allegedly-played in the stealing of about ₦446.3 billion belonging

58. See *Clark and Others v Attorney-General of Lagos State* [1986]1 QLRN 119.

59. O Akanle, 'Pollution Control Regulation in Nigerian Oil Industry' published as Occasional Paper 16 by the Nigerian Institute of Advanced Legal Studies, Lagos 1991 14.

60. <http://www.allafrica.com/stories>, see n 45 above.

61. *Ibid.*

to the Federal Government of Nigeria (FGN) between 1995 and 1998, relying on section 174(1)(c) above;⁶² (c) the case of Bola Ige who was Attorney-General of the Federation, where, on 19 July 2004, the Oyo State Attorney-General entered a *nolle prosequi* to free the four accused persons, including some Peoples Democratic Party (PDP) members who were standing trial in the Oyo State High Court, Ibadan for conspiracy and murder of Ige, relying on section 211(1)(c) above;⁶³ and (d) the cases of *Akor*, *ILori* and *Khilnani*, where the State Attorney-General entered a *nolle prosequi* to free accused persons standing trial in the State High Court, relying on sections 191(1)(c), 191(1)(c) and 211(1)(c) above, respectively. In the *Khilnani* case, there was, also, a great public outrage which followed the *nolle prosequi* entered by the Lagos State Attorney-General to free the accused persons. The development actually elicited wide-spread condemnation and protests, especially by workers of Greenfuels limited a Nigerian company from which the two accused persons allegedly diverted the amount above, as disclosed before.⁶⁴

(iv) It has been disclosed earlier that the Attorney-General in Nigeria acts in his professional capacity as law officer as well as a politician occupying the office of Minister of Justice or Commissioner for Justice and member of the Executive Council. He is bound to take instructions, in the exercise of his prosecutorial powers, from the person who selected him for the appointment and who can remove him from office, that is the president or governor.⁶⁵ A relevant popular saying is: 'he who pays the piper dictates the tune'.

(v) The abuse of the power to enter a *nolle prosequi* in criminal trials by the Attorney-General does not augur well for the current anti-corruption 'war' or 'fight' or campaign embarked upon by the civilian administration of President Muhammadu Buhari. The war or fight above cannot deter members of the Nigerian society from engaging in criminal activities or corrupt practices or be won when criminal or corrupt elements in the Nigerian society are being set-free and allowed to re-unite with

62. <<http://www.thetalkparlour.com>>fg-files for nol...> accessed 20 April 2020.

63. <<http://www.nigerianlawguru.com/./> THE% 20 STATE% 200 F %20 CRIMINAL% 20 JUSTICE and <<http://allafrica.com/stories/200407200157.html>> accessed 21 August 2018

64. <http://www.vanguardngr.com>, see n 45 above.

65. Damola, see n 40 above, 250.

innocent members of the Nigerian public under the subterfuge of *nolle prosequi* entered by the Attorney-General in criminal trials under the Constitution. It is very sad that, in Nigeria, laws that have been put in place to safeguard the interest of all citizens and for the protection of all members of the society are being twisted and manipulated to safeguard the interest of, and or protect, the few strong, capitalists or bourgeoisie and powerful members of the society through the instrumentality of the power of *nolle prosequi* exercisable by the Attorney-General. No doubt, man seems to be returning back to his situation under the *Hobbesian* state of nature where life was short, nasty and brutish and there was survival of the fittest, as the few strong and powerful members of the society took over the properties, lives and wives of the majority weak and less-powerful members of the society without any sanction or punishment, going by the view- points of the social contract theorists like Thomas Hobbes, John Locke and Jean Jacques Rousseau.⁶⁶

The foregoing notwithstanding, it is argued that the exercise of the constitutional power of the Attorney-General to enter a *nolle prosequi* is still desirable in contemporary Nigerian democratic society. It is significant to bear in mind that the prosecutorial powers of the Attorney-General, including the power to enter a *nolle prosequi* in criminal proceedings under the Constitution are both sensible and necessary for the proper and orderly management of contemporary Nigerian society. In the UK, a *nolle prosequi*, in practical terms, was confined originally to two classes or needs, that is: (i) to dispose of technically-imperfect proceedings instituted by the British Crown; and (ii) to put a halt to oppressive but technically-impeccable proceedings instituted by private prosecutors.⁶⁷ Over time, a third class or need was added, that is cases where after the indictment had

66. It was in these circumstances, according to the social contract theorists, that men in the state of nature came together and contracted with one another to surrender their right to govern themselves to a group of persons in the society constituting the government for the purpose of ruling over or governing them, provided their fundamental rights, including rights to life and properties were protected. See AE Abuza, 'Environmental Law: Post-Rio Discussions on Environmental Protection-A Reflection', BC Nirmal and RK Singh (eds), *Contemporary Issues in International Law- Environment, International Trade, Information Technology and Legal Education* (Singapore: Springer Nature Pte Ltd 2018) 94. See, also, <https://www.britannica.com>topic>, accessed 12 June 2020.

67. Damola, see n 65 above, 250.

been signed, it is discovered that the accused person, for reasons bordering on sickness or other medical reasons, is unlikely ever to be fit to stand trial and there is no other way of doing away with the indictment.⁶⁸ These needs cannot be dispensed with. They are, indeed, still critical for the survival and growth of the system of administration of criminal justice in Nigeria.

IV. OBSERVATIONS

It is glaring from the foregoing analysis of the issues involved in the power of the Attorney-General to enter a *nolle prosequi* under the Constitution that sections 174(1)(c) and 211(1)(c) of the Constitution bestow on the Federal and State Attorneys-General the power of *nolle prosequi* in criminal proceedings.

In the *ILori* case, the Supreme Court of Nigeria held that the power of *nolle prosequi* conferred on the Attorney-General by sections 160(1)(c) and 191(1)(c) of the 1979 Presidential Constitution (now sections 174(1)(c) and 211(1)(c) of the Constitution) is absolute or a wide-discretionary power. This is in tune with what obtains in other countries which practice the common law, including the UK, Malaysia and Singapore. It is observable sections 174(1)(c) and 211(1)(c) above are being misused by some Attorneys-General in Nigeria to enter a *nolle prosequi* to free persons standing trial in court for serious criminal offences for their selfish interest or political considerations and so on instead of the public interest and much more. The resultant effect is that some of the rights guaranteed to all citizens of Nigeria such as the right of access to the court, guaranteed under section 17(2)(e) of the Constitution and so on have been unduly eroded under the guise that the *nolle prosequi* entered by the Attorney-General in some criminal proceedings was in the public interest and so on. A typical example is the *Ige* case, where, on 19 July 2004, the Oyo State Attorney-General entered a *nolle prosequi* to free four persons, including some PDP members standing trial in the Oyo State High Court of Justice, Ibadan for conspiracy and the murder of Bola Ige. This unsatisfactory development is attributable, primarily, to the fact that the Constitution does not expressly subject the exercise of the power of *nolle prosequi* by the Attorney-General to the control or approval of the court

68. Quoted in *Ibid.*

or anybody or authority.

It is regrettable that the Nigerian courts have not been able to deal decisively with the problem above. Many of the courts in Nigeria, in this connection, have not been able to reject some of the exercise of the power of *nolle prosequi* by the Attorney-General in criminal trials under the Constitution on the ground that they were not exercised in the public interest and so on. This is attributable to some factors. The author wishes to re-iterate the problems with the judiciary in Nigeria, as disclosed before. It is observable that the continued exercise of the power of *nolle prosequi* by the Attorney-General under the Constitution is still desirable in contemporary Nigerian democratic society. The truth is that the constitutional prosecutorial powers of the Attorney-General, are both wise and necessary for the proper, just and orderly management of contemporary Nigerian society. Needless to re-iterate the three needs which informed the introduction of the power of the Attorney-General to enter a *nolle prosequi* in criminal trials, as stated earlier. These needs cannot be dispensed with. In fact, they are still cardinal for the survival and growth of the system of administration of criminal justice in Nigeria.

Also, it is observable that it is amoral, against legal ethics or unethical, unconstitutional and unlawful to exercise the power of the Attorney-General to enter a *nolle prosequi* in criminal proceedings for his selfish interest or political considerations and so on. There is, therefore, an urgent need in Nigeria to address squarely five problems associated with the exercise of the constitutional power of *nolle prosequi* by the Attorney-General. The author wishes to re-iterate the five problems, as disclosed before.

A continuation of the problem above poses a grave danger to the survival of Nigeria. The sad effect of entering a *nolle prosequi* in criminal proceedings by some Attorneys-General for their selfish interest and so on which is unquantifiable cannot be underscored. It has, not only undermined but, also inhibited the effectiveness of Nigeria's practice of democracy or the rule of law a cardinal tenet of a democratic system of government. The author wishes to recall the provisions of sections 43 and 44(1) of the Constitution. It should be re-iterated that the problem above has engendered the denial of the fundamental right of the accused person or persons and complainant such as the appellant in the *ILori* case to a fair hearing, and the denial of the right of some Nigerian private

prosecutors such as the appellant in the *ILori* case to participate in the Government of Nigeria directly through accessibility to the court or take part in the conduct of public affairs directly or participate freely in the government of their country directly in accordance with the provisions of law, contrary to the law. The power to undertake private prosecution, as stated before, is a right recognised by the Constitution and other laws in Nigeria. The author has indicated earlier that the ICCPR now has the effect of a domesticated enactment in Nigeria while the ACHPR enjoys a status higher than a mere international convention, having been domesticated in Nigeria and the same is part of the Nigerian body of laws.

The entering of a *nolle prosequi* in criminal proceedings by some Attorneys-General for their selfish interest and so on has, again, impacted negatively on the country's system of administration of criminal justice. Of course, the problem above, if not quickly arrested has capacity to impact adversely on political stability. This is so, because citizens of Nigeria may capitalise on sections 39 and 40 of the Constitution which guarantee to them the rights to freedom of expression and peaceful assembly and association, respectively to embark on peaceful mass protests against the Nigerian Government over the misuse of the power of *nolle prosequi* by some Attorneys-General in Nigeria, as was the situation in the *Khilnani* case. This could engender instability in Nigeria's democratic politics and thus encourage the military to foray into politics and take-over political power or governance in Nigeria like what transpired on 11 April 2019 in Sudan when soldiers seized political power from President Omar Hassan Al-Bashir of Sudan who had governed or ruled the North African country with iron-fist since 1989.⁶⁹ His ouster from political power was precipitated by the biggest peaceful demonstration culminating in a vast sit-in attended by many Sudanese citizens in Khartoum, the capital city of Sudan.⁷⁰ In actuality, the take-over 'capped' a season of protest and political crisis or tumult in North Africa. It should be recalled that much earlier, the governments of Hosni Mubarak, Ben Ali and Muamar Ghadaffi in Egypt, Tunisia and Libya, respectively were over-thrown by their people.⁷¹ In Libya's case, Ghadaffi was killed in

69. <<http://www.washingtonpost.com>> accessed 23 April 2020.

70. *Ibid.*

71. <<http://www.peoplesdailyonline.com/columni>> accessed 11 November 2011.

the process by his own people on 20 October 2011.⁷² Nigerian leaders must learn lessons from these developments.

Of course, the Constitution of many States, including Nigeria and the AU African Charter on Democracy, Elections and Governance (ACDEG) 2007 proscribe military or unconstitutional change of government.⁷³ A vital question to ask is: can a constitution prevent the people from over-throwing their governments if they so wish? The answer is in the negative. This is buttressed by the experiences in the countries above. The emphasis, therefore, must be on good governance and development, predicated on democratic ideals, norms and values⁷⁴ which guarantee to citizens fundamental rights in consonance with international human rights' norms or treaties, including the UDHR, ICCPR, ACHPR and the Charter of the United Nations. The fight against criminality and corruption, as enjoined by the AU Convention on Preventing and Combating Corruption (AUCPCC) 2003⁷⁵ is very critical. Also, ensuring access to the court of law or justice and peoples' participation in the government, as enjoined by the Constitution, the ICCPR and ACHPR are very critical. These are the real anti-dote to revolt or rebellion against the State or government.

The problem above must be given the highest consideration it deserves by the civilian administration of President Buhari. This must be the case so that the administration above may not be accused of paying lip-service to the issue of promoting- respect for the constitutional rights of Nigerians, respect for the rule of law as well as the fight against criminality and corruption.

V. RECOMMENDATIONS

The problem of some Attorneys-General in Nigeria entering *nolle prosequi* in criminal trials under the Constitution for their selfish interest or political considerations and so on under the guise or subterfuge of entering *nolle prosequi* in the public interest and so on should be effectively addressed or trackled in Nigeria. In order to surmount the problem above, the author strongly recommends that:

72. *Ibid.*

73. See, for example, s 1(2) of the Constitution and art 23 of the ACDEG.

74. Note that s 14(1) of the Constitution declares that Nigeria shall be a State based on democratic principles and social justice.

75. The Convention was adopted in Maputo, *Mozambique* on 11 July 2003.

(i) Sections 174(1)(c) and 211(1)(c) of the Constitution should be amended to subject the exercise of the power of *nolle prosequi* by the Attorney-General under the Constitution to the permission of the court.⁷⁶ It is in accord with what obtains in other countries, including the USA and Kenya.⁷⁷

(ii) Sections 174 and 211 of the Constitution should be amended to, also, subject the exercise of the power of *nolle prosequi* by the Attorney-General under the Constitution to the provisions of a new sub-section to the effect that if the discontinuance of any proceedings under sub-section (1)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted. This is consistent with the practice in other countries like Kenya, as exemplified in Article 157(7) of the Constitution of Kenya 2010.

(iii) Nigeria should re-open criminal cases, where the Attorney-General had exercised the power of *nolle prosequi* under the Constitution for improper motive or ill-will since the commencement of the current democratic dispensation on 29 May 1999 with a view to re-arresting and re-arraigning the accused in court for the offences allegedly-committed against Nigeria in tune with the current 'war' or campaign embarked upon by Buhari's civilian administration against criminality and corruption. Good enough, President Buhari has already ordered the IGP to re-open investigations into the murder case of Ige.⁷⁸

(iv) Nigerians should seek sanctuary under sections 39 and 40 of the Constitution to organise Sudanese-style protests or demonstrations against a Nigerian capitalist government whose Attorney-General abuses the power of *nolle prosequi* under the Constitution as well as work assiduously towards the replacement of such a government. It should be noted that a revolt or rebellion against the government is justified in the face of violation of fundamental rights of citizens such as the rights to life and properties, according to social contract theorists.⁷⁹

76. See, also, Damola n 68 above, 255.

77. See, for example, Rule 48 of the USA Federal Practice and Procedure Rules 1946, as amended in 2019, art 157 of the Constitution of Kenya 2010 and the Kenyan case of *Republic v Muneh Wanjiku Ikigu* [2016] KLR. <<http://www.kenyalaw.org/case-law/cases/view>> accessed 27 April 2020.

78. <<http://www.vanguardngr.com>>, see n 64 above.

79. Quoted by Abuza, see n 66 above, 97

(v) Nigeria should insulate the office of the Attorney-General from partisan politics in tune with the practice in other countries like India.⁸⁰ To this end, the Constitution should be amended to separate the office of Attorney-General and Minister of Justice or Commissioner for Justice. While a person to be appointed Minister of Justice or Commissioner for Justice may be a card-carrying member of a political party, the appointee to the Office of Attorney-General should be an independent legal practitioner who is not a card-carrying member of a political party. He is to be elected into office by citizens under the Constitution on the basis of independent candidacy.⁸¹

(vi) The Nigerian Government should organise public lectures as well as other public enlightenment programmes to sensitise or interface with Nigerians, including judges and other members of the legal profession, on the import and or purport of the rights of citizens guaranteed under the Constitution.

(vii) The Nigerian Government should intensify or step-up the campaign or 'war' against criminality and corruption.

VI. CONCLUSION

This article has analysed the issues involved in the power of the Attorney-General to enter a *nolle prosequi* under the Constitution. It identified short-comings in the various applicable laws and stated clearly that the exercise of the constitutional power of *nolle prosequi* by some Attorneys-General in Nigeria for their selfish interest or political considerations and much more is amoral, against legal ethics or unethical, unconstitutional and unlawful and therefore ought to be subjected to the permission of the court. This article, also, highlighted the practice in other countries and proffered suggestions and recommendations, which, if implemented, could effectively address or end the problem of some Nigerian Attorneys-General seeking sanctuary under sections 174(3) and 211(3) of the Constitution to enter a *nolle prosequi* in criminal trials for their selfish interest or political considerations and so on instead of the public interest, the interest of Justice and the need to prevent abuse of legal process.



80. <[http://en.wikipedia.org/wiki/Attorney General of India](http://en.wikipedia.org/wiki/Attorney_General_of_India)> accessed 9 February 2016.

81. See Damola n 76 above, 256-57

ELECTRONIC MEDIA IN INDIA : FREE OR CONSTRICTED

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ABSTRACT : Commercialization of electronic media and freedom of expression are competing values. How to maintain a balance between these competing values? Does the Electronic Media especially television fulfill its social responsibility to protect the rights of consumer in India? Whose interests are being affected? Whose rights are being invaded? Is the issue at stake a matter of legitimate public interest? What kind of regulatory mechanism is required for electronic media? This paper examines the freedom of Electronic Media and efficacy of regulatory measures and highlights legislative attempts to control and regulate freedom of electronic media.

KEY WORDS : Electronic Media, Cable Television Networks, Digitalization, Telecom Regulatory Authority of India, Consumer.

I. INTRODUCTION

Electronic Media acts as a bridge between government and public. Electronic Media is that media which utilize electromagnetic waves for the end user (audience) to access the content. In this age of globalization, electronic media especially Television and Cable television play an important role. TV remains the most effective platform for both content creators and advertisers to reach their audience. It has ability to reach vast numbers of people through news, views, sports and entertainment.

Television in India is fast growing and its reach is gradually increasing

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year after year. There are 836 million television viewers out of the total population of 1.38 Billion citizens speaking different languages. It is interesting to note that the television content is seen to be changing which reflects the demand of consumers for variety and change. This also goes to show that it is important for electronic media to keep up social responsibility factor.¹

The T.V. channels available to viewers has increased manifold. Relation between T.V. viewing and literacy is quite high. It is observed that viewers in States with higher literacy watch more TV. Television wields a very pervasive influence in most Indian's lives. It has helped us in matters of cultural communication and overcoming of various kinds of psychological barriers. However, it has also become a tool for misinformation and deception.

The cable television industry that had emerged in the early 1980s as a local video network has since then experienced a strong growth.² In the last few years, the number of satellite television channels over cable has increased from 12 channels in year 1995 to around 902 in 2019, out of which 229 are SD Pay channel and 99 are HD Pay TV channels.³ As on 31 March, 2019, there are total 99 operational HD channels. Cable TV segment is the largest TV service, sector with an estimated subscriber base of around 103 million subscribers. Thus, there are a large number of channels transmitted as Free to Air (FTA) channels⁴. Further, international and foreign channels and websites, national, regional and local broadcasters have multiplied, often owned and run by Corporate

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1. India is the second largest TV Viewers market in the world; available at-www.barcindia.co.in.; TV viewership has increased a 37% spike across India after corona virus outbreak, the share of news in overall TV viewership has risen to 21% from 7% available at liveminst.com visited on 09.03.2020.
 2. Cable television, in India, has its roots in the early 1980's and can be traced, when Doordarshan started its services through cable in rural areas of Rajasthan in 1983. In the mid of 1980's few local entrepreneurs' setup small cable television networks and started offering a local video channels showing movies and television programs. Consultation paper, Issues related to Advertisement in TV Channels, Telecom Regulatory Authority of India, Consultation Paper no.8/2011, dated, 22nd December 2011, available at, <http://www.trai.gov.in> visited on 09.09.2019
 3. Annual Report 2018-19, Telecom Regulatory Authority of India, P.31, available at: <http://www.trai.gov.in/visited> on 10.09.2020
 4. Ibid

Houses including regional and national politicians. One can discover the fact that many political parties have started private channels for example, Jaya TV, Surya TV. India has the Second largest TV market after China⁵

In India, television has been used for marketing product and services. Television Channels are vying which each other to attract viewers/consumers. Developments in Science and Technology coupled with evolution of Social media along-with growing system of network of internet have created immense opportunities for marketing of goods and services in India. Television is the most powerful means of communication. It has ability to mold public opinion/perception related to individual or goods or services.⁶ Tele marketing has become a fact of life. To tackle the challenges created by electronic media (T.V.), numerous rules and regulations have been framed. The Programs or advertisements aired on national channel and all satellite channels or cable network have not adhered to these rules/regulations

Commercialization of electronic media and freedom of expression are competing values. How to maintain a balance between these competing values? Does the Electronic Media especially television fulfills its social responsibility to protect the rights of consumer in India? Whose interests are being affected? Whose rights are being invaded? Is the issue at stake a matter of legitimate public interest? What kind of regulatory mechanism is required for electronic media (T.V.)? This paper examines the freedom of Electronic Media and efficacy of regulatory measures and highlights legislative attempts to control and regulate freedom of electronic media.

II. REGULATION OF PRIVATE SATELLITE CHANNELS IN INDIA: A BACKGROUND

The private satellite channels or the cable industry in India has developed in an unregulated manner. The Government's initial response to private broadcasters took the form of an open skies policy. It took no action to restrict the transmission and reception of their frequencies nor did it take any action to regulate their program content.

5. Supera note 3

6. The death of actor Sushant Singh Rajput, Hathras Case and other subsequent events have opened a debate on the role of electronic media.

There were mainly two reasons for the Government's *laissez faire* attitude towards these satellite channels. First, the Government was not able to prevent such satellite transmitting programmes directly to Indian homes, because all of these services were uplinked from locations outside India (notably Hong Kong). So technologically, it was very difficult to prevent such direct transmission.⁷ The second reason why the Government took no action to restrict these frequencies can be found in the political and economic circumstances in which cable broadcasting was introduced into India. At the start of 1990's India faced a severe economic crisis. To solve the problem the Government opened up the country's economy to Foreign Direct Investment. The Government maintained that it needed to use all available means to realize its economic goals including FDI. It was argued that the country needed the global links, foreign technology and marketing expertise of foreign companies in order to improve the international competitiveness of Indian industry.

In the year 1991, the then Prime Minister, Mr. Narshimma Rao faced the most severe economic crises. The Central Government initiated a series of economic reforms in 1991. In the same year, the CNN's live transmission of the Gulf War beamed dramatic images of the conflict to television sets around the world. This historic coverage of Gulf War was picked up and transmitted in India by dish antenna operators in major cities. The private entrepreneurs sprang up in residential area offering cable connections linked to a rooftop dish antenna. A few months later, the Hong Kong based STAR TV began broadcasting programmes and it launched five channels in Indian market. Zee TV a private owned Indian Hindi channel began telecasting over cable made its foray into India.

In 1991⁸ the Central Government appointed an Inter-Departmental Committee "to take a quick look at introducing competition in the electronic media", chaired by Shri K.A. Varadan, Additional Secretary, Ministry of Information & Broadcasting.⁹ The Committee presented its Report in

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7. In India the Government had monopolized the right to uplink from within the country for its own broadcasting organizations till 1995
 8. Ministry of Information & Broadcasting, Inter-Departmental Committee on Introducing Competition in the Electronic Media, 24th October, 1991 available at. <https://parliament of India.nic.in>
 9. Ibid

October 1991. There have been a number of reports on specific issues related to media regulations, authored by various government and self-regulatory entities.

(i) LIBERALIZATION OF ECONOMY (1991-1996) AND REPORTS OF COMMITTEES FOR EFFICIENT FUNCTIONING OF ELECTRONIC MEDIA

It is important to note that Varadan Committee recognized the importance of introducing competition in the electronic media to provide additional outlets to the creative talent, to strengthen the democratic fabric of the nation and help better in meeting the cultural aspirations of different regions.¹⁰ However, the Committee felt that because of the sensitive nature of the choice, the selection of agencies for grant of broadcast license should be performed by an independent agency in a transparent manner. It suggested that the Broadcasting Council of India to be constituted through legislation, amending the relevant sections in the Prasar Bharati Act, and it shall be entrusted with the functions of licensing, monitoring of programmes and quality rating.¹¹ It also recommended that a new legislation be enacted to govern the setting up and operation of additional broadcast channels¹².

The recommendations of the Committee were never implemented and it was not till the enactment of the Cable Television Networks (Regulation) Act, 1995 that cable television services came to be regulated.¹³

It is pertinent to note that, the Supreme Court also ordered the Central Government to “take immediate steps to establish an autonomous public authority to control and regulate the use of the airwaves”.¹⁴ It may be noted that a high-power committee was appointed in 1995 to review the provisions of Prasar Bharati Act, 1990 and to make recommendations

10. Id, paras 3.3 and 3.4

11. Id, paras 3.11, 3.12 and 3.13

12. Id, paras 4.1 and 4.2

13. The Government promulgated it as an Ordinance, the Cable Television Networks (Regulation) Ordinance, 1995.

14. *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, (1995) 2 SCC 161, 252. The Act ought to register all cable operators and to enforce a Programme Code and Advertising Code. But the Act was confined to the regulation of cable operators only and did not extend to broadcasters, with the result that broadcasters still remained unaccountable under this Act.

regarding the structuring of Prasar Bharati. The Committee was headed by Dr. N.K. Sengupta.¹⁵It may be noted that the Committee was directed to review the provisions of the Prasar Bharati Act but it also turned its attention to the satellite channels. “The Committee took the stand that government should change its policy and consider granting license to satellite channel operator, domestic or foreign with up linking facilities from India.¹⁶It proposed that a provision to be added in the Prasar Bharti Act providing for creation of an independent Television Authority of India to grant license to satellite channels and permit them to uplink from India subject to the standard codes on Broadcasting and advertising of the country.¹⁷ In March 1996, a Sub-Committee of the Consultative Committee for the Ministry of Information & Broadcasting produced a Working Paper under the Chairmanship of Shri Ram Vilas Paswan.¹⁸The Ram Vilas Paswan committee argued that the broadcasting should observe a greater degree of responsibility and sensitivity to Indian culture and ethos and cater to the development requirement of the country. The Sub-Committee recommended that an independent autonomous regulatory body must be set up to oversee both public and foreign satellite channels. The authority would also need to regulate and control use of airwaves in the interest of the public.¹⁹The Committee was in favour of allowing State Governments, NGO’s and Local Governments to enter the field of broadcasting,²⁰ and argued that direct or indirect foreign equity participation in companies entering the field of private broadcasting should be restricted.²¹The recommendations of this Sub-Committee were also never implemented by the Government.

(ii) MAJOR BROADCASTING REFORMS AND ADVENT OF PRIVATE TV CHANNELS

It is interesting to note that at the far end of 1996, News Television

15. Supra note 8. See also; Annual report 1996-1997, Ministry of Information and Broadcasting available at <http://www.mib.gov.in> visited on 5.09.2019

16. Id, para 6

17. Id, para 6.6

18. Summary of the Recommendations Contained in the Working Paper on National Media Policy submitted by the Sub-Committee of consultative Committee for the Ministry of Information & Broadcasting, available at, [ww.mib.gov.in](http://www.mib.gov.in)

19. Id para 9.5.

20. Id para 9.12, 9.13 and 9.14.

21. Id para 9.8.

India, a corporate entity owned by Rupert Murdoch, announced its readiness to start “direct-to-home” (DTH) service in India.²² However, the Government did not allow to provide DTH, because there had been no stated policy statement of DTH. This leads to an urgent need for new broadcast legislation and the Government, in 1997 took two major steps for broadcasting reform²³. First in May 1997, a Broadcast Bill was introduced in Parliament, which intended to establish an independent authority to be known as the Broadcasting Authority of India to grant licenses and to monitor broadcasting services in India.²⁴ Secondly, on September 15, 1997 the Government notified the Prasar Bharati Act, 1990 which was languishing since 1990 and finally the Prasar Bharti came into existence. These amendments were mostly based on “Sengupta Committee Report”.

One can say that the private cable services was launched and developed in India in a policy vacuum. Though, the different Committees were appointed by the government from time to time to review the regulatory mechanism for private TV channels. But the Government had no intention to control these private broadcasters and forces represented by them.

In the following pages, an attempt is made to discover the regulatory measures related to electronic media in India.

III. ELECTRONIC MEDIA AND LEGISLATIVE CONTROL

(i) THE CABLE TELEVISION NETWORKS (REGULATION) ACT, 1995

It is clear that the government’s attempt to give full autonomy to Doordarshan resulted in the Prasar Bharati (Broadcasting Corporation in India) Act, 1990 and to regulate the non-governmental broadcast media

22. Id para 9.10

23. Sukumar Muralidharan, “Broadcast Regulation and Public Right to Know”, *Economic and Political Weekly*, 743-751, March 3, 2007.

24. Notification issued by the Ministry of Communication on 16-07-1997 under the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933. The Notification prohibited establishment, maintenance, working, possession of or dealing in equipment of receiving signals in frequency bands above 4800 MHz (which includes Ku band). See Annual Report, Ministry of Information & Broadcast, 5, 2000-2001.

resulted in the Cable Television Networks (Regulation) Act, 1995. The regulation for cable television in India started with the promulgation of the Cable Television Networks (Regulation) Ordinance, 1994 which was converted on March 1995 into the Cable Television Networks (Regulation) Act, 1995 (hereinafter referred as the Act).

The principal purpose of the Act was to introduce regulatory certainty to the Indian cable market that had emerged in the early 1990s in unregulated manner. The statement of objects and reasons declared that cable television constituted a “cultural invasion” as programmes featured on cable channels were predominantly western and totally alien to Indian culture and way of life. It declared that the lack of regulation had resulted in undesirable programmes and advertisements being shown to viewers without any kind of censorship.²⁵ Further, it has been felt to protect the subscribers of the cable television networks from antinational broadcast from sources inimical to our national interest, address grievances of subscribers and to operate cable television within the broad framework of the laws of the land.²⁶ Accordingly, the Act seeks to bring about uniformity in the operation of cable television networks in India in order to enable the optimal exploitation of this technology and to make available to the subscribers a vast pool of information and entertainment.

The Amendment also includes systemization of registration of cable operators, compulsory transmission of certain channels like Doordarshan,

25. Id. at S.14 of Cable Television Networks (Regulation) Act, 1995.

26. Statement of Objects and Cable Television Networks (Regulation) Act, 1995. The TV business, in most countries, is constructed around one of the three revenue models: Free to Air Channel, These are basic channels solely depending on revenue generated from advertisements. This model is also used as a launch-strategy to gain popularity and gather audience, with an intention to go “Pay” in future. On the other hand, niche channels generally prefer to steer clear of this approach, as they cannot attain the high level of Viewership and advertising revenue that general entertainment and news channels enjoy. • Pay Channels- A pay channel depends on dual revenue stream, relying on subscription and advertising revenue. Parallels are drawn between these channels and the print media, which depend on a mixture of subscription and advertisements. • Premium Channels- A premium channel depends on subscription revenue, generally charges a price over and above what a regular Pay Channel might charge. A premium channel is expected to have a unique programming and the content becomes the unique sales point.

inspection of cable network and services, use of standard equipment in the cable television network, prescription of interference tier and its tariff.

(a) REGISTRATION OF CABLE TELEVISION NETWORKS

The Act mandates for compulsory registration for cable television networks. It provides that a person must get himself registered as cable operator under this Act, for operating a cable television network.²⁷Sec. 4 of the Act²⁸ as amended in 2001, states that any person who is operating or desirous of operating or renewal of a cable network may apply for registration as a cable operator to the registering authority, in prescribed form accompanied with such fees as may be prescribed.²⁹ The Act allows the cable operator to appeal to the Central Government against the decision of the registering authority.³⁰Further, the Central Government has retained the right to suspend or revoke the registration of a cable operator if it violates one or more of the terms and conditions of registration.³¹ The Head Post Master of a Head Post Office of the area within whose territorial jurisdiction of the office of the cable operator is situated has been notified as the Registering Authority.³²

The registering authority under the Act must have technical knowledge and practical experience of cable television network operations, but the Act designates Post-Master as registering authority, who is ill-equipped and not technically trained to understand cable broadcasting system, which is unreasonable and not justifiable³³.

(b) REGULATION OF CONTENT OF CABLE

To check the screening of undesirable programmes and advertisements which are telecasted on cable channels and to stop “cultural invasion” caused by these channels, the cable Act brought into force a Programme Code and an Advertising Code in respect of programmes and

27. The Cable Television Networks (Regulation) Act,1995, Sec.3

28. Id at S. 4

29. The Cable Television Networks (Regulation) Amendment Act, 2011 replaces secs. 4, 4A, 8, 11 of the Principal Act of 1995 and inserted a new S.10A.

