

**INDIAN FAMILY SYSTEM:
CONTEMPORARY ISSUES**



CENTRE FOR COMPARATIVE STUDIES IN PERSONAL LAWS

॥ न्यायस्तत्र प्रमाणं स्यात् ॥



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INDIAN FAMILY SYSTEM:
CONTEMPORARY ISSUES

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FOREWORD

It gives me an immense pleasure to see the efforts of bright and spirited individuals coming together to release a phenomenal work. Within the complex fabric of societal frameworks, the institution of family as an entity arises as a finely interlaced strand, harmoniously bringing together historical, cultural, and traditional components. As we commence our academic exploration within the confines of this comprehensive volume, we are immersed in an in-depth examination of the fundamental aspects of the Indian familial framework. Our objective is to unravel the current barriers and moral dilemmas that arise within this context.

This publication shows the zeal with which the Centre for Comparative Studies in Personal Laws under the aegis of the esteemed National Law University, Delhi is working to encourage and lead discourse around personal laws in India. The book invited esteemed legal experts, professionals, academics, and law students to share their deep insights into the complex and diverse aspects of the Indian family structure. The response received was incredibly encouraging, demonstrating the diverse range of perspectives and personal encounters that intersected on this crucial topic.

The anthology presented here not only provides evidence of the vast landscape of knowledge within these esteemed institutions but also highlights their steadfast dedication to fostering deep discussions on personal laws and familial dynamics. Upon delving into the contents of this compendium, one is met with a diverse array of voices and concepts, each offering a unique thread that contributes to the intricate fabric of the Indian familial structure. The themes examined in this study encompass a wide range of issues, ranging from traditional family set-up to modern challenges. These themes provide an in-depth understanding of the numerous complexities that Indian families face in the current era. This volume has the potential to be a valuable resource for scholars, policymakers, and individuals seeking a thorough comprehension of this complex subject matter.

The process leading to the completion of this volume was characterised by unwavering commitment, cooperative effort, and a dynamic interchange of intellectual discourse. The volume serves as a testament to the shared mindset of individuals who acknowledge the utmost importance of confronting the underlying issues and moral quandaries that surround present day family system and the Indian personal law regime. Through the examination of scholarly articles and research papers, our

understanding of the dynamic landscape of Indian families continues to deepen as we uncover additional layers of complexity.

This volume is poised to not only find a place among the collections of libraries and academic institutions, but also to stimulate in-depth dialogues, foster novel concepts, and influence the development of strategies that enhance and strengthen Indian Family Institutions as a whole. As the readers embark upon the exploration of these enlightening pages, I express my sincere appreciation on behalf of National Law University, Delhi to all those individuals who have made valuable contributions to this noble endeavour and the team who made it all possible. We would like to express our deep gratitude to the readers and scholars who will contribute to the ongoing discourse.

Prof. (Dr.) G.S. Bajpai
Vice Chancellor, National Law University, Delhi

PREFACE

The Indian family system has remained the bedrock of our society throughout history. However, the winds of change have blown with the advent of economic liberalisation and globalisation, reshaping the landscape of Indian families. In response to this transformative shift, the Centre for Comparative Studies in Personal Laws presents a thought-provoking publication that delves into the contemporary challenges faced by the Indian Family System.

The journey leading to the creation of this remarkable publication began with a call for scholarly contributions, inviting legal experts, practitioners, scholars and students to share their insights on the multifaceted dimensions of the Indian family system. This call generated a remarkable response, as individuals from diverse backgrounds and areas of expertise came forward to contribute their research-based papers and articles.

The collaborative spirit that emerged from this call for papers was instrumental in shaping the comprehensive nature of this publication. Through a rigorous process of review and selection, the most insightful and thought-provoking contributions were curated for inclusion in this book. The Centre for Comparative Studies in Personal Laws ensured that this endeavour reached its full potential, uniting scholars and legal professionals to delve into the constantly changing regime of the Indian Personal Law. The effort shows the commitment of both the institutions to foster meaningful dialogue and scholarship in the field of personal laws and family dynamics.

The collective efforts of all those who participated in this project, from the contributors to the editorial team, highlight the dedication and passion invested in this endeavour. The result is a publication that reflects a broad spectrum of perspectives, creating a platform for engaging discussions on the contemporary issues surrounding the Indian personal law paradigm. The journey from the initial call for papers to the final pages of this book is a testament to the collaborative spirit of scholars, institutions, and professionals who share a common goal: to provide a profound understanding of the evolving landscape of Indian personal laws.

Personal laws are a testament to India's commitment to respecting and preserving the diverse customs and traditions of its citizens. They serve as a reflection of the country's ethos of unity in diversity. However, they also present a challenge in terms of ensuring gender equality and individual rights within the family system. The intersection of personal laws with broader legal frameworks, as well as the evolving nature of societal norms, make it essential to scrutinise and debate these laws to address

contemporary ethical issues and ensure a just and inclusive Indian family system.

Having read, researched on and taught personal laws extensively throughout my life as an academician, which is actually being a life-long student of the subject, can say with certainty about the intricacies in this subject-field. In the process of formulating the idea for this book until its publication I came across new perspectives, novel issues arising out of emerging technology and many more such interesting reads. This book embarks on precisely this journey of exploration and introspection into the multifaceted realms of Indian personal laws within the context of this family.

Prof. (Dr.) Anju Tyagi
Executive Director
Centre for Comparative Studies in Personal Law
National Law University, Delhi

PREFACE

Family has always been the cornerstone of Indian society, an institution deeply rooted in the cultural and historical contexts of the nation. Over the ages, it has been the cradle of tradition, culture and values, offering stability and a sense of belonging to generations. The Indian family system, with its rich diversity and complexity, has remained resilient in the face of social and economic changes. Today, we find ourselves at a crossroads, where the contemporary Indian family is navigating a terrain marked by evolving dynamics and emerging challenges.

Within the pages of this holistic work, we embark on an insightful exploration of the intricate fabric of the Indian family system and how it is being affected by the changing dynamics of Indian society and of personal laws, especially post liberalization. We navigate through a diverse array of themes, from the enduring traditions of Hindu Joint and Undivided Families to the evolving dynamics of contemporary nuclear households.

This book thoroughly dissects the functioning of Family Courts, the evolving institution of marriage, and the shifting paradigms that encompass it. It intrepidly addresses critical topics like child marriage, same-sex unions, and the intricacies of live-in relationships, offering a balanced perspective on their advantages and disadvantages. Delving deep into the complexities of family life, we unravel the intricacies of divorce and the role of alternative dispute resolution. Our exploration extends to the nuanced realms of succession and inheritance, with a keen focus on property rights, particularly those of daughters, married individuals, and divorced women. We navigate the intricate terrain of adoption and parenthood, casting a discerning eye on surrogacy and its associated challenges. The book discusses some complicated and substantial questions shedding light on the crucial matter of maintenance rights for children, spouses, and the elderly.

As we embark on this intellectual journey through these multifaceted themes, our mission is to unravel the inherent pros and cons of Indian family system, which may work as insightful solutions to the unique challenges faced by the families in contemporary times. This volume stands as a comprehensive exploration of the ever-evolving landscape of Indian families, serving as an invaluable resource for scholars, policymakers, and individuals seeking a profound understanding of this intricate tapestry. In the Indian context, personal laws play a pivotal role in shaping the dynamics of family life, including marriage, divorce, inheritance, and succession. These laws often draw their authority from religious sculptures and customary practices, offering a unique and complex landscape that varies among different religious and cultural groups.

The role of the Centre for Comparative Studies in Personal Laws and the National Law University, Delhi has been pivotal in bringing this volume to life. It has created a platform for in-depth exploration and discussion, addressing the core concerns and ethical questions that endure in modern Indian society. Through this publication, we aim to contribute to the discourse surrounding the Indian family system, offering fresh perspectives and creative solutions.

Prof. (Dr.) Anupama Goel
Research Director
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ACKNOWLEDGMENT

It is impossible to imagine how this idea could have materialised without the constant support and guidance of Prof. Anju Tyagi and Prof. Anupama Goel along with their team at the Centre for Comparative Studies in Personal Laws. The Centre has received extensive support from National Law University Delhi, its faculty members, administration and support staff. The team is greatly indebted to Prof. Dr. G.S. Bajpai for bringing this out as a University Publication.

It also goes without saying that the editors are greatly indebted to the authors of the present volume who contributed to this ambitious endeavour. Finally, as far as the final editing is concerned, the tireless efforts of our student team must be recognised. Contribution of the editorial team comprising of Manas Mahajan and Vinayak Rajak along with other students- Aditya Sagar and Yashi Agarwal who assisted in the process is gratefully acknowledged. As far as the production of the book is concerned, the editors express their sincere appreciation to the National University Law Press and Dr Akash Singh, who brought a protracted endeavour briskly to finality.

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CHAPTER: 1

STATUS OF WOMAN AND CHILD IN LIVE-IN RELATIONSHIP: A SOCIO-LEGAL ANALYSIS

*Prof. (Dr.) Manjula Batra**

ABSTRACT

In India, live-in relationships are becoming more common as a simple alternative to marriage, as the institution of marriage brings with it numerous duties and responsibilities which the youth of today shirks from accepting. A live-in relationship creates more space for two partners to discover whether they are compatible with each other or not. It also enables them to share their financial resources and saves them from the trauma of going through a painful divorce in case they are married and their marriage does not work. A live-in relationship also gives a lot of time to the partners to understand the wear and tear of living together before taking the final plunge into marriage. Though a live-in relationship is not morally and socially acceptable by the society, it is not illegal. There are numerous judgements and guidelines of the Higher Judiciary that have legalised the status of women and children born out from such a relationship. Till now, women in live-in relationships have been given limited legal rights by the Courts, such as, right to claim maintenance and the presumption of legitimacy of the children born out of such relationships. The main purpose of this Article is to present a socio-legal analysis of live-in relationship in India and the position of women and children in such relationships. With the help of emerging judicial jurisprudence, this Article highlights, while giving examples of nations like, the United State of America, the United Kingdom and Canada including some European Countries, how important it is for the legislature to frame guidelines for regulating live-in relationships or cohabitation in our country.

Keywords: Live-in Relationships, Prenuptial and Cohabitation Agreements, Common Law Marriage, Relationship in nature of Marriage, Right to Maintenance, Presumption of Legitimacy of Child.

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INTRODUCTION

A society can never remain stagnant. It changes over a period of time as new strides are achieved when modernisation takes place and the economy is further liberalised. Society impacts the attitudes, beliefs and behaviour of the people as much as the behaviour of the people transforms the society. In recent times, there has been a spurt in the instances of live-in-relationships¹ or cohabitation² in India which could be due to several reasons including, the influence of the western culture on the youth of our country because of the ever-expanding notion of globalisation, sharing of their financial resources, checking their compatibility and understanding the intricacies of marriage hood, among others. Since time immemorial the institution of marriage has always been given a high social status in developed and developing countries across the world. The concept of live-in-relationship or cohabitation has been prevalent in western societies since the 16th century. It has been observed that though marriage and related matters are regulated by normative law, there is a huge vacuum in law relating to the regulation of live-in-relationships. Studies have shown that while countries like the United State of America, the United Kingdom, Canada, China and some European countries do recognize live-in-relationships through law or agreements but with limited rights around finance, property and custody of children, most Asian countries do not have any law or agreements to recognize such relationships.

The role of law in regulating human behaviour cannot be undermined. It has a dynamic disposition and changes according to the needs of the people prevalent in the society. Today, when young people are preferring live-in-relationships to marriage in urban India it becomes necessary that there should be some legal guidelines to regulate such relationships. The concept of live-in relationship is not new to our country as such intimate relationships were practised in different forms in India since ancient times³ but there is no specific statute or legislation which defines the concept of live-in relationship. However, the *Protection of Women from Domestic Violence Act of 2005* is the only legislation that defines a 'Live-in

¹Merriam-Webster dictionary, "Live-in" means "being or involving people in a romantic or sexual relationship who live together and are not married." Retrieved from

<https://www.merriamwebster.com/dictionary/live-in#:~:text=%3A%20being%20or%20involving%20people%20in,live%2Din%20noun>

² Cambridge Dictionary, 'Cohabitation' means "an act of living and having a sexual relationship with someone especially someone you are not married to" Retrieved from <https://dictionary.cambridge.org/dictionary/english/cohabitation>

³ Rahman, Wazida. (2020). *Status of women in live in relationship in India in the light of legal and judicial responses* (Doctoral Thesis), National Law University and Judicial Academy, Guwahati, Retrieved from https://shodhganga.inflibnet.ac.in:8443/jspui/bitstream/10603/321940/8/08_chapter%201.pdf

relationship'. According to Section 2(f) of the said Act 'Live-in Relationship' is defined as '*Domestic Relationship*' which implies "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family⁴".

INTERNATIONAL DIMENSION OF LIVE-IN RELATIONSHIP

In many States of the United States of America law recognizes cohabitating couples as "Domestic Partners." The recognition of cohabitating couples led to the creation of domestic partner registry granting such couples limited legal rights similar to those available married couples⁵. Till the year 2022, only States, like, Michigan and Mississippi had laws which regarded cohabitation as unconstitutional. These laws have still not been removed or struck down as unconstitutional regarding recognition of cohabitating couples.