30. Supra note 27, SS. 4 and 4(5).

31. Id. at sec. 4(7).

32. Ibid

33. Ibid

advertisements telecasted by cable operators. The Regulatory frame work makes it compulsory for cable operators to adhere to the prescribed Programme Code and Advertising Code and mandated that any programme or any advertisement transmitted/re-transmitted through a cable service must be in conformity with these codes.³⁴

(c) PROGRAMME CODE

The Cable Television Networks Rules, 1994 prescribe a Programme Code which covers all the aspects related to telecasting.³⁵ The Programme Code contain wide and loosely worded restrictions for cable telecast, most echoing those contained in Article 19 (2) of the Constitution. The Code restricts telecast of any programme which, offends against good taste or decency,³⁶ criticizes friendly countries,³⁷ contains anything obscene or defamatory,³⁸ encourages violence or contains anything against maintenance of law and order or promote anti national attitudes,³⁹ amounts to contempt of court,⁴⁰ affects the integrity of the nation⁴¹ and the like. However, some restrictions are wider and not strictly within the scope of Art. 19(2) of the Indian Constitution. For instance, the Programme Code lays special emphasis on the protection of children from the exhibition of programmes unsuited to their age and nature. The cable operators ensure that no programme should be carried in the cable which denigrates children.⁴² Further, the Code prohibits any bad language or explicit scenes of violence in children's programme⁴³, and mandated that the programmes unsuitable for children must not be carried in the cable at times when the largest numbers of children are viewing.⁴⁴

The Programme code also give special attention to women issue

34. TRAI's Recommendations on Broadcasting and Distribution of Cable Television, October 1, 2004, para 9.13, para 9.13, p. 105-106, available at www.trai.gov.in

35. Supra note 27, SS. 5 and 6

36. The Cable Television Network Rules, 1994, Rules 6 (1) (a)

37. Supra note 36, Rule 6 (1) (b).

38. Id. Rule 6(1)(d).

39. Id. Rule 6(1)(e)

40. Id. Rule 6(1)(f).

41. Id. Rule 6(1)(g).

42. Id. Rule 6(1)(I).

43. Id. Rule 6(4).

44. Id. Rule 6(5).

and prohibits programmes that denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent or derogatory to women, or is likely to derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals.⁴⁵ Further, the code imposes a positive duty over the cable operators that they should strive to carry programmes in his cable service which project women in a positive, leadership role of sobriety, moral and character building qualities.⁴⁶

The Code also prohibits programmes which contravenes the provisions of the Cinematograph Act, 1952 or are not suitable for unrestricted public exhibition.⁴⁷ It prohibits any film or film song or fills promo or film trailer or music video or music albums or their promos, unless it has been certified by the Central Board of film Certification (CBFC) as suitable for unrestricted public exhibition in India. It means that no adult film or film bearing “A” certificate or similar obscene programme can be shown on cable television at any time.

Apart from above restrictions the Code also prohibits programmes which attack on religious or communal harmony⁴⁸ encourages superstition or blind belief.⁴⁹

(d) ADVERTISING CODE

Rule 7 of the Cable Television Networks Rules, 1994 deals with the Advertising Code which ensures that all advertisements carried in the cable shall be so designed as to conform to the laws of the land and should not offend morality, decency and religious susceptibilities of the cable subscribers.⁵⁰ The Code does not permit advertisements which derides any race, caste, colour, creed and nationality, violates the provisions of Constitution of India, tends to incite people to crime or glorifies violence or obscenity, exploits the national emblem or personality of a national leader or a State dignitary, projects a derogatory image of women, exploits social evils, promotes directly or indirectly production

45. Id. Rule 6(1) (R).

46. Id. Rule 6(2).

47. Id. Rule 6(1) (o).

48. Id. Rule 6(1)(C).

49. Id Rule 6(1) (J)

50. Id. Rule 7(1).

or consumption of cigarettes, tobacco products, liquor or other intoxicants, infant milk substitute or infant food.⁵¹ Further, the Code prohibits advertisements that are religious or political nature, contain references that hurt religious sentiments, (goods and services) suffer from any defect or deficiency as mentioned in the Consumer Protection Act, (as amended) 2019 likely to show some special or miraculous or supernatural quality of the product, endanger the safety of children, contain indecent, vulgar, suggestive, repulsive themes, violates the Advertising Standards as adopted by Advertising Standards Council of India (ASCI).⁵² Furthermore, the Code provided that advertisements should be clearly distinguishable from the programme.

Sec. 7 of the Act makes it mandatory for every cable operator to maintain a register indicating therein in brief the programmes transmitted or re-transmitted through the cable during a month and the authorized officer has powers to prohibit transmission of certain programmes in public interest if found violative of the prescribed Programme Code and the advertising Code.⁵³

(ii) THE CABLE TELEVISION NETWORKS (REGULATION) AMENDMENT ACT, 2011: DIGITIZATION OF CABLE TELEVISION

In 2010, after studying the subject at length and undertaking a public consultation process, the Telecom Regulatory Authority of India (TRAI), gave its recommendations on implementation of Digital Addressable Cable TV Systems (DAS) across the country along with a roadmap to achieve the same.⁵⁴ It recommended that digitalization with addressability be implemented in the cable TV sector on priority with sunset date for

51. Id. Rule 7(2) (viii)

52. Id. Rule 7(3-7(9))

53. Id. Rule 8.

54. *Pratibha naitthani v. Union of India* AIR 2006 Bom. 259. The case arose by a Writ Petition filed by a teacher who was, inter alia, aggrieved against telecast of adult and obscene films shown by the electronic media and the obscene poster and photography printed by the print media during the hearing when the court asked Police Commissioner about the regulation under the cable Act, 1995, he stated in his affidavit that the Cable Television Networks (Regulation) Act, 1995 is a regulatory Act under which the Central Government has got the power to regulate the programmes on the said channel/cable TV. He further stated that most of the cable/channel TVs were broadcast through satellite, is not practically possible for the police to take any action against the said Cable/Channel.

Analogue Cable TV Services as 31st, December 2013.⁵⁵

Accordingly, the Government had accepted the TRAI's recommendations on digitization of cable services, and passed the Cable Television Networks (Regulation) Amendment Act, 2011. The Amendment Act has made it mandatory for switchover of the existing analogue Cable TV networks to Digital Addressable System (DAS) by December 2014, in a phased manner.

Cable operators in a DAS regime would be legally bound to transmit only digital signals. Subscribed channels can be received at the customer's premises only through a set-top box equipped with a conditional access card and a subscriber management system (SMS). The digitization of cable network has brought a sea change in rights of consumer. Through Amendment Act, 2011, the Central Government makes it mandatory for all cable operators to transmit or re-transmit programmes of any channels in an encrypted form using Digital Addressable System (DAS).⁵⁶ The Central Government may prescribe appropriate measures for implementation of digitalization.⁵⁷ The Amendment also empowers the Telecom Regulatory Authority of India (TRAI) to determine one or more free-to-air channels to be included in the package of channels forming basic tier, any one or more such channels maybe specified for providing a programme mix of entertainment, information and education and fix the tariff for basic service tier, etc.⁵⁸ On November 11th, 2011, the Ministry of Information & Broadcasting, in exercise of the powers conferred by Sec. 4A (1) released a notification and makes it compulsory for every cable operator to transmit programmes of any channel in an encrypted form in a phased manner. According to this notification, the digital switchover in the four metros of Delhi, Mumbai, Kolkata and Chennai was mandated to be completed by June 30th, 2012 and the rest of India by December 31, 2014.⁵⁹

55. Recommendation on implementation of Digital Addressable Cable TV System in India, Telecom Regulatory Authority of India, New Delhi, recommendations/2010, August 05, 2010, available at: <http://www.trai.gov.in>

56. Section 4A (1) of the Cable Television Networks (Regulation) Act, 1995

57. Sec. 4A(1) of the Act, as amended by Sec.5 of the cable Television Network (Regulation) Amendment Act, 2011.

58. Id. Sec. 4A (2)

59. Id. Sec. 4A (3)

It has been claimed that “In the overall context of growing consensus about the need for switchover towards digitalization in India, the “digital” in digital television must be analyzed not merely in terms of technological advantages and disadvantages of the switcher from analogue system. Instead, digitalization must be understood in relation to international politics of harmonization” being promoted by supra national organization like ITU⁶⁰ and being aggressively implemented in television and other allied industries by member countries like India and management of digital dividend through harmonization⁶¹.

The biggest advantage of the digitization is that it will improve the consumers viewing experience and resolve legacy issues from analogue cable services, i.e., limited bandwidth and poor quality of content. With the advent of digitalization, consumers will gain access to large number of television channels, a better viewing experience with digital and high definition content and sound and attractive tiring options of their choice.⁶² A shift to digitization regime of cable television has not only improved the consumers viewing experience but also enhanced the profit of broadcasters; cable operators and investors. Consumers are now able to enjoy better picture and sound quality, enhanced services such as high definition and content facility. High-definition video and other value-added services are available to viewers. Consumers are able to select channels of their choice from the bouquet of channels available and pay only for those channels.

The Government has also established Electronic Media Monitoring

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60. The ITU report (2012) is a 72 pages document that details a whole range of technological issues involved in the switchover from analog and calls for international consensus on the use
61. Punathambekar, Aswin, and Sriram Mohan, (editors) *Global Digital Cultures: Perspectives from South Asia*. University of Michigan Press, 2019. *JSTOR* Ravailable at www.jstor.org/stable/j.ctvndv9rb, accessed on 26th March 2020
62. S.O. 2534 (E), Notification No. 2120, REGD No. D.L. 33004/99, Ministry of Information and Broadcasting, dated November 11th 2011. The Notification provided that in major metros like Mumbai, Delhi, Kolkata, and Chennai was mandated to be completed by June 30th, 2012, in cities with more than one million populations like Pune, Ahmadabad and Bangalore by March 31st, 2013, the deadline for complete digitization in urban areas in September 30th, 2014 while the entire country is expected to achieve digitization by December 31st 2014.

Centre (EMMC) as state-of-the-art facility with a view to monitor and records the content of satellite TV channels with regard to violation of Programme and Advertisement Codes enshrined under the Cable Television Networks (Regulation) Act, 1995 and Rules framed thereunder. EMMC is equipped to monitor and record around 900 channels and currently monitors all permitted channels.

(iii) LEGISLATIVE GAPS

At present, there are 902 television channels registered in India for telecasting news or non-news programmes. So practically, it is impossible for any cable operator to maintain a brief of all programmes telecasted on these channels in individual capacity. Moreover, the Act is silent about what the 'brief of programme' should contain; making it difficult for the operator to decide what should be included in 'brief of programme'.

Further, the Act imposes a duty on cable operator to adhere the Programme and Advertisement Codes and requires cable operators to transmit programmes and advertisements that are in conformity with the Codes. There are so many reasons that make impossible for cable operators to adhere the prescribed Codes, such as: First, the cable operator only relays the programme through the cable wire. So technically it is impossible for him to watch every television channel at a single time to check whether the programmes and advertisements telecasting in television channels are in conformity with the Codes or not. Second, there are so many provisions in the Codes that presupposes a cable operator to be well educated and having a good knowledge of Constitution and other laws, for instances Rule 7(2) (ii) of the Advertisement Code requires that no advertisement shall be permitted which is against any provision of the Constitution of India. The Rule expects every cable operator to know all provisions of the Constitution. Likewise, Rule 7(4) requires that the goods or services advertised shall not suffer from any deficiency as mentioned in Consumer Protection Act, as amended in 2019. It means the Rule imposes duty over the cable operator to check the deficiency of the product in the market before relaying the advertisements of every product and should be well versed in judging the quality of goods or services. Besides this, provisions related to contempt of court, defamation, decency and morality, obscenity and integrity of nation etc. also need a skilled knowledge about the related enactments.

The Act does not establish any specific regulatory body and in case of violation of Programme Code and Advertising Code, it was left to the executive to ensure that the mandate of the legislation was complied with. But such a situation would be an anathema in a democratic set up inasmuch as it would put broadcast industry under the direct control of the State. Practically, the Act does not lay any regulatory framework for the private television industry, instead it provides a registration process for a cable operator. Therefore, the broadcasters continuously remained unaccountable because the Act does not brought broadcasters in its jurisdiction. Further, the Act has failed to identify a department/authority to look after cable television networks in its full perspective.

The enforcement procedure of the Act reveals that the procedure is very poor. The authorized officer means a District Magistrate, or a Sub-divisional Magistrate, or a Commissioner of Police within whose local limits of jurisdiction the Cable network is registered, who is empowered to oversee the functioning of cable operators.⁶³ The Act does not identify and separate department/authority to monitor cable television services rather it vests the power in senior administrative officers i.e., District Magistrate or Sub Divisional Magistrate or a Commissioner of Police. They are mainly administrative officers and already overburdened with assigned administrative works, hardly getting time to monitor Cable TV. Even they have no knowledge regarding their power under this Act.⁶⁴

IV. TRAI IN ACTION

Telecom Regulatory Authority of India (hereinafter referred as TRAI or the Authority) is a principal regulatory agency for telecommunications in India. The Telecom Regulatory Authority of India was established in the year 1997 through a Presidential Ordinance⁶⁵, which was later ratified by Parliament by enacting the Telecom Regulatory Authority of India Act,

63. List of permitted Private Satellite TV channels, available at: <http://www.mib.nic.in>

64. *Supra* note 27, SS. 2(a). This provision further authorizes the Central Government or the State Government to notify officers than those specified in the Act as above to be authorized officers for such local limits of jurisdiction as may be determined by that Government so that the most effective mechanism at local level may be put in place.

65. *Id.* at Point 7.

1997. Sec. 3 (1) of the Act makes provision for the purpose of this Act, that is to regulate telecommunication services, to protect the interests of service providers and consumers and to promote and ensure growth of the telecom sector.⁶⁶

Originally, the Authority was responsible for regulating the telecommunications services in India, but in 2004, the scope of the expression “telecommunication services” was expanded to cover the broadcasting and cable services also.⁶⁷ Thus, the broadcasting and cable services came within the jurisdiction of the TRAI and the TRAI got additional responsibility to supervise the broadcasting and cable services⁶⁸.

The Authority consists of five Members including a Chairperson, two whole time Members and two part-time members.⁶⁹ The Chairperson and Members of the Authority are appointed by the Central Government.⁷⁰ The Central Government may remove a TRAI member from his office on various grounds listed in Sec. 7(1).⁷¹

The Chairperson has the power of general superintendence and directions over the conduct of the affairs of the Authority. The Chairperson also discharges Authority’s statutory powers and functions and presides over the meetings of the Authority.⁷² The Central Government may appoint

66. Id. at Point 7.

67. Sec. 3(1), the Telecom Regulatory Authority of the Act, which was substantially revised by the 2000 Amendment, outlines the purpose of the Authority. See, Preamble of the TRAI Act.

68. Through this arrangement, the Telecom Disputes Settlement and Appellate Tribunal (hereinafter referred as TDSET) became available as an alternate dispute redressal forum also for service providers and consumers.

69. Notification No.39 dated 9th January, 2004, File no.13-1-2004.

70. Sec.3(3). As amended by Telecom Regulatory Appellate Authority of India (Amendment) Act, 2000. Prior to this amendment TRAI consisted of seven members, comprising a Chairperson and six other members, id at Sec. 3(3) (prior to 2000 Amendment).

71. Sec. 4 as amended by Telecom Regulatory Appellate Authority of India (Amendment) Act, 2000.

72. Sec.4. as amended by the telecom Regulatory Appellate Authority of India (Amendment) Act, 2000. Prior to this amendment the Act required that the Chairperson must have served as either a supreme Court Judge or a High Court Chief Justice. See, Sec. 4(1) (prior to 2000(Amendment)).

one of the members to be a Vice-Chairperson of the Authority.⁷³

One can say that the Central Government controls the appointment and removal of the Chairperson and other Members. It may cast doubt on TRAI's role as an independent regulator. In this context, role of TRAI is enumerated as under:

(i) POWER AND FUNCTIONS OF THE TRAI

Under Sec. 11 of the Act, the Authority can make recommendations to the Central Government either *Suo motu* or at the Government's request. Sec. 11(1) makes it clear that these recommendations are not binding on the Central Government.⁷⁴ However, the Central Government has to obtain recommendations from TRAI with respect to need and timing for new service providers and terms and conditions of the license to be granted to the service providers. The above discussion makes it clear that the recommendations of the Authority are not binding on the Central Government, but are only advisory in nature.⁷⁵ Further, the Act allows the Central Government to request the authority to reconsider or modify its recommendations. Moreover, there is no equivalent provision in the TRAI Act that enable the Authority to make a similar request, to ask the Central Government to reconsider its decision.

One can understand that most of these functions relate to the provision of communication services by service providers. They do not involve any significant policy matters or licensing responsibilities, which the Central Government retains under the prevailing statutory framework after the 2000 Amendment. TRAI plays no role in policy matters or licensing which the Central Government set out as a licensor.

This means TRAI may issue directions only with respect to its regulatory functions. It does not have the power to issue directions with respect to its recommendatory functions listed in Sec. (1)(a), rate fixing of the telecommunication services, fees related matters under Sec. 11(1)(c) or additional functions under Sec. 11 (1)(d).

(ii) CHOICE OF CONSUMER IN SELECTING CHANNELS

The Authority noticed that under the existing regime, the consumer

73. Sec. 6(1), the telecom Regulatory Authority of India Act, 1997.

74. Id. Sec. 6(2).

75. Id. First Proviso, Sec.11(1).

has little choice. The consumer's only choice is to subscribe or not to subscribe to the service being offered by the local cable operator. Under this system, consumers would necessarily pay for channels that they do not watch. Similarly, operators have limited choice – they cannot choose individual channels but have to pick up the entire bouquet offered by a broadcaster.

(iii) PRICING OF CABLE CHANNELS (FREE TO AIR CHANNEL)

On pricing issue, the authority noticed that initially, most of the TV channels were free-to-air (FTA). Over the last few years, channels were turning into pay channels and have begun charging subscription fees. As more channels turn pay, subscription fees are rising and monthly cable TV bills for consumers are growing rapidly. In the present system, new pay channels generally join the existing bouquet of channels and customers have no choice but to pay higher subscription fee for the new expanded bouquet.

However, TRAI has increased the number of free to air channel and reduced pricing for pay channels in bouquets. The number of free channel available at the network capacity fee has increased to 200, which was earlier limited to 100.

The rights of the consumers got further nourishment by recently enacted Consumer Protection Act, 2019. It is relevant to mention section 100 of this Act, (CPACT) which states that provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

One can say that amendments that have been made in Consumer Protection Act, 2019 will certainly ensure a fair deal for the consumers of electronic media.

TRAI has acknowledged the fact that consumer will be able to benefit as per amended provisions and the amendments will usher in better consumer offering, more flexible tariff schemes and choice for consumers.

The additional responsibility to regulate broadcasting and cable services have opened a new and challenging frontier for the Authority and gives it powers to supervise the tariffs, pricing, standards of services and interconnection arrangement of the broadcasting and cable services in India. In pursuance of this additional responsibility, the Authority issued several directions, submitted several recommendations and framed several

regulations on a complex legal, technical and policy issues relating to broadcasting and cable services. Under Sec. 14 of the TRAI the disputes between service providers, service provider and group of consumers are to be adjudicated by the Telecom Dispute Settlement Appellate Tribunal (TDSAT).

(IV) REGULATION OF ADVERTISEMENT

On advertising issue, the Authority found that consumers have voiced strong complaints over the frequent and long duration of advertisement breaks. They have been requesting to ban or at least restrict the duration of advertisement on Pay channels. The consumer organizations have been arguing that since they pay subscription fees for viewing pay channels, there is little justification for these channels to show advertisements.⁷⁶

(V) DURATION OF THE ADVERTISEMENT

The Telecom Regulatory Authority of India has observed that there have been several complaints regarding overplaying of advertisements, long duration of advertisements, overlaying of advertisements on the screen, increased audio level during advertisements etc. With the primary objective of striking a balance between giving a consumer a good TV viewing experience, and protecting the commercial interests of broadcasters, the Authority, on 16th March 2012, issued a consultation paper, in which the various issues related to advertisements on TV channels in India were discussed and a proposal for regulation of duration and format of advertisements was put forth for comments of the stakeholders.⁷⁷

After analyzing the various aspects, facts and available studies, the Authority, notified the “Standards of Quality of Service (Duration of advertisements in Television Channels) Regulations, 2012”, for regulating the duration and other issues of advertisements.⁷⁸ These regulations besides prescribing that the limit of advertisement duration should be adhered to on clock hour basis, also provided that⁷⁹ advertisements should be carried

76. In *Reliance Infocom v. Union of India* Petition No. 3 of (2005) 2 *Comp. L.J* 537(TDSAT, 4 March 2005), TDSAT has held that the licensor is under no obligation to obtain TRAI’s recommendations before terminating a license or imposing a contractual penalty. Sec, at Para 35.1 *ibid*.

77. *Id*.p.99.

78. *Id*.p.102.

79. *Ibid*

only during breaks in live sporting action, (ii) time gap between consecutive advertisement sessions should be of minimum 30 minutes in case of movies and 15 minutes otherwise, (iii) no part screen advertisements should be permitted, (vi) the audio level of advertisements not to be higher than the audio level of programmes etc.⁸⁰

The said regulations were challenged by some of the broadcasters in Telecom Disputes Settlement and Appellate Tribunal (TDSAT) on the grounds that the regulation on advertising time and its corresponding effect on the broadcaster's revenues would adversely affect the growth and competition in the broadcasting industry.⁸¹ After the release of TRAI new amended advertisement regulation, the broadcasting fraternity, led by the News Broadcasters Association (NBA) and the Indian Broadcasting Foundation (IBF), have vehemently opposed TRAI's move and argued that TRAI's regulation is against the fundamental rights guaranteed under Article 19(1) (a) and (g) of the Constitution and would affect broadcaster's business revenue.⁸² Taking into consideration the issues raised by the broadcasters in the TDSAT, the Authority recently amended the Principal Advertisement Regulations.⁸³

It is indeed surprising to see the response of the broadcasters, because in its amended regulation the TRAI eliminated its all-prior advertisement regulations made under the principal regulation and the 12 minutes per hour cap on advertisements is not new for the broadcasting industry. It is already a part of an existing Advertisement Code since 1994 and TRAI in its new amended advertisement regulation has not changed the existing limit for advertisements.⁸⁴

80. Consultation paper, Issues related to Advertisement in TV Channels, Telecom Regulatory Authority of India, Consultation Paper no. 7/2012, dated, March 16th, 2012, available at, <http://www.trai.gov.in> visited on 9.9.2019

81. The standard of Quality of Service (Duration of Advertisement in Television Channels) Regulations, 2012, (15 of 2012), Telecom Regulatory Authority of India, dated May 14th, 2012, available at, <http://www.trai.gov.in>

82. Id. Regulation 3.

83. The Standards of quality of service (Duration of Advertisement in Television Channels) (Amendment) Regulations, 2013, Telecom Authority of India, New Delhi, 7-8, Dated March 22nd, 2013.

84. "Never-ending commercial breaks," The Hindu, April 5, 2013

(VI) NEW REGULATORY FRAME WORK OF TRAI & RIGHTS OF CONSUMERS

TRAI on 3rd March, 2017 notified the new regulatory frame work for Broadcasting and cable services. The new frame work came into effect on 29th December, 2018. TRAI new regulations or orders for the television and broadcasting sector gave freedom to consumers to select television channels they want to watch. To ensure proper implementation of new frame work, TRAI has made number of effects such as publicity in electronic and print media, interaction with consumer groups. In this regard, TRAI has also notified the minimum requirements that a website/mobile app of any DPO should have.

Every distributor of television channel shall allow the consumer to access, through application (such as mobile app) or portal developed by the authority, to view the T.V. channels and bouquet of channels available on its platform, deselect any channel or bouquet of channels, view their subscription detail and modify their subscription⁸⁵.

As per the current frame work any excess charges revealed in the filling audit should be refunded to the consumers. However, if a service provider is not able to refund the amount despite its attempt within the time period permitted by the regulations, the service provider has to deposit the unclaimed or unrefunded amount into the telecommunication consumer education and protection fund.

TRAI also interacts with consumer organization/NGO. It has a system of registering consumer organization/NGO for interaction at regular intervals. It constantly adopts measures for strengthening consumer organization. It also organizes seminars, workshop and invite stakeholders to attend these events.

It is interesting to note that electronic media, particularly TV has become a potent weapon to mould public opinion in India. One can find that Doordarshan allocates equal time to all political parties which are eligible for such slot. Private T.V. Channel allows paid political advertisement⁸⁶.

85. Telecommunication (Broad casting and cable) services standard of quality of services and consumer protection (addressable system) regulation 2017. See regulation 3(6), 3(7) & 3 (8)

86. Paid political advertisement is not banned in India whereas in U.K., Communication Act of 2003 imposes a ban on any paid political advertisement.

There is currently no single regulatory authority which oversees either the content and ethics or the ownership of all of these diverse media platforms. In fact, unrestricted cross-media ownership has at times raised red flags with government bodies.⁸⁷

One can discover scandals involving millions of rupees in exchange for favourable coverage of particular political and vested interests; bribery and corruption linking lobbyists and fixers for large Corporate Houses with major Media Houses, journalists and politicians; paid news; the sale of editorial space and airtime for advertorials and sensationalist reporting of health scares and terror attacks.

V. ELECTRONIC MEDIA LAW IN ABEYANCE

One can notice that the Central Government had introduced a number of Bills to control and regulate electronic media. However, none of them could see the light of the day. In order to regulate cable television and broadcasting sector and to bring uniformity in broadcasting and cable regulations across the country, the Central Government made several attempts. In the following pages, an attempt is made to illustrate these Bills.

Broadcasting Bill, 1997 was intended to establish an autonomous Broadcasting Authority for the purpose of facilitating and regulating broadcasting services in India so that they become competitive in terms of quality of service, cost of service and use of new technologies, apart from becoming a catalyst for social change, promotion of values of Indian culture and shaping of a modern vision. However, Bill was not passed and lapsed.

Central Government's next attempt was the Communications Convergence Bill, 2001 to regulate the whole broadcast media. The Communications Convergence Bill, 2001 was aimed at creating a single regulatory authority, the Communications Commission of India that would repeal the Indian Telegraph Act 1885.

87. For instance, the Telecoms Regulatory Authority of India (TRAI) consultation paper of 2013 sets out some of the issues it perceives as crucial to maintaining media plurality alongside economic growth.

There were essentially two areas which the Convergence Bill sought to regulate: (a) Carriage of Communications (b) Content of communications. The Bill proposed a Spectrum Management Committee (SMC), which was to be responsible to allocate available spectrum for strategic/commercial purposes.⁸⁸ The Communications Convergence Bill, 2001 was introduced but lapsed due to the dissolution of the 13th Lok Sabha in 2004.

In 2006, the Government made another attempt and drafted the Bill provided for an independent authority to be known as the Broadcast Regulatory Authority of India for regulating and developing broadcasting services in India. The Bill was intended to regulate both content and carriage services of broadcasting. The Authority was to be established by the Central Government.⁸⁹ The Bill conferred sweeping powers on the Central Government.⁹⁰ However, this Bill also lapsed.

In 2007, the Government drafted the Broadcasting Services Regulation Bill, 2007, to facilitate and develop in an orderly manner the carriage and content of Broadcasting. It aimed at regulation of broadcasting services in India for offering a wide variety of entertainment, news views and information in a fair, objective and competitive manner and to provide for regulation of content for public viewing and matters connected therewith or incidental thereto. The Central Government was empowered to form the Content Code and decide certification and compliance.

The accountability of the Authority and its committees was not clearly laid down in the Bill. The control, the Authority had over electronic media, and private control of radio and TV, and the extensive powers it was invested with, reflected lack of accountability.

The Bill curtailed cross media proliferation and imposed limits, by laying down obligations in advertising programs, for all providers and broadcasters to comply with, as well as prescribed a particular percentage of content broadcasted that had to be of Indian Origin⁹¹.

88. Pritam Kumar Ghosh, Communications Convergence Bill, 2001 available at www.academia.edu/6328593/Communications_Convergence_Bill_2001

89. The Broadcasting Services Regulation Bill, 2006. www.prsindia

90. Id, 12, Sec 23.

91. The draft bill proposed to prevent media monopolies through what it called “restrictions on accumulation of interest.

The Broadcasting Services Regulation Bill of 2007 also fell into abeyance. In 2011, the second UPA government decided to set up a National Broadcasting Content Complaints Council instead that was meant to, at least, make private sector broadcasting more accountable but it also did not materialize.

One can find that calls for rigorous regulation have been strongly resisted by the electronic media industry in India on the grounds that such regulation might interfere with freedom of expression and self-regulation of the electronic media is sufficient to protect the public interest. It may be noted that for the print media, Press Council of India is a regulatory body in India.⁹²

Today news channels are governed by mechanisms of self-regulation's. One such mechanism has been created by the News Broadcasters Association. The NBA has devised a Code of ethics to regulate television content. The News Broadcasting Standards Authority (NBSA), of the NBA, is empowered to warn, admonish, censure, express disapproval and fine the broadcaster a sum up to Rs. 1 lakh for violation of the Code. Another such organization is the Broadcast Editors' Association. The Advertising Standards Council of India has also drawn up guidelines on content of advertisements. These groups govern through agreements and do not have any statutory power

What sanctions would be enough to regulate electronic media? Should licenses be suspended? Should journalists and editors be punished? Should huge fines be imposed against media houses who do not conform?

Former Press Council Chairman Justice Katju has recommended that the electronic media should be brought under purview of Press Council. He also argued that it should be called Media Council and should be given more teeth.⁹³ While there is, indeed, always a danger that a new

92. Press Council of India is a statutory, adjudicating, organization in India formed in 1966. It is the self-regulatory watchdog of the press, for the press and by the press, that operates under the Press Council Act of 1978.

93. The Press Council dealt with only one complaint of paid news against the editor of Abhi Abhi, Hisar (Haryana) an election agent in 2011-2012. The complaint was filed on 5th October 2009. The editor had allegedly approached the complainant and demanded a sum of Rs. 5 Lakh. When he refused, the newspaper started publishing a spate of motivated and false news article against J P Dalal. The matter was dismissed as both the parties did not appear for the hearing. [the hoot, September 17th 2012]

regulatory body might use its powers to encourage particular brands of moral policing of the public sphere and to curtail freedom of expression.

Law Commission's two-hundredth report⁹⁴ on Trial by Media recommended the amendment of the Contempt of Courts Act, 1971 to include more stringent provisions for prejudicial reporting by the media. The Law Commission Consultation Paper (undated) on sting operations, while referring to the observations of the Committee on Petitions of Rajya Sabha in its report dated 12.12.2008, observed that there was a need to evaluate the misuse of the sting operations and their impact on privacy⁹⁵.

VI. CONCLUSION

The developments in science and technology, coupled with use of internet has facilitated the enormous growth of electronic media. One can say that in absence of any statutory regulator, the electronic media has exercised its freedom without accountability unlike Press Council of India, Censor Board or Registrar of Companies; there is no such authority to control and regulate the freedom of electronic media. The rights and interest of 'consumer' is protected by laws enacted by competent legislature and Telecom Regulatory Authority from time to time. Electronic media has expanded its reach from television to mobile phones. One can say that TV remains the most effective platform for both content creators and advertisers.

The growth of digital addressable system in television 'requires a new understanding of emerging modes of digital address in India. One can say that digital TV in Digital India has empowered the consumers to demand better programme service, efficiency of delivery mechanism, security and mobility. It is evident from the rise of Dish TV, TATA Sky, and Reliance Industries

21st Century has witnessed significant developments in cable and satellite television. The country has achieved 100% digitalization in

94. <https://lawcommissionofindia.nic.in/reports/rep200.pdf>

95. In February, 2014, the Parliamentary Standing Committee on Information Technology (2013-2014) submitted its fifty second report on Cyber Crime, Cyber Security and Right to Privacy wherein the Committee recommended that in view of the recent uproar over Section 66A of Information Technology Act, 2000 there should be a system of periodical review of the existing provisions of the Act

March 2017. One can appreciate the fact that new Digital addressable system is utilized to identify each subscriber in conjunction with the Aadhar and KYC systems. The right to choose, notice, consent, Data portability should be conferred upon consumers of electronic media specially TV. TRAI's new regulation for the Television and broadcasting sector empowered the consumers to select television channels of their choice.

In country like India, electronic media empowers the citizens to propel the government of the day to introduce policy reform or seek remedies for violation of the basic rights. One should maintain a strong watch over consumer's basic rights as number of violations of their rights has increased in recent times. It is important that consumer's organization should act in collaboration with universities and other professional bodies/institutes. This partnership permeates transparency and accountability of stakeholders involved in the management of electronic media.

The existing framework for protection of personal information/data of telecom consumers is not sufficient to protect the consumers against misuse of their personal data; a data protection law must be enacted."Dish TV" was among the first in television industry to embrace Aadhar and for rapidly expanding its subscriber base in India. TRAI has recommended that consumer awareness programs be undertaken to spread the awareness about data protection and privacy issues so that users can take well informed decisions about their personal data. It is submitted that recommendation of TRAI should be followed in letter and spirit. It has been suggested that a common platform should be created for sharing of information related to data security breach by all entities in digital ecosystem. It should be made mandatory for all entities including service providers. Electronic media has contributed immensely in the promotion of good governance. Its role as 'watchdog' has been acknowledged by every section of the society. It is submitted that Parliament should enact a law to regulate electronic media and to fulfil the long felt need for efficacious legal regime.

To sum up, in words of the Supreme Court of India "Law should imbibe technological developments and accordingly mould its rules so as to cater the needs of the society. Non recognition of technology within sphere of law is only a disservice to inevitable".



UNIFORM CIVIL CODE : AN UNFULFILLED CONSTITUTIONAL PROMISE

DHARMENDRA KUMAR MISHRA*

ANSHU MISHRA**

In a pluralist society like India, people have faith in their respective religious beliefs or tenets propounded by different religious or their offshoots, the founding fathers, while making the Constitution, was confronted with the problems to unify and integrate people of India professing different religious faiths, born in different castes, creeds or sub-sections in the society, speaking different languages and dialects in different regions and provided a secular Constitution to integrate all sections of the society as united Bharat. The Directive Principle of the Constitution its visualises diversity and attempt to foster uniformity among people of different faiths. A uniform law, though it is highly desirable, In a democracy, governed by rule of law, gradual progressive change and order should be brought about, which is most acute, can be remedied by process of law at stages.¹

ABSTRACT : The question of a uniform civil code has been a subject of speculation among the social and legal practitioners since the commencement of the Constitution in India. On the one hand, there are constitutional guarantee for liberty and equality to all the Indian citizens and on the other, the constitutional mandate to the State for bringing uniformity in civil matters of Indian citizens. It poses a serious challenge to the Government in maintaining a balance

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1. *Pannalal Bansilal Pitti And Ors. v State of Andhra Pradesh And Anr.* AIR 1996 SC 1023;(1996) 2 SCC 498

between the both, particularly in a religiously pluralistic society. The provisions of the customary laws recognise religious ceremonies in every walk of family matters. Therefore, the whole debate on the issue of a constitutional promise to implement a uniform civil code has now been polarized around the twin axes of the State and the community in the light of democratic values- liberty, equality, and justice. The debate is thus embedded in larger concerns about India as a multicultural secular State having liberal policy in family matters in a liberal democratic set-up and divided along both political and religious lines. However, confusion is rooted in concerns over the process and who regulates that process rather than the concept itself. In 2019, the Indian Supreme Court lamented that even after 63 years since the codification of the Hindu Law in 1956, the governments in power have failed to take any steps toward implementation of a uniform civil code. The apex court has opined that *the Muslim Women (Protection of Rights on Marriage) Act, 2019* which abolished the practice of Triple Talaq was seen as a progressive step that would realise the goal of a uniform civil code. A Bill has also been introduced in 2018 in the Lok Sabha by a Member of Parliament for enacting law relating to civil code which re-generated a new debate on the issue of a uniform civil code. The present paper focuses on how successfully the commitment was incorporated for a uniform civil code under the Constitution while giving it a place under the Directive Principles of State Policy and also confines to the constitutional documents and judicial concerns to answer some of the relevant questions, arising out for its implementation.

KEY WORDS : Uniform Civil Code, Pluralism, Directive Principles of State Policy, Justice, Equality, Liberty.

I. INTRODUCTION

India that is *Bharat*,² is the second-most populous democratic nation

2. Article 1, the Constitution of India, 'India *i.e.* Bharat shall be union of States,' reflects a fusion of various religions; cultures; customs; traditions; languages and heritage etc. which makes it an intriguing nation embracing the diversity of this universe. Since the ancient times, it has been termed as *Bharat* (a Sanskrit original name, word 'भरत' (उणादि) - a kind of compound in Sanskrit grammar) is derived from the धातुः (Verb root) - षृ - भरणे (धारणपोषणयोः) – *means* a kind of land which holds and nurtures.

in the world having diversified culture, religions, ethnic groups etc., which lies north of the ocean and south of the snowy mountains³. This pluralistic and multicultural nature of the Indian society generate disparity and inequality due to different provisions of the different customary laws known as personal laws. The Personal Laws in India are civil laws specific to different religious communities. There are various provisions of the various personal laws governing certain family-related legal matters of all the communities in different ways that have exposed a conflict with the constitutional guarantee of equality, liberty, and other fundamental rights of individual and the Personal laws which still regulate, to a certain extent, the various family matters relating to marriage, divorce, maintenance, inheritance, guardianship, adoption, and succession of the Indian people. These laws are largely influenced by the religious customs of different communities. This has been the reason that Hindu males were practising polygamy till 1955; Hindu sons were inheriting greater shares of their parents, not the daughters before 2005⁴ under inheritance rule; a Muslim woman could not seek a divorce from her husband till 1935; Muslim men still may practise polygamy,⁵ polyandry is not permitted; Hindu spouses were not permitted for judicial separation till 1955; even a Christian woman can claim separation only on the adultery of the husband and his change of profession of Christianity to some other religion and marrying other woman. These personal laws are seen completely outraging the basic human rights in the modern evolving times.

A Uniform Civil Code, that would put in place a set of laws to govern the personal matters of all the citizens irrespective of their religion, group or region, caste, or creed, is need of the present times. Such a progressive reform in the age-old laws dealing with the personal matters of various religious groups with different provisions contained under the different laws may be proved as an instrument for complete justice in the modern

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3. उत्तरं यत्समुद्रस्य हिमाद्रेश्चैव दक्षिणम्। वर्षतद् भारतं नाम भारती यत्र संततिः ॥ *Vishnu Purana*, 2.3.1[4][5]
 4. The Hindu Succession (Amendment) Act 2005 provides that in a joint family governed by the *Mitakshara Law* the daughter shall have equal share.
 5. *Muslim Law* permits polygamy but has never encouraged it. The sanction for polygamy among Muslim is traced from the *Quran*-‘If Ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by twos, or threes, or fours or if ye fear that ye cannot be equitable, then only one, or what your right hand possesses’, *Quran*: IV. 3

progressive society. It may be helpful to minimize all kinds of gender bias and discrimination faced by the vulnerable groups in particular, and to strengthen the secular fabric of the country in promoting unity in a pluralistic society in general. However, legal pluralism and legal universalism have been a debated issue in independent India. Should a single legal system be applied to the members of all communities? The differences highlight the apparent contradiction and raise the challenge to the constitutional recognition of certain fundamental rights and constitutional commitment for a uniform civil code. Some critics argue that plural legal systems can legitimise traditional practices that are inconsistent with the expansion of freedoms. Many traditional practices reject the equality of women, for example, in property rights, inheritance, and other realms. But, legal pluralism does not require the adoption of all practices claimed to be traditional. The accommodation of customary law cannot be seen as an entitlement to maintain practices that violate basic human rights, no matter how traditional or authentic they may claim to be. The time has come to take a close and hard look at the mandate of the Constitution for a uniform civil code. The present paper focuses on the issue of whether a uniform civil code is feasible?

II. THE CONCEPT OF UNIFORM CIVIL CODE: HISTORICAL PERSPECTIVE

The concept of a uniform civil code has two aspects: first, uniformity between communities (Hindus, Muslims, Christians, and Tribes etc), all being governed by one law and, second uniformity within communities (between men and women). However, the expression uniform civil code consists of three terms- uniform, civil, and code. The term 'uniform' refers to the form of things. Although the term 'uniform' is very often confused as the synonym for the term 'common', there is a difference between 'common' and 'uniform'⁶. The term 'civil' is a very elastic expression and is used in a number of senses⁷. When it is used as an adjective to 'Law', it means pertaining to the private rights and remedies of a citizen; as distinguished from criminal, political etc⁸. The word 'code'

6. Uniform means 'one and same in all circumstances' while common means 'same in similar conditions'

7. Words and Phrases, Permanent Edition, Vol. 7, p 328

8. The Shorter Oxford English Dictionary, Vol. 1 (1936), p 342

is derived from the Latin term ‘*codex*’ which means, a book, consisting ordinarily of wooden tables covered with wax and later of sheets of parchment or papyrus.⁹

At the time of the framing of the Indian Constitution, a rule of interpersonal conflict of laws evolved by colonial rulers was allowed to continue. Nevertheless, the matter of uniform civil code has been incorporated in the Directive Principle of State Policy. In India, most of the family laws are determined by the religion of the parties concerned. The multifarious caste and creed system and their sects of beliefs or practices are bewilderingly confusing. Understandably, there are a significant number who feel that the enforcement of a uniform civil code would impinge on the individual dignity and religious identity and undermine their ethos, family values, and culture.

It is important to understand the debate over uniform civil code in a historical context. India’s policy at the time of independence was committed to just a State based on democratic values of Justice equality and liberty. The Indian Constitution recognises and accommodates the colonial inherited system of legal pluralism as its multicultural reality. But, the intention behind the proposal for a uniform civil code was not only to give a non-religious alternative to the personal laws,¹⁰ but to codify scattered socially accepted existing laws governing the family matters and to put together them into a written form. Therefore, some challenges arise in the way of a uniform civil code from a country’s historical links with religion or from the legacy of colonialism. British were not interested to build a new society for India on the western ideals of justice, equality and fairness. The Warren Hastings’ Plan of 1772 explicitly stated that the Muslims of India would be governed by their own personal laws.¹¹ As a result, communities continue to enjoy unqualified rights in the matters of family affairs in British India. It has attempted to categorise religious and cultural identities, fixing their relative positions in the polity and society

9. Encyclopaedia Americana, Vol. 7 (1960), p 194

10. Human Development Report (New Delhi: Oxford University Press, 2004), p. 57.

11. Warren Hastings had decreed in 1772 that in matters of inheritance, marriage and other such religious affairs “the laws of the *Quran* with respect to the Mahomedans and those of the *Shashtra* with respect to the *Gentoos* [Hindus] shall be invariably adhered to.” See Act II of 1772, adopted as resolution of 17th April 1780, Section 27.

both. In India, the British colonialists introduced their own law and legal system. But, they retained much customary law and many elements of the traditional judicial process that they deemed consistent with their sense of justice and morality. The same policy is continued by the politicians in independent India. Now, it is a matter of serious concern how personal law compromises and maintains human rights standards?

The demand for a uniform civil code for all religious communities was first made by the All India Women's Conference in 1937. In 1930, at the time of communal conflict between Hindus and Muslims, when the All India Women's Conference and other women's organisations raised demands for a uniform civil code, Muslim women felt forced to choose to focus on demands for changes within their own personal law.¹² Ironically, what they demanded was that the *Shariat* be taken as authoritative, because customary law treated women badly. The Muslim Women's organisations have also condemned customary law as it adversely affects their rights, and have demanded that Muslim Personal Law (*Shariat*) should be made applicable to them.¹³ Not surprisingly, both the pre and post-Independence feminist movements have seen family and home as the single most important structure ordering women's lives. In the late seventies feminists have focussed on the dowry form and by the early eighties, attempts to analyse the relationship of women to and within the family had led to examine the codification of women's rights in marriage, divorce, property, maintenance, etc. In India, most of the family laws are differentiated on the basis of religion, as well as community. This entailed investigation into different personal laws.¹⁴ Thus, the history of India is full of cases of women of all communities each of whom has raised the matter of a uniform civil code in their own way, against the personal laws applicable to them for a rethinking of the notion of uniformity, gender justice and dignity.

III. UNIFORM CIVIL CODE AND THE CONSTITUENT ASSEMBLY DEBATES

The idea of a uniform civil code entered in the political debate in the

12. Radha Kumar, *The History of Doing* (1993), p169

13. Preamble, *the Muslim Personal Law (Shariat) Application Act, 1937*

14. *Supra* note 12 at 160

pre-independence era. It is a policy statement.¹⁵ It was a much-debated subject of the Constituent Assembly and has given rise to considerable literature. The Constituent Assembly took up the issue of Uniform Civil Code on November 23, 1948 as part of Article 35 of the draft Constitution. There were impassioned debates on the issue. The founding fathers of the Constitution, especially Chairman of the Constitution Draft Committee, Dr B R Ambedkar supported by eminent members- M Ananthasayanam Iyyangar, K M Munshi, Alladi Krishnaswami Ayyar, and others had favoured the proposal of a uniform civil code; but it was strongly opposed by the some Muslim members – M. Muhammad Ismail, Naziruddin Ahmad, Mahboob Ali Baig, B Pocker and KTM Ahmed Ibrahim, and the members from other religions.

B. Pocker Sahib characterised the proposal to the Code of civil law as tyrannous provisions.¹⁶ While proposing an amendment in the draft, he said that:

‘Whether by the freedom we have obtained for this country, are we going to give up that freedom of conscience and that freedom of religious practices and that freedom of following one’s own personal law and try or aspire to impose upon the whole country one code of civil law, whatever it may mean, - which I say, as it is, may include even all branches of civil law, namely the law of marriage, law of inheritance, law of divorce and so many other kindred matters?’¹⁷

Hussain Imam wondering on the issue of a uniform civil law to deal with the matters of succession, marriage and divorce and others things said that:

‘In a country so diverse, is it possible to have uniformity of civil law? How is it possible to have uniformity when there are legislative bodies ready to legislate on a subject according to the requirements of their own people and their own circumstances?’¹⁸

15. Uday Raj Rai, *Fundamental Rights and Their Enforcement*, EEC, (2011), p771

16. Vol. VII, *Constituent Assembly Debates*, Pp. 544 (1948)

17. *Ibid*

18. *Ibid* p 546

Naziruddin Ahmad pleaded that abrogation of a personal law should not be treated as regulation of secular affairs surrounding a religion or as a measure of social welfare and reform. He pointed out that even the British during 175 years rule, who enacted uniform civil and criminal codes, did not interfere with the certain fundamental personal laws.¹⁹ The next amendment was proposed by him. He wanted that one proviso to be added²⁰ in the draft for a uniform civil code. Taking a broader perspective, he further said that:

“Each community, each religious community has certain religious laws, certain civil laws inseparably connected with religious beliefs and practices. I believe that in framing a uniform draft code, these religious laws or semi-religious laws should be kept out of its way..... One of them is that perhaps it clashes with article 19 of the Draft Constitution. In Article 19, it is provided that ‘subject to public, all persons are equally entitled to freedom of conscience and the right of freely to profess, practice and propagate religion.’ In fact, this is so fundamental that, On the other hand, by the Article under reference, we are giving the State some amount of latitude which may enable it to ignore the right conceded. And this right is not justiciable. It recommends to the State certain things and therefore it gives a right to the State. But then the subject has not been given any right under this provision. I submit that the present Article is likely to encourage the State to break the guarantees given in Article 19.²¹’

A number of arguments were put forward against the uniform civil code that was taken up in the counter debate that ensued and many of the

19. *Ibid* Pp 541-543

20. Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law

21. *Supra* note 18

fears were dispelled by those who advocated for a uniform civil code.

K. M. Munshi put forth the argument in favour of a uniform civil code. However, being agreed with the opinion of B. Pocker to the extent that there are many Hindus who do not like a uniform civil code, but he pleaded for divorcing “religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession”²². He said that the provisions are not tyrannical.

He stressed that:

‘the point of a common code is to ensure that the way of life for the country becomes unified and secular. He questioned how religion can interfere in matters like inheritance and succession which essentially form the tenets of social relations. He said, enactment of a common code affects Hindus equally and the goal of such legislation is to protect the fundamental rights guaranteed by the Constitution like ensuring gender equality. He criticized the isolationist outlook and called for religion to be restricted to spheres that legitimately pertain to it and ensure that the other areas are regulated in the larger interests of national unity’²³.

Because of all these controversies, the architects of the Constitution, therefore, found a compromise by including the enactment of a uniform civil code under the Directive Principles of State Policy under Article 44 of the Constitution. Distinguished members like Shri Minoo Masani, Smt. Hansa Mehta and Rajkumari Amrit Kaur put forth a note of dissent saying that one of the factors that have kept India back from advancing to nationhood has been the existence of personal laws, based on religion, which keep the Nation divided into watertight compartments in many aspects of life. They were strongly in favour of the view that a uniform civil code should be guaranteed to the Indian people within a period of five to ten years.

Alladi Krishnaswami Iyer drew the attention of the Muslims to abrogation by the British of various branches of the Hindu and the Muslim laws and to the enactment of common codes on the matters of personal

22. Supra note 16 Pp 546-548

23. *Ibid*

status in European countries.²⁴K.M. Munshi and Alladi Krishnaswami Ayyar claimed that the state could enact a uniform civil code even if there was no such provision in the Constitution.²⁵Alladi Krishnaswami Ayyar thought that the replacement of the diverse personal laws by a uniform civil code was necessary to preserve national unity and to remove dangers threatening national consolidation.²⁶

Dr. B.R. Ambedkar, while supporting the need to frame a uniform civil code, disfavoured the amendment, expressed the hope that its application might be voluntary. He also said:

‘Now, I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code.....and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as a part of the Constitution to bring about that change.’²⁷

He further said that:

‘I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is full of inequities, discriminations and other things which conflict with our fundamental rights²⁸’.

Dr. B.R. Ambedkar emphasised that in a secular state religion should

24. *Id.* at 549-550.

25. *Id.* at 548.

26. *Id.* at 549.

27. *Supra* note 16 Pp550-552

28. *Id.* at 550-552

not be allowed to govern all human activities and that personal laws should be separated from religion. Dr. Ambedkar further expressed the view that it would be unwise for a legislature seeking to enact a common civil code to ignore strong opposition from any section of the community. He asked the Muslim members not to read too much into the proposed Article and assured them that even if a common code was enacted it would be applied only to those who voluntarily consented to be bound by it.²⁹ He cleared in his speech that we must remember- including member of the Muslim community who have spoken on this subject, though one can appreciate their feelings very well- that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities.

The Constituent Assembly rejected the proposal and the debate finally clarified that religious freedom does not immunise the personal laws from state regulation and that in its opinion the state could enact laws to reform or replace the personal laws by a uniform civil code as a measure of social reform.

IV. THE CONSTITUTION AND PERSONAL LAWS: A CONFLICT

In India, personal laws are recognized by the Constitution on the one side,³⁰ and on the other side, the Constitution itself declares that all laws in force in the territory of India shall remain in force unless lawfully altered, repealed, amended (or adapted) by a competent legislature³¹ which

29. *Ibid*

30. Article 246; Entry 5 List III of the Seventh Schedule of the Constitution, reads thus:

Marriage, divorce;..... adoption; wills, intestacy and Succession;before the commencement of this Constitution subject to their personal law

31. Article 372, Continuance in force of existing laws and their adaptation, reads thus:

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

needs to be reconciled the fundamental rights of individuals with the pre-Constitutional personal laws and the conflict may be resolved by a harmonious interpretation.³²The Preamble of the Constitution aims to ensure Justice, Liberty and Equality, and assures dignity of individual; Articles 14 and 15 guarantees right to equality and not to discriminate against any citizen on the grounds of religion, caste, sex etc.; whereas Article 13 provides that all laws in force in the territory of India before the commencement of the Constitution, so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. All these multiple provisions favour to the Article 44 of the Directive Principles of State Policy which provides that the State shall endeavour or secure the citizens a uniform civil code throughout the territory of the country.

Parliament is empowered to enact family and inheritance laws for all communities, nevertheless no post-Independence legislation was enacted in place of the personal law of the Muslim and Christian except Hindu, and no move towards enacting a common family law for all communities was made. This failure to legislate, despite the promise of the Constitution, can only be understood in a political context. The Indian Constitution grants the right to freedom of religion and ensures to preserve and develop minority's culture as well as to make institutional arrangements for this. As incorporated in the Constitution, this right is like a restriction on the powers of the state. Increasingly, Article 25 of the Constitution which has given the right to citizens "to profess, practise and propagate religion" could well turn out to be a guaranteed right to state-supported communalism. This Article also guarantees besides freedom of conscience, the right to profess, practise and propagate religion, subject to the limitations specified in that article. A Muslim, who wants to divorce his wife unilaterally in arbitrary manner by uttering a specific word thrice without assigning any reason, or practise polygamy, is engaged neither in professing and practising nor in promoting or propagating his religion. He cannot, therefore, complain of denial of the right to profess, practise or propagate religion, if the State takes away his unilateral right to divorce his wife or put ban on the practice of polygamy.

Freedom of religion is not an absolute right under the Indian

32. *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84

Constitution and the matters of personal laws are not protected under this right, as claimed by many people. Modern society cannot accept the unqualified rights of communities to their cultural identity, providing of space for such identity is crucial for a democratic polity. For one thing, the 'community' identity that is claimed today as natural and prior to all other identity is no more primordial than the value of the Nation is.

V. THE MARCH OF JUDICIAL RESPONSE AND UNIFORM CIVIL CODE

In democratic countries, the judiciary avails greater significance. It is a fundamental norm of constitutional jurisprudence that the State shall not make any law that is violative of fundamental rights. However, challenges of personal law as being inconsistent with the right to equality had not always received a favourable response from the side of the Indian judiciary. The hesitance to bring personal laws within the purview of fundamental rights was pioneered way back in 1952 by the Bombay High Court in *State of Bombay v Narasu Appa Mali*.³³ While deciding on the validity of the *Bombay Prevention of Hindu Bigamous Marriages Act, 1946*, the Court has reached at the conclusion that the framers of the Constitution did not wish that the provisions of the personal laws should be challenged because of the Fundamental Rights. The Bombay High Court has held that the word 'law in force' does not intend to cover personal laws as such laws are derived from higher sources of law and therefore they should not be tested under constitutional morality. Personal laws are beyond the pale of the fundamental rights and hence cannot be struck down by this Court³⁴.

This view continued to be reiterated by the various High Courts as well as the Supreme Court of India. Later on, in *Ahmedabad Women Action Group And Ors. v Union of India*,³⁵ a writ petition to challenge the Muslim personal law which allows polygamy as offending the Articles 14 and 15 was refused to take cognizance by the Supreme Court on the ground that it was a matter of state policy, which ordinarily falls outside the Court's domain. On similar lines, the Kerala High Court in *P E Mathew v Union of India*³⁶ also held that the Christian personal law to be outside

33. *Ibid*

34. *Ibid*

35. AIR 1997 SC 3614

36. AIR 1999 Ker 345

the scope of Fundamental Rights, falling back on the principle of ‘judicial hands-off’ over such matters. In this case, section 17 of *the Indian Divorce Act* 1986 was challenged. The Court held that personal laws do not fall under the purview of Fundamental Rights as they are outside the scope of Article 13(1) as they are not laws as defined in Article 13(3) (b) of the Constitution. The Court has observed:

‘It must not be forgotten that in a democracy, the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to advance the welfare of the State³⁷’.

However, there have been contrary views as well, but it would be worth mentioning the case of *John Vallamattom And Ors v Union of India*,³⁸ wherein the Court has ventured to strike down Section 118 of the *Indian Succession Act*, 1925 as violative of Article 14 of the Constitution and observed:

‘in the very nature of things, the society being composed of unequals, a welfare State will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged and in the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Article 14 of the Constitution’.

It is noteworthy to mention here that the controversy which arose in the Constituent Assembly is not set at rest till date and continues before the Indian judiciary in different flavour. The responses of the judiciary to a uniform civil code have not been uniform at all. In some of the cases, much importance has been given to a uniform civil code by the apex court but in some of the cases, the Supreme Court has shown reluctance and avoided the issue either by holding the view that the time has not ripened for enacting uniform civil code or by saying that it is within the domain of Parliament to resolve the issue. It is important to note that the

37. *Ibid*

38. AIR 2003 SC 2902

debate on the uniform civil code has surfaced in consciousness as a national issue of integrity and gender justice.

The need for enactment of a uniform civil code was first taken for consideration in 1985 in the case of *Mohd. Ahmed Khan v Shah Bano Begum*.³⁹ The Supreme Court ruled in favour of Shah Bano, seeking maintenance under Section 125 of the Code of Criminal Procedure, 1973 after divorce by her husband. Chandrachud, C J has observed:

‘It is a matter of regret that Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for a country. A belief seems to have gained ground that it is for the A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the call by making gratuitous concessions on this issue.⁴⁰

He further said that:

‘a beginning has to be made if the Constitution is to have any meaning. Inevitably..... it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case⁴¹.

At one level, the judgment was about the personal claim of Shah Bano and the applicability of Section 125 of the Code of Criminal Procedure to all citizens, irrespective of their religion and customary laws. At the other levels, it was about the unquestioned allegiance to legally created semiotic objects. But, the worst effect of this case can be seen in the succumbing of a law nullifying the Supreme Court judgment through *the Muslim Women (Protection of Rights in Divorce) Act, 1986*.

39. AIR 1985 SC 945

40. *Ibid* p 954

41. *Id*

Again, in *Ms. Jordanm Diengdeh v S. S. Chopra*,⁴² the apex court had emphasised the urgency of infusing life into Article 44 of the Constitution by the Constitution Bench of the Supreme Court. The Court opined that:

‘the time has now come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion or caste. It is necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases’.⁴³

The Supreme Court stressed that now it is for the legislature to provide a uniform code specially to deal with the matters of marriage and divorce.

One argument about uniform civil code is that unlike fundamental rights, the directive principles are not justifiable, that is, a citizen cannot ask the court to force the government for implementation of a directive principle. But in *Minerva Mills Ltd And Ors v Union of India And Ors*,⁴⁴ Bhagawati J broke this barrier and ruled that the court could in certain circumstances implement them for the end of justice.

In *Sarla Mudgal And Ors v Union of India*,⁴⁵ the apex court while delivering the judgment directed the Government to implement the directive of Article 44. The Court had quoted the speech of Pandit Jawahar Lal Nehru, then Prime Minister, defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954:

“I do not think that at the present moment the time is ripe in India for me to try to push it through. It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve article 44 from the cold storage where it is lying since 1949. The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956,

42. AIR 1985 SC 935

43. *Id.* at 940

44. AIR 1980 SC 1789

45. AIR 1995 SC 1531

and the Hindu Adoptions and Maintenance Act, 1956, which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80 per cent of the citizens have already been brought under the codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of Uniform Civil Code for all citizens⁴⁶.”

In *Mudgal* case, the Supreme Court was inclined for a uniform civil code to pursue the Directive Principles of the Constitution. Kuldip Singh, J who presided over the Bench along with Sagir Ahmad J, has observed:

‘One wonder how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44.....The traditional Hindu law- personal law of Hindus – governing.....was given go-bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country⁴⁷.’

But, the decision in the case relates only concerning the bigamy-rights of a Hindu converted to Islam- a direction was given to the Union Government to ensure a uniform civil code, but all other observations regarding the necessity of implementing the Directive Principle and enactment of a uniform civil code were *obiter dicta*.⁴⁸

In *Lily Thomas And Ors v Union of India And Ors*⁴⁹ the Supreme Court expressed the desirability of Uniform Civil Code and said that Government to have a fresh look at the Article 44 of the Constitution in the light of words used in that Article.

However, in the *John Vallamattom And Ors v Union of India*,⁵⁰ while discussing the constitutionality of Section 118 of *the Indian Succession*

46. *Ibid* p 1532

47. *Id* at 1538

48. An *obiter dictum* is an expression of opinion on a point which arises in the case but is not necessary for its decision. Two questions may arise before a court. The court may determine both although only one of them may be necessary for the ultimate decision. Opinion on the question which was not necessary to decide the case would be only an *obiter dictum*.

49. 2000 (4) SCALE 176

50. AIR 2003 SC 2902

Act, Khare, C J reiterated the need for a uniform civil code. He had observed:

“It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country.⁵¹”

In *Ahmedabad Women’s Action Group v Union of India*,⁵² the Ahmedabad Women’s Action Group (AWAG) placed three petitions before the Supreme Court, all filed as Public Interest Litigation. The petitioners sought to challenge several aspects of codified and un-codified discriminatory provisions of personal laws of different communities. The Court commented that:

‘... these Writ Petitions do not deserve disposal on merits inasmuch as the arguments advanced before us wholly involve issues of State policies which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court (*Maharishi Avadhesh v Union of India*⁵³) held that the remedy lies somewhere else and not by knocking at the doors of the courts.’

In *Shyara Bano and Ors v Union of India*,⁵⁴ the Supreme Court has said that the practice of triple Talaq is in opposition of multiple Articles of the Constitution including Article 44. About the constitutionality of religion-based personal laws in general, and triple Talaq in particular, some of constitutional provisions play a role. Consequently, the existence of different personal laws for different religious communities do not conflict *per se* with the principle of secularism nor is the call for a uniform civil code in Article 44 in conflict with the existence of personal laws. But, on the other hand, the provision leaves open whether such a uniform civil code would actually replace or simply complement the personal laws? Recently, Supreme Court, in case of *Jose Paulo Coutinho v Maria Luiza Valentina Pereira*,⁵⁵ has held that:

‘It is important to note that in so far as the continuance of

51. *Ibid*

52. AIR 1997 SC 3614

53. (1994) SCC Supp (1) 713

54. AIR 2017 SC 4609

55. 2019 (12) SCALE 338

old laws is concern, the new sovereign is not bound to follow the old laws. It is at liberty to adopt the old laws wholly or in part. It may totally reject the old laws and replace them with the laws which apply in the other territories of the new sovereign. It is for the new sovereign to decide what action it would take with regard to the application of laws and from which date which law is to apply^{56.}

The Court remarked that Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights^{57.}

VI. CONCLUSION

The issue of a uniform civil code, in India, has been a topic of heated debate in progressive society. Because of the lack of objectivity of approach, the conflict often assumes irrelevant dimensions marked by communal overtones. The issue must be dealt in socio-legal and gender perspectives. It is possible and even desirable for a State to remain neutral on culture and religion, but not possible on gender bias issues.

A uniform civil code will bring understanding and effective integration of all communities on common issues. However, such uniform civil law may bring some new challenges. This harmonisation process marks a major challenge in India's enormous task of legal reform. The first step was to provide civil, political, and economic justice to all people irrespective of their caste, creed, sex, or religion. Next was to integrate socially and economically marginalized into the mainstream. Now India must shape new laws to govern a new social order by bringing all communities within one uniform law on the family issues. A uniform civil code may build up and cultivate the consciousness for reform of all personal and customary laws, upholding gender equality rather than imposing identical gender-biased, prejudicial laws across all communities. Universal principles of human rights and gender equality should be the guiding principle for building consensus on the issue of uniform civil

56. *Ibid* p339

57. *Id* at p 348

code. The time has come for all of us to consider the need to reform all personal and customary laws following the spirit of the Constitution. Thus, the opinion of scholars, practical considerations, the experience of progressive countries and the ideals laid down in the Constitution of India lead to the conclusion that reforms in personal law in general, and equality of women in particular could only be achieved by the displacement of age-old legal institutions by new institutions having their foundation on secular principles taking into account the existing social conditions of India.

The detour of the apex court from Shah Bano to Shayara Bano has focused on gender-friendly reforms of personal laws. With the changing times, the need has arisen for having a uniform civil code for all citizens, irrespective of religion to fulfil the constitutional promise for gender justice and common citizenship. While emphasising that the foundations of secularism would only get further strengthened by introducing a uniform civil code, I would like to recall the words of Mahatma Gandhi:

‘I do not expect India of my dreams to develop one religion, i.e., to be wholly Hindu or wholly Christian or wholly Mussalman, but I want it to be wholly tolerant, with its religions working side-by-side with one another.’⁵⁸

The Law Commission of India in its consultation paper aims to point towards and problematise certain well-accepted practices within the various family law regimes in India that are gender bias.⁵⁹



58. Cited by M Venkaiah Naidu, *The Hindu* (16-07-2016)

59. Consultation paper on Reform of Family Law, August 31, 2018

POST TRUTH POLITICS ON MISUSE OF LAW BY DISGRUNTLED WIVES

BIBHA TRIPATHI*

ABSTRACT : Discontented, dissatisfied, displeased, unhappy, angry, annoyed, irritated, peeved are synonyms of the term 'Disgruntled' and each synonym may contain one or more words of meaning alike. Against this backdrop, the paper attempts to discern the post truth politics of the notion misuse of law by 'Disgruntled wives'. Here, the 'wife' can be a mother of a toddler also having complaint against her own husband wherein, she may be addressed as 'vengeful mother' who is ruthless, relentless, merciless, so on and so forth. Therefore, the paper makes an attempt to discern the reason of such defaming sobriquets against those who turn to legal recourse either against their own sufferings or against their kids' sufferings. The paper also attempts to focus on the need of further researches on many other facets of 'Misuse of Laws' meant for the protection of women by their own parents like misusing the PCPNDT ACT, 1994 providing conditional education to their daughters, killing them in the name of honor if they get married according to their own choice, giving them as an object in arrange marriages in the name of '*Kanya Dan*', without any testamentary disposition or assuring their rights in the ancestral property. Dowry related laws which should have lost their significance in the light of daughters' coparcenaries' rights in ancestral property are still being invoked due to the bitter reality of considering girls as liability and '*Paraya Dhan*'.

KEY WORDS : Cruelty, Misuse, Post Truth.

I. INTRODUCTION

The reason behind choosing this topic was a write up published in

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The Hindu on the basis of disclaimer¹ mentioned in the NCRB report. The NCRB is having an increased responsibility because the data are referenced by national and international agencies for policymaking and research. Even the Supreme Court has blamed the wives as disgruntled only on the basis of data of NCRB showing the number of acquittals in cruelty and Dowry Death cases. Therefore, the paper attempts to discern the post truth politics on misuse of law by women along with Supreme Court's observation on use and misuse of law. Some organizations have also done their studies on the issue of 'misuse of law by women' to reveal the truth behind such sweeping remarks. Therefore, the paper also attempts to analyze those studies so that a just conclusion can be drawn.

Here it is worth mentioning that "There is a horrendous imbalance in power between men and women" and it is reflected very often in the form of intimidation and violence from those closest to one. From dangerous breast enhancement surgery to tighten vagina surgery to teenager's rape by her father, women are at fault for just being women².

The paper also highlights that 'we the people of India' are having very high expectations from our Apex Court. The judges are kept at a very high pedestal. Every single word pronounced by the renowned and reputed judges of the apex court is of considerable importance. It is extremely sad to note that judges have used derogatory remarks against women in general and wives in particular.

The paper attempts to draw attention towards some basic issues like how Text and Context differs from lay man to law man. All male members consider themselves as husband and females as wife, whenever a law protecting women is questioned. The hypothesis of the paper is that the term "Misuse of law by women" is rooted in the conceived notion of patriarchy, which intends to reject all special laws meant for the protection of women in general.

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1. The disclaimer in the report of NCRB states that "in the report it has made every effort to be statistically consistent". The report further goes on to state that "NCRB shall not be responsible for statistical error, if any, in the published data". K.P.Asha Mukundan, NCRB Data: Handle with care, Sept.9,2016, www, The Hindu.com, visited on Nov 7.2016
 2. Githanjali, The Rock That Was Not and other stories, Ratna Books, 2019

II. USE, MISUSE AND ABUSE OF LAW IN GENERAL

Use of law means using laws to procure Justice, to enjoy Legal Rights, to attain autonomy, whereas, misuse of law means use of law in the wrong way or for the wrong purpose³ and abuse of law includes frivolous and vexatious litigants, abuses by law enforcement agencies and misconduct from the judiciary itself⁴. Thus, under the connotation of misuse and abuse of law all the parties engaged in the occurrence of crime and criminal justice system, the perpetrator, the victim and the state through its agents could be discussed⁵. It is also submitted here that Legal abuse is responsible not only for injustice, but also harm to physical, psychological and societal health.

III. POST TRUTH POLITICS

The Oxford Dictionary has chosen 'Post Truth' as the word of the year 2016. The dictionary meaning of the term is relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.

'In this era of post-truth politics, it's easy to cherry-pick data and come to whatever conclusion you desire' 'some commentators have observed that we are living in a post-truth age'.⁶

Post Truth Politics is a political culture in which debate is framed largely by appeals to emotion disconnected from the details of policy, and by the repeated assertion of talking points to which factual rebuttals are ignored. Post-truth differs from traditional contesting and falsifying of facts by relegating facts and expert opinions to be of secondary importance relative to appeal to emotion. While this has been described as a contemporary problem, some observers have described it as a long-standing part of political life that was less notable before the advent of the Internet and related social changes⁷.