Live-in relationship in the United Kingdom (UK) is covered under the Civil Partnership Act of 2004. Under this Act, the cohabitating couple is required to appear before the registrar at a ceremony which is similar to marriage and is organized at a venue licenced to hold civil partnership ceremony in the presence of two witnesses who sign the register afterwards.⁶ The Act is also known as the "Gay Marriage" Act.

In Canada, a couple who lives together as husband and wife without having a formal marriage is considered to be married by common law. Also, such a couple carries out all the duties and rights as a married couple. Further, when both partners have lived together for at least one year, the relationship is referred to as a common law marriage.⁷ In Canada a live-in relationship is recognized under section 54(1) of the Family Law Act of 1990 which states that two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death. These rights and obligations include ownership in or division of property, support

⁴ Section 2(f) of Protection of Women from Domestic Violence Act of 2005, "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

⁵ Domestic partner registry Achieved from the original on 2008-07-19 Retrieved 2009-06-30.

⁶ Duncan Lewis, Retrieved from <https://www.duncanlewis.co.uk/Civil-Partnership-Act-2004.html>

⁷ Calver Immigration Consulting Inc. (November 12, 2021), <https://www.calverimmigrationservices.com/post/moving-to-canada-as-an-unmarried-couple>

obligations and the right to direct the education and moral training of their children, but does not include the right to custody of or access to their children⁸.

In France, Live-in Relationship is governed by the “Civil Solidarity Pacts” or PACS (Pact Civil de Solidarite) which was passed by the French National Assembly in 1999. This law is a contract between two adults (heterosexual or homosexual) who live together as a married couple. The law recognizes certain obligations and rights of the parties in a live-in relationship, in terms of inheritance, housing and social welfare. This kind of relationship needs registration which can be done by the Court or can be notarized. PACS agreement can be revoked unilaterally or bilaterally with a simple declaration made in writing, prior to a three-month notice being given to the other partner as mentioned in Article 515-8 of the France Civil Code of 1999. This enactment provides independent legal status to couples in France. The France Civil Code also recognizes legitimacy of the children born out of such a relationship under Article 334 of French Civil Code of 1999.

EVOLUTION OF MARRIAGE AND LIVE-IN RELATIONSHIP IN INDIA

In India, marriage, under Hindu Law, has been considered as a holy or sacred bond between a man and a woman since Vedic times. The institution of marriage creates many legal rights in the matter of inheritance of property, succession, maintenance, custody of children, etc. As per the Vedas or Manu, there are eight types of marriages prevalent under Hindu Law, namely: *Brahma Marriage*, *Daiva Marriage*, *Arsha Marriage*, *Prajapatya Marriage*, *Asura Marriage*, *Rakshasa Marriage*, *Paisacha Marriage* and *Gandharva Marriage*⁹. The Smritis divide or categorize these eight forms of marriage into two main groups: (1) The *Prashasta* or Approved or Desirable marriages and (2) The *Aprashasta* or Disapproved or Undesirable marriages¹⁰. In *Koppiseti Subbharao v. State of Andhra Pradesh*¹¹ the Supreme Court of India recognized both the above approved or disapproved categorizes of marriages. Out of all the disapproved marriages, the Gandharva form of Marriage could be described as being closest to a live-in relationship in Ancient times. In the Gandharva form of marriage, the partners neither took consent from their

⁸

<https://www.advocatekhoj.com/blogs/index.php?bid=4294fe94c613c9ad072931429&bcmd=VIEW>

⁹ Vishesh Gupta. (June 24, 2020). *Forms of Marriage in Hindu Religion*, pleader, Retrieved from <https://blog.ipleaders.in/forms-marriage-hindu-religion/>

¹⁰ Rajni Devi. (2015). *Marriage among Hindus with Special reference to Dowry*, IOSR Journal of Humanities and Social Science (IOSR-JHSS). 20 (7), 2279-0837, Retrieved from <https://www.iosrjournals.org/iosr-jhss/papers/Vol120-issue7/Version-6/A020760109.pdf>

¹¹ Koppiseti Subbharao v. State of Andhra Pradesh AIR 2009 SC 2684

family nor did they solemnise their marriage under any specific ritual¹². The relationship was purely based on verbal commitment. The same kind of verbal commitment can be seen in a live-in relationship.

The *Gandharva* form of marriage was a kind of marriage where the couple lived together out of love, with mutual consent and consummated their relationship consensually. It may be noted that even though the *Gandharva* form of relationship was based on mutual consent, the commitment and responsibility of the man and woman were identical to any other type of valid marriage or deemed valid marriage as mentioned in the original Hindu religious scriptures. The Relationship between *Shakuntala* and *Dushyanta*, and *Bhim* and *Hidiba* are examples of *Gandharva* form of marriage¹³. Even though, the *Gandharva* form of Marriage was criticized by the people it was still acceptable in Ancient times. According to Manu such “premarital relationships existed both in the Vedic history and afterwards, but was a rare occurrence.”¹⁴

During the ancient period people were not judgemental about common social practices, like, living together. At the same time, they did not tolerate hypocrisy. The society in ancient times recognised the fact that a human being could not be monogamous by nature and that sex was a necessity for everybody. Thus, it may be noticed that the Rishis and Rishikas of those times tried to bring intimate relationships under the purview of Dharma and were open to accepting relationship between a woman and a man outside marriage¹⁵. However, in the post Vedic times, premarital sex, prostitution, sex outside marriage, divorce, homosexuality, widow remarriage etc. were considered a taboo.

In the Ancient or the Medieval period, in a situation, where the wife was unable to conceive a child then the husband kept a concubine to give birth to his offspring or child. At that time there was a common belief that if a married woman could not bear a child, it was her fault. As a result of this belief the man was allowed to keep a concubine or mistress who would bear his child. In Modern India, there were a number of social reformers,

¹² Sushma. (2020-2021). *Legal Recognition to Live-in Relationship in India and Issue involved*, The National University of Advanced Legal Studies, Kochi, Retrieved from <http://14.139.185.167:8080/jspui/bitstream/123456789/427/1/120020.pdf>

¹³ Alakananda Bhattacharya. (March 10, 2019). *Gandharva Marriage-Ancient, Modern or Both? Know all about Unique Indian Marriage Tradition*. Retrieved from <https://www.weddingwire.in/wedding-tips/gandharva-marriage--c2845>

¹⁴ Shilpa Tank. (2021). *Laws pertaining to Live-in Relationship in Indian Society*. IOSR Journal of Humanities and Social Science (International Journal of Creative Research thoughts, 9(12), 2320-2882, Retrieved from <https://ijcrt.org/papers/IJCRT2103418.pdf>

¹⁵ Hari RaviKumar. (2015). *Ours Vedas Permitted Live-in Relationship*. Retrieved from <https://www.dailyo.in/lifestyle/live-in-relationships-vedas-marriage-rape-prostitution-supreme-court-3361>

such as, Raja Ram Mohan Roy, Mahatma Gandhi, Dr. Bhimrao Ambedkar, Jyotiba Phule, etc. who fought against the evil practice of keeping concubine¹⁶. There was a strong movement against the elimination of this evil practice which ultimately resulted in a decreased number of cases of keeping a concubine though the practice could not be fully eliminated.

The status of women in India in the Post Vedic Period had gradually deteriorated. As a consequence, there were many examples of live-in relationships that existed between men and unmarried women. Such a practice was accepted in the society to give protection to unmarried women who could not fend for themselves. This Post Vedic practice culminated in the concept of '*Maitray Karaars*'¹⁷ in the State of Gujarat during the modern period. This concept enabled the making of an agreement or a contract between a married man and an unmarried woman to live together as friends and look after each other. '*Maitray Karaars*' relationship was meant to provide some form of security to unmarried women¹⁸. The agreement of '*Maitray Karaars*' enabled couples of the opposite sex and the same sex to live together outside wedlock. In a way the unmarried woman was giving security of home and man which she would have not got otherwise. Subsequently, the concept of '*Maitray Karaars*' became popular in the States of Rajasthan and Madhya Pradesh as well¹⁹. Later on this kind of practice came to be described as "service contract" wherein the man chose to keep such as a woman in his house as a maid or servant²⁰. This type of traditional practice became a legitimate contract when drawn up by the Sub-Registrar with the seal of affidavit on stamp paper of Rs.10 and signed by the both the parties in the presence of two witnesses²¹. It is important to note that this practice was finally abolished by the Gujarat High Court in *Minaxi Zaverbhai Jethva v. State of Gujarat*²² on the ground

¹⁶ Junaid ul Islam. *Live-in Relationship: Indian and International Perspective*. Legal Service India. Retrieved from <https://legalserviceindia.com/legal/article-5173-live-in-relationship-indian-and-internationalperspective.html#:~:text=The%20first%20case%20in%20which,in%20relationship%20of%20a%20couple>.

¹⁷ Sushma. (2020-2021). *Legal Recognition to Live-in Relationship in India and Issue involved*, The National University of Advanced Legal Studies, Kochi, Retrieved from <http://14.139.185.167:8080/jspui/bitstream/123456789/427/1/120020.pdf>

¹⁸ Ibid

¹⁹ Ibid

²⁰ Rahman, Wazida. (2020). *Status of women in live in relationship in India in the light of legal and judicial responses* (Doctoral Thesis), National Law University and Judicial Academy, Guwahati, Retrieved from https://shodhganga.inflibnet.ac.in:8443/jspui/bitstream/10603/321940/8/08_chapter%201.pdf

²¹ Pet Therapy. (n.d.) Retrieved from https://dbpedia.org/page/Maitri_karar

²² *Minaxi Zaverbhai Jethva v. State of Gujrat* Special Civil Appeal No.3708 of 1998

that it violated Section 5 of Hindu Marriage Act of 1955, which provides the grounds of a valid marriage, one of them prohibiting the married man from remarrying or living with another women during the lifetime of his spouse. The Gujarat High Court also stated that ‘*Maitri Karars*’ is illegal as it is opposed to public health and morality²³.”

EMERGING JURISPRUDENCE ON LIVE-IN RELATIONSHIP IN INDIA

In India, there is no specific or express law to recognize the concept of live-in relationship. However, the *Protection of Women from Domestic Violence Act of 2005*, recognizes the concept of live-in relationship to the extent of providing protection against violence committed against the female partner. The courts in India have time and again legalised live-in relationships whether they come within the ambit of PWDV Act or outside, through their decisions and as a consequence have developed a new jurisprudence on the matter. In *Badri Prasad v. Dy. Director of Consolidate & Others*²⁴, the court recognized live-in relationship to be legal, subject to conditions necessary for a valid marriage as laid down under section 5 of the Hindu Marriage Act of 1995, such as age of marriage, consent and soundness of mind. In the same case, the Supreme Court ruled that presumption of marriage arises if a man and woman have lived as husband and wife for a long time. In words of the court “*a strong presumption arises in favour of wedlock where partners live together from long spell as husband and wife.*”²⁵ The court continued to say that this presumption is rebuttable and a huge burden lies on the person who seeks to deprive a relationship of its legal origin. It seems that the Indian Judiciary while dealing with the question of legality and legitimacy of live-in relationships has looked for answers under Articles 19(a) and 21 of the Constitution of India. The court in Badri’s case, probably, gave legal recognition to live-in relationship by interpreting Article 19(a) which embodies the Right to Freedom of Speech and Expression and Article 21 which guarantees Protection of Life and Personal Liberty in favour of live-in partners. It is clear that the court’s objective was to give dignity and liberty to partners living together outside marriage.

In the case of *Payal Sharma v. Nari Niketan*²⁶, where the concept of live-in relationship was recognized, the Allahabad High Court Bench, comprising Justice M. Katju and Justice R.B. Mishra, stated that “In our opinion, a man and a woman, even without getting married, can live together if they wish to. This may be regarded as immoral by society but

²³ Ibid

²⁴ *Badri Prasad v. Dy. Director of Consolidate & Ors.* AIR 1978 SC 1557

²⁵ Ibid

²⁶ *Payal Sharma v. Nari Niketan* AIR 2001 All 254

it is not illegal. There is a difference between law and morality²⁷". Speaking in the same vein, the Supreme Court in the case of *Lata Singh v. State of Uttar Pradesh*²⁸ ruled that two hetro-sexual partners living together were not doing anything illegal. Again in 2010 in *Khushboo v. Kanniammal*²⁹, the Supreme Court reiterated the verdict given in *Lata Singh*³⁰ that a live-in relationship between two consenting unmarried adults of opposite sex does not amount to any offence even though it may be perceived as being immoral. It may be noted that the Supreme Court further liberalized the concept of living together by laying down in *Joseph Shine v. Union of India*³¹, that a married hetro-sexual person living with an unmarried hetero-sexual person would not amount to the offence of adultery anymore. This decision of that Apex Court recognizes the sexual autonomy of a person in general even after marriage 'particularly' in case of a woman whose sexual autonomy gets restricted once she gets married. However, in *D. Velusamy's case*³² the Supreme Court had explicitly stated that the benefits of a live-in relationship in the nature of common law marriage would not extend to a relationship between an unmarried person and married person of the opposite sex.

The Supreme Court in the case of *D. Velusamy V. D. Patchaiammal*³³ gave a detailed interpretation to the concept of live-in relationship as recognized under the *Protection of Women from Domestic Violence Act of 2005 (PWDV Act)*. The court very categorically stated that to get the benefits of the PWDV Act a live-in relationship must "be akin to a common law marriage." The Apex Court laid down the following requirements which need to be satisfied to justify the existence of a live-in relationship in the nature of a 'common law marriage', namely, that:

1. Both man and woman should be of marriageable age;
2. Both must not have been married before;
3. Both man and woman should be living in a manner that society accepts them as husband and wife;
4. Both the man and woman must have cohabited for a "significant" period of time and;
5. Both man and woman must be living together voluntarily.

It is humbly submitted that the expression "*living together for a significant period of time*" is not defined by the court anywhere and it is left to the

²⁷ Prof. (Dr) Priya Sepaha (2021). *Live-in Relationship in India: Laws and Challenges*. Law Colloquy Journal of Legal Studies (LCJLS). Retrieved from <https://lawcolloquy.com/journals/PriyaV1C2.pdf>

²⁸ *Lata Singh v. State of Uttar Pradesh* (2006) 5 SCC 475; 2006 (56) ACC 234

²⁹ *Khushboo v. Kanniammal*, (2010) 5 SCC 600

³⁰ *Lata Singh*, supra note 28

³¹ *Joseph Shine v. Union of India* AIR 2018 SC 1676

³² *D. Velusamy V. D. Patchaiammal* (2010) 10 SCC 469

³³ *Ibid*

interpretation by courts depending upon the facts and circumstances of each case. This has created a lot of ambiguity in the minds of ordinary citizens as to what exactly would entail a significant period of time for a live-in relationship to be interpreted as a common law marriage. In *D. Velusamy* case³⁴, the court defines the difference between "live-in relationships", "a relationship in the nature of marriage", "casual relationships" and relationship with a "keep". The court recognized that only "a relationship that would be in the nature of marriage" would be entitled to rights and protection conferred under the PWDV Act.

In *Alok Kumar v. State*³⁵, the Supreme Court had said that "live-in relationship is a walk-in and walk-out relationship in which neither any strings are attached, nor it creates any legal bond between the parties to the live-in relationship. It is a mutual contract to live together which is renewed every day by the acts of the parties and the relationship can be ended by either of the parties without the consent of the other party and one party can walk out at his/her will at any time." It is submitted that though no legal rights are created for the partners in live-in relationship, nonetheless, the female partner in a live-in relationship has the right of protection against violence under PWDV Act. It is also humbly submitted that by describing a live-in relationship, which is akin to common law marriage, as a walk in or walk out relationship, the court completely overlooked the emotional strings attached in such a relationship. When there is break-up of a live-in relationship, which is in the nature of common law marriage, it causes as much pain to the partners as in case of a marriage breaking down. However, the Apex Court rightly recognized the right of both, a man and woman to choose their partner in marriage or in a live-in relationship as being an integral part of the Right to Life and Personal Liberty under Article 21 of the Indian Constitution.³⁶

RIGHTS OF A FEMALE PARTNER IN LIVE-IN RELATIONSHIP

Considering that the PWDV Act is gender specific and secular in nature, it is applicable to all females irrespective of their religion. However, the extent of legal rights that are available to a woman in case of a valid marriage are not available to female partner in a live-in relationship. The PWDV Act recognizes the right of female partner in a live-in relationship to be protected against domestic violence. It has been seen, lately, that in a number of live-in relationships even though the female partner has been subjected to gross physical violence resulting in death of the female partner the PWDV Act has not being invoked for getting protection order against the male offending partner. This speaks volumes about the unacceptability

³⁴ Ibid

³⁵ Alok Kumar v. State 2010 SCC online Del 2645

³⁶ Khushboo v. Kanniammal, (2010) 5 SCC 600 & Nandakumar v. State of Kerala, (2018) 16 SCC 602

of live-in relationship in the Indian society, as the female partner is unable to muster enough courage to report about the violence committed against her with the police or the magistrate, as the case may be. Where right of maintenance of the female partner and status of the child born in live-in relationship is concerned, the Indian Higher judiciary has in several cases given favourable orders for the female partner and the child born in live-in relationship.

RIGHT OF MAINTENANCE

It is clear from *D. Velusamy's case*³⁷ that partners of opposite sex in a live-in relationship, which is similar to a common law marriage, are entitled to the benefits of the PWDV Act. The *Malimath Committee* report of 2009, has suggested that a female live-in partner should be regarded as 'wife' under Section 125 of Criminal Procedure Code of 1973, so that she becomes entitled to claim maintenance thereunder. The committee considers that a woman living in a live-in relationship for a "considerable period of time", must be accorded the status of a married woman.

Drawing analogy from *D. Velusamy's case*³⁸ and Malimath Committee report of 2009 the Indian courts have in several cases passed a favourable order for maintenance of the woman in a live-in relationship. In *Abhijit Bhikaseeth Auti v. State of Maharashtra & others*³⁹, the Bombay High Court held that the term "wife" as embodied in explanation (b) of Section 125 of Criminal Procedure Code of 1973, can also include a female partner who has been living with a man as wife in a relationship similar to a common law marriage. This means that a woman who has been living with a man outside wedlock for a long term shall enjoy legal status as a legally wedded wife⁴⁰. According to the decision given by the Supreme Court of California in *Marvin v. Marvin*⁴¹, a female partner in a live-in relationship is entitled to the right of maintenance as "Palimony"⁴². However, the Indian Courts while awarding maintenance to a woman in a live-in relationship have used the word 'Alimony' instead of 'Palimony'. It was only in *D. Velusamy's case*⁴³ that the Supreme Court, while recognising the right of maintenance

³⁷ D. Velusamy, supra note 32

³⁸ Ibid

³⁹ Abhijit Bhikaseeth Auti v. State of Maharashtra & others AIR 2009 (NOC) 808 (Bom)

⁴⁰ Shailesh Kumar (2016), *Breaking the Shackles: Sexuality, Freedom and Judicial Recognition to live-in relationship*. HNLU Journal of Law and Social Sciences. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235820

⁴¹ Marvin v. Marvin 18 Cal. 3d 660

⁴² Law Dictionary: Cambridge, An Amount of money that a court of law orders a person to pay to his or her partner after they end their relationship, when they were not married. Retrieved from <https://dictionary.cambridge.org/dictionary/english/palimony>

⁴³ D. Velusamy's case, supra note 32

of a woman in a live-in relationship, had used the word 'Palimony' for the first time.

In *Ajay Bhardwaj v. Jyotsna & others*⁴⁴, the Punjab High Court stated that women in live-in relationships are entitled to alimony. In that case a married woman started living with a man outside her marriage. Subsequently, she obtained divorce from her husband. In the course of her relationship with this man she had two children and also discovered that the man that she was living with was actually married, and had not yet divorced his wife. This fact was hidden from her. Further the woman alleged that whenever she told this man to marry her he evaded the matter under some pretext or the other. Finally, the woman then filed a complaint against him under Sections 376 and 506 of Indian Penal Code of 1860. She also filed for maintenance under Section 125, Criminal Procedure Code of 1973 for herself and their children. The man went for appeal on the ground that there was no valid marriage between them and that the woman had already received 40 lakhs as alimony from her previous husband. The court took note of *Chanmuniya v. Virendra Kumar Singh Kushwaha's*,⁴⁵ case, where the Supreme Court had laid down that "where partners live together as husband and wife, a presumption would arise in favour of a wedlock." Ultimately, the court gave a decision in favour of the woman on the ground that their relationship was in the nature of common law marriage and the woman should get the benefits of a legally wedded wife. The view expressed in *Ajay Bhardwaj's case*⁴⁶, was reiterated in *Parveen Tandon v. Tanika Tandon*⁴⁷, in which case the Delhi High Court directed that ad-interim maintenance be provided to the woman who was in live-in relationship with the respondent. The petitioner stated that the respondent had not disclosed his marital status to her. She also said that the petitioner executed a marriage agreement with her to show his genuineness and responsibility towards her and her child from her previous marriage. The Single Judge Bench of Hon'ble Justice Subramonium Prasad upheld the order passed by the Additional Sessions Judge directing the respondent to pay ad-interim maintenance to his live-in partner under the provisions of the PWDV Act. The Court concluded that the parties were adults and had cohabited for a long time voluntarily.

In the case of *Lalita Tappo v. State of Jharkhand*⁴⁸ the Supreme Court held that a female live-in partner could seek maintenance under the PWDV Act. In *Dhaannulaal v. Ganeshraam*⁴⁹ Apex Court on April 08, 2015, declared that if a "woman is living with a man for a long and considerable period,

⁴⁴ *Ajay Bhardwaj v. Jyotsna & others* 2017 ALLMR (Cri) 43

⁴⁵ *Chanmuniya v. Virendra Kumar Singh Kushwaha*, (2011) 1 SCC 141

⁴⁶ *Ajay Bhardwaj's case*, supra note 44

⁴⁷ *Parveen Tandon v. Tanika Tandon* CRL. M.C. 264/2021

⁴⁸ *Lalita Tappo v. State of Jharkhand* AIR (2019) 13 SCC 796

⁴⁹ *Dhaannulaal vs. Ganeshraam*, (2015) 12 SCC 301

law will presume that they are husband and wife unless and until contrary is proved and also entitled to claim inheritance rights". In that case, the court expanded the right of female partner in live-in relationship to include her inheritance right also which shows the progressive attitude of the highest court of the country.

STATUS OF CHILD BORN IN LIVE-IN RELATIONSHIP

While the law is clear regarding the legal status of a child born within wedlock, there exists a lot of controversy regarding the legitimacy and legal rights child born to a couple in a live-in relationship. Prior to the Marriage Laws (Amendment) Act of 1976, child was considered legitimate only if the child was born out of a valid marriage. Subsequent to the enactment of Marriage Laws (Amendment) Act of 1976, the scope regarding the legitimacy of the child was considerably widened.

According to the Hindu Marriage Act of 1955 (HMA Act), the conditions of a valid marriage are provided under section 5⁵⁰ of the Act. A violation of any these conditions makes the marriage void or voidable under sections 11 and 12 of the HMA respectively. Section 16⁵¹ of the HMA grants

⁵⁰ Section 5(1) of Hindu Marriage Act of 1955, Conditions for a Hindu marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity
- (iii) the bridegroom has completed the age of ⁴ [twenty-one years] and the bride, the age of ⁵ [eighteen years] at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

⁵¹ Section 16(1) & 16 (2) of Hindu Marriage Act of 1955, Legitimacy of children of void and voidable marriages.

legitimacy and property rights to children born from invalid or voidable marriages. This section, however, recognises the property rights of child only to a limited extent. The relevant section confers property rights on a child only with respect to her/his parents, and not beyond. In case of a child born out of a live-in relationship there is no legislation regarding the presumption of legitimacy or other rights in favour of the child. The judiciary in its attempt of fill up the void in law, has evolved its own jurisprudence relating to rights of a child born out of a live-in relationship with respect to legitimacy of the child and his or her property rights.

**PRESUMPTION OF LEGITIMACY AND PROPERTY RIGHTS OF CHILD
BORN OUT OF LIVE-IN RELATIONSHIP: JUDICIAL APPROACH**

As more and more matters come before the Indian Courts regarding the issues of legitimacy of a child born out of live-in relationship and his or her property rights, the judiciary has been very sensitive and given decisions in favour of legitimacy of the child where the paramount question is about the welfare of the child.

In *S.P.S Balasubramanyam v. Suruttayan*⁵², the Supreme Court for the first time considered the issue of Legitimacy of children born out of a Live-in Relationship. It was held that "If a man and woman are living under the same roof and cohabiting for some years, there will be a presumption under Section 114⁵³ of the Evidence Act of 1872 that they live as husband and wife and the children born to them will not be illegitimate."⁵⁴ In the case of *Vidyadhari v. Sukhrana Bai*⁵⁵, the Supreme Court stated that Children born out of live-in relationships are also entitled to the right of Inheritance

(1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

⁵² *S.P.S Balasubramanyam v. Suruttayan*, 994 AIR 133, 1994 SCC (1) 460

⁵³ Section 114 of Indian Evidence Act of 1872, there would be presumption in favour of wedlock if the partners lived together for long spell as husband and wife; but it would be rebuttable and heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place

⁵⁴ *S.P.S Balasubramanyam's case*, supra note 52

⁵⁵ *Vidyadhari v. Sukhrana Bai* (2000) 2 SCC 431

and ascribed them with the status of “legal heirs”. The Apex Court in *Tulsa & other v. Durghatiya*⁵⁶ granted the right to property to the child born in a live-in relationship and held that the child shall not be treated as illegitimate where the partners of live-in relationship cohabit for considerable period of time. Further, in *Revanasiddappa v. Mallikarjun*, the court held that a child born in such a relationship will have all the rights like that of a legitimate child from a valid marriage. In that case the court held that “regardless of the legitimacy of the relationship between parents, the child born out of that relationship must be regarded separately from the relationship between his or her parents⁵⁷”. The court was clear in its mind that a child born from a live-in relationship is innocent and must enjoy the same rights and privileges which are available to children born from a valid marriage. The Supreme Court went a step further in case of *Bharat Matha v. R. Vijaya Renganathan*, wherein the Supreme Court recognized the Inheritance’s Rights of a child born out of a live-in relationship by stating that a “child born in a live in relationship may be allowed to succeed inheritance in the property of the parents, but doesn't have any claim as against ancestral coparcenary property”⁵⁸. The Apex Court interpreted Section 16 of Hindu Marriage Act of 1955 which deals with issue of legitimacy of child and his or her inheritance rights under expression “Legal heirs” to include inheritance rights of child born in live-in relationship. In the case of *Kattukandi Edathil Krishan v. Kattukandi Edathil Valsan*⁵⁹ the Supreme Court held that children born out of a live-in relationship can be considered legitimate if the live-in relationship has been for a long period of time and such relationship has not been in the nature of a walk-in and walk-out relationship. In that case the court clarified that children born out of such relationship based on protracted period of cohabitation are legal offspring with coparcenary rights to the family’s property⁶⁰. It is heartening to note that in *Kattukandi*’s case, the Supreme Court expanded the property rights of the child born out of live-in relationship to not only include his or her inheritance rights but also to include coparcenary rights accruing from family property.