3. Cambridge dictionary; misuse means to use something in an unsuitable way or in a way that was not intended.

4. See, wikipedia

5. Like MACOCA, UPCOCA type counter terror laws have been facing the criticism of being abused at the hand of state.

6. <https://en.oxforddictionaries.com/definition/post-truth>, visited on 2nd July, 2018

7. https://en.wikipedia.org/wiki/Post-truth_politics visited on 2nd July, 2018

IV. HISTORY OF SECTION 498-A IPC⁸

As we all know that marital abuse is an age old crime. But there is a defining power of law in which an injury is not an injury until it had a legal name and definition. There was no law in India prior to 1983. The acts of cruelty and Dowry Death were dealt with general provisions of murder, abetment to suicide, hurt, grievous hurt etc. IPC in which the court followed the traditional criminal jurisprudence of presumption of innocence etc. It was 91st Law Commission Report of 1983 and feminist movement against Dowry Death of certain ladies which led to the enactment of criminal law amendment act of 1983 making the offence cognizable and non-bail able with a presumption of abetment if the lady dies within seven years of her marriage.

In *Chitnis v. Chitnis*⁹, it was observed that the sole constituent of the offence is wilful conduct in which *mens-rea* is essential. In 1992, the Calcutta High Court while acquitting the husband of the charge of abetting the suicide of his wife said. “The deceased woman was hot-tempered and outspoken. She was a high strung sensitive girl who could not adjust herself to her husband’s family¹⁰” In 1993, the Orissa High Court while acquitting the accused in a rape case regarding the injuries on a woman’s body said, “The injuries could have been self-inflicted, so benefit of doubt must go to the accused.¹¹” In *S. Faisal Nabi v. State of M.P*¹² it was observed that the husband’s illicit relation with his sister in law is no harassment. Further, a bench of Justices SB Sinha and Cyric Joseph opines that kicking by mother in law is not cruelty¹³.

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8. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]
 9. 29th September, 1988, <http://indiakanoon.org>, visited on 11th November, 2018,
 10. *Tapan Pal and Ors. v State of West Bengal*, 1992. Cri 1 1 I (17 (Cal)).
 11. *Sanyasi Challani Seth v State of Orissa* 1993. Cri 1 J 2784.
 12. 2001, CriLJ 1598
 13. 5th august, 2009, times of india. indiatimes.com

V. STUDIES ON CRUELTY¹⁴

The National Family Health Survey III conducted in 2005-06 has stated that more than 54% of women responded that it was okay for a man to beat his wife if she disrespected her in laws, neglected her home or children, or even over something as trivial as putting less or more salt in the food¹⁵.

The NCRB Data of 2008 disclosed that more than 8,000 women are killed by their husbands for dowry. In its 2015 data it has been stated that the proportion of female victims was more in marriage related issues like dowry, divorce and physical abuse. Over 40% in 2005-6 and 30% in 2015-16 of married women in India have faced varied forms of domestic violence and going by these numbers, not even 15 facing domestic violence have lodged complaints under section 498A. In such a scenario the Supreme Court and the Law Commission of India have repeatedly and very casually used the NCRB statistics to paint a very ugly picture of women using the law to address the violence faced by them inside their marital homes. The NCRB data shows the number of arrests without distinguishing those who got anticipatory bail¹⁶. Another study of 2011 done by the International Centre for Research on Women said that one in every five Indian men surveyed admitted to forcing their wives into sex. Here, it is also worth noticeable that conviction rate u/s 304 B is relatively high then 498A that means conviction for murder is proper when wife is burnt to death after objecting husband's illicit relation or in any other situation . For section 498A an erroneous view prevails that it is a law exclusively to curb dowry related cruelty. Hence, the police refuse to record a complaint. However, the plain reading of section 498A makes it clear that for section 498A neither needs to be related to dowry nor does it have to involve physical cruelty or death.

Police lawyer nexus is another significant aspect to be highlighted through the paper. The police do not register a case of domestic violence

14. See, www.tribuneindia.com, [http/the print. in](http://theprint.in), www.thehindu.com, www.quora.com

15. Flavia Agnes, “ Section 498 A Marital Rape and Adverse Propaganda, E P W June 6, 2015”

16. Bindu N. Doddahatti, The dangerous, false myth that women routinely misuse domestic cruelty laws, August 11, [the wire. in](http://the-wire.in), visited on 11th November 2017

of women from the lower class, but if a woman from the middle or affluent class approaches them, registering the complaints becomes a lucrative business, as the police can immediately alert the husband and provide contacts of a criminal lawyer for filing for anticipatory bail, or for filing counter FIR or for seeking divorce by putting allegations on her character and all for a hefty fee¹⁷.

VI. STUDIES ON WOMEN'S RECOURSE TO LAW

Indira jaisingh the famous women's rights activist opined that the word misuse is itself misused by courts. It is a classic case of victim blaming. Good women are bound by 'maryada' and so they don't go to the law. The court too looks at the woman who demands application of section 498A as here comes another one who is misusing the law. Flavia Agnes is the other famous women's rights activist who has written number of articles in renowned journals and emphatically questioned the issue of misuse of law by women. She says that the realities of women's lives are far removed from the citadels from where the high priests of justice pronounce their verdicts. How else can one explain that even where there are convictions by the trial courts, the higher judiciary routinely reverses the orders of the trial court resulting in the acquittals of the offenders¹⁸?

The very idea of justice is now being governed with the notion of perfect and imperfect victim. Only the perfect victims, under *Doli to Arthi* notion, dutifully following *Pati Permeshwar* (husband is god) tradition, tolerating violence, producing male children, and making no demand for their rights are not misusing the law because they are literally not using any law for protection of their legal rights. Whereas, the divorced woman, the separated woman, the woman in live- in- relationship, the widow who are cast out of the shared household, the woman who fails to bear a male child is always meant for misuse of law¹⁹.

17. Ibid

18. Flavia Agnes, Protective Legislations: Myth of Misuse , *EPW*, Vol. 30, No. 16 (Apr. 22, 1995), pp. 865-866

19. Audrey D'Mello, Flavia Agnes, Persis Sidhva, The Making of a High Profile Rape Trial, Vol 49, Issue No 29, 19 Jul, 2014

VII. SUPREME COURT ON MISUSE OF LAW

The most important recently delivered case by the Supreme Court on misuse of law is *Arnesh kumar v. State of Bihar*²⁰. In this case the petitioner husband had apprehensions for his arrest under section 498 IPC and section 4 of Dowry Prohibition Act, 1961. Here the marriage was solemnized on 1st July 2007 and anticipatory bail could not be granted so through SLP he knocked the door of SC. In this case, the wife alleged that her in-laws demanded for cash and kind and when she told about the same to her husband, he took favor of his parents and threatened her to marry another woman. It was also alleged that she was driven out of home due to non fulfillment of demand.

The Supreme Court observed that there is phenomenal increase in matrimonial disputes²¹ in recent years and provisions for cruelty and demand of dowry are used as weapons, rather than shield by disgruntled wives. The court further observed that in a quite number of cases, bed-ridden grand fathers and grand mothers of the husbands, their sisters living abroad for decades are arrested. The basis of courts observation was the statistics shown by the NCRB²² wherein a disproportionate ratio was shown between arrest and conviction. The Supreme Court was concerned with traumatic experience of arrest and opined that arrest brings humiliation, curtails freedom and cast scars forever. It also scolded police for making all arrests possible. It finally held that no arrest should be made only because the offence is non-bailable and cognizable and asked for reaching upon a reasonable satisfaction after some investigation.

20. 2nd July, 2014

21. Marriage has been addressed as a root cause of women's oppression since long by the feminist scholars, which a perfect victim is supposed to tolerate, but with the phenomenal increase in girls education, aspiration and job opportunity, time has come to follow the convention on all forms of discrimination against women, 1979 which calls for sharing even in house hold works as maternity is a social responsibility. On the one hand we are making our girls ambitious and on the other we are imposing patriarchal norms on them to rear and care not only the child but also doing all house hold works despite doing her job....so court must also focus on shared responsibility while highlighting the cases of matrimonial disputes. It should also focus on assuring women's right in ancestral properties to reduce the cases of demand of dowry.

22. NCRB 2012 shows arrest of 1,97,762 persons which is 9.4% more than 2011 in which quarter of person arrested were women. Rate of charge sheeting is as high as 93.6% while the conviction is only 15% which is lowest.

The issue of arrest seems to be the most detrimental for court's observation. It would not be irrelevant to mention here that following the Law Commission's report and based on certain judgments new subsections have also been added in Cr. P C section 41²³ dealing with arrest as to when police can make it without warrant. Court has also expressed its dissatisfaction towards the related functioning, because the power is not exercised with great care rather in a routine, casual and cavalier manner in spite of recording its satisfaction in writing. (However, it would not be irrelevant to mention that whatever precautions are mentioned under section 41 (A) Cr. P C are for those arrests in which punishment is prescribed for three years only and not for those offences in which punishment is for seven years or more.)

Supreme Court further opined that all or most of the reasons contained in section 41 Cr. P C for effecting arrest be discouraged and discontinued. To avoid unnecessary arrest and casual detention the court issued direction that all the state governments would instruct its police officers not to arrest automatically.

The court has relied on rate of arrest and rate of actual conviction to come to a conclusion of misuse of law by women. Thus the paper attempts to submit that such rulings of court dilute the very purpose of law. Had the apex court treated every individual case as per its merit it would have been appreciated more. Misuse of law by women seems to a sweeping statement generalizing police statements or public opinion.

In *Rajesh Sharma and others v. State of UP*²⁴ and another, A. K. Goel and U. U. Lalit JJ observed:

That most of such cases are filed in the heat of the moment over trivial issues. Many of the complaints are not bonafide. The court also referred the Malimath Committee report, the 243rd report of Law Commission and other reports over the issue of making section 498A a compoundable offence. Ultimately the court issued directions for constituting Family Welfare Committees to look into the complaint filed under section 498A. Further the committee will be empowered to interact with parties and will submit its report to the authority

23. See, section 41(1)(b)(ii)

24. 27th July, 2017, <http://indiakanoon.org>, visited on 11th November, 2018

by which the matter is referred. Here, it is worth mentioning that the court has also observed that such directions will not apply to the offences involving tangible physical injuries or death²⁵.

In the abovementioned case the wife had complained for dowry demand and abuses for not meeting the demands. She was dropped to her matrimonial home. She was pregnant and suffered pain and in that process her pregnancy was terminated. Her husband was summoned but the relatives were not summoned because after perusal of the file and the document brought on record it was clear that the husband tortured his wife²⁶.

In the revision petition it was demanded that the relatives should also be summoned. When the relatives were also summoned and the High Court found no ground to interfere with the order of summoning as the attempt of mediation failed, the appeal was filed before the Supreme Court.

The court in the very beginning of the judgment opines that the very question which had arisen in that appeal was whether any directions are called for to prevent the misuse of section 498A. Further it opined that the main contention is that there is need to check the tendency to rope in all family members to settle a matrimonial dispute.

It is submitted that the observation made by the judges were extremely objectionable. In spite of showing concern to the torture faced

25. Ibid

26. It is worth mentioning that in the case of Rajesh Sharma, it was not denied that the husband demanded Rs 3,00,000 and a car after the marriage. The wife's complaint was that when the demand was not met, her husband left her at her maternal home when she was pregnant. She experienced severe trauma and thereafter suffered an abortion. The order of the lower court, as reproduced in the Supreme Court judgment states: After perusal of the file and the document brought on record, it is clear that the husband Shri Rajesh Sharma demanded car and three lacs rupees and in not meeting the demand, it appears that he has tortured the complainant. How then is this "false case"? When charges against the husband's relatives were not framed, the wife moved the sessions court which directed that charges should be framed against all the accused. Accordingly the lower court framed charges. When the husband challenged this order in the high court, the matter was referred to mediation. The mediation efforts failed. The high court did not interfere with the order of the lower court. Against this, the husband approached the Supreme Court where the judges passed the adverse comments about women filing false cases.

by woman resulting into termination of her pregnancy the court had taken the issue of misuse and tried to check the tendency to rope in all family members. It is always right not to implicate the innocent relative under section 498A but that does not mean to address cases of cruelty as cases of misuse.

The role if media is also damaging the whole issue of justice strived by women. By virtue of their incomplete reporting or only reporting the half truth, people are having a prejudiced and biased opinion over women related issues.

Author has got strong support to her submissions by the comments made by leading advocates of women's rights like Flavia Agnes, who opined that the Supreme Court's judgment in the *Rajesh Sharma v State of UP* which passed adverse remarks about the "misuse" of Section 498 A of the Indian Penal Code by women to harass their husbands and in-laws, ignores the lived realities of a vast majority of married women. It completely ignores the fact that the aggrieved woman approaches the police and courts as a last resort and in the face of intolerable cruelty²⁷.

27. Flavia Agnes, Are Women Liars? Supreme Court's Judgment Ignores Lived Reality of Married Women, *EPW*, Vol. 52, Issue No. 35, 02 Sep, 2017, The judgment of the Supreme Court in *Rajesh Sharma v. State of UP* delivered on 27 July 2017 seems to convey that the violence inflicted upon women is a mere figment of their imagination and that cases registered under the anti-dowry law—Section 498A, of the Indian Penal Code (IPC) are false. Further, it implies that women are irrational beings. Without weighing the implications of their actions, in the heat of the moment, they file false complaints of cruelty and dowry demands. Later, when reality dawns they want to retract and save their marriages. But by then it is too late, the marriage is broken irretrievably. Mind you, the marriage does not break because the husband's family demands dowry, humiliates the woman or throws her out of the matrimonial home. The only reason that marriages break, according to our judges, is because the wife approaches the police and files a complaint. Adding insult to injury, the judges proclaim that the guidelines issued by them to the police not to arrest the accused until a family welfare committee investigates the case and sends in a report will be beneficial to the wife. This narrative projected by our judges is totally out of tune with the lived realities of women. The experiences of several women's organisations indicate that women approach the police as a last resort. This is because they, more than anyone else, are acutely aware that there are very few options open to them outside the marriage. Their natal families do not accept them. The government has failed to provide alternatives such as emergency shelters, half way homes, subsidised housing, jobs for single women, prompt injunctions and maintenance orders, etc as has been done in several other countries where the issue of domestic violence came out of its closeted existence in the 1970s and 1980s. her observation must

VIII. SUPREME COURT VERSION ON 'USE OF LAW'

In *Nyayadhar (an NGO) v. U.O.I.*,²⁸ a petition was filed to get implementation order of directions issued in Rajesh Sharma case. But the three judges' bench headed by Dipak Mishra CJ disagreed with July 27 judgment which diluted the rigor of section 498a and observed that "we can't scuttle the sphere of sec. 498a". The court observed that there is no need for a family welfare committee to examine complaints and that police officers, based on facts of the case and governed by the legal provisions, should decide on their own. The court also directed the DGP in the states to ensure that investigating officers probing offences under section 498A should be imparted rigorous training with regard to the principles stated by the top court relating to the arrest made in such cases.

Further, in *Social Action Forum v. Union of India and Ors*²⁹ a petition was filed under Article 32 to get the writ of mandamus issued so that a uniform policy of registration of FIR, arrest and bail U/S 498-A IPC can be adopted. Here, again the court observed that Constitution of Family Welfare Committees by DALSA is beyond the provision of Code and any dilution of Section 498-A IPC is not warranted. But this judgment was not highlighted by the media.

IX. MYTHS AND REALITIES

While writing a paper in a post truth perspective, it was thought appropriate to discuss certain myths related with section 498A because such myths are being treated as truth in post truth scenario.

Myth: section 498A is a *BRAHMASTRA* in the hands of wives

Reality: it is legal provision to prevent cases of cruelty and torture

Myth: Bedridden parents cannot do cruelty.

Reality: mental torture can be done by any person. Simple act of reporting each and every activity of daughter in law to the daughter along

be highlighted and it should reach to those who pass such sweeping remarks on misuse of law by women without considering the whole truth.

28. Decided 13 October, 2017. Indian Kanoon - <http://Indiankanoon.org/doc/3668888>.

29. Decided on 14th September, 2018 Indian Kanoon - <http://ankanoon.org/doc/81618143>.

with comments can also cause cruelty.

Myth: Educated women with high aspirations are misusing the law.

Reality: Educated women are not manipulating law. They are simply walking out of the marriage³⁰.

Myth: women are misusing the laws

Reality: not women but the police lawyer nexus is responsible for the same, as they suggest implicating all the relatives to make the case stronger.

X. DIFFERENT WOMEN DIFFERENT UNDERSTANDING

It is noticeable that one has to understand the different perspectives of women also so that a neutral conclusion can be drawn. It cannot be denied that there are women, who neither know nor understand the legal provisions meant for their protection, and some women are there who know the laws and delivers lectures on the rights of women but they never apply in their own case for reasons not disclosed. However, one cannot deny that there are some women who know the law and want to take recourse of law but governed by police advocate nexus. Here it cannot be denied that some women do have a subjective perception and they express different opinion in different situations. The perspective also differs if she is working under a system as Chairperson, advocate, judge or prison authority.

XI. CONCLUSION

It is submitted that there is no doubt in truth of a statement that legal abuse is responsible not only for injustice, but also harm to physical, psychological and societal health. Patriarchal prejudices perpetuate post truth politics on misuse of law by disgruntled wives. Soli J. Sorabjee, an Indian Jurist and former Attorney General of India, also opined that there is no statutory provision which cannot be misused³¹. But that does not mean that one should misuse any provision of law. No law should be misused by anyone.

30. Suicide of Bolly wood actresses,who are perceived as empowered women, are neither covered under PWDVA nor under 498A

31. The Limits of Freedom, Indian Express, (30.01.2018)

An allegation should not be enough to make an arrest unless an immediate investigation has been done on the basis of allegation and the woman should have faith in the Criminal Justice System. There could be number of reasons for the acquittal of accused persons and the jurisprudence of criminal law undoubtedly play a pivotal role in such acquittals. Thus, the paper attempts to submit it very humbly that mere acquittal cannot be the ground of cursing women who are failed in their attempt to take legal recourse to end their miseries. Actually, the systemic biases, prejudices of the police and judiciary, corruption and socio economic vulnerabilities of women litigants have a direct correlation with the low conviction rate in 498A cases. There should not be generalization of misuse and sweeping statements should not be passed by the men's rights activists, the state and its agencies as a whole. We should also try to remember that absence of conviction is not absence of cruelty and all cases of acquittals should not be termed as misuse of law by women.

At the end of the paper, an attempt has also been made to raise some questions on the deep rooted patriarchal prejudices because there are cases of violence even against the unborn girl child, they face discrimination after birth, they get conditional education and ultimately encountered in honor killing.

Do we have answers or can we get answers in near future?

Can we accept every girl and don't misuse the PCPNDT ACT?

Can we give them education free from any condition?

Can we accept the boy proposed by our daughters for marriage without naming it as 'love jihad'?

Can we say no to dowry and yes to right in ancestral property?

Can we share household works on equality basis if both are working?

If we could get affirmative answers of such questions there would certainly be no issue of 'misuse of law by women'.



CONTEMPT PROCEEDINGS AGAINST JUDGE : A REVIEW OF CONSTITUTIONAL AND LEGAL MECHANISM IN INDIA

*HARUNRASHID A. KADRI**

ABSTRACT : The Contempt of Court is a mechanism aimed to establish Rule of Law and thereby safeguard the Independence of Judiciary. The object of contempt proceedings has never been to protect the judges personally from criticism, but it was to preserve the Court's authority and the administration of justice from undue attack or interference. Nevertheless, the judges can use this power to secure larger public interest by protecting their rights, but they cannot serve their personal vengeance. The Supreme Court of India in a recent matter of Contempt of Court convicted Justice Karnan, a sitting judge of Calcutta High Court, for making false allegations of corruption against colleagues and misbehaviour in the Court. Although the judge's behavior was extremely condemnable, the Supreme Court instead of recommending impeachment proceedings; adopted an unprecedented route to refrain him from the exercise of the judicial function and punished him while he was in office, completely ignoring the constitutional route. The way the Supreme Court has acted in this case raised questions on the contempt mechanism itself and the application of Principles of Natural Justice. The present paper is an insight of Constitutional and Legal provisions relating to Contempt of Court by a judge in India and abroad

KEY WORDS : Contempt of Courts in India, Contempt by Judge, Contempt of Court & Independence of Judiciary.

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I. INTRODUCTION

The law of Contempt of Court emerged when King was the supreme law giver, the fountain of justice, the judicial system, and the authority for code of conduct in all walks of life. The sovereign King was supreme, and his authority could not be questioned, he could not be abused or scandalised, and proceedings before him could not be prejudiced or interfered. When somebody disobeys, scandalises or prejudices or interferes with the Kings Laws or orders or ordinances or decisions or dictates, he was held to have committed *Avman* (Contempt) and was subjected to severe and inhuman punishments. This practice of arbitrary and undemocratic rule under the sovereign King has been transferred to courts when the power to decide disputes has been shifted from the King to the Courts established by him due to overburdening of litigations.¹ However, the practice of punishment for *Avman* (Contempt) has been continued even in democratic set up under the pretext of maintaining “Rule of Law” and “Independence of Judiciary”, nevertheless, it is considered an essential device to secure and promote the confidence of the people in the administration of justice; to protect interests of the public by preventing interference or obstruction in the course of justice and to maintain the authority of the law.²

In a democratic state, the legislative, executive and judicial powers are separate and defined by the Constitution. Three organs operate independently with no interference from other organs of the state. However, the Judiciary enjoys the inherent powers to punish for its Contempt to effectively enforce its decisions and protect the authority of the Court and the administration of justice from undue attack or interference. Although the law relating to Contempt for scandalising the Court has been abolished in England, the Constitution of India retains it and confers such powers on the Supreme Court and High Courts under Articles 129 and 215 respectively. In addition to this, the Indian Parliament has enacted the Contempt of Court’s Act, 1971, to define and limit the

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1. Ronald Goldfarb, *The History of the Contempt Power*, WASHINGTON UNIVERSITY LAW REVIEW 1961 (1) 1-29.
 2. JajatiKeshariSamanatasinghar& Madhusudan Dash, *Contempt of Court Vis-A-Vis Supreme Court’s Inherent Power Under Article 129 of Indian Constitution*, INTERNATIONAL JOURNAL OF CURRENT RESEARCH July 2017 (9) 7, pp.54210-24212, accessible at <http://www.journalcra.com/sites/default/files/23944.pdf>

powers of certain courts in punishing Contempt of Court and regulating their procedure. Although the courts in India have rarely exercised these powers, it has been subjected to severe criticism because the legal provisions that empower the Court to punish for its Contempt are very broad, unregulated and threatened the exercise of freedom of speech and expression.³ In a recent case of *In re Justice C S Karnan*, the Supreme Court punished a sitting judge of Calcutta High Court, for making false allegations of corruption against fellow colleagues and misbehaviour in the Court. Although the behaviour of the judge was condemnable and caused lot of damage to the image of Judiciary, the way Supreme Court has reacted to it was equally deplorable. The Court instead of recommending impeachment proceedings in the Parliament adopted an unprecedented route to punish him while he is in the office, ignoring constitutional route. The way Supreme Court has dealt with this case has raised questions on the contempt mechanism itself and also on the application of Principles of Natural Justice. This paper is an attempt to examine the Constitutional and Legal provisions relating to Contempt of Court by judge in India and abroad.

II. CONTEMPT OF COURT UNDER THE INDIAN CONSTITUTION

The ‘Rule of Law’ and ‘Independence of Judiciary’ are the two fundamental principles of the Indian constitution and are recognised as ‘basic feature’ of the Constitution.⁴ In order to ensure effective implementation of these two principles, it should be ensured that the Judiciary should be able to work free from any fear or favor and be secured from undue interference in administration of justice. It should also be ensured that the decisions of the Judiciary are respected and complied with. Therefore, the Constitution of India under Article 129 empowers the Supreme Court and Article 215 empower High Courts to punish for Contempt of Court. In fact, these two provisions recognise the inherent powers of the court to punish for Contempt of Court for it

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3. SpadikaJayraj, Judicial Accountability and Contempt of Court Comparing India with U. K., U.S.A. and Singapore http://docs.manupatra.in/newlinearticles/Upload79C309CF-C960-49EB-9254-1C88A2FA30C4.1-b__contempt%20of%20court.pdf
 4. *Supreme Court Advocates-on-Record Assn. v. Union of India* (1993) 4 SCC 441.

being the 'Court of Record' under the pre-existing system. This inherent power to punish for Contempt is inalienable, summary in nature and cannot be governed or limited by any rules of procedure excepting the principles of natural justice. Neither it can be taken away nor whittled down by any legislative enactment including the Contempt of Courts Act, 1971, except the Constitutional amendment.⁵ Judiciary may exercise such power when there is interference in administration of justice, fair trial or when there is non-compliance or obstruction or outrage of its orders.⁶ Since, the higher Judiciary has been bestowed with the responsibility to establish Rule of Law, the dignity and authority of the courts need to be protected & respected and people's confidence in the Courts of Justice need to be strengthened.⁷ The law of Contempt of Court is essential for the maintenance of fundamental supremacy of law.⁸ However, the contempt power is not to protect the judges personally from criticism but it is to preserve the authority of the Court and the administration of justice from undue attack or interference. Initially the Contempt law has been used a convenient method to enforce the orders of judicial authority, however, in later period it has been used to extract respect and dignity of judges and courts.⁹ Nevertheless, the judges cannot use it to serve their personal vengeance but it is to secure larger public interest by protecting their rights.¹⁰ Gajendragadkar C J in Special Reference No. 1 of 1964 observed :

"We ought never to forget that the power to punish for Contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of

5. 2000(8)scale366

6. K. Balasankaran Nair, *Law of Contempt of Court In India*, Atlantic Publishers and Distributers, 2004, P. 3.

7. Offut v. U. S. (1954) 348, U.S. 11. *In Re Arundhati Roy* (2003) 3 SCC 349

8. Offut v. U. S. (1954) 348, U.S. 11.

9. Naseem Ahmed Handa, *An Appraisal of Law of Contempt in India* (Ph D Thesis, Punjab University, Patiala, 2010) 29 accessed http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/10/10_chapter%202.pdf

10. K. Balasankaran Nair, *Law of Contempt of Court In India*, Atlantic Publishers and Distributers, 2004, P. 9.

their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.....To wind up, the key word is “justice”, not “judge”; the key-not thought is unobstructed public justice, not the self-defence of a judge; the cornerstone of the contempt law is the accommodation of two constitutional values-the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.”¹¹

Although, these golden words are rule of guidance forever for the Judiciary, the subsequent courts used Contempt provisions for protecting the individual judges from being criticised. *In Re Blog Published by Justice Markandey Katju*, the Supreme Court observed that, “Prima facie, the statements made seem to be an attack on the Judges and not on the judgment. We therefore, issue notice of Contempt to show cause why contempt proceedings should not be drawn up against Justice Markandey Katju and he be appropriately dealt with.”¹² Justice Markandey Katju’s blog was a defamatory publication but instead the Court has issued a *suo-motu* contempt notice against Justice Katju, later he tendered unconditional apology in the Supreme Court and the charges were dropped.¹³ Such uncontrolled exercise of contempt power by the Judiciary suppresses individuals freedom of speech and expression and very much contradicts the purpose and spirit of Contempt law. Justice Krishna Iyer in *Baradakanta Mishra v The Registrar of Orissa High Court*¹⁴ rightly warned that:

“A vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to publish regardless of truth and public good and permits a process of brevity conviction, may unwittingly trendiness upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with

11. *In Re: S. Mulgaokar v Unknown* (1978) 3 SCC 339

12. *Suo Motu* Contempt Petition (Criminal) No.5 Of 2016 accessed http://supremecourtfindia.nic.in/pdf/cir/2016-11-12_1478947169.pdf

13. SC drops contempt cases against Justice Katju (The Tribune, 6 January 2017) accessed <http://www.tribuneindia.com/news/nation/sc-drops-contempt-cases-against-justice-katju/346682.html>

14. AIR 1974 SC 710, 1974 SCC(1)374

deliberation and operated with serious circus section by the higher judicial echelons. So it is that as the palladium of our freedoms, the Supreme Court and the High Courts must vigilantly protect free speech even against judicial umbrage—a delicate but sacred duty whose discharge demands tolerance and detachment of a high order.”

Despite clear guidelines by the Court with regard to use of power to punish for Contempt, the subsequent courts seem to have ignored these guidelines while dealing with allegations of Contempt.

III. THE CONTEMPT OF COURT ACT, 1973

The Contempt of Court Act, 1973 has been enacted to define and limit the powers of Courts in punishing Contempt of Courts and to regulate their procedure and to remove the doubts which had arisen as to the powers of a High Court.¹⁵ The Act empowers the Court devise its own procedure for Contempt of court proceedings and also empowers to initiate suo-motu proceedings against the contemnor. It is evident that the provisions of Cr. P. C. and C. P. C. are not applicable to Contempt proceedings.

Under this act contempt has been classified into Civil Contempt or Criminal Contempt. Civil Contempt means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court; and Criminal Contempt defined as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner. Civil Contempt is to enforce the rights and remedies of parties and criminal Contempt is to vindicate judicial authority.¹⁶ However, the term “scandalise”

15. *Hadi Husain And Ors. v. Nasir Uddin Haider And Anr.*, AIR 1926 All. 623 at 625.

16. The Columbia Encyclopedia, 6th edition, Columbia University Press, New York, 2010, p. 346 *cf.* Naseem Ahmed Handa, *An Appraisal of Law of Contempt in India* (Ph D Thesis, Punjab University, Patiala, 2010) 29 accessed http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/10/10_chapter%202.pdf

has not been defined and it is for the Court to interpret, which may lead to different interpretations as to what includes the term ‘scandalise’.¹⁷ The Supreme Court in *Brahma Prakash Sharma And Others v The State of Uttar Pradesh*¹⁸ observed that:

“The object of contempt proceedings is not to afford protection to judges personally from imputations to which they may be exposed as individuals, but is intended to be a protection to the public whose interest would be very much affected if, by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which the people have in the administration of justice by it is weakened. When the Court itself is attacked, the summary jurisdiction by way of contempt ‘proceedings must be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt.’”

The Court laid down two considerations which should weigh with the Court while exercising the summary powers in Contempt of Court by scandalising the Court. Firstly, “the rejection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses”; Secondly, “when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to Contempt of Court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it Contempt. If it is a mere defamatory attack on the judge and is not calculated to interfere with the due course of justice or the proper administration of the law by such Court, it is not proper to proceed by way of Contempt.”¹⁹ The Court observed that, while determining the difference between the defamation and Contempt all the surrounding facts and circumstances under which

17. Justice Markandey Katju, Judge, Supreme Court of India, Vol. XII, 2007 Cri.L.J. , p. 16 *cf.* Naseem Ahmed Handa, *An Appraisal of Law of Contempt in India* (Ph D Thesis, Punjab University, Patiala, 2010) 181 accessed http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/12/12_chapter%204.pdf

18. 1954 SCR 1169

19. 1954 SCR 1169

the statement was made and the degree of publicity that was given to it would be relevant. The question should “not be determined solely with reference to the language or contents of the statement made.”²⁰ However, it has been found that, there is unequal application of the contempt law and it has been misused by the Judiciary against critiques of Judiciary.²¹

The contempt proceedings may be initiated by the Court either on its own motion or otherwise, however, initiation of any proceedings for Contempt is barred after the expiry of a period of one year from the date on which the Contempt is alleged to have been committed.²² The said period of one year should be reckoned from the date on which a notice under this section has been issued.²³ Every such case of criminal Contempt shall be heard and determined by a Bench of not less than two Judges.²⁴ An order initiating proceeding for Contempt by a notice issued under section 17 is not appealable under section 19 of the Act.²⁵

The appeal from the decision of Single bench will lie to the Division Bench of High Court and appeal from a Division Bench of the High Court shall lie to the Supreme Court, and when the contempt proceedings are initiated by the Supreme Court, there is no appeal.²⁶

The Contempt of Courts (Amendment) Act, 2006 amended the 1971 Act and the Court has been banned from imposing any sentence under the Contempt Act for unless it is satisfied that the Contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice. Further, the truth has been added as justification for Contempt of Court, provided it is satisfied that it is in the ‘public interest’. Under this provision, the Court may permit truth as a valid defense if the act is in public interest and he is acting bona fide.²⁷ In

20. 1954 SCR 1169

21. Singh K D, A critical look at the 2002 *Re: Arundhati Roy* decision and modern-day contempt laws (Legally India Blog, 30 March 2015), <https://www.legallyindia.com/views/entry/a-critical-look-at-re-arundhati-roy>

22. Section 20 of the Contempt of Courts Act, 1971.

23. *K.K.R. Nair v. Mohan Das*, 1990 Cr LJ 1641 (AP).

24. Section 18(1) of the Contempt of Courts Act, 1971.

25. *The Union of India v. Mario Coural Sa*, AIR 1982 SC 691.

26. Section 19 of the Contempt of Courts Act, 1971.

27. See Section 2 of the Contempt of Courts (Amendment) Act, 2006. See also Section 13 of the amended Act of 1971.

fact, truth should have been a complete defence / justification for publication of contemptuous matter, however, the Parliament by adding a proviso to the truth as a defense, further empowered the courts to apply meaning to the term “public interest” and reject any such claim on irrelevant considerations. Such a wide power has further deteriorated the situation and it is likely to result in gross violations of fundamental freedoms of speech and expression at the hands of Judiciary, although the Judiciary is considered as the guarantor and the protector of citizens’ rights.