⁵⁶ *Tulsa & others v. Durghatiya* AIR 2008 SC 1193

⁵⁷ *Revanasiddappa v. Mallikarjun* AIR 2010 SC 2685

⁵⁸ *Bharat Matha v. R. Vijaya Renganathan* AIR 2010 SC 2685

⁵⁹ Civil Appeal No. 6406-6407 OF 2010; 13th June, 2022, Retrieved from https://www.live.law.in/pdf_upload/549-kattukandi-edathil-krishnan-v-kattukandi-edathil-valsan-13-june-2022-421799.pdf

⁶⁰ Pragya Swaraj. Can a child born out of live-in relationship claim Coparcenary rights? Finding I recent Supreme Court Case. Chanakya National Law University, Patna. Retrieved from <https://jlrs.com/can-a-child-born-out-of-live-in-relationship-claim-coparcenary-rights-findings-in-a-recent-supreme-court-judgement/>

CONCLUSION

As the world moves further into modernization and liberalization there is bound to be a drastic change in the traditional social norms and the life style of the people in a society. The concept of live in relationship which was popular only in western societies some years ago is gradually gaining acceptance in India, especially in cosmopolitan cities. In times to come, more and more young people would be opting for a live in relationship than marriage.

As discussed earlier countries like USA, UK and Canada including European Countries have specific cohabitation agreements that can be filled by two people who decide to live together. Such agreements recognize certain rights and liabilities of live-in partners which a married couple would also have. It is important to note that though cohabitation agreements are similar to prenuptial agreements there is a distinct difference between the two. A prenuptial agreement is drawn for partners who have been living together and decide to marry each other while a cohabitation agreement serves to protect the interests of partners in a live-in relationship.

In India, since there is no legal provision for either a prenuptial agreement or a cohabitation agreement the interests of the live-in partners are left unprotected. In recent times, it has been observed in our country that a female partner in a live-in relationship is particularly vulnerable to exploitation as people at large disapprove of such relationships. The case of *Gurvinder Singh vs State of Punjab*.⁶¹ shows how a runaway couple, in a live-in relationship, want to seek legal approval of their relationship as the girl's parents did not approve her male partner and did not want her to get married to him. In that case the Punjab and Haryana High Court caution that giving legal approval to live-in relationship would disturb the social fabric of the society as such a relationship is not socially and morally acceptable to the society. Subsequently, the Supreme Court laid down that a threat to a couple living together amounts to a threat to the right to liberty and freedom of two consenting adults. The court directed the police to look into the matter to determine whether the two partners were actually in a live-in relationship or not. This approach of the Supreme Court depicts the sensitivity of the court towards partners who want to have a live-in relationship.

Recently, a Public Interest Litigation⁶² has been filed before the Supreme court for a direction to the centre to frame guidelines for the registration of live-in relationships regarding the marital status, criminal background and

⁶¹ *Gurvinder Singh vs State of Punjab* CRM-M-25480-2022

⁶² Kashmira Sahani. (03 March 2023). *PIL in Supreme Court seeks mandatory drafting of guidelines for registration of live-in partnership*. Law Beats. Retrieved from <https://lawbeat.in/amp/top-stories/pil-supreme-court-seeks-mandatory-drafting-guidelines-registration-live-partnerships>

other details of the live-in partners. This petition has been filed specially in the light of the *Shraddha murder case*⁶³. This petition would also give opportunity to the highest court to direct the centre to frame guidelines to determine the rights and liabilities of the live-in partners on matters relating to maintenance, inheritance and custody of children born out of such relationships.

In *D. Velusamy's case*⁶⁴, the Supreme Court had said that the PWDV Act is applicable only to hetro-sexual unmarried persons in a live-in relationship. It is humbly submitted that since there are cases where the partners in a live-in relationship may be of the same sex or may be married persons or one partner may be married and the other may be unmarried the benefits of the PWDV Act must also be extended to such couples. In fact, in *Chinmayee Jena v. State of Odisha*, the court acknowledged the sexual orientation of same-sex couple and held the benefit of PWDV Act would also be extended to "Lady" in same sex relationship⁶⁵.

Nonetheless, the freedom of choosing a partner of one's choice is recognized as Fundamental Right of every citizen under Article 21 of Constitution of India which protects the rights of life and personal liberty of each person. Then, there is Article 14 of Constitution of India which protects the right to equality of each citizen of our country which includes partners in a live-in relationship. Further, Article 19(1)(a) of Constitution of India, which provides the right of freedom of speech and expression, allows partners in a live-in relationship to live together in peace and harmony.

There is no specific law stating that a couple can only live together in marriage. The law of nature is such that human being evolves and so does the law. Therefore, whether two hetro-sexual person live together or two homosexual persons live together, the need of the hour is that the legislature comes up with guidelines to protect the rights and interests of such people.

⁶³ Kashmira Sahani, supra note 62

⁶⁴ D. Velusamy's case, supra note 32

⁶⁵ Arunima Bose. (2020). Same-sex couple have a right to live together outside wedlock; Rights of a woman enshrined in Protection of Women from Domestic Violence Act, 2005 to apply on the "lady" in the relationship. Retrieved from <https://www.scconline.com/blog/post/2020/08/26/ori-hc-%E2%94%82-same-sex-couple-have-a-right-to-live-together-outside-wedlock-rights-of-a-woman-enshrined-in-protection-of-women-from-domestic-violence-act-2005-to-apply-on-the-lady/>

CHAPTER: 2

CHANGING NATURE OF LIVE-IN RELATIONSHIPS

-Aayushi Dhurvey^{1*}

ABSTRACT

In the domain of Family Law, marriage has played an integral role. The rights and liabilities as specified in the law emerge out of marriage. Other aspects of family law like “legitimacy of a child” stand dependent upon the institution of marriage. However, the changing nature of the society calls for a change in this understanding. People today opt for live-in relationships, which is an informal arrangement between two heterosexual/homosexual persons to live together without entering into the formal institution like marriage. Such relationships are distinguished from marriage by the fact that there is absence of legal rights and liabilities between the partners, which eventually is a factor of the growing popularity of live-in relationships. However, with the emerging family law jurisprudence in India, the courts are not reluctant in imposing legal obligations between the partners. This continuing trend completely changes the nature of live-in relations which was intended to be an informal institution. This article will analyse the effects and implications of the emerging jurisprudence in the context of imposed rights and obligations in live-in relationships.

Keywords- Live-in relationships, Emerging Jurisprudence, Legal rights, Legal obligations, Rights and obligations, Legitimacy of live-in relationships, Protection of women, maintenance rights, Legitimacy of children, visa rights.

INTRODUCTION

Marriage as a legal institution has been recognised all over the world. The legal structure and family law thus is largely based on the traditional understanding of family. Marriage legitimises cohabitation between couples. However, the world witnesses a new trend in the 21st century with a large number of couples living together without the sanctity of marriage. “Live-in-relationship is a relationship with an informal arrangement between two heterosexual/homosexual persons to live together without

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entering into the formal institution like marriage.”²These relationships resemble the normal institution of marriage. Western countries are largely open to the concept of live-in relationship and many countries have proper laws governing it. The reasons as to why people enter into live-in relationships are numerous. Couples generally want to check compatibility of their partners while living like married couples. Another reason is that getting out of a married relationship involves multiple legal hassles whereas in a live-in relationship a partner can randomly walk out of and no one can question them. This concept of dating has been imported to India as well and currently it only exists in the urban societies. Indian societies place heavy burden on the importance of marriage. However, in a country like India where even dating is considered as a taboo, live-in relationships face far greater backlash. This aversion towards live-in relationships emerges out from multiple factors, one of which is that pre-marital sexual intercourse is frowned upon. To substantiate this point, in 2005, 22 criminal cases were filed against a South Indian actress for allegedly endorsing pre-marital sex in interviews to various magazines.³

In such a rigid society, judiciary plays an important role by ensuring fundamental rights of the citizens. Indian judiciary has been delivering progressive judgements in the subject of live-in relationships, thereby giving certain legitimacy to it when parliament is politically silent on the subject. Many judgements have been delivered with respect to legitimacy of live in relationships, safety of women partners, legitimacy of children born out of such relationships, inheritance rights of children and visa rights. Legally speaking the basic fact that distinguishes live in relationships from marriage is the absence of rights and corresponding obligations that only arise when they formally get married. However, the current judicial trend of introducing rights and obligations completely alters the nature of live-in relationships which was initially intended to be informal. This article, through the emerging jurisprudence emerging in India, will assess and analyse the need for imposition of such rights and obligation and would also embark upon understanding the effect of the same on the partners.

EMERGING JURISPRUDENCE AND LEGAL POSITION IN INDIA

With the emergence of live-in relationships courts face the challenge of balancing the societal structure of marriage with westernisation. With numerous cases of honour killings, religious and caste division in marriage, opposition towards pre-marital sexual intercourse and aversion towards dating the challenge is far greater than it seems. Following this

²Rahman, W. (2016). Live-in-relationship and status of women in India. *International Journal of Law and Legal Jurisprudence Studies*, 3(3).

³ S. Khushboo v. Kanniammal and Anr, 2010 (4) SCALE 462

archaic social fabric, the judgements have also been contradictory. In two separate judgements of *Gulzar Kumari v. State of Punjab 2019 SCC ONLINE P&H 3089*⁴ and *Ujjawal v. State of Haryana 2021 SCC ONLINE P&H 914*⁵ the Punjab and Haryana High Court denied to grant protection to couples living within a live-in relationship. Additionally, these judgements claimed that as a consequence of such cohabitation “entire social fabric would be disturbed” and that these relationships are unacceptable. These judgements spurred controversy in the country and later the Punjab and Haryana High court in the case of *Pardeep Singh v. State of Haryana 2018 SCC ONLINE P&H 3533*⁶, held that the right to choose whether to marry or adopt a non- formal approach is inherent to the right to life and personal liberty. Contradicting the above stance several other high courts did grant protection to couples cohabiting in a live-in relationship. To name a few, in *Kamini Devi v. State of UP 2020 SCC ONLINE ALL 1740*⁷ and *Paramjit Kaur v. State of Punjab*⁸ the high courts granted police protection citing reasons of personal liberty envisaged under article 21 of the Constitution of India. This section will attempt to examine the current legal position in of live in relationships where several contradictory judgements already exist.

LEGITIMACY AND LEGAL POSITION OF LIVE-IN RELATIONSHIPS

Live-in relationships are not illegal in India but they are backed by several progressive judgments delivered by the Hon’ble courts. This section will examine how the courts have given legitimacy to live-in relationships over the course of time. It will be wrong to say that live-in relationships have only existed in the 21st century. A 1978 judgement of Supreme Court indicate the contrary. In *Badri Prasad v. Deputy Director Consolidation*⁹, the court held that if a couple, over a long period of time presented themselves to the society as husband and wife, then they get recognised as being legally married.¹⁰ However, this judgement did not provide any clear emphasis on the concept of live-in relationships rather it based its decision on the model of institution of marriage.

⁴ *Gulzar Kumari v. State of Punjab 2019 SCC ONLINE P&H 3089.*

⁵ *Ujjawal v. State of Haryana 2021 SCC ONLINE P&H 914.*

⁶ *Pardeep Singh v. State of Haryana 2018 SCC ONLINE P&H 3533.*

⁷ *Kamini Devi v. State of UP 2020 SCC ONLINE ALL 1740*

⁸ *Paramjit Kaur v. State of Punjab LQ/PunjHC/2021/3264*

⁹ *Badri Prasad v. Deputy Director Consolidation 1978 AIR 1557*

¹⁰ Narayan, C. L., Narayan, M., & Deepanshu, M. (2021). Live-in Relationships in India—Legal and Psychological Implications. *Journal of Psychosexual Health*, 3(18).

Fast forward in 21st century, it was only in 2001 where the court gave legal recognition to live-in relationships. The Supreme Court in the case of *Payal Sharma v. Nari Niketan*¹¹, held that a man and a woman can live together if they wish without marrying while noting that although it is immoral in the eyes of society it is not illegal in the eyes of law. Following this several progressive judgements followed. In the case of *Lata Singh v. State of U.P.*¹², the court opined that, even though it is considered as immoral, a live-in relationship between two consenting adults of heterogenic sex does not constitute an offence (with adultery as an exception). A major girl has the freedom to marry or "live with anyone she likes." The proceedings were initiated by the family of the girl and the court noted that the case in question is an abuse in the process of law. The above judgement was also cited in the case of *S. Khushboo v. Kanniammal*¹³, where the Supreme Court while giving legal recognition to live-in relationships categorized them as domestic relationships that fall within the ambit of Protection of Women from Domestic Violence Act, 2005¹⁴. The court further included live-in relationships within the ambit of the right to life Article 21 of the Constitution of India and stated that such relationships are completely permissible and it is not illegal for two consenting adults to live-in together. The above judgements establish the legitimacy of two couples living together without the obligation of marriage.