The conferment of blanket powers on Judiciary to define the acts that tend to ‘scandalise’ and acts done in the ‘public interest’ is unreasonable, unjust and violative of fundamental rights under Articles 14, 19 and 21 of the Constitution, and hence needs to be abolished. The US and UK have already abolished or abandoned the offence of ‘scandalising’,²⁸ however; in India it has been placed in the hands of Judiciary to decide the future of contempt law.

IV. CONTEMPT BY THE JUDGE : CONSTITUTIONAL AND LEGAL FRAMEWORK

Independent and impartial Judiciary is the basic feature of the Indian Constitution. In order to effectively exercise the constitutional power of judicial review, the Judiciary should be able to act without any fear and favour in the administration of justice. The appointment of judges, their tenure, and their relation with the other government agencies, their removal, and the protection of Judiciary from the interference and influence of the executive²⁹ *inter alia* are the factors considered important in maintaining the independence and integrity of the Judiciary.³⁰

The ‘Independence of Judiciary’ requires that the judges must be

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28. Andhyarujina T. R., *Scandalising the Court - Is It Obsolete?* (2003) 4 SCC (Jour) 12 at <http://www.ebc-india.com/lawyer/articles/2003v4a2.htm> (Accessed 02.12.2017)
 29. See The Constitution of India, Article 50. (It provides that, the State shall take steps to separate the judiciary from the executive in the public services of the State). See also *Indira Gandhi v. Raj Narain*, 1975 AIR 1590 (The Supreme Court asserted the *Kesavananda Bharati* ruling and upheld the separation of powers doctrine as the basic structure of the Constitution). See also *L. Chandra Kumar v. Union of India*, A.I.R. 1997 S.C. at 1125 (Holding that, the independence of the judiciary and judicial review are part of the basic structure or basic features of the Indian Constitution)
 30. Criticism of judges for their acts and behavior while performing judicial function, their termination, transfer, etc.

able to act according to the law without any interference, fear, favor or influence of any organ of the state. Furthermore, the Independence of Judiciary requires a complete freedom of every individual judge from the personal, substantive and collective controls of all organs of the state, including Judiciary itself.³¹ According to Shimon Shetreet,³² 'the independence of the individual judges and the collective independence of the Judiciary as a body is distinct from each other and they together constitute Judicial Independence. The independence of the individual judge consists of the judge's substantive and personal independence'. Substantive independence is nothing but exclusive subjection of the judge to the law, whereas, the personal independence refers to adequate security of the terms, tenure and other conditions of the service. The Indian Constitution consists of special provision for the appointment, transfer and removal of Judges of the higher Judiciary.

Articles 124(2) & 217(1) provide for the appointment of the Chief Justice of India, Chief Justice of High Courts, other Judges of the Supreme Court and the judges of High Courts by the President after consultation with the Chief Justice of India, such of the Judges of the Supreme Court and High Courts in the States as the President may deem necessary for the purpose,³³ the Governor of the State, and the Chief Justice of the High Court respectively, as required under the above mentioned Articles³⁴ and empowers the Parliament to decide the salary of judges of Supreme Court and High Courts.³⁵

Although the above Articles of the Constitution empower the President of India to appoint the judges of higher Judiciary after necessary consultation, the Supreme Court successfully hijacked the power from executive through various case laws.³⁶

31. Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges* cf. Singh M. P., 'Securing The Independence of the Judiciary - The Indian Experience' (2000) 10 (2) Ind. Int'l & Comp. L. Rev., 245 at 247, 248.

32. *ibid*

33. The Constitution of India, Article 124(2).

34. The Constitution of India, Article 124(2) and 217(1)

35. The Constitution of India, Article 125 and 221

36. S. P. Gupta v. Union of India AIR 1982 SC 149, Supreme Court Advocates-on-Record Assn. v. Union of India (1993) 4 SCC 441, In re Presidential Reference AIR 1999 SC 1, Supreme Court Advocates-on-Record Assn. v. Union of India (2016) 5 SCC 1

Moreover, Article 124 (4) read with Article 217(1)(b) provides that, a Judge of the Supreme Court or High Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. In short, the Constitution of India provides for removal of any High Court or Supreme Court judge through the impeachment proceedings only. These provisions are supplemented by the Judges Enquiry Act, 1968 which regulates the procedure of impeachment on the ground of proved misbehaviour or incapacity.

However, in the history of independent India not a single judge has been impeached, although, the impeachment proceedings were initiated in few such cases. In case of Justice Ramaswamy, motion initiated against him for spending extravagantly on his official residence during his tenure as Chief Justice of Punjab and Haryana in 1990. He found guilty by the three member committee appointed by the speaker, but the motion failed in Parliament due to the lack of two-thirds majority of the total number of members present in both houses of the Parliament.³⁷

In another case of Justice Saumetra Sen of Calcutta High Court, he was held guilty of misappropriation of Rs 33.23 lakhs he received as receiver appointed by the High Court of Calcutta when he was a lawyer and misrepresenting the facts before the Calcutta court in 1983. The impeachment motion against him was passed by Rajya Sabha in 2011; however, he resigned from the post and avoided the impeachment ahead of motion being passed by the Lok Sabha. In one more case Justice P.D. Dinakaran, Chief Justice of the Sikkim High Court resigned from the post when the Rajya Sabha Chairman had set up a judicial panel to look into allegations of corruption, land-grab and abuse of judicial office in 2011, and the impeachment proceedings against him could not be initiated.

In one more such example in 2015, a group of 58 Rajya Sabha MPs moved an impeachment notice against Justice J.B. Pardiwala of the Gujarat High Court for his 'objectionable' remarks on the issue of reservation for Scheduled Castes and Scheduled Tribes in the judgment in a case against

37. https://en.wikipedia.org/wiki/V._Ramaswami

Patidar leader Hardik Patel. The objectionable words of the judge are placed in para 62 of the judgment, “If I am asked by anyone to name two things which have destroyed this country or rather have not allowed the country to progress in the right direction, then the same is, (i) Reservation and (ii) Corruption. It is very shameful for any citizen of this country to ask for reservation after 65 years of Independence.” He further said, “Reservation has only played the role of an amoeboid monster sowing seeds of discord amongst the people.” But immediately after the notice of motion has been submitted to the Chairman of Rajya Sabha, he withdrew his observations from the judgment.

The Contempt of Court Act, 1971 under Section 16 provides that, subject to the provisions of any law for the time being in force, a judge, magistrate or other person acting judicially shall also be liable for Contempt of his own Court or of any other court in the same manner as any other individual is liable and the provisions of this Act shall apply, however, this provision is not applicable for any observations or remarks made by a judge magistrate or other person acting judicially, regarding a subordinate court in an appeal or revision pending writ.

The wording of the above section clearly indicates that, the contempt law is equally applicable to sitting judges of lower courts or higher courts. However, in *Harish Chandra v. Ali Ahmed*,³⁸ Patna High Court observed that, Only a Judge of a subordinate court can be said to have committed Contempt of his own Court i.e. the Court in which such judge is presiding. The Supreme Court in *Baradakantav. The Registrar, Orissa High Court*,³⁹ held that a judge can foul judicial administration by misdemeanors while engaged in the exercise of the functions of a Judge.

The Judges (Protection) Act, 1985 provides additional protection for Judges and others acting judicially. Section 3(1) of the Act bans the courts to entertain or continue any civil or criminal proceedings against any present or former judge for any act, thing or word committed, done or spoken by him in the discharge of his official or judicial duty or function. However, subsection (2) to section 3 dilutes all the effect of section 3(1) and restores the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority

38. 1987 Cr LJ 320

39. AIR 1974 SC 710

under any law to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against a Judge, acting or former. This implies that, contempt proceedings may be initiated even against a sitting judge.

V. POSITION IN OTHER COUNTRIES

In England, the law of Contempt is partly set out in case law, and partly specified in the Contempt of Court Act 1981. The Contempt may be classified as criminal Contempt or civil Contempt. In criminal Contempt, the Crown Court is a superior court of record under the Senior Courts Act 1981 and accordingly has power to punish for Contempt of its own motion. This power applies in three circumstances: 1) Contempt “in the face of the court” (which took place within the court precincts or relates to a case currently before that Court) 2) Disobedience of a court order; and 3) Breach of undertakings to the Court.⁴⁰

A publication which creates a real risk that the course of justice in proceedings is seriously impaired, amounts to criminal Contempt under the Contempt of Court Act 1981. However, this applies only when the proceedings are active and there is guidance from the Attorney General to this effect. Civil Contempt is said to have committed if a person failed to attend at Court despite a summons requiring attendance or failed to comply with a court order.

However, the Contempt for scandalising the Court in UK has been rarely exercised and now it has been abolished by the Crime and Courts Act 2013.⁴¹ The earliest evidence of conviction for scandalising the Court was in 1931, and judges generally ignore even the outrageous insults to them.⁴² Lord Denning in *Regina v Commissioner of Police of the Metropoli Ex-parte Blackburns*⁴³ observed that, “Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That

40. https://en.wikipedia.org/wiki/Contempt_of_court#Criminal_contempt_of_court

41. See Section 33 of the Crime and Courts Act 2013, <https://www.legislation.gov.uk/ukpga/2013/22/section/33>

42. Andhyarujina T. R., Scandalising the Court - Is It Obsolete? (2003) 4 SCC (Jour) 12 at <http://www.ebc-india.com/lawyer/articles/2003v4a2.htm> accessed 02.12.2017

43. [1968] 2 QB 118, [1968] 1 All ER 763, [1968] 2 WLR 893

must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it, for there is something far more important at stake. It is no less than freedom of speech itself.”

In United States contempt of Court is divided into direct or indirect and civil or criminal. Civil Contempt is “coercive and remedial” in nature whereas the criminal Contempt is punitive. Direct Contempt is that which occurs in the presence of the presiding judge while indirect Contempt occurs outside the Court and consists of disobedience of a court’s prior order. The conduct to be contemptuous must relate to the pending proceedings and there must be a clear and imminent danger of prejudicing the proceedings.⁴⁴ The prosecutor must prove beyond reasonable doubt that the speech could pose a “clear and present danger” to the administration of justice.

In *Garrison v Louisiana*, Garrison had been charged with libel for his public statement that a large backlog of criminal cases was due to the inefficiency and laziness of eight state judges. Justice William J. Brennan Jr., held the Louisiana’s criminal libel law as unconstitutional because it restricted the use of truth as a defense.⁴⁵ Justice Black in *Bridges v California*⁴⁶ observed that:

“The assumption that respect for the Judiciary can be won by shielding Judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion, and Contempt much more than it would enhance respect.”

Justice Frankfurter in the above case observed that:

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44. Andhyarujina T. R., Scandalising the Court - Is It Obsolete? (2003) 4 SCC (Jour) 12 at <http://www.ebc-india.com/lawyer/articles/2003v4a2.htm> accessed 02.12.2017
45. 379 U.S. 64 (1964)
46. 86 L Ed 192 (1941), available at <https://supreme.justia.com/cases/federal/us/314/252/case.html>

“Some English judges extended their authority for checking interferences with judicial business actually in hand to “lay by the heel” those responsible for “scandalising the court,” that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England, and has never found lodgment here. But even the technical power of punishing interference with the Court’s business is susceptible of abuse.”⁴⁷

The above observations of Court indicate that the offense of scandalising the Court has become almost non-existent in United States. However, it has been still maintained essential in India and some Common Law Countries like Canada, Australia, New Zealand, South Africa, Mauritius, Hong Kong, Zimbabwe and Fiji.⁴⁸

VI. CONTEMPT BY A JUDGE : JUSTICE KARNAN’S CASE

Justice C S Karnan was appointed in 2009 as judge of Madras High Court, and his tenure was till March 12, 2017. He entered into controversies just within two years of his appointment. In 2011, he wrote a complaint to the National Commission for Scheduled Castes alleging that he is being discriminated and harassed on the basis of caste by his brother judges and addressed a press conference on this matter. The chairman of the National Commission for Scheduled Castes forwarded the complaint to the then Chief Justice of India without taking any action on it. In 2014 Justice Karnan entered into a court room of Madras High Court where a PIL on a matter relating to the appointment of certain judges of lower Court was being heard, intervened in open Court and told the Court that the selection of judges is unfair and he wanted to file an aûdavit in that matter.

The said facts were communicated to the then Chief Justice of India P Sathasivam along with the request of Justice Karnan’s transfer to other High Court. Justice Karnan wrote a letter to Justice Sathasivam and

47. 86 L Ed 192 (1941), available at <https://supreme.justia.com/cases/federal/us/314/252/case.html>

48. Andhyarujina T. R., Scandalising the Court - Is It Obsolete? (2003) 4 SCC (Jour) 12 at <http://www.ebc-india.com/lawyer/articles/2003v4a2.htm> accessed 02.12.2017

requested to withhold his transfer so as to prove his allegations and continued at the Madras High Court.

The above discussed fact of entering the court room of a fellow judge and making statement in the open Court may amount to interference in the administration of justice. Here, he should have adopted legal ways to submit his say, however, he had adopted an unprecedented route and directly made open allegations in the working court room. Nevertheless, this act of Justice Karnan is no more relevant in the Contempt proceedings in the Supreme Court as one year time period has already lapsed.

He wrote another letter to the joint registrar of the Right to Information section alleging irregularities in the appointment of district judges, sought for details about the selection process so as to file a complaint with the President of India. In the meantime, 20 judges of the Madras High Court jointly requested the chief justice of India to transfer Justice Karnan.

Although the behavior of Justice Karnan seems to be irritating and not suitable for a High Court judge as seen in the above incidents, however, in many instances, except the one in open Court, it was an exercise of common rights by a citizen. Something which is unexpected from a judge cannot be termed as offense or contemptuous. On the contrary, failure of higher Judiciary to give patient hearing to claims of Justice Karnan (though seems to be outrageous) and repeated request to transfer him to another High Court would have surely fueled his anger, making him more uncontrollable. The reaction of the Judiciary to the behavior of Justice Karnan indicates that questioning or criticising any decision of the Judiciary is intolerable.

In April 2015 again, Justice C S Karnan issued a *suo motu* writ and stayed the Chief Justice Sanjay Kishan Kaul's administrative order constituting a recruitment committee to interview candidates for the recruitment of civil judges. The chairman of Public Service Commission was also restrained from conducting interviews and CBI has been ordered to enquire the educational qualifications of Justice Dhanapalan, a member of recruitment committee. He objected inclusion of Justice Sudhakar and Justice Hariparanthaman in the committee on the ground that both are from same community and related to each other. The order of Justice Karnan has been stayed by the division bench of the Madras High Court

on the ground of jurisdictional issues as the matter has not been assigned to him by the Chief Justice, who enjoys prerogative to distribute the work and no other judge has this power. In reaction to this, Justice Karnan threatened to initiate contempt proceedings against chief justice of Madras High Court, although his previous order has been stayed by the division bench. This incidence lead the Madras High Court registry to approach the Supreme Court, and a bench headed by Justice H L Dattu, Chief Justice of India, stayed Justice Karnan's 30 April and ordered to continue the judicial appointments without any further interference.⁴⁹

The matter of judicial appointments closed but in meantime Justice Karnan leveled allegations of sexual assault with an intern, a brother judge but with no evidence of the same. After few months, Justice Karnan made allegations of belittling his capacities by giving him "in significant" and "dummy" portfolios against the Chief Justice of Madras High Court directly to him and sent copies of letter to the Chief Justice of India and to the President of India. He also wrote a letter to the Union Law Minister Sadananda Gowda and held the collegium system responsible for producing nepotism and favoritism. Justice Karnan did not stop there, he wrote a third letter to the office of the Principal Accountant General in Chennai, asking him to find out if any Financial irregularities had been incurred by the Chief Justice of the Madras High Court.⁵⁰

In February 2016 Justice Karnan has been transferred to the Calcutta High Court, however, he himself stayed his transefer order and sought explanation from CJI on his transfer and directed him not to interfere with his jurisdiction.

Once again the registry of Madras High Court approached the Supreme Court, with request to restrain Justice Karnan from issuing such an order. The Supreme Court bench comprising Justice J S Khehar and Justice R Banumathi quashed Justice Karnan's stay order, ordered a blanket stay on all orders passed by him after 12 February 2016 and also ordered Madras High Court to not assign any work to Justice Karnan,

49. Smita Chakraburty, The Curious Case of Justice Karnan, *ECONOMIC & POLITICAL WEEKLY* 52 (18) 06 May, 2017, available at <http://www.epw.in/node/148776/pdf>

50. Smita Chakraburty, The Curious Case of Justice Karnan, *ECONOMIC & POLITICAL WEEKLY* 52 (18) 06 May, 2017, available at <http://www.epw.in/node/148776/pdf>

Thereafter, Justice Karnan met with Chief Justice T S Thakur and tendered his apology for staying his own transfer order, however, attributed his actions to “loss of mental balance due to mental frustrations,” caused due to caste discrimination against him in the high Court. He also agreed to his transfer to the Calcutta High Court.

On January 23, 2017, Justice Karnan, Judge of Calcutta High Court, wrote a letter to the Prime Minister of India with the initial list of 20 High Court and Supreme Court judges and made allegations of corruption against them. This letter caused the Supreme Court to initiate the contempt proceedings against Justice Karnan. It was for the first time in the history of India that contempt proceedings were initiated against a sitting judge of the High Court.

The Supreme Court *In re Justice C S Karnan*, Chief Justice of India Justice Khehar Singh constituted a bench of seven senior-most judges and issued notice to Justice Karnan and sought assistance from Attorney General Mukul Rohatgi and Justice Karnan was refrained from any judicial or administrative work. The Court discussed the above facts at length and decided the matter considering Justice Karnan as a ‘Common Citizen’ and proceeded with proceedings under the Contempt of Court Act, 1971.

Justice Karnan wrote a letter to the Secretary General accusing the Chief Justice-led bench of caste bias in initiating proceedings against him and stated that the court order amounted to an offence under the SC and ST (Prevention of Atrocities) Act, 1989 and appealed the Court to refer his case to Parliament.

Justice Karnan refusing to attend the contempt proceedings claimed a compensation of Rs 14 crore from the seven-judge bench for “disturbing his mind and normal life”.

Justice Karnan initially remained absent for the proceedings, but appeared before it when Court issued billable warrant, and requested the Court to restore his judicial work. He further informed the bench that he would not attend the next hearing, and that the Court may arrest him if it pleases.

In a shocking move, unfettered Justice Karnan “ordered” the seven-judge bench to appear before him at his “residential court,” to face proceedings for insulting him in open Court, and issued non-bailable warrants against the all seven judges, ordered the CBI to probe his

allegations against them, and also directed the Air Control Authority to restrain the seven judges from flying abroad and finally convicted the bench under the SC/ST Act for a term of 5 years. On the other hand, the Supreme Court directed that, no authority is required to take cognisance on any orders issued by him and also ordered that he be administered a medical test, however, Justice Karnan denied any such test and claimed medically and mentally fit.

Finally, the Supreme Court delivered a historic judgment and convicted a sitting judge of Calcutta High Court, for Contempt of Court.

If the series of acts committed by Justice Karnan are perused, it becomes clear that his behavior is undoubtedly condemnable and caused a severe injury to the decorum and dignity of the Court and also it amounts to interference with the administration of justice at various occasions, particularly making allegations against brother judges in open Court, issuing *suo motu* proceedings and vague allegations. However, the way Supreme Court has reacted to it was also not free from criticism. The Court instead of recommending impeachment proceedings in the Parliament, adopted an unprecedented route to punish him while he is in the office, ignoring constitutional route. In previous cases of Justice Ramaswamy and Justice Dinkaran mentioned above, the Chief Justice of India recommended the Parliament to remove them; however, in the case of Justice Karnan the Supreme Court adopted a different view. The Supreme Court ordered to refrain him from exercising judicial and administrative functions in fact given the effect of impeachment even prior to issue notice to him. While doing so the Court never explained the source from where it derived this power. The power of impeachment is the Parliament's prerogative and it is one of the fundamental principles of 'Independence of Judiciary', and 'separation of powers' which are basic structure of the Constitution. The procedure of impeachment is regulated by Judges Enquiry Act, 1968. The Supreme Court by restraining Justice Karnan from judicial functions has breached the provisions of Constitution and also the Judges Enquiry Act, 1968. The Supreme Court attempted to put a judge behind the bar even when he is in office and did not wait till his retirement which was due just after a month. This did not occur only because Justice Karnan avoided arrest for a month. Imagine he would not have retired for few more years, he would have joined again as a Judge of High Court with full powers. Then what was the remedy if he

continues to behave in the similar way? This proves the way adopted by Supreme Court was not appropriate.

Let us discuss another example to see how the Judiciary responded in such matters. In the well-known Bhanwari Devi rape case, which led to the Vishakha guidelines, the trial court acquitted the accused observing that the rapists were middle-aged and respectable persons of a higher caste who could not have raped a lower caste woman.⁵¹ Such castiest remarks in the judgment and acquittal of the accused on its basis, although severely criticised by one and all, never considered by the Supreme Court as Contemptuous or wrongful. This example also shows that the Court is selective in using Contempt of court law.

Further, Justice Karnan started behaving irresponsibly in 2011, then why the Court was silent for so many years. Imagine, if he would have elevated to the Supreme Court and might have also become Chief Justice of Supreme Court after some years, what would have been the alternative. Was it possible to refrain him from judicial function or stay the *suo motu* orders issued by him or to convict him for Contempt of Court, as he being Chief Justice of India? The impeachment proceedings provided by the Constitution would have been the only solution in such cases. However, the Supreme Court, as rightly said by a senior lawyer Indira Jaising, that the Court has set the wrong precedent.

Justice Karnan's case also raises questions on judicial appointments by the collegium that how such person is appointed on such a higher post.

VII. CONCLUSION

Although the Contempt law has been used to enforce the orders of judicial authority, however, the courts have started to use it to extract respect and dignity for judges.⁵² The Constitution of India read with the

51. Justice J S Verma, REPORT TO THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (Government of India, January 23, 2013) 14 available at https://timesofindia.indiatimes.com/realtime/justice_js_verma_committee_report.pdf accessed 02.12.2017

52. Naseem Ahmed Handa, *An Appraisal of Law of Contempt in India* (Ph D Thesis, Punjab University, Patiala, 2010) 29 accessed http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/10/10_chapter%202.pdf

Contempt of Court's Act, 1971 empowers the Supreme Court and the High Courts to punish for Contempt of Court. However, these provisions confer blanket powers on the higher courts. The term 'scandalise' has not been defined leaving it for the Court to interpret. The offence of 'scandalising the court' has been abolished in most of the countries including England from where we derived it however, it is preserved in India. The fundamental right of speech and expression has been made subject to Contempt of Court and it acts as hanging sword on media even if there is truth in their information. In short, the contempt power is ultimately restraining free speech and safeguarding the Court from criticism even if based on facts. Further 'truth' as a defense is not available unless it qualifies the test of 'public interest'. Such a scenario will definitely help saving corrupt judges and may encourage corruption. In democracy, government (state) is servant and people are real sovereign and they should have every right to criticise the government (state) including Judiciary. This power of people has been taken away by the Contempt law, which should be restored. Therefore, the offence of 'scandalising' the Court should be abolished and 'truth' as defense should be made unqualified.

In case of Justice Karnan, the Supreme Court by refraining him from judicial functions, exercised the powers which it is not authorised under any law, rather it is breach of constitutional mandate. Such a precedent cannot be followed by future courts.



PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 : A PROCEDURAL OVERVIEW

RABINDRA KUMAR PATHAK*

ABSTRACT : Protection of women from domestic violence has been a pressing issue demanding legislative response so that the inhuman treatment meted out to women may be checked, and instances of domestic violence are dealt with by providing reliefs of various kinds. Therefore, the enactment of the Protection of Women from Domestic Violence Act, 2005 was a welcome step aimed at dealing with domestic violence within the framework of civil law. The present paper brings to fore the procedural aspect of the Act, and how the courts have interpreted different procedural provisions, especially those beset with ambiguity and lack of clarity. There are some provisions that have been interpreted by courts causing confusion as to their true legislative import. Sections 12, 26, 27, and 28 along with section 29 are some of the important provisions that need to be looked into with a critical insight in order to have a clear perspective as to their applicability to varied fact situations. There is a need for rethinking and re-appreciating their true meaning because true import and implication of any given provision is instrumental as regards an aggrieved person and her claim for reliefs. The paper takes into account a number of judgments of high courts and the Supreme Court to shed light upon existing ambiguities and their future implications.

KEY WORDS : Domestic violence, Procedure, Magistrate Court, Court of Sessions, reliefs.

I. INTRODUCTION

Domestic violence has a pervasive societal presence.¹ It causes and

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1. See generally, Jonathan Herring, "The Severity of Domestic Abuse", 30 *National*

perpetuates subjugation and subordination of women. It is inflicted upon women in various forms. It may be in the form of physical abuse, sexual abuse or verbal and emotional abuse committed by a person with whom such women share domestic relationship. Economic abuse is also a manifestation of such violence, which deprives a woman of her basic human rights that are regarded as inalienable and inviolable.² Psychological violence also comes across as a form of domestic violence in many cases.³

Illiteracy, economic dependence on men, and insensitivity to women's rights and dignity are some of the primary factors responsible for domestic violence, which knows no societal boundaries. Every *stratum* of the society abounds with abusive stories of violence that women suffer often *silently* within the presumably safer confines of a house. Violence against women within the confines of domesticity is also reflective of a deep-rooted societal bias against, and disrespect for, women and women's rights. History so well archives stories of deprivation of rights and liberties of women *within* and *outside* the family in different forms. Incidents of domestic violence, despite being so pervasive and frequent, remain largely unreported and consequently invisible. Given the enormity and gravity of the problem of domestic violence prevalent in the society, law-makers in India responded with the enactment of Protection of Women from Domestic Violence Act, 2005. The Act was intended to provide remedies under a civil law. The new enactment aims to prevent acts of domestic

Law School of India Review 37-50 (2018). According to World Health Organisation, "Nearly 1 in 3 (35%) of women worldwide have experienced physical and/or sexual violence by an intimate partner or sexual violence by any perpetrator in their lifetime.... Globally, as many as 38% (1) of murders of women are committed by an intimate partner" See, World Health Organisation, *Violence Against Women* (2019), available at <https://www.who.int/reproductivehealth/publications/violence/en/> (last accessed on 13.11.2019).

2. See, Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. Rts. Q. 36 (1993). Also see, *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755. A divorced wife can also institute a proceeding under the Protection of Women from Domestic Violence Act, 2005 provided she is able to establish that she *has been* subjected to domestic violence within the meaning of Section 3 of the Act. See, *Prabir Kumar Ghose v. Jharna Ghose*, 1 (2016) DMC 734(Cal) where Calcutta high court held that a divorced wife, however, cannot claim a right to residence under the Act. *Id.* at 739.
3. Stacy L Mallicoat, *Women, Gender and Crime* 70 (Los Angeles, Sage Publication, 2019)

violence, and protect some of the basic rights of women guaranteed under the Constitution of India. In *Kunapareddy*⁴, the Supreme Court observed that “the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the *civil law* for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society”.⁵ Moreover, the legislature while enacting the law was cognizant of the fact that enforcement of criminal law on the husband and relatives will have a deleterious effect upon the matrimonial relationship. The legislative intention seemingly aims at protecting a woman’s relationship with her husband or husband’s family from getting ‘snapped’. A civil law, therefore, is apparently more efficacious and appropriate as regards protecting the rights of women and providing relief to her in cases of her suffering domestic violence.⁶

II. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: A BRIEF OVERVIEW

A piece of ‘progressive legislation’⁷, the Act is in tune with Article 15(3) of the Constitution.⁸ It is a complete code in itself, and deals with the entire gamut of family relationship between husband, wife and children, and the *civil remedies* available to an ‘aggrieved person’ who suffers domestic violence.⁹ Sections 17 to 23 deal with some of the important ‘civil rights’¹⁰ under the Act through provisions pertaining to *right to*

4. *Kunapareddy v. Kunapareddy Swarna Kumari*, (2016) 11 SCC 774

5. *Id.*, para 12. Emphasis added.

6. *Vijaya Baskar v. Suganya Devi*, MANU/TN/3477/2010.

7. *Brundaban Patra v. Rajlaxmi Patra*, 2011 AIR CC 2386.

8. *Dennison Paulraj v. Union of India*, AIR 2009 (NOC) 2540 (Mad). Also see, *Aruna Pramod Shah v. Union of India*, 2008 (2) JCC 1177.

9. *Jagadesh v. Kalpana*, (2015) 1 MWN (Cri) 451. Punishment may be given only if there is a breach of any order passed under the Act. See, *Savita Bhanot v. V D Bhanot*, (2010) DMC 530 (Del).

10. *S v. J*, II (2018) DMC 35 (Del). Also see, *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori*, (2014) 10 SCC 736; *Kunapareddy v. Kunapareddy Swarna Kumari*, (2016) 11 SCC 774

*reside in a shared household*¹¹, *protection orders*¹², *residence orders*¹³, *monetary orders*¹⁴, *custody orders*¹⁵, and *compensation orders*¹⁶. The proceedings under the Act are of *quasi civil* nature.¹⁷ It is also a notable fact that though the Act is a piece of civil law¹⁸, forum that it provides for the enforcement of rights under the Act is that of ‘Magistrate Court’ constituted under the Code of Criminal Procedure (CrPC).¹⁹ It seems that it was so provided in order to reduce the procedural delays. Section 12 states that an *aggrieved person* or a protection officer or *any other person on behalf of the aggrieved person* may present an application to the Magistrate seeking one or more *reliefs* under the Act. Moreover, section 26 deals with *reliefs* in other suits and legal proceedings. It clearly states that any *relief* available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding before a Civil Court, Family Court or a Criminal Court affecting the aggrieved person and respondent whether such proceeding was initiated before or after the commencement of this Act. Section 26(2) provides that any of these reliefs is *in addition to* and *along with* any other relief that the aggrieved person may seek in such a suit or legal proceeding before a Civil Court or Criminal Court, with a requirement that any relief so obtained by the aggrieved person ‘in any

11. Section 17

12. Section 18

13. Section 19

14. Section 20

15. Section 21

16. Section 22, DV Act, 2005.

17. *Raosaheb Pandharinath Kamble v. Shaila Raosaheb Kamble*, 2010 CrLJ 3596.

18. It is noticeable that there are two penal provisions under the Act, namely section 31 and section 33. However, that does not make the proceedings under the Act to be criminal proceedings. Moreover, the power under the Act may be exercised even by a Civil Court or a Family Court. Section 26(1) of the Act *inter alia* provides that any relief available under sections 18,19,20,21 and 22 may also be sought in any legal proceeding before a Civil Court, Family Court or a Criminal Court. See, *Chanmuniya v. Virendra Kumar Singh Kushwaha*, 2010 AIR SCW 6497; *Shambhu Prasad v. Manjari*, (2012) DLT 647(DB); *Mangesh Sawant v. Minal Vijay Bhosale*, 2012 Cr.L.J. 1413; *Md. Abdul Haque v. Srimati Jesmina Begum Choudhuri*, (2013) 1 HLR 540; (2014) 2CCC(SN) 238; *Rameshbhai Ramajibhai Desai v. State of Gujarat*, (2016)2RCR (Cri) 88:(2016) 3GLH 91.

19. Section 12 of the Act *inter alia* provides that ‘An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act’.

proceedings other than a proceeding under this Act' shall be brought to the notice of the Magistrate by the aggrieved person.²⁰ Section 29 of the Act provides for appeal to the Court of Sessions against the order of the Magistrate with thirty days from the date on which such order is made is served on the aggrieved person or the respondent. Section 31 prescribes penalty for breach of protection order by the respondent, and section 33 prescribes penalty to be imposed upon the Protection Officer if he fails or refuses to discharge his duties as directed by the Magistrate in the protection order. Protection Officer, Service Provider, Police Officers and Magistrate are important functionaries that play an instrumental role in effectuating the intent of the Act, and have certain duties cast upon them under the Act.²¹

III. JURISDICTION' AND 'PROCEDURE' UNDER THE ACT

A judicial magistrate has a pivotal role²² in the aggrieved person's effort to avail the reliefs and remedies under different provisions of the Act which under Section 2(i) defines the word 'magistrate' to mean 'judicial magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place'.²³ Section 27(1) further deals with territorial jurisdiction of the Magistrate whereas section 27(2) gives extra-territorial effect to the jurisdiction of the Magistrate under the Act.²⁴ Proceedings

20. Section 26(3), DV Act, 2005.

21. For instance, Section 5 that prescribes certain duties for police officer, service providers and magistrate. Rule 8 appended to the Act lists the duties and functions of the Protection Officer. Section 11 also casts a series of duties on 'Central Government' and 'every State Government' to ensure *inter alia* wide publicity of the provisions under Act, to provide sensitisation and awareness training to the police officers and members of the judicial services on the issues addressed by the Act and so on.

22. However, as Gauba says, "There seems to have been no study made as to the additional litigation that would flow into the Courts of Magistrates as a consequence of this law." R.K. Gauba, "Domestic Violence Law — A Recipe for Disaster?", (2007) 8 SCC J-25.

23. See, Section 6, Code of Criminal Procedure, 1973 for classes of criminal courts under the Code. Section 11 of the Code provides for the establishment of 'Courts of Judicial Magistrates' of the first class and of the second class. Also see, *Emperor v Noor Muhammad*, AIR 1928 Sind 1at 4.

24. Section 27(2) reads thus: "Any order made under this Act shall be enforceable throughout India."

under the Act may be initiated²⁵ under section 12(1) which provides that an *aggrieved person* or a *protection officer* or *any other person*²⁶ on behalf of the aggrieved person may present an ‘application’²⁷ to the magistrate seeking *one or more* remedies under the Act provided that before passing any order on such application, the Magistrate *shall* take into consideration ‘any’ *domestic incident report* received by him from the protection officer or the service provider. Be that as it may, the ‘place of trial’ is regulated by *three* clauses of section 27 which mandates that the Judicial Magistrate of the First Class or the Metropolitan Magistrate shall be the competent court to grant *protection order* and *other orders* or to try offences under the Act only if the ‘aggrieved person’ *permanently* or *temporarily resides* or carries on business or is employed or the ‘respondent’ resides or carries on business or is employed or the ‘cause of action’ has arisen within the ‘local limits’ of such a Magistrate.²⁸ The expression ‘cause of action’ implies a right to sue.²⁹

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25. As regards the period of limitation, it has been held that Section 468 of CrPC has no application to an application made under section 12 of the Act. See, *Pankaj Sharma v. Priyanka Sharma*, 1 (2016) DMC 556(Raj); *Shaikh Ishaq Budhanbhai v. Shayeen Ishaq Shaikh & Ors*, 1 (2013) DMC 227. However, as regards the provision of ‘appeal’ under the Act, Section 29 prescribes that an appeal shall lie to the ‘Court of Sessions’ within *thirty* days from the date on which the order made by the Magistrate is served on the aggrieved party or the respondent, as the case may be, whichever is later.
26. Section 4(1) of the Act states that any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer. Section 4(2) further states that no liability, civil or criminal, shall be incurred by any person for giving in good faith of information for the purpose of sub-section 4(1).
27. In *Kunapareddy v. Kunapareddy Swarna Kumari*, (2016)11 SCC 774, it was held that an application filed under section 12 of the Act can be amended.
28. *Neeraj Goswami v. State of UP*, 2013 CrLJ 1767(All). In *Manish Shukla v State of UP*, 2012(4) Crimes 167(All), it was observed that “the question of jurisdiction of the Magistrate does not depend upon the domestic violence report of the Protection Officer. The said question is to be decided according to the provisions of section 27 of the Act”. Moreover, the territorial jurisdiction of the Court under the Act does not depend upon the location of the office of the Protection Officer or his report. See, *Manisha v. State*, AIR 2012 All 477. Also see, *Jai Lal v. Soma Devi*, 2019 Cr.L.J. (NOC) 332(HP); *Shyam Lal Devda v. Parimala*, (2020) 3 SCC 14.
29. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254. “In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must

IV. DOMESTIC INCIDENT REPORT: IMPORT AND IMPLICATION

Domestic incident report is a report made in a 'prescribed form'³⁰ on the receipt of a complaint of domestic violence from an aggrieved person.³¹ Section 4 of the Act provides that '*any person*'³² who has *reason to believe* that an act of domestic violence *has been, or is being, or is likely to be committed*, may give information about the same to the concerned 'Protection Officer'³³. Upon the receiving the complaint, Protection Officer prepares a domestic incident report and submits the same to the *magistrate* besides forwarding the copies of the same to the *police officer* in charge of the police station within whose jurisdiction the alleged act of domestic violence has occurred. The report is also sent to the *service providers* in that area.³⁴ Service provider³⁵ may also record a domestic incident report in the aforesaid 'prescribed form' upon the request of any '*aggrieved person*', and *forward* a copy of the same to the magistrate and the Protection Officer having jurisdiction in the area where the domestic violence is alleged to have taken place.³⁶ However, the normal course of action is that domestic incident report is sent to the *magistrate* having jurisdiction, a copy thereof to the *police officer* having local jurisdiction and the *service provider* in the concerned area as provided under section 9(1)(a) of the Act. But, the aforesaid provisions do not imply that the 'aggrieved person' has to go to the protection officer or to

include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise."See, *Y. Abraham Ajith v. Inspector of Police, Chennai*, (2004) 8 SCC 100.

30. The prescribed form is provided under 'Form I' appended to the Act. The 'Form I' *inter alia* contains the details of the complainant or the aggrieved person, details of the respondents, details of children, if any, of the aggrieved person, incidents of the domestic violence and also the nature of sexual violence besides mentioning verbal and emotional abuse.
31. See, section 2(e), D V Act, 2005
32. Section 4(2) states that no liability, civil or criminal, shall be incurred by any person for giving in *good faith* of information for the purpose of section 4(1) of the Act.
33. Protection Officer is an officer appointed by the State government under section 8(1).
34. See, Rule 5(1), Protection of Women from Domestic Violence Rules, 2006. Also see, section 9(1)(b) of the D V Act.
35. Service provider means 'an entity registered' under section 10(1) of the Act.
36. See, Rule 5(2), Protection of Women from Domestic Violence Rules, 2006.

the service provider. She may also approach the magistrate. In *Narayankumar v. State of Karnataka*³⁷, Karnataka High Court observed to the effect that:³⁸

...if there is a Domestic Incident Report that is received by the Magistrate either from the Protection Officer or from the Provider, then it becomes obligatory on the part of the Magistrate to take note of the said Domestic Incident Report before passing an order on the application filed by the aggrieved party. Therefore, the Section does not say that in every case an aggrieved person is bound to go before either the Protection Officer or the Provider....the scheme of the act make it clear that it is left to the choice of the aggrieved person to go before the Service Provider or the Protection Officer or to approach to the Magistrate under Section 12 of the Act.

Be that as it may, the requirement of Domestic Incident Report (DIR) under the Act has invited criticism for the reason that:³⁹

...the proviso to Section 5 makes it clear that the role assigned to other functionaries under this law is not to be construed as relieving the police officer from his duty to proceed in accordance with the law in the matter of a cognizable offence. If it were so, the law has added the formality of DIR for no conceivable purpose. In fact, such additional formality would be against the interest of the victim woman.

i) ‘any domestic incident report’

The use of the word ‘any’ before the expression ‘domestic incident report’ under the proviso⁴⁰ to section 12(1)⁴¹ has great implication, and it

37. 2010 ALL MR (Cri) 158.

38. *Ibid.* Emphasis added.

39. R.K. Gauba, “Domestic Violence Law — A Recipe for Disaster?”, (2007) 8 SCC J-25. “The domestic incident report, similar in nature to FIR ...can lead to confusion and conflict.” *Ibid.*

40. “...before passing any order on such application, the Magistrate shall take into consideration *any* domestic incident report received by him from the Protection Officer or the service provider.”

has come for judicial interpretation in a series of cases given the importance it carries with respect to the role a magistrate has to play in view of section 12 and section 13 of the Act. It has been held by the Bombay high court that “if there is a Domestic Incident Report that is received by the Magistrate either from the Protection Officer or from the Service Provider *then only* it is obligatory for the Magistrate to take note of the same before passing final order of the application made by the aggrieved person.”⁴² Calcutta high court further added making it clear that:⁴³

“...it is not obligatory for the Magistrate to call for the Domestic Incident Report from the Protection Officer or from the Service Provider; but it is mandatory on the part of the Magistrate to take into consideration any such report received by him from the Protection Officer or from the Service Provider. He *may* call for such report from the concerned Protection Officer and the said report shall be taken into consideration by the Court along with the application.”

In *Shambhu Prasad Singh v. Manjari*,⁴⁴ the order passed by the Metropolitan Magistrate issuing notice⁴⁵ upon a complaint made under section 12 of the Act without calling a report from the Protection Officer was challenged. Taking into account the diverse and differing opinion of

41. “An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an *application to the Magistrate* seeking one or more *reliefs* under this Act.”

42. *Maroti v. Sau. Gangubai*, (2011) 6 AIR Bom R 303 : 2011 AIR CC 3336 : 2012 Cri LJ 87 : (2012) 1 HLR 237 : (2012) 2 HLR 316 : (2012) 2 DMC 201 : (2011) 3 DMC 483. Also see, *Murugan v. Kasimani*, (2011) 1 MWN (Cri) 567 : (2011) 3 E Cr N 1047 : (2012) 1 CCC (SN) 454 : (2011) 2 HLR 686 at page 571

43. *Kajal Baran Das v. Santa Das*, 2012 SCC OnLine Cal 11617.

44. (2012) 131 DRJ 200 : (2012) 4 CCC 22 : (2012) 4 CCC 188.

45. Section 13 provides for service of notice: “(1) A notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt. (2) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.”

different high courts, the Delhi high court in the present case made a very pertinent observation:⁴⁶

It may be noted that the very use of the word “any domestic incident report having been received” indicates that all cases where domestic incident report may be received, the same shall be considered. However, where no domestic incident report has been received, it is not mandatory for the Court to wait for the said report before issuing notice. Thus, the receipt of the domestic incident report is not a pre-requisite for issuing a notice to the Respondent. This position is further clarified from sub-Section (2) which says that the relief sought under Sub-Section (1) may include relief of issuance of an order of payment of compensation or damages without prejudice to the rights of such person to institute a suit for compensation for damages.

Therefore, the use of the word ‘any’ is very significant. It reflects the legislative intention as to the effect that it was intended to have in the scheme of the Act. If the word ‘any’ was absent in the aforesaid proviso, the effect of section 12 would have been completely different. It would have had a mandatory effect as regards the role of the magistrate under section 12. As perspicuously observed in the aforesaid judicial opinions, it simply implies that magistrate *shall* take into account the domestic incident report if there is ‘any’. The effect of ‘shall’ is dependent upon the word ‘any’ in the proviso to section 12(1).

However, is the requirement of domestic incident report mandatory under section 26 that states that any *relief*⁴⁷ available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court? The question arose in *M Palani v. Meenakshi*⁴⁸. The observation made by the high court in the instant case is worth-quoting:⁴⁹

46. (2012) 4 CCC 188 at 206. Also see, *Basit v. State of Assam*, 1(2012) DMC 774; *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori*, (2014) 10 SCC 736 : (2015) 1 SCC (Cri) 241 : (2015) 1 SCC (Civ) 110.

47. Section 26(2) states that any relief referred to in section 26(1) may be sought for *in addition to and along with any other relief* that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

48. AIR 2008 Mad 162.

49. *Id.*, para 18.

Section 12(1) contemplates an Application before the Magistrate wherein the Proviso to the Section makes it clear that before passing an order by the Magistrate, he shall take into consideration the domestic incident report received from the Protection Officer. But however, no such Proviso is enumerated under Section 26 of the said Act. If the intention of the legislature is that even if an Application is filed before the Civil Court or Family Court or a Criminal Court by the aggrieved person, an order shall be passed by them taking into consideration any domestic incident report received from the Protection Officer or the service provider, then the legislature would have incorporated such Proviso as in the case of Section 12(1), even in Section 26 also.

Therefore, the absence of any provision under section 26 similar to the one under proviso to section 12(1) makes it amply clear that a Civil Court or a Family Court while passing orders granting reliefs under section 26 is not bound by the requirement of domestic incident report.

ii)Expounding the meaning of ‘temporary residence’

The word ‘resides’ under section 27 has come for interpretation in many cases arising out of different fact situations. Question of residence is a mixed question of fact and law, and therefore, has to be decided in view of the facts and circumstances of each case by the court after recording evidence.⁵⁰ Generally, a temporary residence implies a ‘continuing residence’. It should not be a ‘short stay’. It should be more than a casual stay. It should have *some* permanency. Probably, this Act is first of its kind where even a ‘temporary residence’ is regarded to be sufficient to invoke the jurisdiction of the Court. Judicial pronouncements on the meaning of ‘reside temporarily’ seem to suggest that the expression implies a residence that the ‘aggrieved person’ is compelled to have after being subjected to domestic violence as a result of which it may not be possible for her to live in the same place, and she may be compelled by the domestic violence to relocate or shift to a different place where she may choose to do some job or have some support or she may simply decide to be with her kith and kin.⁵¹

50. *Vikas Rastogi v. State of U P*, 2014 (2) DMC 470.

51. *Zeba Khan v. State of UP*, 2019 Cr.L.J. 1248. Also see, *Rabindra Nath Sahoo v. Smt. Susila Sahu*, 2017 (1) RCR (Criminal) 312.

In *Gautam Sapra v. State Govt. of NCT of Delhi*⁵², the wife, an Uzbekistani citizen, was, after marriage with her Indian husband, living in Gurgaon. She had no home of her own in India. She made allegation in petition that she was subjected to domestic violence and was compelled to leave the country and stay with her mother in Uzbekistan. Subsequently, on returning to India, she chose to stay in Delhi temporarily instead of at Gurgaon. The Court held that her temporary stay in Delhi qualifies her to file an application under section 12 of the Act. It was observed that "...temporary residence in lodge or hotel would not give jurisdiction to Court if the person hires lodge or hotel only for the purpose of filing Domestic Violence application and has no other reason to make the place as her temporary residence. In the present case, after landing in Delhi from Uzbekistan, the applicant had no choice but to live at a lodge or hotel as she had no friend or relative in India."⁵³ In *Sharad Kumar Pandey v. Mamta Pandey*⁵⁴ the Delhi high court held thus:⁵⁵

A temporary residence...must be a temporary dwelling place
of the person who has for the time being decided to make

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52. (2011) 176 DLT 226 : (2011) 99 AIC 535. In *Kanti Devi v. State of Uttarakhand*, 2014 Cr.L.J 2348, the complainant was married in Uttar Pradesh, but she was living in Uttarakhand at the time of the filing the case under the Act, it was held that the Magistrate Court in Uttarakhand had jurisdiction to entertain the case under the Act.
53. *Id.*, para 4. Also see, *Sharad Kumar Pandey v. Mamta Pandey*, (2010) 171 DLT 565; *Neeraj Goswami v. State of U.P.*, (2013) 3 DMC 178.
54. (2010) 95 AIC 439
55. *Id.* at 629. In *Bhagwan Dass v. Kamal Abrol*, (2005) 11 SCC 66, it was observed that "the term "residence" makes it clear that the word "residents" includes two types which are: (1) a permanent residence, and (2) a temporary residence. First type of residence forms all the permanent dwelling which means that the person has settled down at a particular place permanently and regularly for some purpose. The second type refers to a situation that the person is not residing at a place forever but residing at a place for a temporary period or not for a considerable length of time. This is also referred to as a temporary living in a place. Hence, in one place the word "residence" is interpreted in the strict sense to include only permanent living at a place which may be referred to as domicile and in the second place the word is interpreted in the flexible sense to show a temporary or tentative residence." *Id.* at 69. For a judicial interpretation of the word "resides", see *Jagir Kaur v. Jaswant Singh*, (1964) 2 SCR 73 where it was held that "A person resides in a place if he through choice makes it his abode permanently or even temporarily." *Id.* at 80. Also see, *Jeewanti Pandey v. Kishan Chandra Pandey*, (1981) 4 SCC 517 : AIR 1982 SC 3.

the place, as his home. Although she may not have decided to reside there permanently or for a considerable length of time but for the time being, this must be place of her residence and this cannot be considered a place where the person has gone on a casual visit, or a fleeing visit for change of climate or simply for the purpose of filing a case against another person.

Be that as it may, it is not possible to lay down with certitude any strait-jacket formula for deciding the import of the expression 'temporary residence'. There are facts and circumstances in each case that are to be taken into account before holding a residence to be temporary residence. However, one of the important considerations underlying section 27 with respect to 'temporary residence' is that:⁵⁶

In the cases of violence against women under the D.V. Act, the moment she files a complaint, she is thrown out of the house and in several cases, there is threat and there is no security to the lady at the matrimonial place and she forced to flee to safety. In such cases the victim of domestic violence finds shelter in the parents' house, in certain cases, parents won't be able to support the lady basing on several reasons and the lady is forced to live at some other place in search of employment or to pursue some course which will fetch her a job, so that she will have the financial independence. In such a scenario, if the Section specifically says that to claim "temporary residence", the lady has to stay in a particular place for a specified period, in majority of the cases, women have to prefer a complaint at the place where the husband resides, where she has no safety and protection in several cases....The legislature in its wisdom thought it appropriate not to specify the time limit for claiming "temporary residence", in view of the practical problems that will be faced by the aggrieved person.

V. APPLICABILITY OF SECTION 126 CrPC

There is no *specific* provision either under the Act or the Rules as to

56. *Ram Lakhan Singh v. Union of India*, 2013 SCC OnLine Del 4844.

the mode of receiving or recording of evidence in pursuance of an application made under section 12 of the Act. Application under section 12(1) is *required*⁵⁷ to be filled in accordance with the ‘prescribed form’ prescribed by Rule 6 of the Protection of Women from Domestic Violence Rules, 2006. Rule 6(5) states that the ‘applications under section 12 shall be dealt with and orders enforced in the same manner as laid down under section 125 of the Code of Criminal Procedure, 1973’ (CrPC). Section 126, CrPC, governs the proceedings under section 125, CrPC. Section 126(2) states that “All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases.” Proviso to section 126(2) further provides for *ex parte* proceedings, and therefore the same may be applicable to a proceeding under the DV Act. For instance, if the Magistrate is satisfied that the concerned person is avoiding appearing before the Court in spite of the proper serving of notice upon him and being aware of the proceedings before the Magistrate Court, the Magistrate may initiate *ex parte* proceeding as provided under section 126, CrPC, following the mandate of Rule 6(5).⁵⁸ Therefore, a conjoint reading of section 28(1) and Rule 6(5) implies that an application under section 12 has to be dealt with following a procedure prescribed under section 126, CrPC. However, the applicability of section 126 CrPC is subject to section 28 (2) which states that the court shall have the *power to lay down its own procedure* for disposal of an application under section 12 or under section 23(2) of the Act.

57. Rule 6(1) appended to the Act states that every application of the aggrieved person under section 12 shall be in Form II or as nearly as possible thereto. Form II is appended to the Act. The use of the expression “as nearly as possible thereto” is significant in that strict compliance with Form II is not mandatory; it is merely directory in nature. If any piece of information missing in the application is of such nature that it is required by the magistrate to appreciate an application under section 12 of the Act, a supplementary affidavit will suffice the purpose. See, *Siladitya Basak v. State of West Bengal*, (2009) 4 CHN 94; *Milan Kumar Singh v. State of UP*, 2007 CrLJ 4742. Therefore, an application under section 12 cannot be rejected merely on the ground that it was in the prescribed form. See, *P Simachalam v. P Neelaveni*, 2012 CrLJ 269(Cal); *Chandrakant v. Manisha*, 1 (DMC)640.

58. See, *Naorem Shamungou Singh v. Moirangthem Guni Devi*, AIR 2014 Manipur 25.

i) '*laying down its own procedure*'

Section 28(1) clearly provides that save otherwise provided in this Act, *all proceedings* under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions under the Code of Criminal Procedure, 1973 whereas section 28(2) states that nothing in sub-section (1) shall prevent the court from laying down *its own procedure* for disposal of an application under section 12 or under section 23(2). This implies that the court may deviate from the procedure mandated under section 28(1) read with Rule 6(5), and devise its own procedure. Therefore, the Court exercising its discretion may allow evidence on affidavit and permit cross examination to test the veracity of the evidence.⁵⁹ However, the guiding light while adopting its 'own procedure' by a Magistrate court should be the object of the Act. The Court will adopt and follow such procedure that shall further, and shall not be in derogation of, the aims and objects for which the provisions were enacted under the Act for the protection of the rights of women who suffer domestic violence.⁶⁰ The procedure should be just and fair. Section 28(2) which provides for adopting 'its own procedure' can be pressed into service, it has been held, *in the absence of any provision* for implementing any order passed under the Act.⁶¹ Therefore, in *Sachin v. Sushma*⁶², where the magistrate issued a non-bailable warrant for recovery of amount towards interim maintenance by taking recourse to section 28(2) of D V Act, Bombay high court set aside the order of the magistrate and observed that magistrate had to follow the procedure for the recovery of maintenance as provided under the CrPC, meaning thereby that in such cases the magistrate should follow the procedure as laid down as laid down under section 126 CrPC.⁶³

In *Aniket Subhash Tupe v. Piyusha Aniket Tupe*⁶⁴, the Bombay high court held that notwithstanding the procedure prescribed in 28(1) read

59. *Aniket Subhash Tupe v Piyusha Aniket Tupe*, 2018 CrLJ 3316.

60. See, *Dilip V Patkar v. Vina D Patkar*, 2015(3) ABR (Cri)107(Goa Bench).

61. *Arun Balasaheb Yengure v. Smita Arun Yengure*, 2018(1) HLR 171.

62. 2014 (4) Mah LJ (Cri) 290

63. See, *Mdhusudan Bhardwaj v. Mamta Bhardwaj*, 2009 CrLJ 3095(MP). However, in *Sagar Sudhakar Shendge v. Naina Sagar Shendge*, 2013 All MR (Cri) 2572, it was held that Availing section 28(2), a Magistrate may issue a non-bailable warrant (NBW) for ensuring compliance of his order.

64. 2018 Cri LJ 3316(Bom)

with Rule 6(5), the Court is empowered to lay down its own procedure in deciding the application under Section 12 or 23(2) of the D.V. Act. The high court made a pointed reference to the inaugural words with which section 28(2) begins: “Nothing in Sub Section (1) shall prevent the Court from laying down its own procedure”. In *Aniket Tupe*, the Bombay high court had before it the following question: whether in an application filed under Section 12 of D V Act, the applicant can be permitted to file affidavit in evidence in view of section 28(2) of the Act? The Court observed thus:⁶⁵

Though, unlike Negotiable Instrument Act, *there is no specific provision in the D.V. Act to give evidence on affidavit*, section 28(2) with words plain, simple and unambiguous gives flexibility to the Court to depart from the procedure prescribed under Sub Section (1) of Section 28 and to devise its own procedure in deciding application under Section 12 or 23(2) of the Act. This enabling provision, which *intends to achieve the object of the Act*, would over-ride sub section (1) of section 28 the Act as well as Rule 6(5) of D.V Rules. Having regard to the object and scope of the Act, this provision cannot be given a narrow interpretation which will have an effect of rendering it redundant, surplus or otiose.

It is not a strait-jacket formula that in pursuance of an application under section 12, magistrate has to necessarily follow the procedure laid down in CrPC. Magistrate may deviate from this requirement in the interest of justice.⁶⁶ Section 28(1) is directory in nature, and any departure therefrom shall not vitiate a proceeding initiated under section 12.⁶⁷ This is apparent from the fact that the statute empowers the court under section 28(2) to ‘lay down its own procedure’.

ii)Section 26 vis-à-vis section 28(2)

Moreover, the expression ‘lay down its own procedure’ may be required to be interpreted when section 28 is read along with section 26 of the Act. Section 28 is about *proceedings* under section 12, 18, 19, 20,

65. *Id.*, para. 26. Emphasis added.

66. *Jaydipsinh Pratibhasinh Singh v. State of Gujarat*, 2010 CrLJ 2462.

67. *Naorem Shamungou Singh v.Moirangthem Guni Devi*, AIR 2104 Mani 25.

21, 22, 23 and offences under section 31 while section 26 speaks of *reliefs*⁶⁸ in other suits and legal proceedings before a Civil Court, Family Court, or a Criminal Court. Section 26(1) does not mention section 12 or section 23, two provisions which are noticeable in section 28(2), which provides for adopting “its own procedure” by the Court. This seems to suggest that the ambit and scope of these two provisions are different, and raises an important question: can a court under section 26(1) devise ‘its own procedure’ *à la* section 28(2)? This question needs to be seen in view of the fact that whereas section 28(1) is about ‘proceedings’ being governed by the provisions of Code of Criminal Procedure and Section 28(2) carves out an exception thereto, Section 26 is silent in this respect for the obvious reason, and aims at making ‘available’ reliefs under the specific provisions of D V Act in proceedings before a civil court, family court, or a criminal court. The Courts envisaged under the two aforesaid provisions are also different in nature. Moreover, the Act does declare that the three courts under section 26 shall be deemed to be a court of Judicial Magistrate, First Class.⁶⁹ The *focus* of the Act may be said to be primarily upon providing *reliefs* to an aggrieved person, either within the confines of the present Act or in proceedings under other laws. That being so, applicability and nature of procedural law should not be a bottleneck to achieving the aims of the Act, and that also includes availing the reliefs under the Act in proceedings under other laws before courts that may be a civil court, a family court or a criminal court. Therefore, when a relief under D V Act is sought in some other legal proceeding before a Civil Court or a Family Court, it has been held that such court may have to evolve ‘its own procedure’ as recourse to Criminal Procedure Code may in that event may result in some confusion.⁷⁰

VI. APPLICABILITY OF LIMITATION ACT

Section 12(5) mandates that the Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing. However, there is no time limit

68. These reliefs are ones provided under section 18, 19, 20, 21 and 22 of the DV Act.

69. See, *Nandkishore Pralhad Vyawahare v. Sau Mangala Pratap Bansar*, 2018(1)Bom CR (Cri) 449.

70. *Nandkishore Pralhad Vyawahare v. Sau Mangala Pratap Bansar*, 2018(1)Bom CR (Cri) 449.

fixed under the Act for filing an application under section 12(1).⁷¹ It raises an important question as to the applicability of the provisions of the Limitation Act as regards filing an application under the Act. Section 29(2) of the Limitation Act provides that sections 4 to 24 of the Act shall be applicable in so far as and to the extent they are not excluded expressly by *any special or local law*. DV Act is a special law, but does not contain any specific provision as to a 'time limit' for making an application under section 12. Therefore, in the absence of any provision providing a limitation period under the DV Act for making an application, sections 4 to 24 of the Limitation Act shall be applicable as the said provisions have not been expressly excluded by the DV Act.

VII. APPEAL AND REVISION

As regards provision for appeal, the Act under section 29 prescribes that an appeal shall lie to the Court of Sessions within thirty days from the date on which '*the order*'⁷² made by the Magistrate is *served*⁷³ on the aggrieved person or the respondent.⁷⁴ However, the aforesaid provision is silent as to the procedure to be followed. Section 28 providing for the applicability of Code of Criminal Procedure, 1973 to proceedings under *certain provisions*⁷⁵ of the Act, does not mention section 29 to be one such provision amongst them. However, as regards the procedure to be followed with respect to section 29 of the Act, it has been held that

71. *Ritesh v. Sandhya*, 2014 (2) Crimes 217 (Bom)

72. "...purely interlocutory orders which deals with procedure and which do not affect or determine the rights and liabilities of the parties, will not come within the sweep of the expression 'the order' as used in Section 29 of the Act of 2005. The order impugned has to affect or have a *material bearing on the rights of the parties* in order to make such order appealable....Section 29 of the Act of 2005 does not exclude interlocutory orders from the sweep of expression 'the order'." Emphasis added. See, *Vishal Jindal v. Puja Jindal*, 2015 (2) DMC 291.

73. Mere non-service of a copy of an order would not take away the right to appeal. Service of a copy of the order made by the Magistrate is only for the purpose of deciding the question of limitation of thirty days. See, *Smita Singh v. Bishnu Priya Singh*, 2013 CrLJ 4826 (Ori).

74. *Neelam Manmohan v. Manmohan Attavar Din*, 2018 (4) AKR 837(Kar); *K M Revanasiddeshwara v. K M Shylaja*, LNIND 2012 KANT 31.

75. Section 28 mentions that proceedings under sections 12, 18, 19, 20, 21, 22, 23, and 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973.

“Section 29 refers to an appeal before the court of Sessions *without saying anything more*, therefore, the normal procedure applicable to it under Code of criminal Procedure will apply”.⁷⁶ Against the judgment and order in appeal under section 29, no further appeal or revision is provided under the Act. However, it has been held that the provisions of the Code of Criminal Procedure, 1973 for the revisional powers under section 397 read with 401 of the Code would be applicable.⁷⁷ The *Court of Magistrate* is empowered to act under the Act and *Court of Sessions* empowered to decide appeals under section 29 of the Act are courts to be treated as inferior courts amenable to the revisional jurisdiction under section 397 and 401 of the Code of criminal Procedure, 1973. Neither the magistrate nor the Courts of Sessions is a *persona designata*. The jurisdiction of the Magistrate Court or the Court of Sessions under the Act is referable to, and derived from the Code.⁷⁸ Therefore, the Court of Sessions being a court inferior to the High Court, revision against its order passed under section 29 of the D V Act shall lie to the High Court.⁷⁹

VIII. CONCLUSION

The diverse and conflicting corpus of judicial pronouncements, more so of different high courts, reflects upon the need to read the provisions of the Act in view of the intent of the legislature that aimed at realising into reality the mandate of constitutional provisions as to the protection of women from domestic violence and providing relief to an aggrieved women who has suffered domestic violence. The conflicting judicial opinions over the years since 2005 also underscore the need for revisiting some of the specific provisions of the Act in view of the questions and interpretational predicaments that the courts have faced while dealing with cases of domestic violence. Be that as it may, the Act has proved to be instrumental in alleviating the plight of women subjected to acts of domestic violence.



76. *Dinesh Kumar Yadav v. State Of U.P.*, 2018 CrLJ 389.

77. *Rameshbhai Ramajibhai Desai v. State of Gujarat*, (2015)56 (3) GLR.

78. *Suo Motu v. Ushaben Kishorbhai Mistry*,(2016)2 RCR (Cri)

79. *K Rajendran v. Ambikavathy*, 2013 (2) MLJ (Cri) 406 (Mad).

REVOCATION OF SPECIAL STATUS OF JAMMU AND KASHMIR AND HUMAN RIGHTS ISSUES : AN APPRAISAL

AJAY KUMAR SINGH*

ABSTRACT : This is universal truth that Article 370 of the constitution of India is a temporary provision which conferred special powers to the state of Jammu and Kashmir to make its own Constitution. Accordingly a separate constitution of the state of J& K was duly enacted by its constituent assembly which was against the concept of "One Nation two legislation" (*Ek Desh, do Nisan, do Vidhan*). However Central laws were to be implemented in the state only on the matters included in the instrument of accession (IOA). It needed the concurrence of the state government. Likewise Article 35-A of the Indian Constitution had empowered the state legislature of J&K to define 'Permanent residents' of the state and special rights and privileges to the permanent residents. On 5 August¹ 2019, the president of India issued an order by revoking special status of Jammu and Kashmir and the state reorganization bill 2019 was introduced in the parliament as a result of that two union territories have been created to ensure all round development of the both Union territories of Jammu and Kashmir. The creation of new union territories have many challenges such as to ensure right to life and personal liberty, right to health, right to education, right to peace, right to property and right to development particularly to those who are underprivileged. This paper examines the effect of revocation of special; status of J&K on its citizen with special reference to human rights and would substantiate the argument.

KEY WORDS : Instrument of Accession, Human Rights, Constituent Assembly Debates.

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1. <https://en.m.wikipedia.org> , Accessed on (15/05/2020)

I. INTRODUCTION

Every citizen of this country has been very much aware about the Jammu and Kashmir issue though not in detail but every Indian through news channels or newspapers has some idea about the controversy prevailing in that state. Many people had lost their hopes about Jammu and Kashmir that it would become integral part of India. It has many historical reasons. India is only country in this world where a state had its own constitution and flag due to this autonomy many North East states have been demanding separate status either in form of Bodoland or Greater Nagaland and this country has lost many lives of people in different movement led by extremist.

The state of Jammu and Kashmir had got special status of state because of Article 370 which was administered by Indian government from 1954 to October 2019. The provision of Article 370 was drafted as temporary, transitional and special provisions. The constituent Assembly of Jammu and Kashmir was empowered to recommend the application of Article 370 and other provisions. The central government after consulting the constituent Assembly of state issued presidential order 1954² specifying that what provisions of Indian Constitution would be applicable to the state of Jammu and Kashmir. Since the Constituent Assembly dissolved itself without making recommendation of the abrogation of Article 370. The Article 370 was deemed to have become permanent provision of the constitution. Another significant provision which created a lot of hindrance in the process of national integration was Article 35-A of the Indian Constitution which had empowered the Jammu and Kashmir state's legislature to define permanent residents of the state and few special rights and privileges to the residents of that state. Though, it was added to the constitution through a presidential order issued by then president. Dr. Rajendra Prasad i.e. the Constitution (Application to Jammu and Kashmir) Order, 1954³. Through this presidential proclamation some privileges were given to the residents of Jammu and Kashmir states such as right to purchase land and immovable property, right to vote and contest elections, right to employment and other benefits such as higher education and health care facilities. Indian citizens were not entitled to avail these benefits

2. <https://indiankanoon.org.doc> (accessed on 16/05/2020)

3. <https://en.m.wikipedia.org> (Accessed on 16/05/2020).

because of Article 35- A, that is why on 5th August 2019 the president of India issued a presidential order by declaring that all the provisions of the Indian Constitution shall be applicable to the state without any special provision. This would mean that the state's separate constitution stands inoperative and ineffective including all the privileges granted by the Article 35-A.

Apart from this there is another history of Jammu and Kashmir⁴ though Article 370 itself is gender neutral but the manner under which permanent residents are defined in the constitution of Jammu and Kashmir which is based on a notification⁵ issued by Maharaja Hari Singh during June 1932 which reveals that a woman from the state who marries outside the state shall lose her status as a state citizen.

Now abrogation of Article 370 and Article 35-A would definitely give a chance to the women of that state to marry with the citizen of this country. Not only matrimonial right of citizen have been retained but also right to life and personal liberty, right to movement freely across the country except Jammu and Kashmir has also been extended.

Since the president of India has issued a notification for revocation of special status of Jammu and Kashmir to ensure the concept of national integration embodied in the part 4 of the constitution but on the other hand after abrogation of Article 370 this country has to face many challenges such as what are the various issues and challenges before the union government, what would be the new policies for the betterment of Jammu and Kashmir and how peace and development can go in hand to hand should be seen in the light of Indian Constitution and through the lens of human rights perspectives which can be summarized in brief.

II. RIGHT TO LIFE AND PERSONAL LIBERTY

Every democratic country has recognised right to life and personal liberty as basic right to its citizen. Article 3 of Universal Declaration of Human rights, 1948 clearly talks about right to life and personal liberty that means every person has right to live with all human dignity across the globe. India being signatory member of Universal Declaration of

4. <https://indiankanoon.org> (Accessed on 16/05/2020).

5. Parliament library india.nic.in

Human Rights (UDHR) 1948⁶ has also recognized right to life and personal liberty as fundamental right under Article 21 of the Indian Constitution⁷ but unfortunately due to internal disturbance in the state of Jammu and Kashmir, state government as per National Crime Record Bureau (NCRB) has failed to ensure basic right to life and personal liberty particularly before abrogation of Article 370. People of J & K have been facing life threat due to rise of terrorism. Many people lost their lives and family members because of terror attack. Ultimately state is under obligation to protect the life and limb of its citizen and where state has failed to protect the life and limb of its citizen state is held liable for its failure and citizens are entitled to get compensation from the state.