In the same line of judgements, the Supreme Court in *Indra Sarma v. V.K.V. Sarma*¹⁵, while deciding whether in a broken live-in relationship non maintenance would amount to domestic violence under the DV Act, recognised live-in relationships to be in the nature of marriage. However, the court also noted that in a live-in relationship where one of the couples is already married cannot be recognised as in the nature of marriage as it is clearly prohibited by law. The court was referring to bigamy provisions that are section 494 and 495 of Indian Penal Code, 1860¹⁶. The court also laid down factors that needed to be considered while determining whether the cohabitation was in the nature of marriage. The factors include "duration of the period of relationship, shared household, pooling of resources and financial arrangements, domestic arrangements, sexual relationship, children, companionship, socialisation in public and intention

¹¹ Payal Sharma v. Nari Niketan AIR 2001 ALL 254

¹² Lata Singh v. State of U.P. AIR 2006 SC 2522

¹³ S. Khushboo v. Kanniammal (2010) 5 SCC 600

¹⁴ Protection of Women from Domestic Violence Act, 2005

¹⁵ Indra Sarma v. V.K.V. Sarma (2013) 15 SCC 755

¹⁶ Indian Penal Code, 1860, s. 494, 495.

and conduct of parties.”¹⁷ The above judgements present a strong case towards the legitimacy of live-in relationships. This fairly new concept has thus found its place in the Indian Jurisprudence.

RIGHTS OF WOMEN AND CHILDREN

i. Protection and maintenance rights of women

Legitimacy is only one aspect of jurisprudence in the area of live-in relationships. The judiciary has adjudicated over women's safety within such relationships. Indian courts have recognised palimony, the equivalent of alimony in live-in relationships. This term was first coined in the case of *Marvin v. Marvin*¹⁸, in California, US. The woman partner in this case approached the court for financial compensation from her partner. She was living with him in a live-in relationship for a long period of time¹⁹. Justice Malimath's committee in 2003 recommended amendments under section 125 of The Code of Criminal Procedure 1973²⁰, to include women cohabiting with a man for a reasonably long period of time. The purpose was to include such partners under the definition of the word “wife” in section 125.²¹ Palimony was first recognised in India in 2010 in the case of *Veluswamy v. Patchaimmal*²². The right is only available to those couples who are not cohabiting only for sexual pleasures. In *Chanmuniya v. Virendra Kushwaha*²³, the Supreme Court upheld the right of women in a live-in relationship to claim maintenance. The court also elaborated on the rationale behind such ruling and stated that the purpose of this is to ensure that the women partners are not left in a disadvantaged position where men can take advantage of them. Further in the case of *Kamala v. Mohan Kumar*²⁴, the court observed that prolonged cohabitation will lead to the presumption of marriage, therefore, women and children born out of such relationships are entitled to receive maintenance.

¹⁷ Sonia. (2021, July 26). Legal status of Live-in Relationships in India: Mapping Indian Jurisprudence - Academike. Retrieved from [www.lawctopus.com](https://www.lawctopus.com/academike/live-in-relationships-in-india/) website: <https://www.lawctopus.com/academike/live-in-relationships-in-india/>

¹⁸ *Marvin v. Marvin* 18 Cal. 3d 660

¹⁹ Narayan, C. L., Narayan, M., & Deepanshu, M. (2021). Live-in Relationships in India—Legal and Psychological Implications. *Journal of Psychosexual Health*, 3(18).

²⁰ The Code of Criminal Procedure 1973, s 125.

²¹ Ministry of Home Affairs. (2003). Committee on Reforms of Criminal Justice System Government of India. Retrieved from https://www.mha.gov.in/sites/default/files/criminal_justice_system_2.pdf

²² *Veluswamy v. Patchaimmal* (2011) 1 SCC (Cri) 59

²³ *Chanmuniya v. Virendra Kushwaha* (2011) 1 SCC 141

²⁴ *Kamala v. Mohan Kumar* (2019) 11 SCC 491

Live-in relationships are also covered within the ambit of Prevention of Domestic Violence Act, 2005. Section 2(f) of the DV Act, 2005 defines domestic relationship and mentions covers relationships that are “in the nature of marriage”. Couples who are cohabiting for a long period of time are thus in a relationship which is in the nature of marriage. Aggrieved party can also receive monetary relief on the direction of courts under the DV Act, 2005. The court granted relief under this act to the live-in partner in the case of *Lalita Toppo v. State of Jharkhand*²⁵. It is pertinent to note that such relief is only available to women both under section 125 of Cr. P.C. and the DV Act, 2005. Courts have enforced such right and obligation in live-in relationships which initially intended to exist without them. However, this set of right and obligation is only imposed in relationships which are in the nature of marriage. To elaborate further, if a relationship merely exists to check compatibility of partners or to mutually cohabit for companionship for a short period of time such obligation would not exist. In the case of *Indra Sarma v. V.K.V. Sarma*²⁶, the couples were financially vulnerable towards each other as they started their own business. Their relationship escalated to something more than a normal cohabitation. The court pointed out that “such relationship may endure for a long time and can result in a pattern of dependency and vulnerability”. Normally the court would have classified this within the scope of “relationships in the nature of marriage” but since the man was already married this classification did not happen.

ii. Legitimacy and rights of children born out of live-in relationships

Sexual intercourse is an important component of a live-in relationship. With increasing number of such relationships courts faced another difficulty of granting legitimacy and rights to children. In the 1992 judgement of *SPS Balasubramanyam v. Sruttayan*²⁷, the court gave legitimacy to children born out of pro-longed live-in relationships. The court observed that if the couple has been living together for reasonable years, then there will be a presumption of marriage. This presumption stems out from Section 114 of the Evidence Act, 1872. In the 2008 judgement of *Tulsi v. Darghatiya*²⁸ the Supreme Court observed that children born from live-in relationships will be considered legitimate. The court also laid down a condition that the parents must have been cohabiting and living together for considerable number of years. The court observed that for children to receive legitimacy status such relationships should not be of that of “walk in and walk out” relationship. (Jha, 2016) In the same

²⁵ *Lalita Toppo v. State of Jharkhand* 2018 SCC ONLINE SC 2301

²⁶ *Indra Sarma v. V.K.V. Sarma* (2013) 15 SCC 755

²⁷ *SPS Balasubramanyam v. Sruttayan* AIR 1992 SC 756

²⁸ *Tulsi v. Darghatiya* (2008) 4 SCC 520

line of judgments the court in *Bharatha Matha v. R Vijaya Renganathan* AIR 2005 SC 1809 held that children born out of live-in relationships will be considered legitimate. The legislature has not focused on this aspect of live-in relationships at all and thus courts have emerged as protector of child interests. Keeping in mind the principles of juvenile justice, the courts have interpreted the law in broader manner in the favour of children. This can be noted from the fact that in the case of *Savitaben Smbhai Bhatiya v. State of Gujrat*²⁹, the court provided maintenance rights to a child born out of a live-in relationship whereas the mother was refused any maintenance on the ground that the father already had a wife. The court has also on occasions granted maintenance rights to children born out of illicit relationships.

The court passed the landmark judgement in the case of *Vidhyadhari v. Sukhrana Bai*³⁰ and granted inheritance to children born from live in relationship while giving them the status of legal heirs. In the case of *Bharatha Matha*³¹ it was also held that such children would also be given rights to inherit property of their parents. The court further added that such children would not be entitled to receive ancestral property as section 16 of Hindu Marriage Act, 1955³² does not entitles children of void and voidable marriage to inherit ancestral property. The researcher contends that this legal position was discriminatory and against the constitutional principles. The above judgement was also criticised by Justice Ganguly in the case of *Revanasiddappa v. Mllikarjun* (2011) 4 SCR 675. He noted that the word property under Section 16(3) of HMA does not distinguish between the kinds of property. It is silent on the subject that whether the property is self-acquired or ancestral. The court in the above case stated that-

“If they were declared legitimate, then they cannot be discriminated against and they will be on a par with other legitimate children and be entitled to all the rights in the property of their parents, both self-acquired and ancestral.”

The court quoted Article 39(f) and Article 300A of the Constitution of India and went on to uphold that whatever “becomes the property of their parents whether self-acquired or ancestral,” will be the property of the children born out of live-in relationships.

iii. Rights surrounding visa

The area of visa rights in terms of live-in relationships has remained largely untouched by the judiciary. Ordinarily a foreign national's visa can

²⁹ Savitaben Smbhai Bhatiya v. State of Gujrat AIR 2005 SC 1809

³⁰ Vidhyadhari v. Sukhrana Bai (2008) 2 SCC 238

³¹ AIR 2005 SC 1809

³² Hindu Marriage Act, 1955

be extended if their partner is an Indian National. No such provision exists for extension of visa in case the partners are in a live-in relationship. This creates a peculiar problem for foreign nationals exposed to western culture for whom live-in relationships is a normal affair. In a 2015 judgement the Delhi High Court in the case of *Svetlana Kazankina v. Union of India*³³, dealt with the issue of granting visa extension of an Uzbekistan national women living with an Indian man in a live-in relationship. The court directed the centre to take policy decisions on this case. Justice Endlaw expressed that-

"I am of the view that just like a need was felt to extend the benefit of DV Act also to women in live-in relationships in the nature of marriage, there is a need to extend the benefit of the Rule/Guideline providing for extension of visa of foreigners married to an Indian national to foreigners though not married but in a live-in relationship."

The extension was although denied, however, as a result of the above judgment the coercive methods of deporting her and their kids were stayed. The court highlighted a major loophole in the law that needs attention of the legislature. For instance, United Kingdom has a provision for Unmarried Partner Visa which enables an unmarried person to enter and remain in UK on account that their partner is a permanent resident of UK. There is a need to bring about such a reform in the visa laws that would contribute towards building a legal structure governing live-in relationships in India.

CONCLUSION

Live-in relationships have been a subject of taboo to this date in India. Indian societies largely rely on the institution of marriage. Acceptance becomes an issue whenever someone goes out of the traditional way of living. Legally recognised marital relationships have their own pros. Such relations are backed by law and are protected at every instance. They reduce vulnerability of partners. Live-in relations on the other hand are diametrically opposite with no security guards. Couples choose this over marital relationships as they have lesser obligation and commitments. However, the judiciary is working towards ensuring rights of women and children within a live-in relationship. Women are protected under the domestic violence act and they have maintenance rights as well. Whereas children born out of such relationships are considered legitimate, have maintenance rights and inheritance rights as well. Thus, the courts have imposed obligations in a relationship which initially intended to start off as something casual.

³³ (2015) 225 DLT 613.

On deeper analysis of facts and circumstances of various cases the researcher contends that such obligations are necessary. Live-in relationships make partners emotionally, financially and domestically vulnerable towards each other. Their relationship as the courts have defined is in the “nature of marriage”. In many prolonged relationships the couples live as married couples. Now if in such situations the law refuses to protect women against domestic violence then it will be injustice towards them. When we consider maintenance and inheritance rights of children born out of live-in relationships, the law does not treat them at par with children born out of regular marriages. This discrimination is against the principles of justice and equity. Thus, the absence of rights and obligations would put women and children in a compromising position.

In essence it can be concluded that partners enter into live-in relations to avoid the burdens of marriage and test each other's compatibility. However, simultaneously it makes them vulnerable towards each other. This calls for a legal framework that necessarily imposes certain rights and obligations that would shield the partner/ child from potential legal wrongs. Law is necessary to maintain order in the society and similarly live in relationships could create havoc in the society if they are not governed by proper legal framework. The emerging rights and obligations are slowly altering the nature of live in relationships into a relationship “in the nature of marriage”.

The courts have done their part on legitimising live-in relationships. They have covered the major aspects that are necessary for ensuring rights of couples. However, the baton is now in the hands of legislature. The legislature must codify laws that govern live-in relationships to ensure smooth and speedier justice. France has Civil Solidarity Pact of ‘pacte civil de solidarite’ that governs live-in relationships. Similarly United Kingdom's live-in relationships are governed by Civil Partnership Act, 2004. In Canada live-in relationships or common law relationships get legally recognised after cohabitation for 12 months. The legislature in India has only spoken up regarding women protection within a live in relationship. It has been silent on the subject of child legitimacy and inheritance. There are several other aspects like homosexual relationship and visa extension that must be taken into account and a legal structure must be framed.