After abrogation of Article 370, Union territory of Jammu and Kashmir has to own responsibility to take care of its citizen in effective manner so that people of that state can live with all human dignity without any fear.

Since right to life means right to live with all human dignity that is Human right⁸ provided under Universal Declaration of Human rights as well as fundamental right⁹ guaranteed under part III of the Indian Constitution but right to life has always been threatened from time to time by the militants in the state of Jammu and Kashmir. For this we have to look in to the history of J&K which happened in 1948 through instrument of Accession¹⁰ (IOA) signed by then Jammu and Kashmir state and then central government of India and after first attack by Pakistan in the state of Jammu and Kashmir and intervention made by United Nations Organisation (UNO) in 1948 by declaring “cease fire” and line of control (LOC) for both the countries India and Pakistan.

Since then every citizen of that state has been living in trauma, trauma of militant attack and proxy war created by the Pakistan against India. Particularly after ninety’s decade many people of that state have lost their lives due to Indo-Pak bitter relationship on that issue. A

6. Sudarshanam Gankidi, *Human Rights in India*, Rawat Publications, Jaipur, 2019,

7. V N Shukla’s *Constitution of India*, 13th edition, 2017, EBC, Lucknow.

8. Article 3 of the UDHR, 1948. (<https://indiankanoon.org.doc>.)

9. Article 21 of the Indian Constitution.

10. <https://en.m.wikipedia.org> (Accessed on 17/05/2020).

report¹¹ reveals that the Pulwama suicide bombing that left nearly forty CRPF jawans dead, the largest number of soldiers fighting at the borders and out of these 15 soldiers were from outside the state. However, it is very strange that those who lost their lives to protect the land are not given even a small piece of land because of Article 35-A, because they are outsiders.

In the light of above mentioned facts central government was constitutionally bound to protect life and limb of its citizen otherwise it would have been constitutional failure on the part of central government. Now it is the duty of union government to ensure the rights of the citizen of that state so that they can live with all human dignity.

III. RIGHT TO OWN PROPERTY

Right to property has been most significant right of an individual since inception of the civilization, which can be traced into ancient Hindu, text such as Manu Smiriti, and Yagyavalkya Smiriti. Ancient Indian society has been patriarchal society where property laws were in favour of male person and females were deprived of rights of property. Hindus were being governed by customary laws which varied from region to region. Hindu females were not allowed to own property. They did not have independent right to own property. Hindu women were not allowed to inherit to ancestral property after the death of their parent or husband before the commencement of the Hindu Succession Act, 1956.

After the commencement of Indian Constitution 1950 the entire situation has changed with preamble with objective that every person whether male or female is equal in eye of law. State under Article 15 is prohibited to make any kind of discrimination on the ground of race, caste and sex. In accordance with this provision Parliament enacted the Equal Remuneration Act, 1976 which ensures equal pay for equal work for men as well as women and women are also entitled to own property but because of Article 370 Indian citizens were not allowed to purchase the land in the state of Jammu and Kashmir. On the other hand International Instrument like Universal Declaration of Human Rights 1948 declares right to property as human rights

11. <https://www.thehindu.com> (published on 06 August, 2019) Accessed on 17/05/2020.

As per Article 17¹² of the Universal Declaration of Human Rights (UDHR) 1948 every human being is entitled to own property irrespective of his caste, creed and religion and can only be deprived by the state with due process of law. This human right was not available to non residents of Jammu and Kashmir state because of Article 35-A of the Constitution.¹³ Even people of neighboring state were not entitled to purchase the land or construct a house in that state whereas that state is integral part of India but due to special status of Jammu and Kashmir outsider were not allowed to purchase the land in that state though many army personnel who fought only to save that land they lost their lives in war against Pakistan as well as militants even their dependents could not purchase land or any house in that state, but after abrogation of Article 370¹⁴ and Article 35-A, now any citizen of this country can own property, or house in the state of Jammu and Kashmir, As a result of this multinational companies and different investors now can invest or construct factories or any establishment of their own choice. It has also opened the door for the establishment of public colleges and universities. It would also generate public employment and ratio in that state was low to the national average. Certainly revocation of Article 35-A would open the door of employment and remove poverty in Jammu and Kashmir.

IV. RIGHT TO EDUCATION

It is universally accepted that education is the backbone of any civilized country. The entire growth of a family a society and a nation depends upon the literacy rate of that country; literacy here means primary education as well as higher education. Developed countries are developed because they have good human development index (HDI) and education is one important component of HDI. India has also good parameter of HDI including education as an important factor, it has best software engineers working abroad whether it is developed countries like USA¹⁵. France and U.K or developing countries like South Africa, South Korea or African countries, everywhere Indian software engineer have proved their knowledge but this country itself is facing few challenges regarding

12. <https://www.un.org> (Accessed on 17/05/2020)

13. D.D. Basu Gankidi, *Human Rights in India*, (2019), Rawat Publications, Jaipur.

14. M.P.Jain, *Indian Constitutional Law*, 8th edition, 2018, LexisNexis, New Delhi, India.

15. www.in.undp.org, accessed on 17/05/2020.

implementation of constitutional right i.e right to education particularly in the state of Jammu and Kashmir. This state¹⁶ has 67.16% literacy rate as per 2011 population census out of which 76.75% is male literacy ratio and female literacy rate is at 56.43%. This ratio could have been higher if the state of Jammu and Kashmir would have recognized Article 35-A, because of these provision public colleges, medical colleges and public as well as private universities were not established in that state. No outsider had right to establish college or universities because of Article 35-A, but after revocation of Article 35-A now any one can purchase land and may establish college or universities definitely it would enhance the quality of education as well as economic growth of that state. Why this is necessary because right to elementary education¹⁷ is human rights and everyone is entitled to get at least elementary education free of cost as per the mandate of Article 26 of the universal declaration of human rights (UDHR).

In order to pay due respect to the universal declaration of human rights parliament enacted the right to education act 2009¹⁸ which was applicable to the whole part of the country except to the state of Jammu and Kashmir and it was only because of Article 370 of the Constitution¹⁹ which gave special status to the state. Recently parliament amended this act and passed the right of children to free and compulsory education (Amendment) Act, 2019²⁰ to abolish 'no detention' policy in the school.

Now every act is applicable to whole part of India including the Jammu and Kashmir. This act would be beneficial to fulfill the dream of the children of that state.

V. RIGHT TO HEALTH

COVID-19 pandemic has exposed the India's public health care system. There are two important factors which are responsible for weak public health care system first reason is low expenditure on public health and another significant reason is the absence of a statutory framework that guarantees right to health a fundamental right. Implementing the right

16. <https://www.census2011.co.in.state> (Accessed on 17/05/2020)

17. <https://www.humanrights.com> (Accessed on 17/05/2020).

18. V N Shukla's Constitution of India, 13th edition, 2017, EBC, Lucknow.

19. M.P.Jain, *Indian Constitutional Law*, 8th edition, 2018, LexisNexis, New Delhi, India.

20. <https://mhrd.gov.in> (Accessed on 17/05/2020)

to health within India's framework of Co-operative federalism would make this country capable to address the challenges posed by COVID-19.

NITI Ayog report (2019) has highlighted that various states in India had unequal public health welfare system. This is because of lack of technical expertise and financial constraint. Apart from this important subject like health there must be coordination between the centre and states to respond the challenges created by COVID-19 at the district and local levels.

The constitution of India through the Directive Principles of State Policy has imposed an obligation upon the states to provide a decent standard of living but the state of Jammu & Kashmir due to Article 370 had got special power and many health schemes of central government could not be effectuated implemented in the state.

Though right to health is not expressly recognized as fundamental right under Indian Constitution but the Supreme Court of India has recognized right to health as fundamental right and part and parcel of right to life guaranteed under Article 21 of the Constitution. It was held by the Supreme Court in *Arjun Gopal v Union of India*²¹ that right to health does not mean a mere absence of sickness but complete physical mental and social well being. The Apex Court further observed that providing adequate medical facilities is an essential part of the Constitutional obligation undertaken by the government in a welfare state and failure of a government hospital to provide timely medical treatment to a person in need of treatment results in violation of fundamental right guaranteed under Article 21 of the Constitution.

Under Article 47 the Constitution of India itself imposes Constitutional obligation to make an endeavor for raising and improving the condition of Public health. In pursuance of this constitutional directives and Judicial pronouncement central government and state governments from time to time make health insurance scheme just to ensure right to health of its citizens particularly for those who are unable to afford medical fees, expenses and hospital's other expenses²². Ayushman Bharat Scheme (ABS) is one of them. This health care scheme is one step ahead towards giving

21. Decided on 23/10/2018, <https://indiakanoon.org> (Accessed on 17/05/2020)

22. <https://en.m.wikipedia.org> (Accessed on 17/05/2020)

statutory recognition to right to health as fundamental right as well as statutory right and this right can be effectively ensured after the judicial pronouncement of apex court in *Anuradha Bhasin v Union of India*²³ where it held that access to the internet, mobiles and computers have become essential not just for communication but also for learning and getting an education.

The Supreme Court held that right to have access to the internet has become a right to education as well as right to dignity under Article 21 of the Constitution of India and thus blocking the same for the months is a violation of not just freedoms but also fundamental right to life, dignity and education. In digital era, ability to access the internet often determines access to health services as utilizing this device but at the same time it is also necessary to maintain harmony between public interest and private interest. If internet facility is misused by the public at large just to spread fake news or hate speech against the elected government which may create problem for public tranquility. Government should be given liberty to block the internet services. The only thing which is paramount for constitutional value that is reasonable restriction and government will have to justify its step on the ground of integrity and sovereignty of the state otherwise it would be glaring violation of fundamental right as well as Constitutional morality.

After abrogation of Article 35-A, it would be easy for the government as well as private hospitals to purchase the land and establish good medical colleges as well as large number of hospitals in Jammu and Kashmir state. It shall not only strengthen medical care facility but also ensure right to health as precious right to the citizen of that state. By doing this country would be able to pay due respect to this right to health as human right provided under Article 25 of the Universal Declaration of human Right²⁴.

VI. HOW RIGHT TO DEVELOPMENT WOULD WORK

After revocation of Article 370 and Article 35-A, another significant issue before both the union territories Laddakh and Kashmir is the effective implementation of human rights like right to development²⁵ though

23. AIR 2020 Sc. (<https://indiankanoon.org>, Accessed on 17/05/2020.)

24. <https://www.en.m.wikipedia.org>

25. <https://www.em.m.wikipedia.org> (Accessed on 19/05/2020)

this right was adopted as human right by United Nations general Assembly resolution 1986 (UNGA-1986) to ensure collective development of people particularly people of developing countries.

The right to development²⁶ is regarded as inalienable human rights which all people are entitled to participate, contribute and enjoy social, economic, cultural and political development. This right is people centered development and it emphasizes on such development is to be carried out in a manner in which all human rights and fundamental freedoms can be fully realized, people's participation in development equal distribution of resources among people so that people can feel that they have also been brought in to the main stream of the society.

The right to development posses three additional attributes which justify its meaning and specify how it may reduce poverty in developing countries, it enables environment under which marginalized and vulnerable groups of population can get social, economic and political benefits. How these benefits are available to the people of Laddakh and Kashmir union territories and how the citizen of Jammu and Kashmir could have been provided social, economic and political justice by then government?

There are various reports²⁷and researches which reveal that the people of that state could not get the benefit of development as they would have been in better position. As per the reports²⁸Human Rights abuses in Kashmir has been important issue pertaining to the territory dispute and conflict between India administered Jammu and Kashmir and Pakistan administered Azad Kashmir and Gilgit- Baltistan since 1947.

India administered Jammu and Kashmir was also facing several allegations of violation of human rights such as mass killing, forced disappearance, rape, torture and sexual abuse either by militant groups, extremist or sometimes allegations were against the forces deployed in that part of the state²⁹.

But after revocation of special status of Jammu and Kashmir the marginalized class and vulnerable groups would certainly get all the benefits of development. It's new challenge for the U.T government to ensure

26. <https://www.ohchr.org> (Accessed on 19/05/2020)

27. <https://www.ohchr.org> (accessed on 19/05/2020)

28. <https://www.jstor.org> (19/05/2020)

29. <https://www.en.m.wikipedia.org> (Accessed on 19/05/2020)

right to development to the citizen of both the Union territories by providing social justice, economical and political justice so that new process of development can be started in UTs.

It is needless to say that now a common man of that part who has not political background can also contest election and won that election, and few members from Laddakh have won that election without having any political background which shows that people have accepted the change and they need development rather than politics.

VII. RIGHT TO HAVE ACCESS OF WELFARE SCHEMES

Another significant right which needs to be recognized is right to have access of welfare schemes particularly to the farmers and poor people of both the union territories because India, being a welfare state is Constitutionally bound to ensure that whether beneficiaries are getting the benefits of the welfare schemes run by the government. Central government's motto Maximum governance and minimum government should be ensured. Why it is necessary because as per report³⁰ due to snowfall in valley Apple farming was in distress in 2019 which caused damaged about 80 billion dollar that is about 8% of total GDP of the Jammu and Kashmir and due to clampdown in valley. Farmers could not sale or transport their crops outside the state in spite of several assurances given by National agricultural cooperative making federation of India (NAFED). Farmers of that state have suffered great loss due to unreasonable snowfall in early November 2019 and threats of their lives by the militants but All these issues have been taken care of the central government after revocation of status to Jammu and Kashmir in state. According to governor of the state about eighty five welfare schemes³¹ have been implemented in both the Union Territories for the welfare of farmers and citizens of the Union territories. In spite of all adversities all the essential commodities and services except internet are being carried out properly by the government's authorities.

VIII IS RIGHT TO ACCESS INTERNET A FUNDAMENTAL RIGHT DURING COVID-19 PANDEMIC

Though right to access internet has become integral part of right to

30. <https://www.ortonline.org/research> (Accessed on 19/05/2020)

31. <https://m.economicstimes.com> (Accessed on 19/05/2020)

freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution with reasonable restrictions but the Constitutionality of this right was challenged by a foundation³²(The foundation for media professionals) in the Supreme Court claiming that 4G internet should be restored by the government to help the union territory to fight the COVID-19 Pandemic and Lockdown. But the affidavit filed by the government in the Apex Court stating that right to access the internet is not a fundamental right which includes free speech and expression including the fundamental right to trade, business and trade over the internet, can be curtailed by the state in general public interest because restriction like the reduction of internet speed was not only least restrictive but also most appropriate and has reasonable nexus with object sought to be achieved by the order i.e. protecting the sovereignty, integrity, security of state. The government further clarified that the state government while fighting the war against COVID-19 is also fighting a “Continuous War” against terrorist aided, abetted and encouraged from across the border.

IX RIGHT TO SHELTER

There are three significant rights to life and right to shelter, particularly right to shelter is most significant right for the survival of human being. These basic necessities have been paramount concern for the people since inception of the civilization. Many battles have been fought by the people to secure their existence to ensure their lives and shelter. Indian people have also fought great battle against the Britisher with utmost courage to secure their land and lives and free and independent shelter as a result of that India got freedom. After the commencement of Indian Constitution providing shelter to the Indian people who are underprivileged has been paramount concern of the states.

According to Article 11(1)³³ of the International Covenant on Economic, Social and Cultural Rights, 1966 all the member states to the covenant recognize “the right to everyone to an adequate standard of living for himself and his family including food, clothing, and housing and to the continuous improvement of living conditions”.

The preamble of Indian Constitution ensures to every citizen social

32. <https://www.thehindu.com/news> (Accessed on 20/05/2020)

33. Article 11(1) ICESCR, 1966.

and economic justice and equity of status and opportunity and dignity of person so as to promote fraternity among all sections of society in India, another provision of Indian Constitution Article 21 guarantees protection of life which encompasses within its ambit the right to shelter to enjoy the meaningful right to life.

In *Chameli Singh v State of U.P.*³⁴, Supreme Court for the first time held that right to shelter is an integral component of right to life guaranteed under Article 21 of the Indian Constitution. Right to life guaranteed in any civilized society implies the right to food, water decent environment, education, medical care and shelter. These are basic human rights recognized by every democratic country. After abrogation of special status of the state of Jammu and Kashmir, Central government as well as government of union territory Jammu and Laddakh have to provide shelter particularly to those people who are poor. Government will have to strengthen housing board by providing financial support to the board and effective plan of housing would enable the poor people to connect with the cultural heritage of this country.

The government of India³⁵ took a major initiative by introducing *Pradhan Mantri Awas Yojana* to the people of India giving them a hope of roof. Jammu and Kashmir Bank provides loan under this scheme in order to help beneficiaries to purchase or construct new houses. This scheme was launched on 25 June 2015 and this scheme is dedicated to provide houses to every individual by 2022. Under these scheme women, people belonging to Schedule Caste, Schedule Tribe, Economically weaker section and lower income group are eligible for taking benefit of loan but demerit of this scheme is that loan subsidy is available only up to Rs 6 lacs. If loan amount is above 6 lacs then no subsidy is allowed. Government should enhance this limit up to 8 lacs so that objective of this scheme could be materialized.

Housing and Urban Development Department of government of Jammu and Kashmir is dedicated to provide shelter to the weaker section of the society under PMAY scheme beneficiaries will be provided loan to construct houses at very low interest but government should identify those people who cannot afford loan or very poor should be provided

34. AIR 1995 S.C Page No.

35. [www.jkslbc.com.\(pmay\)](http://www.jkslbc.com.(pmay)) visited on 15/05/2020.

houses free of cost so that right to shelter as fundamental right could be ensured by the state of Jammu and Kashmir housing board³⁶ is planning to construct 30000 new housing units in Jammu with the help of Jammu development authority to provide affordable houses in a time bound manner.

X. CONCLUSION

Article 370 and Article 35-A of the Constitution had given special status to the state of Jammu and Kashmir and because of this the state had its own Constitution, separate flag and dual citizenship, many fundamental rights were not applicable to the citizens of Jammu and Kashmir state and state had closed economy it could not connect the economic growth of the country, more importantly right to primary education was also not applicable in that state, women's right to marry as a human right guaranteed under Article-16 of the universal declaration of Human Rights (UDHR) was also not applicable in that sense if they would get married with non- resident of Jammu and Kashmir, they might lose their citizenship, that state has parallel Constitution without adequate safeguards to the minorities, many schedule castes were also deprived from the benefit of reservation. Article 35-A did not allow the thousands of Dalits who were brought in the state from Punjab in 1957 to get any government jobs other than sweepers. They could not get certificate of schedule caste as a result of that they could not get the benefit of central government's employment scheme, but after revocation of special status of Jammu and Kashmir the most significant provision of the Indian Constitution right to equality shall be applicable to the minority community such as Sikh, Kashmir pundits, Buddhist they will get equal right as majority people have got in that state and now union territories government is constitutionally bound to ensure these rights. Apart from this it would be easier to accelerate the pace of development in the UTs with the help of PPP model and private investments. New economic policy in the UTs would create a lot of avenues in public as well as private sector for the youth of that territory who had been misguided by the Elite political families in the name of 'Jehad'. By creating more job opportunities to the citizen of that Union Territory so that misguided youth can also be brought into

36. www.realityeconomicstimes.indiatimes.com visited on 15/05/2020.

the main stream of society and it would be helpful in curbing terrorism in the valley. After revocation of Article 370 and Article 35-A Kashmir women are benefited in the sense that they are now free to marry with any person of the country to whom they wish without losing their citizenship right.

Now Muslim Women are also free from Triple Talaq because the law of land will apply and it will enable them to prosecute their husband from pronouncing Triple Talaq as Muslim women of the rest part of the country are feeling their victory on Triple Talaq legislation. Above all right to education (Primary or Higher) and education for all now would be available to the people of this Union Territories as it is available to other people of the country.

On the basis of above analysis it appears that now responsibilities on government's authorities have increased to provide the benefit of all governmental welfare schemes, so that they can feel that this is the only way of peaceful life because every citizen of a country wants to live peacefully. Therefore the people of Laddakh and Kashmir territory should be hopeful for their bright future.



NOTES AND COMMENTS

DECRIMINALIZATION OF ADULTERY IN INDIA : A SOCIO LEGAL UPHEAVAL

*PRAVEEN MISHRA**

*SONAM YANGCHEN BHUTIA***

ABSTRACT : The law of adultery has been a contentious issue in various jurisdictions of world. Punishment for adultery varies in different jurisdictions. Most of the common law countries have decriminalized it. Decriminalization has also been demanded since long in India. But the legislative inaction has eventually compelled Indian judiciary to address the issue. Our ethical considerations on issues like prostitution, Death Penalty, sedition and sexual relations falling under the realm of criminal laws of the land are different from our counterparts in different parts of the world. The law of adultery of west may not be apt for us due to our different socio legal considerations. Public opinion shapes law and at times law also shapes public opinion. The pertinent question that needs to be considered is whether public opinion should shape the law of adultery or the law will shape the public opinion in India. The author is of the opinion that offences against marriage prescribed under Indian Penal Code should be reexamined having regard to our present socio- legal context which has significantly changed over the years. As the parliament has come up with a law relating to triple Talaq under Muslim matrimonial laws and penalised the pronouncement of triple Talaq, the parliament should have also taken the ideological position to decide whether it intends to decriminalize adultery. These are the ideological positions which fall within the domain of

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policy framers. The review paper is an attempt to make a socio legal -analysis of the law of adultery in India and provide some suggestions for the streamlining the law of adultery and make it more purposive. The methodology which has been adopted in the present study is doctrinal and analytical.

KEY WORDS : Adultery, Crime, Divorce, Discrimination, Gender.

I. INTRODUCTION

Cambridge dictionary defines adultery as “sex between a married man or woman and someone he or she is not married to.”¹ The Merriam-Webster’s defines “voluntary sexual intercourse between a married person and someone other than that person’s current spouse or partner.”² Under the Common Law, the offence of fornication was meant to be “an unlawful sexual intercourse between an unmarried woman and a man, regardless of his marital status.”³ For the offence of adultery in India, it is necessary that the woman is married⁴. The legal definition of adultery however has added an element of knowledge on the part of a man of having voluntary sexual intercourse with a woman “who is and whom he knows or has reason to believe to be the wife of another man.”⁵ The definition of adultery varies from one country to another. While in some jurisdictions adultery is when a woman has voluntary sexual intercourse with a person other than her husband, in other jurisdictions offence of adultery is committed when a woman has voluntary sexual intercourse with a third person without her husband’s consent.⁶ Although the definition of “adultery” differs in nearly every legal system, the

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1. <https://dictionary.cambridge.org/dictionary/english/adultery> last visited on 26.2.2020.
 2. <https://www.merriam-webster.com/dictionary/adultery> last visited on 26.2.2015.
 3. <https://legal-dictionary.thefreedictionary.com/Fornication> last visited on 7.2.19
 4. Section 497 I.P.C .
 5. Section 497 of the Penal Code 1860 states: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor.
 6. *People v. Stokes*, 71 Cal. 263, 12 P. 71 (1886).

common element in all definitions in different jurisdictions is sexual relations outside the wedlock of marriage.⁷ Law of adultery is a culmination of practices and customs requiring marriages to be monogamous.⁸ In most cultures both the offending man and the woman are liable to punishment. Under the ancient Hindu law, in ancient Greece and in Roman law, only the offending wife was killed but the offending man was not liable to severe punishment.⁹ However the recent trend regarding the law of adultery is to decriminalize the offence of adultery.

II. STATUTORY FRAME WORK UNDER PERSONAL LAWS

(i) Hindu Law

Section 13 (1) (i) of the Hindu Marriage Act, 1955 has dealt with adultery as “any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.” Prior to 1857, the husband could file a petition for divorce on the ground of wife’s adultery (single act was enough), but a wife had to prove adultery coupled with either incest, bigamy, cruelty or two years desertion or alternatively, rape or any other unnatural offence.¹⁰ The Matrimonial Causes Act, 1923 put both spouses at par and wife could also sue for divorce on the ground of adultery simpliciter.¹¹ While the original Hindu Marriage Act 1955 made single act of adultery a valid ground for the matrimonial relief of judicial separation, for a decree of divorce, it was necessary to prove that the other party was ‘living in adultery.’ After an amendment Act of 1976 under the Hindu Marriage Act of 1955 a single

7. Tanuj Kanchan, K. R. Nagesh, “*Adultery and the Indian Law*” Vol. 10. IJMFM, 2008.

8. Joseph Shine v. Union of India 2018 SC 1676.

9. vijaykumar Chowbe and Shrikrushna, “Adultery – A Conceptual and Legal Analysis” 2011. Available at SSRN: <https://ssrn.com/abstract=1856991> or <http://dx.doi.org/10.2139/ssrn.1856991> last visited on 30.2.2020.

10. Paras Diwan, Family Law, 6th edn. 2001, p.124, Allahabad Law Agency, Faridabad (Haryana)

11. Id.

act of adultery is regarded as a cause for divorce.¹² If the aggrieved spouse condones the act of adultery of the other spouse, the petitioner does not have a valid case against the spouse guilty of adultery.¹³ Adultery before the enactment of the Marriage Laws, 1976 was considered a conduct of grave immorality however it wasn't a ground for divorce.

(ii) Muslim Law

The concept of Lian is prevalent in Islamic laws. When a man falsely accuses his wife of adultery it is a presumable offence. In the case of Tufail Ahmad vs Jamila Khatun¹⁴ it was held by the court that a false charge of adultery is a ground for the dissolution of marriage.¹⁵ When husband accuses wife of having committed an act of adultery the husband has two options, he can either substantiate the charge or retract.¹⁶ If the husband fails to substantiate the charge of adultery and does not retract then the wife can bring a claim for dissolution of marriage against the husband. But if the husband from such allegation retracts, the wife's claim no longer exists.¹⁷

As per quranic text adultery is a very serious offence under muslim law and the guilty woman is dealt with by being stoned her to death.¹⁸ But this kind of punishment is not prevalent in India. Adultery by a muslim woman is dealt under Indian penal Code. But now adultery has been decriminalized. The husband has every right to divorce his wife if he is capable of proving that his wife had an adulterous relationship after the solemnization of marriage.

12. Somasekharan Nair vs Thankamma AIR 1988 Ker 308.

13. Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and Ors. AIR 1967 S.C 581.

14. AIR 1962 All. 570

15. This ground falls under clause(ix) of section 2 of Dissolution of Marriage Act, 1939.

16. In Shamsunnessa Khatun v. Mir Abdul Mannaf, AIR 1940 Cal 95, Akram, J., said; "The purpose behind the principle of retraction is to give the husband a locus poenitentiae before the marriage is dissolved. The object is to reestablish cordial relationship between husband and wife. The retraction therefore must be bona fide and not a mere device for defeating the suit for dissolution."

17. This, however, has gained recognition in India under Section 2 of the Shariat Act, 1937.

18. Supra note 11.

(iii) Parsi Law

Parsi Marriage and Divorce Act, 1936 provides adultery as a ground for divorce.¹⁹ It is also necessary to make the adulterer co-defendant under the suit for divorce and the adulterer is also liable to pay the cost of proceedings.²⁰ Adultery is also a ground for judicial separation.²¹ Parsi Marriage and Divorce Act provide equal treatment to both the male and female spouses, guilty of adultery.²²

(iv) Christian Law

Adultery is a ground for the dissolution of marriage.²³ Petition for dissolution of marriage could be filed either by husband or wife against the party guilty of adultery.²⁴ Before the judgment in the case of *Ammini E.J. And Etc. vs Union of India*²⁵ Christian woman could file a petition for dissolution of a marriage for adultery, it either had to be incestuous or coupled with other grounds like desertion or cruelty.²⁶ The law was considered to be discriminatory as the ground of adultery was way more favourable to men than to the wife as she not only had to prove adultery but also has to prove another ground. Such discrimination was purely on the basis of sex and hence, violated Article 15 of the Constitution.²⁷ Section

19. Section 32(d)

20. Section 33 provides. "In every such suit for divorce on the ground of adultery, the plaintiff shall, unless the Court shall otherwise order, make the person with whom the adultery is alleged to have been committed a co-defendant, and in any such suit by the husband the Court may order the adulterer to pay the whole or any part of the costs of the proceedings."

21. Section 34 provides any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce.

22. Section 32 (d) states "Any married person may sue for divorce on any one or more of the following grounds, namely:—that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact."

23. Section 10(1)(i).

24. Section 11.

25. AIR 1995 Ker .252.

26. Section 10 as it was before the judgment of *Ammim v Union of India* AIR 1995 Ker 252.

27. The court agreed with the observation of Justice V.R. Krishna Iyer in "The Indian Divorce Act, 1869 and the Christian Marriage Act, 1872 are dated survivals with an anti-woman slant. The Divorce Act directs Free India's courts to apply English matrimonial law — at once an affront to Indian Christian dignity and our

11 of the Act, however, provides that the adulterer has to be pleaded as co-respondent. The provisions for Judicial separation under the Indian Divorce Act allow Christian women to file judicial separation on the grounds of adultery.

III. ADULTERY : THE SPECIAL MARRIAGE ACT, 1954

The special marriage Act 1954 provides adultery as a ground for dissolution of marriage. It states that if husband or wife enters into a voluntary sexual inter course after the solemnization of the marriage, it is a ground for divorce. It is important to mention that under the Special Marriage Act adultery itself is as an offence and no additional ground is required for dissolution of marriage or judicial separation²⁸ in the petition for dissolution of marriage on the ground of adultery it is necessary for the petitioner of the divorce petition to make adulterer a co-respondent.²⁹

IV. ADULTERY UNDER THE CRIMINAL LAW

The offence of adultery is committed by a man who indulges into sexual intercourse with the wife of another man without her husband's consent. Section 497 of Indian penal Code has penalised adultery and prescribes punishment up to five years of imprisonment and fine.³⁰ The wife is not punishable for being an adulterous, or even as an abettor of the offence³¹. The objective behind penalising of adultery is to punish a person who undermines the sanctity of relation arising out of marriage.³²Section 497 further provides “ the adulteress “wife” is free

injury to that community's women. The husband can divorce his wife on grounds of adultery by wife while the reverse is denied. Statutory discrimination against women in other areas are not uncommon, but who cares to compel laws in the books to speak the language of gender justice?”

28. Section 27(1)(a)

29. Section 41(2)(a)

30. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

31. Section 497I.P.C .

from any kind of criminal responsibility. She cannot be punished even for abetting the offence.”³³ Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.³⁴ The constitutional validity of section 198Cr.P.C was challenged in the case of *V. Revathi v Union of India & Ors*³⁵ on the grounds of discrimination prohibited under the Constitution of India. However the Supreme Court refused to accept that section 198 Cr. P. C was hit by hostile discrimination. Section 497, considers wife as a victim of adultery rather than perpetrator or an accomplice. Adultery is an offence against the husband of the wife involved in adultery.

V. SOCIAL ETHOS & PUBLIC MORALITY IN CONTEXT OF ADULTERY

Social temperament against adultery and criminalization of adultery is divided. Sanctity of a marriage whether it is Hindu marriage, Muslim marriage, Christian marriage or Parsi marriage sanctity of marriage has been valued in all societies and infidelity of a party to the marriage is injurious to the wedlock of marriage and society at large. How the society considers adultery depends upon the civilisational values of the society. Whether adultery should be criminalised is a debatable issue. The opinion of majority is aligned towards making adultery a civil wrong rather than making it a criminal offence. The wind of change on the issue has lately affected India. The central government in *Joseph Shine vs. Union of*

32. *V. Revathi v Union of India*, AIR 1988 SC 835.

33. See *V. Revathi v Union of India*, AIR 1988 SC 835 where the court observed “The contemplation of the law, evidently is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime.”

34. Section 198 of the Code of Criminal Procedure, 1973 which provides Prosecution for offences against marriage. — (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

35. AIR1988 S.C 835.

India³⁶ was of the opinion that anti-adultery laws were required to protect the “sanctity of marriage and the institution of family.” and any attempt to do away with these laws would hurt “Indian ethos.”³⁷ The National Women Commission, India however has opposed any amendment in criminal law to penalise woman involved into adulterous act and has recommended making adultery a civil wrong.³⁸ The Supreme Court of India has also insinuated that husband or wife should not strike against the spouse guilty of adultery with criminal action.³⁹ Justice V.S. Malimath was of the view that adultery undermines the sanctity of marriage so wife involved in adulterous act should not be absolved of her liability for penal action and should be treated with equality as regards the penal liability for adultery is concerned.⁴⁰ Majority of lawyers and judges who expressed their opinion in the study carried out by second law commission were in the favour of retention of section 497 which punishes adultery.⁴¹ Lord Macaulay was of the view that providing punishment for act of adultery will not have any advantage. The 2nd Law Commission of 1853 did not agree with the views of Macalaly and kept adultery as an offence against marriage. However the commission was guided and concurred with Macaulay on the status of woman in India and absolved woman from the penal liability for the act of adultery.⁴² The United Nations Human Rights

36. (2018) 2 SCC 189.

37. Samanwaya Rautray, ET Bureau Anti-adultery laws must to protect marriage: Government to Supreme Court available at <https://economictimes.indiatimes.com/news/politics-and-nation/anti-adultery-laws-must-to-protect-marriage-government-to-supreme-court/articleshow/64954695.cms> last visited on 12.7.2018.

38. Amartya Bag , Adultery and the Indian Penal Code: Analysing the Gender Neutrality of the Law Available at SSRN: <https://ssrn.com/abstract=1627649> or <http://dx.doi.org/10.2139/ssrn.1627649> . last visited on 19.3.2020.

39. NCW rejects proposal to punish women for adultery, The Hindu, visited on Dec 26, 2006, Available at <http://www.hindu.com/2006/12/26/stories/2006122603270900.htm>. last visited on 19.3.2020

40. Justice V.S. Malimath, Committee on Reforms of Criminal Justice System, (Government of India, Ministry of Home Affairs) March. 2003.