CHAPTER: 3

RAJNESH v. NEHA JUDGEMENT: MAINTENANCE LAWS AND SOCIAL JUSTICE

*Manas Mahajan and Dristant Gautam**

ABSTRACT

Marital and domestic arrangements have an unequal power disparity, especially in developing countries such as India, where women and children are left in precarious situations post-separation. It is the mandate of the state to protect their rights and ensure social justice. Matrimonial disputes are expensive, messy and long-drawn; often, the dispute is exaggerated instead of resolving the discord. Various legislations in India provide for maintenance, but the objective and persons covered also differ. This variety leads to parallel proceedings, duplicity of orders and increased burden on the respondent. The paper analyses various provisions under, CrPC, PWDVA, HMA and HAMA to display where they overlap and their effects. The Supreme Court of India, in the Rajnesh v. Neha judgment, has after evaluating various factors, laid down comprehensive guidelines to fill the gaps in maintenance proceedings at the ground level. Out of the various facets of the judgment, this article focuses on 'social justice'. After a thorough critical analysis of issues pertaining to Interim Maintenance, Quantum and the factors of maintenance and whether it is correct to be adjusted against other orders, the author suggests that the judgment has brought in the much-needed practical reforms.

Keywords – Rajnesh v. Neha – social justice – interim – quantum – maintenance – set-off – multiple proceedings – husband – constitutional.

INTRODUCTION

Through the *Rajnesh v. Neha*¹ judgement, Supreme Court changed the landscape of maintenance proceedings in India. Through this case comment, the authors examine its efficacy in promoting social justice. Maintenance support legislation aims to protect dependent persons from destitution and vagrancy. As per the *Manu Smriti*, "It is a man's duty to maintain his virtuous wife ageing parents and children even if he has to partake in a hundred misdeeds" The Supreme Court, while explaining the

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¹ Rajnesh v. Neha, (2021) 2 SCC 324

rationale behind maintenance laws, said in *Badshah v. Urmila Badshah Godse and Anr*² held that the "provision of Maintenance aims at empowering the destitute and achieving social justice or equality and dignity of the individual. The law regulates relationships between people. It reflects the values of society." In India, general and personal laws provide maintenance rights. Interim Maintenance can be awarded even during the pendency of the cases, i.e., *pendente lite* to help the weak party maintain itself during the proceedings; this provision is crucial considering the significant delay and pendency of maintenance suits.

The existence of multiple legislations to claim maintenance leads to confusion and multiplicity of proceedings. Since both grant 'interim maintenance', there is no clear-cut line between various provisions like 125 of the CrPC³ and Section 24 of the HAMA, 1955⁴. They significantly overlap, e.g., a woman who is a victim of domestic violence and wants to file for divorce can claim interim maintenance under Section 20 of PWDVA 2005, Section 25 of HMA⁵ 1955 and even Section 125 of CrPC. This overlap gives rise to undue delay, multiple concurrent proceedings and excessive financial burden on the respondent supposed to pay maintenance.

At times, it takes several years to decide a suit of interim maintenance, the very purpose of which is to provide for the dependent spouse until a final order is passed. The deleterious combination of maintenance suits, with overlapping and multiple proceedings, prevent the ward from a timely and fair amount of Maintenance. It is a practical reality that maintenance proceedings are messy due to dirty negotiation tactics, exaggerated claims and underreporting of assets.

Article 15(3) of the Indian Constitution allows the Parliament to make special provisions for women and children. The failure of maintenance laws due to the above-discussed factors points to a failure of social justice, as envisaged by the law.

The two-judge bench decision of the Supreme Court in *Rajnesh v. Neha* is significant as it seeks to remedy the defects in the Indian maintenance regime. Through this case comment, the author analyses the judgment in detail, explaining how the guidelines framed are to further social justice, not just for the aggrieved persons but also for the respondents.

² *Badshah v. Urmilla Badshah Godse*, (2014) 1 SCC 188

³ Code of Criminal Procedure, 1973

⁴ The Protection of Women from Domestic Violence Act, 2005

⁵ Hindu Adoption and Maintenance Act, 1956

BRIEF FACTUAL MATRIX

The Supreme Court heard this case as an appeal filed by the husband against the impugned order of the Bombay High Court, which had upheld the order of maintenance as passed by the Family Court. The husband, i.e., the appellant, claimed that he was unemployed and hence not able to support his wife. On the other hand, the wife alleged that he was hiding his income and investments in the real estate sector to avoid paying her rightfully demanded maintenance; this tussle is common in most matrimonial disputes. The apex court observed that the proceedings had already stretched beyond 7 years, even when they were for maintenance under Section 125 CrPC. Hence, the court needed to frame guidelines to ensure fair and swift proceedings to achieve social justice, which is the aim of maintenance laws.

CONSTITUTIONAL GUIDANCE ON INTERPRETATION

Article 15(3)⁶ of the Constitution of India states “*Nothing in this article shall prevent the State from making any special provision for women and children.*” In the *Ramesh Chander Kaushal v. Veena Kaushal*⁷ judgment, the apex court held that the mandate of this article maintenance laws have been enacted to protect women, children and other dependents from falling into destitution and vagrancy, and that these laws are a measure of social justice. Thus, the court observed that the constitutional empathy towards women and children must inform their interpretations.

THE OVERLAPPING JURISDICTION PROBLEM: DIFFERENT OBJECTIVES OF THE VARIOUS PROVISIONS

Court has taken note of the existence of multiple provisions under the Hindu Marriage Act, 1955, Hindu Adoption and Maintenance Act, 1956, Code of Criminal Procedure, 1973, Special Marriage Act, 1954, Protection of Women from Domestic Violence Act, 2005 etc; this increases confusion for the litigants and often leads to multiple proceedings on the same dispute. It was observed that each piece of legislation had a distinct purpose and offered relief under different conditions thus, the **grant of relief under one provision would not act as a bar against the filing of an application for relief under another provision.**

The court highlighted the differences between various provisions to explain why a grant of relief under one is not a bar for relief under another provision.

⁶ Constitution of India, 1950

⁷ *Ramesh Chander Kaushal v. Veena Kaushal*, (1978) 4 SCC 70

HINDU MARRIAGE ACT, 1955 AND HINDU ADOPTION AND MAINTENANCE ACT, 1956 :

The first major distinction is that under Section 18 HAMA, only the wife can claim Maintenance, whereas, under Sections 24 and 25 of HMA, either of the spouses can file for the relief.

Under Section 18 of HAMA, only a **legally wedded "wife"** during her lifetime can claim the maintenance; Section 18(2) stipulates the conditions under which maintenance can be granted to a wife while living separately. HAMA contemplates maintenance during the subsistence of marital relations. HMA contemplates the grant of maintenance based on the assumption that the marital relationship is affected negatively due to the passing of decrees of divorce, judicial separation, restitution of conjugal rights or a decree of nullity of marriage. Under HMA, a divorced wife or even a wife of null and void marriage can claim maintenance.

SECTION 125 OF CrPC

This is a secular provision, meant to provide immediate relief to a woman who has left her matrimonial home and provide for her sustenance. The section recognizes the urgency of protecting women from destitution and thus has been interpreted liberally by the courts. The court relying on *Chanmuniya v. Virendra Kumar Singh Khuswaha*⁸ points out that a woman is entitled to maintenance under this section if she has cohabited with her partner for a long time *even in the absence of a valid marriage*. The rationale for such an interpretation is that no man should be able to take advantage of a de-facto marriage without fulfilling his duties. Thus, strict proof of marriage will not be a precondition to the maintenance grant as per the court, and such an interpretation upholds the spirit of S. 125 CrPC. If the courts were to go into the intricacies of the validity of the marriage, it would lead to delays in the proceedings, which would frustrate the entire purpose of S 125 CrPC, which is to provide a summary remedy to women who have left their matrimonial home and are without support. Compared to HAMA, Section 125 CrPC covers a wider range of Females who can claim relief, including divorced women and women in a de-facto/common law marriage. However, it is to be noted that *this provision does not provide relief to women who live with men for a long period knowing that he has a wife* as per established rulings, including the case of *Sunita V. Suresh*.⁹ The court has remained silent on the rights of such women. This silence perhaps reflects that the judiciary is not willing to promote extramarital relations. However, they are in favour of providing maintenance rights to women to live in relationships that are in the *nature of marriage* by virtue of long cohabitation.

⁸ Chanmuniya v. Virendra Kumar Singh Khuswaha, (2011) 1 SCC 141

⁹ Sunita V. Suresh, (2022) (2) Mh.L.J.

Thus, we have seen that the nature of relief provided in CrPC differs from that provided in HMA and HAMA. As per *Nanak Chand V. Chand Kishore Aggarwal*¹⁰, the scope and purpose of 125 CrPC is to provide summary relief and is applicable to all religions, whereas the obligation to maintain a wife under HAMA is an absolute obligation applicable to Hindus only, which arises out of the customs and tenets of the religion. Thus, both acts can stand together.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT

This legislation is aimed at providing women in a domestic relationship with relief when she has suffered domestic violence. The court relied on *Hiral P. Harsora And Ors vs Kusum Narottamdas Harsora And Ors*¹¹ case and observed that ‘respondent’ in this legislation includes both males and females as the court recognized that women too are involved in inflicting abuse on other women. This interpretation is despite the fact that the express wording of Section 2(q) of the PWDVA defines respondent as ‘*any adult male person*’¹². The court is cognizant of the unfortunate reality that even a woman can inflict physical, emotional, and economic abuse against another woman. Suppose such a broad interpretation is not given; In that case, men can exploit this loophole and commit the prohibited acts with the assistance of other female members of the family, leaving the *aggrieved person* with no recourse.

As per the act, a domestic relationship includes the relationship between two persons *who live or have lived at any point together in a shared household* when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Through various judgements, the act has been made progressive and now takes into account the increasing prevalence of live-in relationships. It would be a failure of justice if there were no relief available to women who are in need of support after being deserted by their partners of live-in. The need to protect the interests of such women remains since it is a situation analogous to marriage, and the accompanying issues are bound to arise. However, it is to be noted that not all women in live-in relationships can claim maintenance. The relationship need not be solemnised by marriage but must have certain salient features of marriage.

¹⁰ Nanak Chand V. Chand Kishore Aggarwal, (1969) 3 SCC 802

¹¹ Hiral P. Harsora and Ors vs Kusum Narottamdas Harsora And Ors, (2016) 10 SCC 165

¹² Section 2(q), The Protection of Women from Domestic Violence Act, 2005

The following factors are to be considered while determining if a live-in relationship is a relationship in nature of marriage per the Supreme Court in “*Veluswamy*”¹³ case:

- (a) duration of the relationship,
- (b) shared household,
- (c) domestic arrangements,
- (d) economic pooling of resources,
- (e) sexual relationship,
- (f) having children and a semblance of a family,
- (g) socialisation in public i.e., representing to others as a married couple, and
- (h) the partners must have the capacity to marry.”

The court, in this case, has abstained from touching upon the issue of maintenance of women who live in a relationship with men knowing that he has a subsisting marriage. The rationale per the case of *Gokul Chand v. Pravin Kumari*¹⁴ is that the presumption of marriage raised by long cohabitation is rebuttable. If the woman is aware that the man has another wife, and still chooses to cohabit, then the relationship cannot be in the nature of marriage. The reason is that bigamous marriage is a void marriage, and the status of such women would be that of a mistress. By not providing Maintenance in such cases, it seems that the court is trying to create a distinction between a de-facto wife and a mistress. **Here, the court seeks to protect the values of a family system by clarifying that a mistress cannot be entitled to maintenance.** However, the courts cannot remain silent with the rise in such relationships, especially in urban cities. Such relationships, at times, go on for a long period of time, creating dependency on the man in the illicit relationship. The authors accept that the legislature and the courts cannot promote illicit relationships; nonetheless, they would still have to protect their interests since the mandate to create special provisions for protecting women and children lies with them, it must not exclude those in illicit relationships. There is a pressing need for clear guidelines for the maintenance of women in such relationships, especially when the non-recognition can result in no support from the courts or respondent’s end.

The court also discusses the right of women to reside in the ‘shared household’ under PWDVA. Relying on *Prabha Tyagi V. Kamlesh Devi*¹⁵ and *Satish Chandra Ahuja V. Sneha Ahuja*¹⁶, the court observed that “if a woman is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or by being a member of a joint family, she has a right to reside in the shared household under Section 17 of the

¹³ D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469

¹⁴ Gokul Chand v. Pravin Kumari AIR 1952 SC 231

¹⁵ Prabha Tyagi V. Kamlesh Devi (2022) SCC OnLine SC 735

¹⁶ Satish Chander Ahuja v. Sneha Ahuja (2021) 1 SCC 414

PWDVA. If such a woman becomes an *aggrieved person*¹⁷ she can enforce her right to reside in the shared household notwithstanding the fact that she had never resided there.”

This interpretation takes into account the practicalities of the lives of the common man to do complete justice. So, if a woman on account of her job or any other reasonable cause resides elsewhere, she nevertheless has a right to reside in the shared household which includes the shared household of the husband's joint family. Thus, this creates a comprehensive framework to ensure that women suffering domestic violence are not evicted from their homes

EXISTENCE OF PARALLEL PROCEEDINGS

Thus, each legislation has a different intention and provides relief under different situations. Hindu Marriage Act applies when the marital relation is strained, and a decree has been passed as specified. HAMA applies during the subsistence of the marriage; Section 125 of CrPC protects women from falling into destitution via summary proceeding, and PWDVA provides maintenance to women suffering domestic violence. The decision of the court to not preclude proceedings across different legislations is consistent with the desire to protect women from destitution by giving them the to enforce their rights under all possible legislations. All rights are accompanied by duty, and it is mandatory to disclose the existence of parallel proceedings and the details of the orders passed (if any).

PARALLEL MAINTENANCE PROCEEDINGS AND THEIR QUANTUM: MISUSED AGAINST THE HUSBAND?

There were broadly two divergent positions of the High Courts on overlapping jurisdiction. Some High Courts, such as the Madhya Pradesh High Court¹⁸, have held that it is incorrect to have a thumb rule to adjust the award, as per the maintenance order(s) under different legislations, since the different legislations have different objectives. On the other hand, Bombay and Delhi High Courts¹⁹ have believed that set-off or adjustment must occur in case of parallel proceedings. The Bombay High court rightfully said the following,

“18. What I intend to emphasise is the fact that the adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount.

¹⁷ The Protection of Women from Domestic Violence Act, 2005, s 2(a)

¹⁸ Ashok Singh Pal v. Smt. Manjulata, 2008 SCC Online MP 18

¹⁹ Vishal v. Aparna 2018 SCC OnLine Bom 1207

Though the wife can simultaneously claim maintenance under the different enactments, it does not in any way mean that the husband can be made liable to pay the maintenance awarded in each of the said proceedings.”

(Emphasis supplied)

The Supreme Court observed that it was nowhere the intention of the legislature that once maintenance has been granted under a certain provision it should act as a bar to filing for re-adjudication under some other provision. However, it said that to require the husband to pay maintenance under each proceeding, independent of the relief granted in the previous proceedings would be inequitable. It directed the courts to take into account relief granted under previous proceedings while deciding the quantum of relief.

The men's group welcomed this direction as it saved them from being forced to pay under each provision and the fear of multiple legislations. This direction aligns with the real objective of maintenance, i.e., ensuring that dependents, mostly women and children, do not fall into destitution while ensuring that the amount is such that the man would be reasonably able to pay. Court proceedings are expensive and lengthy, if multiple proceedings are initiated against a man, it can deplete his earnings. This is antithetical to the objective since the person supposed to provide is also destitute, and the dependents would have no remedy.

ENSURING INTERIM MAINTENANCE REMAINS INTERIM

The court observed that despite statutory provisions requiring the disposal of interim maintenance applications in a time-bound manner, they remained pending for several years. This defeat the purpose of granting interim maintenance, which is to maintain the women and children during the proceedings and cover their cost of proceedings. The court remarked that parties often submit scanty materials, and incorrect details and suppress vital details to conceal the actual income. The calculation thus was done on the basis of arbitrary guesswork with delays that often left the women with no support.

The court, while recognising the private nature of the dispute, directed that marriage counsellors should be appointed to Family courts by giving effect to Sections 5 and 6 of the Family Courts Act 1984, who would help in the process of settlement. This is a laudable step as it will let parties know the interests of one another and reach a mutually agreeable solution.

According to the court's directions, the party claiming maintenance and the application for interim maintenance must file an Affidavit of disclosure of assets and liabilities as a mandatory disclosure. The respondent has to file his reply and affidavit of disclosure within 4 weeks. Suppose the respondent fails to submit the affidavit in the said period. In that case, the

court must proceed to decide the application based on the affidavit of the applicant and pleadings on record. This direction will help the court objectively decide the need of the applicant and direct the payment of a reasonable amount of maintenance in a time-bound manner. The court has been very cognizant of the social realities while framing guidelines for an Affidavit of Disclosure. On the suggestions of NALSA (National Legal Service Authority) and SLSAs, the court framed different Affidavits of Disclosure for rural and urban areas it framed a completely different affidavit for Meghalaya taking note of the largest tribal population there and their peculiar way of life. Additionally, any change in the financial status of any party will be brought to the notice of the court via a supplementary affidavit which the court will consider at the time of final determination. The court directed that a reasoned order should be passed within 4-6 months of filing the affidavit in front of the court. These directions have addressed the causes of delay and have tried to ensure that interim maintenance is decided within a short period. This is a laudable step taken by the court, as several years of delay in interim Maintenance means that women and children fall into destitution during the trial and are not able to fight for their rights. This frustrates the very purpose of Article 15(3) of the constitution and interim maintenance laws.

FROM WHICH DATE MAINTENANCE SHOULD BE AWARDED?

There were no clear directions in the statute regarding the date from which the maintenance has to be paid, the exception being Section 125 of CrPC, which clarifies that it can be paid from the date of application or the date of order. This ambiguity had led to vast variance among family courts on the date from which Maintenance would be payable.

The courts took three prominent positions:

First, Payment of maintenance from the date of application is based on the rationale that the needy person should not be denied maintenance due to delay in litigation.²⁰

Second, based on the rationale, S125 CrPC states the Maintenance shall be paid 'from the date of order' or ordered from the 'date of application'.²¹ This is a literal reading of the provision without paying heed to the fact that this section seeks to prevent women from falling into vagrancy. This approach does not consider the need for the maintenance of women during the period of litigation, which goes on for several years.

²⁰ Kanhu Charan Jena v. Nirmala Jena, 2000 SCC OnLine Ori 217

Arun Kumar Nayak v. Urmila Jena, 2010 SCC OnLine Ori 30

²¹ Bina Devi v. State of U.P. 2010 SCC OnLine All 236

*Third and last, paying Maintenance from the date when the summons was served to the respondent is based on the practice of courts.*²²

The SC finally directed that Maintenance be paid from the date of application. This direction upholds the purpose of maintenance. There is an immense delay in the disposal of maintenance cases, and only when the maintenance is paid from the date of application the wife will be able to sustain financially, after separating from the husband. In *Bhuwan Mohan Singh V Meena*²³ repeated adjournments were sought by the husband, which resulted in a delay of 9 years. In these cases, granting maintenance from the date of order would mean pushing the wife into destitution which was never the intention of the legislature. In *Lavlesh Shukla V. Rukmani*²⁴ it was observed that where the wife is unemployed and maintaining minor children maintenance had to be provided from the date of application. Other interpretations would leave the women and children on their own from the date of application till the date of adjudication of the suit. In the Indian context, this means that destitute women and hapless children would be without support and Maintenance for several years till the slow and overburdened judiciary finally decides upon the suit.

FORMULA AND GUIDELINES FOR THE QUANTUM OF MAINTENANCE?

The objective of granting Maintenance is to ensure that the wife does not fall into destitution and is able to enjoy a reasonably similar quality of life that she was accustomed to. There can be no straitjacket formula for calculating maintenance as each person's life situation and needs differ. "The few indicative factors to determine the quantum of maintenance are:

- (a) the status of the parties during and post-marriage,
- (b) reasonable needs of the wife and dependent children,
- (c) Educational and professional qualifications of the applicant,
- (d) whether the applicant has any independent source of income,
- (e) whether the income is sufficient to enable the applicant to maintain the same standard of living as she was accustomed to in her matrimonial home,
- (f) whether the applicant was employed prior to her marriage,
- (g) whether she was working during the subsistence of the marriage,

²² S. Radhakumari v. K.M.K Nair . 1982 SCC OnLine Ker 51
Samir Kr. Banerjee v. Sm. Sujata Banerjee, 1965 SCC OnLine Cal 196

²³ Bhuwan Mohan Singh v. Meena (2015) 6 SCC 353

²⁴ Lavlesh Shukla v. Rukmani 2019 SCC OnLine Del 11709

(h) whether the wife was required to sacrifice her employment opportunities for nurturing the family, child-rearing, and looking after adult members of the family and,

(i) reasonable costs of litigation for a non-working wife.”

BEG, BORROW OR STEAL: IS THE HUSBAND’S FINANCIAL SITUATION RELEVANT?

This famous line comes to one's mind when considering a husband's obligation to pay the maintenance amount. This statement was recently made by the Punjab and Haryana High Court while dismissing his challenge against the family court's order, imprisoning him for failing to pay maintenance. This line should be read as obliging the husband to pay a reasonable amount of maintenance and not fixing such a high of Maintenance that he has to beg, borrow or steal to pay it. In such a situation, long-drawn proceedings would become practically infructuous if, in the process, the husband loses his capacity to pay.

The court has laid down *the financial capacity of the husband, reasonable expenses for his upkeep and that of his dependent members of his family, and his liabilities according to the law* to be taken into account while arriving at the quantum of maintenance. The Maintenance should be *reasonable and realistic* and avoid being on the extreme end, i.e., *it should not be so oppressive for the husband or be so meagre that the wife is driven into destitution*. This is an extremely important observation, it is the duty of the husband to maintain his wife, but it does not mean that he is obliged to fulfil her unreasonable demands. If the doctrine of beg, borrow or steal is used to grant extravagant maintenance awards, then the result would be delayed payments of maintenance, lengthy suits due to the challenge to the award by the husband and strain in relations because of the imprisonment due to failure to pay. A reasonable amount of maintenance, taking into account the husband's income, avoids the prospect of delay and imprisonment and increases the prospect of timely payments, which is the aim of the law.

SHOULD THE FINANCIAL STATUS OF THE WIFE’S PARENTS BE CONSIDERED WHILE GRANTING MAINTENANCE?

The court relied upon *Manish Jain V. Akansha Jain*²⁵ and held that the financial position of the parents of the wife would not be material to decide the quantum of Maintenance. The most important reason and factor for claiming maintenance are the applicants having no *independent* income to support themselves. If this interpretation is not given, the dependent spouse's maintenance or quality of life would depend on imponderables

²⁵ Manish Jain v. Akanksha Jain (2017) 15 SCC 801

like their relationship with their parents. Even when the parents are in a good financial position, they may choose not to support the applicant in need. Thus, only the *independent* income of the applicant is to be considered since placing the future of the needy person on contingencies like his relationship with his parents cannot be a provision which ensures a secure livelihood or social justice for the needy spouse. Hence, considering the income of parents would frustrate the purpose of social justice which is the objective of maintenance laws.

CONCLUSION

The court has attempted to simplify the maintenance regime to further social justice in the judgment. Noting *Justice Krishna Iyer's* proposition in *Ramesh Chandra Kaushal v. Veena Kaushal*²⁶, the court held that maintenance laws aim to help hapless women and children. The ruling that multiple proceedings will not be barred ensures that the dependents have every possible opportunity to maintain themselves. *Further*, the court has directed that the Maintenance granted in a proceeding should be adjusted with that granted in the previous proceeding. This ensures that maintenance does not burden the respondent while achieving its purpose. The court has also disclosed assets and liabilities, which would prevent lengthy suits caused by submitting false details of assets. The direction that interim maintenance should be adjudicated within six months after filing disclosure affidavits ensures that the dependent party does not fall into destitution due to lengthy interim maintenance suits.

The courts often try to protect the values of their society. The clear ruling in *Chanmuniya vs Virendra Kumar Singh Kushwaha*²⁷ and *Badshah v. Urmila Badshah Godse and Anr*²⁸ is that marital status is not important for the grant of maintenance under Section 125 of CrPC if the male and female have resided together *as husband and wife* for a sufficiently long period of time. However, in this judgment, the court is silent about women who reside with men knowing that he already has a wife. The result is that these women and their children become vulnerable to destitution. The judiciary must introspect and ask whether social justice can be achieved by neglecting a visible and vulnerable part of our society.

Through the *Rajnesh v. Neha* judgment, the Supreme Court has framed reasonable guidelines which aim to address the practical realities as well as maladies of maintenance proceedings.

²⁶ Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70

²⁷ Chanmuniya vs Virendra Kumar Singh Kushwaha, 2011 SCC OnLine Del 3841

²⁸ Badshah v. Urmila Badshah Godse and Anr., (2014) 1 SCC 188

CHAPTER: 4

CRITICAL ANALYSIS OF MAINTENANCE OF SENIOR CITIZENS UNDER MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

By AKANKSHA CHOUDHARY^{1*}

ABSTRACT

Indian senior citizens have never been viewed from the perspective of a social class. Previously, there were no counters to their decisions. But with changing times, the conditions have led to a shift from a joint-family to nuclear family structure, caused by the increased urbanisation and changes in the working environment, significantly impacting the lives of the senior citizens. The researcher will examine the numerous issues faced by senior citizens as well as how laws and policies enacted by governments are not implemented efficiently. The courts on the other hand, have played a significant role in guaranteeing the well-being of older citizens. According to Article 41 of the Indian Constitution, "Within the limits of its economic capabilities and growth, the State shall make appropriate provisions to secure the right to public assistance in context with old age."² The legislative regulations governing the care of senior citizens in India as well as their implementation and success in the current social environment must be critically analysed. The researcher will critically analyse the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 alongside the amendment bill of the same act.

Keywords-Legislation, Maintenance, Parents, Senior Citizen.

INTRODUCTION

An Indian citizen who has reached the age of sixty or more is considered as a senior citizen.³ Aging is one of the huge social issues of humans. By 2050, one out of every five people on the planet will be 60 years old or

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²Article 41 of Indian Constitution.