41. Law Commission of India, 42nd Report on the Amending of Law in Indian Penal Code, 1860(1971).

42. Macaulay on the status of woman stated “Though we well know that the dearest interests of human race are closely connected with the chastity of women

Commission has also expressed its concern against penalising private sexual relations of consenting partners even if it amounts to debauchery in a particular jurisdiction.⁴³

VI. LAW OF ADULTERY: A COMPARATIVE ASSESSMENT IN SELECT JURISDICTIONS

In United States of America the law of adultery is different in various states.⁴⁴ There are three systems prevalent in the United States which is common law where the offence of adultery is committed when woman is married. Under the common law both the parties involved in adulterous act are penalised. Under canon law only married persons are liable. According to the hybrid rule, both the parties involved in sexual intercourse are guilty of adultery.⁴⁵ There are eight states where both the partners of adultery are liable for punishment if the woman is married. There are few states which do not penalise adultery.⁴⁶ In England adultery is not a crime.⁴⁷ In India adultery was a crime before the Supreme Court Judgment

and the sacredness of nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law.”

43. 50 Concluding observations of the Human Rights Committee : Egypt, (United Nations 2002), online at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) visited on 1.2. 2017.
44. Alyssa Miller, Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and their Effects on Women Fordham International Law Journal, Volume 41, Issue 2.
45. Supra note 11.
46. Supra note 43.
47. Ruth A. Miller, The Limits Of Bodily Integrity: Abortion, Adultery, And Rape Legislation In Comparative Perspective at 122-23 (Ashgate 2007).

of Joseph Shine vs. Union of India⁴⁸ but after the said judgment adultery no longer remains a crime.

VII. JUDICIAL PARADIGM

In the case of Yusuf Abdul Aziz vs. The State of Bombay and Husseinbhoj Laljee⁴⁹ Section 497 of the Indian Penal Code was challenged to be violative of Article 14 and 15 of the Constitution of India. The Supreme Court held that Article 14 is general provision and should be read keeping in view the other provisions of part III of the Constitution of India namely Article 15, and 16. It further observed:

“Sex is a sound classification and constitution itself provides for the exceptions to the women and children.”

On the issue of exculpating woman from penal liability for adulterous intercourse it further commented:

‘We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount, to a license to commit the offence of which punishment has been prohibited.’

The Supreme Court in the case of *V. Revathi v Union of India & Ors*⁵⁰ endorsed the collective wisdom of policy framers for not allowing the woman aggrieved of her husband’s adulterous intercourse with another woman refused to consider section 198, Cr P C hostile discrimination against a woman.⁵¹ In the case of *V. Revathi v Union of*

48. (2018) 2 SCC 189.

49. 1954 AIR S.C 321.

50. 1988 AIR S.C 835.

51. The Supreme Court stated “philosophy underlying the scheme of these provisions appears to be that as between the husband and the wife social good will be promoted by permitting them to ‘make up’ or ‘break up’ the matrimonial tie rather than to drag each other to the criminal court. They can either condone the offence in a spirit of ‘forgive and forget’ and live together or separate by approaching a matrimonial court and snapping the matrimonial tie by securing divorce. They are not enabled to send each other to jail. Perhaps it is as well that the children (if any) are saved from the trauma of one of their parents being jailed at the instance of the other parent. Whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law.”

*India & Ors*⁵² the Supreme Court held that under the provisions of Section 497 the husband is entitled to prosecute a person who has committed adultery with his wife but he cannot prosecute his wife who has committed an act of adultery. The Court observed “the wife who is involved in an extra-marital sexual relationship is not an author of a crime but is a victim and the legislature considers it to be offence against the sanctity of a matrimonial home, and the offence is generally considered to be committed by a man.” However the Supreme Court of America in this context had a view which is different from the view taken by Supreme Court of India and stated that where male and female counterparts are on an equal footing denying the right to prosecute the husband involved in adulterous intercourse will be denying the woman aggrieved of her husband’s adulterous intercourse, equal protection clause contemplated in American Constitution. The Supreme Court of India in the cases of *Sowmithri Vishnu v Union of India*⁵³ left it to the policy framers to take note of the transformation in the status of woman that has taken place over the years and observed “it is commonly accepted fact that is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the legislature to consider whether section 497 should be amended appropriately so as to take note of the transformation which the society has undergone.” In the cases of *Joseph Shine vs. Union of India*⁵⁴ the Supreme Court stated that censorship has an important bearing on human dignity and a dignified life includes right against unwarranted censorship. The state has a bounden duty to evaluate the suitability of criminal action to regulate a conduct which it considers harmful for individuals. Criminal action to regulate should be considered only when civil action fails to serve the social purpose the state aims by bringing criminal action.

VIII. INTERNATIONAL HUMAN RIGHTS INSTRUMENT

Article 10 of the Universal Declaration of Human Rights stipulates that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights

52. AIR1988 S.C 835

53. AIR1985 S.C 1618.

54. (2018) 2 SCC 189.

and obligations and of any criminal charge against him.” Woman aggrieved by the adulterous intercourse suffers in myriad ways so she can be certainly considered to be a victim under the human rights laws.⁵⁵ Article 4 of Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides for right to access to mechanism of justice for redressal of harm suffered by the victim.⁵⁶ According to International human rights jurisprudence, “criminalization of sexual relations between consenting adults is a violation of their right to privacy and infringement of article 17 of the International Covenant on Civil and Political Rights.”⁵⁷ State parties to the Covenant have an obligation to ensure that their domestic laws should be in consonance with International human rights jurisprudence.⁵⁸ The experts on the Working Group on *the issue of discrimination against women in law and in practice* observed “Maintaining adultery as a criminal offence – even when, on the face of it, it applies to both women and men – means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women.”⁵⁹

IX. CONCLUSION

Judicial dicta on law of adultery has scrapped out section 497 of Indian Penal Code as violative of Article 14 and 15 of the Constitution of India and it being opposed to international human rights jurisprudence. Various jurisdictions have decriminalized adultery and held it to be a civil

55. *Article 1 of Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985.*

56. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985.*

57. UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

58. Office of the High Commissioner for Human Rights, “‘Adultery should not be criminal offence at all,’ says UN expert group on women’s human rights,” October 18, 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12673&LangID=E> last visited on 24.3.2020.

59. <https://ohrh.law.ox.ac.uk/decriminalizing-adultery-eliminating-discrimination-and-violence-against-women/> visited on 4.4.2020.

wrong. It is a settled principle that policy considerations are beyond the competence of judicial intervention. But the Supreme Court has taken a view different from the view taken in the Sowmitra case referred above where it held that it is upon the legislature to consider the change in the condition of woman that has taken place over the years and then take a position on the issue of amendment of section 497 of I.P.C. Preservation of purity of institution of marriage is essential for protection and promotion of social harmony. The legislature has prohibited triple Talaq and imbibed penal provisions in context of triple Talaq under Muslim personal laws where as adultery which have been considered injurious to sanctity of institution of marriage and have serious repercussions on the life of the person aggrieved by husbands or wife's involvement in adulterous intercourse, has been decriminalized. Consistency is virtue and inconsistency is a vice of law. The inconsistency of law on the issue of matrimonial relief needs to be addressed. The law of adultery requires being discussed and debated by the policy framers and adultery needs to be criminalised. Section 497 I.P.C needs to be redrafted and fine-tuned with personal laws of our legal system to make our civil and criminal laws supplementary and complimentary and to make our legal system coherent and symmetrical. Laws cannot be incongruous or self-contradictory nor can a legal system be incoherent and opaque.



NEXUS BETWEEN CHILD LABOUR AND ECONOMIC INCAPACITY: AN ANALYSIS FROM THE HUMAN RIGHTS PERSPECTIVE

SURAVI GHOSH*

ABSTRACT : The phenomenon of child labour is an age-old concept. Since ancient time, child labour existed in Indian society. 'Dasya Pratha' of tender ages was one of the pernicious practices that had been in existence from the time immemorial. This plight of children has been perpetuated in one or other form with the evolution of Time. In most of the cases of child labour, economic incapacity is one of the main reasons behind the wide prevalence of it. Poverty can be explained as a situation in which people are incapable to fulfill their basic needs. India is such a country where approximately one third of its total population is under starvation. When parents are in hand to mouth situation or they do not get enough work to feed the family properly, they are compelled to send their children to work. Lack of employment, indebtedness etc. are some of the main reasons for those unfortunate families to force their children to go to work even when they know it very well that the work or labour is not at all proportionate to their age, physical capacity as well as mental health. A gross human rights violation can be located against those children. In this Article, an attempt is made firstly, to analyze the fact that being an important factor of economy, poverty is playing the key role for increasing the menace of child labour and secondly, to elaborate the legal provisions prevalent in our

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country for the protection of this vulnerable group from the engulfing curse of child labour as well as the loopholes in legal framework. Apart from the national initiatives attempt is also made to highlight the areas of International initiatives and lastly how the Indian Judiciary has played the pivotal roles in protecting the child rights and eradicating the crimes occurred against those tender ages.

KEY WORDS : Child Labour, Economic depravity, Human Rights violation, Vulnerable Group, Legal provisions.

I. INTRODUCTION

The existence of the issue of child labour is considered as one of the biggest challenges of our society. It is a curse and stigma upon the society, a malady that may destroy the economic backbone of a country. The problem is obviously multidimensional. The rights of the child are marginalized. *Prima facie* it seems rational to send children to work to augment family income in economic stricken society but it is to be remembered that it is at the cost of their physical, mental as well as emotional development. The practice of child labour is an age-old phenomenon in India. Existence of child labour in different periods has marked the history with the stigma of children's plight.

Since ancient time, slavery or *Dasya Pratha* was one of the pernicious practices, which had huge confrontations with human dignity. During this period, children of slaves were born as slaves. They were treated as chattels. However, an approach on humanitarian ground towards children was also recognized in Indian culture. Kautilya considered child slavery as degrading practice of the then society¹. He strictly prohibited the purchase or sale of children of less than 8 years of age. Economic status of that oppressed class was worse than ever².

During medieval period, child labour was rampant. A class of destitute labourers became wide spread in society. These labourers used the children to help in economic activities. In pre-capitalist India, works of children were informal in nature. Children were allowed to work in a family environment in nonhazardous manner. That image underwent a radical change on the advent of capitalism in the industrialization during the 18th

1. Kautilya, *Artha Shastra.*, Part III, Chapter 13,

2. *Ibid.*

century and child labour began to be designated as a social menace.

The lust of new economic forces of capitalism and abnormal growth of industrialization started destroying the family based economy. In addition, it was a new turn of over-all socio economic structure of the society. At that time employers were free to bargain with labourers. Agriculture based economy somehow shifted towards industry-based economy. Due to all these reasons, children were forced to earn wages not only for themselves but for the other family members as well. The environment of the work places was completely different from environment of home. The rude face of industrialization exposed those tender ages to the environment, which was devoid of innocence. The working hours were quite long. Many children were employed in cotton mills, jute mills, coalmines, even for underground works. After independence, not much dynamic change was located. Still it is prevailing everywhere in one or the other form. Moreover, undoubtedly it is crime. A crime against children as well as it is a crime against the society at large and the entire humanity. All the jurists of law are undoubtedly unanimous regarding the fact that with the burden of this kind of menace society cannot be empowered.

II. MEANING OF 'CHILD LABOUR'

The term 'Child' is defined as any person below the age of 14³ and employment of any child in any hazardous employment including domestic help is prohibited⁴. The term 'child labour' is often defined as work that deprives children of their childhood, their potential and their dignity and that is harmful to their physical and mental development. It refers to work that:-is mentally, physically, socially or morally dangerous and harmful to children; and /or -interferes with a child's ability to attend and participate in schools fully by obtaining them to leave school prematurely or requiring them to attempt combine school attendance with excessively long and heavy work⁵.

3. *The Child Labour (Prohibition and Regulation) Act, 1986* (Act 61 of 1986), s.2(ii)

4. *The Child Labour (Prohibition and Regulation) Amendment Act, 2016* (Act 35 of 2016), The Schedule, s. 3A

5. *Child Labour: A Textbook for University Students*, (2004) International Labour Organization, ISBN web pdf version: 92-2-115549-8:16

India's census office 2001 defines child labour as participation of child less than 17 years of age in any economically productive activity with or without compensation, wages or profit. Such participation could be physical or mental or both. This work includes part time help or unpaid work in the farm, family enterprise or in any other economic activity such as cultivation or milk production for sale or domestic consumption.

III. NEXUS BETWEEN POVERTY AND CHILD LABOUR

The world health organization (WHO) has described poverty as the greatest cause of suffering on earth. Sociologist offers two definitions of poverty: Absolute poverty-refers to lack of necessities such as food, shelter. Relative poverty-refers to a situation in which some people fail to achieve the average income or lifestyle enjoyed by the rest of the society⁶. Poverty dumps a crowd of problems onto a child. Not only do these problem because immediate suffering they also comprise to keep the poor child throughout his or her life⁷.The increasing gap between the rich and the poor, privatization of basic services and the neo-liberal economic policies are the causes to make major sections of population out of the employment and without basic needs. This adversely affects children more than any group⁸ UNICEF suggests poverty is the biggest cause of child labour. A BBC Report similarly concludes poverty and inadequate public education are the main reasons of child labour in India.ILO and OSSE (Spreading Smiles through Education Organization) suggests poverty is the greatest single force driving children into workplace.

Child labour is both the reason and the consequence of poverty. They are heavily interlinked with each other. Poverty and lack of livelihood lead to a child to contribute to the family income. Often children are also compelled to go to work due to the indebtedness of family. Overall, the economic circumstances of the family including adult unemployment or under employment, indebtedness, inability to fulfill the basic needs of the family contribute much more than any other factors to give a heinous outlook of child labour.

6. Anna Leon Guerrero (ed.), *Social Problems Community, Policy and Social Action* 224. Prime Forge Press, 3rd edn)

7. <http://www.thehindu.com/opinion/op-ed/childhood-foregone/article21011313.ece> (last visited on June 25,2020)

8. <http://www.childindia.org.in> (last visited on June 25,2020)

The story does not end here. The presence of large number of child workers is considered as a serious issue in terms of economic welfare of any country. Child labour has long term adverse effects for India. The young labourers of present time will be a part of India's human capital tomorrow. According to ILO, there are tremendous economic benefits for any developing nation by sending children to school instead of work.

IV. LEGISLATIVE FRAMEWORKS BEFORE INDEPENDENCE AND AFTER INDEPENDENCE

The first protective legislation for child labour was enacted in the year 1881. This was known as *the Factories act 1881*. This enactment only covered the area regarding factory. It dealt with the minimum age and the working hour of the child. After few years, in accordance to the recommendations of the Factory Commission, in the year 1891, *the Factories Act 1891* was enacted with a view to increase the age of the working child.

In 1901, *the Mines Act 1901* was passed which at the same time prohibited the employment of child below 12 years of age in mines. The significance of new *the Factory Act 1911* lies in the fact that it reduced the working hours (6 hours) per day. With the progress of time, suitable amendments are made to cope up the ILO Conventions. According to the provisions of *the Tea District Emigrant Labour Act, 1933* no child under 16 years of age shall be employed and immigrated to the district unless accompanied by his parent or adult relative.

In *the Factories Act 1948*, the minimum age of admission to the employment also raised to 14 years. 6 months of imprisonment and compensation of Rs. 500/- can be given under section 22 of *the Minimum Wages Act 1948*. Under the same legislation the relevant terms as child, adolescent are also defined.

(a). Constitution of India

It was after independence that, the founding fathers of the nation became aware that employment of the children is one of the manifestations of the pervading poverty in the country and realized the nation's responsibility towards that tender age group. That was why the framers of the Constitution deemed it needful to make special provisions for the protection of working children. They are embodied under Art. 15(3), 21,

21A, 23, 24, 39(e) and 39(f), Art 45, Art 46 and 51A (k). Apart from these provisions, in the Preamble it also lays down the principle of 'socio-economic justice' by which indirectly the forefathers of our Constitution extended the very concept of empowerment to the most fragile section of society, the children. India has a federal form of government, and labour being a subject in the Concurrent list, both the Central and the State Govt. can legislate on the issue of child labour.

Some other enactments regarding the issue of child labour after passing of our Constitution were - the Mines Act 1952; Motor Transport Workers Act 1961, Apprentice Act 1961, the Cigar Workers (Conditions and Employment) Act 1966, the Child Labour (Regulation and Abolition) Act 1970. Apart from these above mentioned legislations Govt. of India had constituted First National Commission on Labour in 1969 and just after five years Govt. of India adapted and introduced National Policy of Children in 1974. The policy has laid down that no child under the age of 14 years shall be permitted to engage in any hazardous occupations or be made to undertake heavy work. The National Children's Fund 1979 was created under the Charitable Endowment Fund Act, which provides financial assistance to the voluntary agencies for implementing programmes for the welfare of the children including rehabilitation of destitute children. Again, Govt. had formulated the National policy on Child Labour in the year 1987. The policy focuses mainly on three welfare aspects of the child firstly, on the enforcement of child labour, secondly, on the families of child workers to avail the benefits of the welfare and thirdly to take up the projects in the areas of child labour concentration.

Bonded child labour is a system of forced or partly forced labour under which the child or child's parents enter into an agreement oral or written with a creditor. Legislation was enacted to prohibit this kind of bonded labour by anyone including children. According to the provisions of *the Bonded Labour System (Abolition) Act, 1976* under section 16, punishment can be provided and which may extend up to the period of 3 years. Under section 20 of this Act, same punishment can be given in the cases of abetment. All are cognizable offences.

National Child Labour Project in 1988 was implemented by Govt. of India under the child labour policy for the rehabilitation of child labour. At present more than 250 NCLP are undertaken working in different districts, spread over in 25 states of India. National Plan of Action for

Children was adopted by Govt. of India in the year 1992. In 2005, it was again reintroduced to provide a road map for steps be taken for the improvement in the lives of Indian children. National Charter for Children 2003 was adopted to emphasize its commitment to children's right to survival, development and protection and in order to see that no child remain hungry, illiterate or sick. Govt. has formulated National Common Minimum Programme (NCMP) 2004 to protect the rights of children especially the rights of girl child.

The Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted by repealing Juvenile Justice Act, 1986. By succeeding amendments, it is now more efficient to protect the best interest of children and deal them with child friendly approach. Amendment Act of 2015 has made child labour a crime with a prison term, for anyone to keep a child in bondage for the purpose of employment.

The National Commission for the Protection of Child Rights is a statutory body set up in 2007 to protect promote and defend the rights of children. *The Right of Children to Free and Compulsory Education Act 2009* mandates free and compulsory education to all children aged 6 to 14 years. This legislation also mandates that 25 percent of seats in every private school must be allocated for children from disadvantaged groups. *The Child and Adolescent Labour (Prohibition and Regulation) Act 1986* is considered as one of the most important legislations regarding the issue of child labour in India. A child is defined as any person below the age of 14 years of age and this legislation prohibits employment of a child in any employment including as a domestic help (except helping own family in non-hazardous occupations). It is a cognizable criminal offence to employ any children for any work. Children between age of 14 and 18 are defined as adolescent and the law allows them to be employed except in the listed hazardous occupation and processes that include mining, inflammable substance and explosives related work etc.

V. JUDICIAL INTERVENTION REGARDING THE ISSUE OF CHILD LABOUR

It is marked with the golden letters in the pages of legal history of our country that judicial activism has always plays a vital role in preserving justice in its true sense. Whenever, any arbitrariness, misinterpretation, or ultra virus acts lead to society to the wrong path, judiciary every time acts as the protector of our rights enshrined in the Constitution of India. The issue of child labour is not an exceptional case in this regard.

In the landmark case of *People's Union for Democratic Rights V. Union of India*⁹, the court held that even if construction is not specified in the schedule to the Employment of Children Act 1938, the construction work is hazardous employment and therefore under Art. 24 of Constitution of India no child below the age of 14 years can be employed. Expressing concern about the 'sad and deplorable omission', Bhagwati, J. advised the state Govt. to make immediate steps for the inclusion of said category.

In another landmark case *M. C Mehta V. State of Tamil Nadu*¹⁰, the Supreme Court has held that children below the age of 14 years of age cannot be employed in any hazardous industry, mines or other works and has also laid down exhaustive guidelines how the state authorities should respect economic, social and humanitarian rights of millions of children, working illegally in public and private sections. The court directed of setting up of Child Labour Rehabilitation Welfare Fund.

In *Sheela Barse V. Union of India*¹¹, the Hon'ble Supreme Court of India observed that a child is a national asset. It is the duty of the state to look after the child with a view to ensuring full development of its personality.

In *Bachpan Bachao Andolan V. Union of India and others*¹², Hon'ble Apex Court held that, no child shall be deprived of his fundamental rights guaranteed under Constitution of India. It is held by the Court that child labour, forceful detention and other forms of gross human rights violations are rampant in circuses. Among other things, the Court ordered that employment of children in circuses must be prohibited.

VI. CHILD LABOUR- A HUMAN RIGHTS VIOLATION VIS-À-VIS IMPORTANT INTERNATIONAL INITIATIVES.

It is an undoubted fact that the issue of child labour is a gross human rights violation. The tender people are ruthlessly exploited to perform dangerous jobs. They can be found in brick factories, carpet weaving centers, fishing, leather tanning shops, mines and other places associated with hazardous activities. Most abundantly, they can be found

9. (1982) 3 SCC 235

10. (1996) 6 SCC 756

11. (1986) 3 SCC 596

12. (2011) 5 SCC 1

in domestic service. To eradicate such human rights violation against the most vulnerable group of our society, so many International initiatives have been taken.

(a) Universal Declaration of Human Rights 1948

It is the basic document of International Bill of Human Rights. It speaks about 'people' in general sense. So the children can be included under purview of UDHR to utilize every such right enshrined under the Articles of UDHR. Specifically under Art 4 it lays down the principles relating to the protection and welfare of children. It speaks about the freedom from slavery and forced labour.

(b) International Covenant on Civil and Political Rights 1966

the issue of child labour can be included under the four corner of first generation civil and political rights, second generation economic social and cultural right and lastly third generation community rights.

(c) International Covenant on Economic Social and Cultural Rights 1966

Art. 10(3) of ICESCR provides: children and young people should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. State should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The year 1979 was considered as the International Year of the child another important event World Summit for Children was held in the year 1990 UN Convention on the Rights of Child, 1989: the first complete statement of child rights ever made. At the same time it is considered as the first UN Human Rights instrument which aims to create and balance between the rights of children and those of parents or adults responsible for their survival, development and protection of children. It recognizes the rights of every child to be protected from economic exploitation and from performing work that is hazardous or harmful to their health and development or that interferes with their education. It also requires Govt. to set a minimum age for employment and to provide for appropriate hours and conditions of employment. With several of its Articles this Convention sums up the problem and required benefits together.

The nexus between child labour and human rights is both broad and deep. That is why a number of states, intergovernmental institutions,

non-governmental organizations engaged in the struggle against child labour to combat with the child labour.

International Labour Organization (ILO) is International specialized agency of UN concerned with child labour. It came into existence after the First World War in 1919. The basic objective of ILO is the betterment of labour by ensuring international cooperation for some minimum and uniform standards. The ultimate aim of abolition of child labour is not only consistent with its basic objectives and policies; it is an integral part of it. The most concrete International agreements on combating child labour are the conventions of ILO concerning minimum age for the admission of employment¹³ not be below the age of compulsory schooling and in any case not below 15 years and another convention prohibits hazardous work which is likely to jeopardize children's physical mental and moral health¹⁴. It aims at immediate elimination of the worst forms of child labour for children below 18 years.

UNICEF has been working in a great manner to reduce and eliminate child labour by using various strategies.

VII. CONCLUSION

All the initiatives taken by our Govt are amply discussed. Nevertheless, every coin has its two sides. Despite all the laws, policies or even the international initiatives the real situation is something different. One of the main pitfalls lies within the framework of Child Labour Amendment Act 2016. It has reduced the long list of hazardous work into a short list consisting of only three occupations¹⁵. Apart from this another loophole lies in an exempted clause related to family occupation¹⁶ is incorporated. Such a deficiency in the statute will obviously vitiate the very object of eradicating child labour completely. It would not be inappropriate if one says that along with the issues of migration, large family structure, non-existence provisions of compulsory education, illiteracy and ignorance of parents, there are various economic reasons

13. Convention no. 138 International Labour Organization

14. Convention no. 182 International Labour Organization

15. The Child Labour (Prohibition and Regulation) Amendment Act, 2016. (Act 35 of 2016), The Schedule, s. 3A

16. The Child Labour (Prohibition and Regulation) Amendment Act, 2016. (Act 35 of 2016), s.3(2)(a)

namely, poverty, unemployment, absence of schemes for family allowance, children being cheaply available. If by the application of legal machinery all these issues which are associated with economy cannot be resolved, the menace of child labour cannot be eradicated in spite of having legislations, policies, committees etc.

Some suggestions are given in the following-

1. Court must have to play a vital role in providing guidelines in eradicating child labour.
2. Investigating authority should be very careful during the process of investigation. Because from the data it is quite clear that due to lack of proper investigation conviction rate falls. Sometime a deterrent policy can prohibit further harm.
3. Social mobilization and community participation are very important in this regard. There must be a strong process which can withdraw children from work as well as monitor the rates of school drop outs and at the same time force those children to join school instead of going to work.
4. Education department must play an active role in this regard.
5. Labour department should rescue children from work and to coordinate with the other concerned departments.
6. Panchayat or other local authorities are to ensure about their active monitoring on the status of children in their area.
7. With the progress of time, laws must be reviewed. Necessary amendments must be done to resolve all the ambiguities.
8. Awareness programmes can make people aware about their right as well as obligations.
9. Lastly if the economic condition of nation is stable and every person has employment then no guardian will be compelled to push their little fellows to work. Because child is meant to learn not to earn.

Change of a mindset can change everything. It will be appropriate to conclude this Article with this famous quote by Nelson Mandela:

‘There can be no keener revelation of a society’s soul than the way in which it treats its children.’



BOOK-REVIEW

ARREST AND INVESTIGATION by Prof. Pradeep Singh (2020), Satyam Law International, New Delhi, India, Paper Back Edition, pp. vii + 431 Rs. 795/-

One of the jural postulates of Roscoe Pound enunciates that in a civilized society man shall be able to assume that there shall not be intentional aggression. Man wants to live in a crime free society but crime is inevitable. Unfortunately, with the growth and development of society, crime is regarded as an index of civilization. The State endeavours to reduce the crime and it seeks to do so by declaring certain behaviour as criminal which violate the rights of individual, society and the State as well. The State forbids certain behavior through substantive criminal law, the violation of which may invite penal consequences. The substantive criminal law does not function automatically; rather, it is the procedural law which not only sets the substantive criminal law into motion but it is also instrumental in fetching the conviction and sentence, if the court adjudged the accused guilty. Immediately after the commission of the offence, the procedural law comes to the rescue of the victim and the members of the society by re-constructing solidarity between State and the members of the community. The observance of procedural law by the investigating agencies restores confidence and peace in the society which is disturbed for a time being. Thus, the procedural law is significant in maintaining the social fabric by enforcing the substantive criminal law.

The procedural law plays a crucial role in the administration of criminal justice. On the one hand, its prime function is to produce the accused before the court with evidence so that the accused could be declared guilty; on the other hand, it has to ensure the freedom and fairness to the accused. The procedural law thus stands on two pillars, namely, fairness and freedom of not only the accused but the society as a whole. Though the elements of freedom and fairness run throughout the scheme of the Criminal Procedure Code, 1973 but the author of the book under review¹ has dealt with the issues which are likely to impede upon freedom

1. *Arrest and Investigation* by Prof. Pradeep Singh (2020)

and privacy of the accused.

Police play a pivotal role in the administration of criminal justice. In a society governed by rule of law people have confidence in the courts but a common man who is a victim of crime has faith and trust in the police because it reach to them first in point of time after the commission of offence and the role of courts in dispensation of criminal justice comes later. The book under review² has been divided in two Parts comprising 12 Chapters. While Part I comprises three chapters (from Chapter 2 to 4) dealing with power to arrest, Part II deals with the power to investigate comprising eight chapters (from Chapter 5 to 12) Chapter 1 is introductory.

The author has devoted substantial space³ for analyzing the Concept of Arrest and Power to Arrest which has been discussed in Chapter 2. The State exhibits its power in controlling the crime and protecting the society by conferring power to the Police. The power to arrest is not unbridled rather it is regulated. The definition of 'arrest' does not find place in the Criminal Procedure Code, 1973 and thus author has attempted to delineate the meaning of arrest. Arrest puts restriction on freedom of movement of the accused and therefore it is to be nicely balanced with the individual freedom with that of society. The author has neatly outlined the reason behind depriving the accused from enjoying his freedom. The circumstances of arrest – before commission of offence, after the commission of offence, with warrant, without warrant, arrest by the Judicial Officer and the private person have been appropriately discussed. The book appears to be advantageous to the investigating agency but this chapter by giving some space for consequences of non - observance of arrest procedure would have been made equally student friendly as well. In this chapter however an inadvertent minor printing mistake of non substantial nature has crept into.⁴

Chapter 3 of the book deals with the Procedure to Arrest. The Criminal Procedure Code, 1973 stipulates three modes of effectuating an arrest, namely, the submission/surrender of the accused to the custody of the police officer or by touching the body of the accused and showing the intention to arrest and by confining the body of the accused. The

2. Id at 84

3. from p. 13 - 97

4. Id Chapter 2 at p. 84 where the same heading finds place twice at 2 and 3.

special procedure for arresting a woman and the procedure enunciated by the Supreme Court of India while arresting the Judicial Officer have also been taken care of. A person who is arrested is still entitled to enjoy certain rights. Various rights of the arrested person – constitutional and statutory both have been discussed in Chapter 4.

Part II of the book is related to investigation. The information to police (commonly known as First Information Report) is the first important step towards setting the criminal law in motion and investigation have has been discussed in Chapter 5. The importance of this chapter is clear from the fact that the author has devoted 79 pages for it.⁵ In this chapter the nature of duty – discretionary or mandatory to register the information concerning the commission of cognizable offence on the part of the Station House Officer has been suitably analyzed. The author has also analyzed the judicial pronouncements regarding registering FIR in cases related to SC/ST (Prevention of Atrocities) Act, 1989. The issues like two FIRs, the requirements of FIR, promptness in lodging FIR, absence of vagueness etc. besides the evidentiary value of FIR have been discussed.

Initiation of Investigation has been discussed in Chapter 6. When the police officer has reason to suspect the commission of offence, he may initiate the investigation. While non - cognizable offence can be investigated by the police officer only after the permission of the Magistrate, the cognizable offence may be investigated by the police without such order. It is possible that the information discloses several offences where such case includes cognizable and non – cognizable both, the police may investigate the case in similar fashion had it been a cognizable case. The author has succinctly distinguished the investigation on the basis of Section 156 (3) and Section 157 of the Code. The role of magistracy in investigation also finds place in this chapter.

The Code empowers the Investigating officer to interrogate the accused and the persons acquainted with the facts and the circumstances of the case. Chapter 7 deals with the Interrogation of the accused and the witnesses. The evidentiary value of statement made by person examined during investigation has been addressed in this chapter. During the investigation recording the confession and statements is significant and this aspect has been covered in Chapter 8. The procedure of recording

5. From p. 135 to 214

confessional statement and the rule of caution have been effectively addressed. Any defect or irregularity in recording the confession is curable unless it has occasioned injustice to the accused.

The medical examination of the accused and the victim is an important step for inculcating or exculpating the accused and also in identifying the nature of offence committed against the victim. This aspect has been dealt with in Chapter 9. The relevant important cases have been analyzed in this regard. In Chapter 10 Search and Seizure has been analyzed. In order to establish the complicity of the accused with the commission of offence, the search of incriminatory material is essential. The provisions empowering the court to issue summons and warrant for the production of documents and other articles, search of the arrestee immediately after the arrest, search without warrant and search and collection from other jurisdictions have been discussed.

The investigation cannot run for an indefinite time. The delay in investigation may result into substantial loss of material evidence and witnesses. Timely investigation will ensure fair trial. The time limit for completion of investigation has been discussed in Chapter 11. Sexual offences against women and children are to be completed within two months. During investigation police may request the court for remand for a period not exceeding fifteen days. There are provisions in the Code which puts pressure on the investigating agency to complete investigation otherwise the person in judicial custody shall be entitled for bail in default. The difference between police custody granted under Section 167 and 309 (2) are quite distinct the former is during pre cognizance stage, the later is post cognizance.

Chapter 12 deals with Police Report and Further Investigation. While investigation initiates with 'Occurrence Report', it culminates into 'Final Report'. The submission of Police Report is indicative of completion of investigation.⁶ The author took pain in clarifying the subtle conceptual difference between 'Challan', 'Final Report and 'Police Report.' While the Constitutional Court may pass an order for re – investigation or de novo investigation, the Judicial Magistrate may pass an order for 'further investigation'.⁷ This further investigation may either be in pre - cognizance

6. Chapter 12 at pp 401 – 402

7. Id. at 414

or post - cognizance stage. The power of 'further investigation' vests in police but usually it is done either with the order of the court or by informing it. The Magistrate taking cognizance on the basis of police report has to take all the police reports including the report submitted in pursuance of further investigation. The author has discussed relevant issues pertaining to police report, e.g. its relevance in taking cognizance, the grievance of the victim who is not satisfied by the police report etc.

The book is an addition to the knowledge and the beauty of the book lies in the fact that the author has made an effort in discussing the topic with relevant cases and at appropriate place he has also discussed the background in which the provisions came into effect. The author has been successful in clarifying basic concepts. At the end of the book a table of cases enhances its utility. The book is useful for the persons involved in investigation, students at LL.B. level particularly preparing for the judicial services and also to the law practitioner. The book may be recommended for law libraries. The book is handy but the price is slightly on higher side.

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