³THE HINDU (2017). *60 to be the senior citizen age limit*. Retrieved from <https://www.thehindu.com/news/national/60-to-be-senior-citizen-age-limit/article18195678.ece>.

older.⁴ According to the report of the World Health Organisation, the population of aged persons is supposed to increase up to 2 billion by 2050.⁵ Older people are neglected and they suffer from prejudice, discrimination and deprivation. Old people are considered as unproductive and disregarded as a result of generational gaps, nuclear families, increased longevity, less resources and other concerns. The increased health-care expenses and dependency on younger people as they get older are generally viewed as a burden on the family. The Ministry of Social Justice and Empowerment is responsible to safeguard the people in society who have been subjected to social inequities, discrimination, and injustice are treated reasonably. On the other hand, The Ministry Of Social Defence Division is responsible to provide help to the necessities of senior citizens, transgender people, and beggars as well as victims of alcoholism. State Governments/Union Territory Administrations and the Ministry together associate to develop and execute Acts as well as Programs for the welfare of Senior Citizens to guarantee that they can live a secure, dignified and productive life.⁶ Due to rising life expectancy and declining fertility rates, India's population of elderly persons (those 60 and above) is fast growing. From 8.6% (10.38 crores) in 2011 to 14.9% (23 crores) in 2036, it is anticipated to rise.⁷ In 2050, it's anticipated to be close to 19% (31.9 crores). As a result, the resources and support mechanisms that are currently accessible to elderly adults will be greatly impacted by this predicted rise in population. Given the high prevalence of physical and mental health problems in this age range, it could overload the health and social care systems for older residents.⁸ According to a 2016 Agewell Foundation study on the financial situation of older adults in India, four out of every five of them are depending on their family (children and other relatives) for their financial needs, even though two-thirds of them were experiencing a financial crisis.⁹ Additionally, during the past forty years, support systems for the elderly have been declining while their dependency ratio has increasing. More than 65% of Indian seniors rely on others for

⁴ 2 S. K. Kapoor. (2014). Human Rights under International Law and Indian Law. 6 Central Law Agency, Allahabad, P-195.

⁵ Ageing. World Health Organisation. Retrieved from https://www.who.int/health-topics/ageing#tab=tab_1.

⁶ Department of Social Justice & Empowerment. *About the Division*. Retrieved from <https://socialjustice.gov.in/common/47564>.

⁷ Velayutham B, Kangusamy B, Joshua V. The prevalence of disability in elderly in India—analysis of, 2011 census data. *Disability Health J* 2016, 9 584–592.

⁸ Agrawal S. Effect of living arrangement on the health status of elderly in India: Findings from a national cross-sectional survey. *Asian Popul Stud*, 2012, 8 87–101.

⁹ Soneja S (2011). Elder abuse in India: country report for World Health Organization. New Delhi: Help India.

CRITICAL ANALYSIS OF MAINTENANCE OF SENIOR CITIZENS UNDER MAINTENANCE ACT, 2007

daily upkeep, according to the government of India's Situation study of the elderly in India report from 2016. Older ladies are more vulnerable to this condition than older guys. Delhi has a dependency ratio of 10.4%, and Kerala has a dependency ratio of 19.6%. ¹⁰According to the first-wave report of the Longitudinal Ageing Study in India (LASI), the aged are more likely to experience frailty, sensory and cognitive impairment, mental health problems, and functional activity impairment. These problems could potentially raise a person's susceptibility to abuse. The maintenance requirements and welfare of the elderly become a crucial concern that must be addressed in this regard.¹¹

MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

The Maintenance and Welfare of Parents and Senior citizens Act, 2007 [Hereinafter "the Act"] was enacted in December, 2007 to ensure a need-based maintenance and welfare of parents and senior citizens. The Act provides for the rights of the elderly, guaranteed and recognised under the Constitution and matters connected therewith or incidental thereto. Section 23 of the Act provides that if a senior citizen has transferred any of their properties by way of gift or otherwise, the transferee shall provide for the basic physical needs of the senior citizen transferor). In cases where the transferee fails to fulfil this duty, the Tribunal is empowered to declare such a transfer as void, as it is deemed to have been made under coercion, fraud or undue influence. Section 24 of the Act provides for the liability of person, entrusted with the care and protection of senior citizen, intentionally abandons them, with punishment of either imprisonment for a period of up to three months or a fine of up to five thousand rupees or both. The legislation has also established a separate Tribunal to resolve issues related to senior citizens. Previously, Section 125 of the Code of Criminal Procedure, 1973 was the only option for the senior citizens to file a case for maintenance. However, such litigation is often time consuming and expensive. According to the NSS Survey on the Condition of the Elderly which was conducted in 2004,

- 6-7 percent of economically dependent elderly men in both rural and urban areas of the country were financially supported by their spouses: 85 percent by their own children, 2 percent by grandchildren and 6 percent by others.

¹⁰Panruti RV, Liebig PS and Duvvuru J. Gerontology in India. *Gerontologist*, 2015; 55: 894–900.

¹¹International Institute for Population Sciences (IIPS). *Longitudinal ageing study in India (LASI). Fact sheet 2010*. Mumbai: International Institute for Population Sciences.

- 16-19 percent of the rural and urban women were reliant on their spouses: 71- 75 percent on their children, 3 percent on grandchildren and 6-7 percent on others, including non-relations.¹²

ANALYSIS

The legislation was brought for the welfare and maintenance of the senior citizens. However, it requires efficient implementation as well as significant amendments to enable better implementation.

Scope of liability- Section 23 and 24 of the Act obligates children and relatives of senior citizens to fulfil their needs in living a normal life. But some of the liabilities are not justified:

- **Liability of a relative-** Any legal heir of a childless senior citizen is defined as a “relative” under the Act. There is no certainty as to who will be the legal heir as the opinion might change at any time. Therefore, the imposition of liability on a person who is a relative of the senior citizen only on the grounds that they would inherit the property of the senior citizen is not justified. What About the senior citizens who doesn’t inherit any property?
- **Liability of son/ daughter- in- law-** The Act does not even include the responsibility of son/- daughter- in- law to provide help to their in-laws. As the property inherited by both son and daughter is equal so their spouses will also get the property. They enjoy the benefits of the property in the same way the legal heirs do and they are not even considered when the problem of maintenance appears. Shouldn’t they be held accountable for their responsibilities if they get the benefits?

Maintenance Amount- In such a scenario, when spouses are entitled to benefits arising from the property of their in-laws, they must be held liable when they fail to fulfil their duties towards their in-laws. The Act empowers state governments to establish Maintenance Tribunals to determine the amount of monthly maintenance that children must pay to senior citizens. The maximum maintenance allowance is set by the State Government, but such a limit must not exceed ten thousand rupees per month. But as the prices of everything is increasing day by day (inflation), a senior citizen cannot fulfil his need just by Rs 10,000 per month. The medical expenses itself is a lot of burden for the senior citizens. In such cases, a rigid upper limit of the monthly maintenance is unjustified. Thus,

¹²Seilan Anbu. (2020). Health of Old Aged Persons in India -An Analysis using NSS Data. *Health and Nutrition*, 67-76.

the courts must be given discretion to decide an appropriate amount on a case-to-case basis.

Legal practitioners are not allowed to represent a party in Tribunal hearings- According to the MWPSA Act, A legal practitioner is not allowed to represent a party in a hearing before the Tribunal. It limits legal representation and also speeds up the process and saves money for the parties involved. But this provision is totally against the Section 30 of the Advocates Act of 1961 grants all advocates the right to practise in all courts (including the Supreme Court), any tribunal or person lawfully authorised to take testimony, and any other authority or person before which such advocate is entitled to appear.

Home care services have not been defined- The Act does not define home care services. Home care services may include medical treatments like physiotherapy and IV drip administration or everything from cooking to cleaning. Such ambiguity causes difficulty in identifying what constitutes home care services and consequently, establish a system for its regulation. Furthermore, the hiring of trained and accredited attendants or caregivers by institutions offering home care services. Moreover, even hiring of trained attendants and caregivers from accredited institutions, does not standardise the system to establish uniform rules.

Government responsibility- Section 1 of Act demonstrates the need for the State Governments to work towards proper execution of this law. The Act specifies a number of responsibilities that the state government must undertake. One of the responsibilities is Medical support. It is the duty of the state governments to provide appropriate medical facilities to senior citizens including availability of beds, separate queues so that they do not have to wait as long, facilities for treatment of chronic, terminal, and degenerative diseases and also set up research teams to work on ageing. The hospitals constructed specifically for senior citizens should be managed by an officer from medical background, who is an expert in geriatric care (also known as geriatric medicine is a medical speciality that focuses on the care of the aged and it basically aims to improve their health by providing medicine and treatment for diseases and disabilities). But Geriatric care and medical competence are only available in a few hospitals in India, neither special beds are available for the senior citizens nor they are given the preference to form a separate queue.¹³ But all these responsibilities require adequate funds from the central government to the state government. According to the Financial Memorandum, no additional funds will be allocated from the Consolidated Fund of India to carry out these provisions. If state legislatures do not make the necessary money

¹³Sathya T, and Premkumar R. Association of functional limitations and disability with elder abuse in India: A cross-sectional study. *BMC Geriatr*, 2020; 20 1–11.

allocations or do not have sufficient finances, implementation is hampered. There has been no substantial investment in programmes that could be used as realistic financial security options. Due to a lack of acceptable options, these communities are particularly vulnerable.

Lack of Awareness- Many elderly people are unaware of the MWP Act, 2007. Even after fifteen years since the Act was implemented, only 12% of the elderly are aware of it. The perceived shame associated with filing a formal complaint against one's offspring prevents the elderly from seeking help, even if they are aware of the Act. Seniors who are physically or mentally incapable may not receive the necessary help to request relief under this clause. The senior citizens who reside in senior citizen homes are restricted to access justice.¹⁴

Establishment of Old-Age Homes- Chapter III of the MWP Act, 2007 and sections 19 (1) and (2) talks about the problems which are related to the old-age homes. But the act doesn't talk about provisions to hold state executive liable for not implementing the provisions. Article 21 of Indian Constitution considers 'Right to shelter' as one of the fundamental rights. The old age homes in India are mostly managed by private organizations where they get aid either from central government or from state government. The act makes it mandatory for all the state governments to have at least one old age home in each district to keep the senior citizens of the country.¹⁵ But in the case, *Dr. Ashwani Kumar vs. Union of India and others*¹⁶, the court held that India doesn't have an appropriate method to provide easy access as well as good quality of old age homes to the senior citizens. In this case, a Public Interest Litigation (PIL) was filed in the Supreme Court of India and highlighted the necessity of the MWP Act, 2007, being implemented effectively to ensure the fulfilment of senior citizens' fundamental and legal rights, such as the Right to Live with Dignity, the Right to Health, and the Right to Shelter. The Union of India and all state and union territory governments are respondents in this PIL. The Supreme Court emphasized the significance of continuous and regular monitoring in its ruling from December 13, 2018, to ensure the smooth execution of MWP Act, 2007. In the recent report of the Royal Commission on Aged Care Quality and Safety in Australia, the country mentioned about the abuse in the old age homes because of the absence of appropriate methods for quality as well as safety measures. Chapter IV of

¹⁴ Ho Cyrus SH. Siow-Yi Wong. Marcus M. Chiu and Roger CM Ho. (2017). Global prevalence of elder abuse: A meta-analysis and meta-regression. *East Asian archives of psychiatry*. 43-55

¹⁵ Kyu HH. Abate D. Abate KH, et al. Global, regional, and national disability-adjusted life-years (DALYs) for 359 diseases and injuries and healthy life expectancy (HALE) for 195 countries and territories. A systematic analysis for the Global Burden of Disease Study 2017.

¹⁶ WRIT PETITION (C) No. 193 of 2016.

MWP Act, 2007 mentions health care as one of the important concerns because of many physical and mental health conditions. The act makes it compulsory for all the old age homes to have a required number of beds, separate queues, facilities for managing chronic, terminal, and degenerative conditions, promoting research and improvement of dedicated geriatric health facilities. The National Programme for the Health Treatment of the Old (NPHCE) was introduced in 2010–2011 by the Ministry of Health and Family Welfare of the Government of India to enhance the medical treatment provided to the elderly. To aid in the development of qualified medical professionals and tertiary care health services for senior citizens, the Indian government built two national institutes for aging and approved 20 regional geriatric facilities.¹⁷

LASI- The MWP Act's emphasis on encouraging geriatric health care-related research has contributed in the development of the LASI, a significant population-based longitudinal study with an aging focus. This study is based on ongoing Health and Retirement surveys conducted in a number of countries, enabling comparisons of social and health issues across national boundaries. Data from a representative sample of 31,464 senior citizens aged 60 and above, including 6749 seniors aged 75 and up, from 35 states and union territories across India are included in the LASI 1st wave (2017-2018) report, which was just released in 2020. (Except Sikkim). In this study, national and state-level demographic, chronic medical condition, sensory impairment, mental health issues, functional impairment, and disability data were supplied. For those in India with little financial means, the Ayushman Bharat Pradhan Mantri Jan Arogya Yojana (PM-JAY) has improved access to hospital-based healthcare.¹⁸

Protection of Life and Property- In order to safeguard the interests of senior persons who transfer their property, Section 23 of the MWP Act, 2007, mandates that the transferee continue to care for and protect the transferred individuals. The senior person may reclaim the property by asking the tribunal to declare the transfer null and unlawful if the transferee doesn't meet the required support requirements under this condition. Numerous cases have been filed in accordance with this provision, which has drawn a lot of attention. This regulation does not permit retrieving the property if it was transferred for a sale consideration, according to a recent decision by the High Court of Karnataka.

¹⁷ Khanna S. Supreme Court of India. Dr Ashwini Kumar vs Union of India, Ministry of Home. 1-48 Retrieved from https://www.live.law.in/pdf_upload/pdf_upload-364089.pdf

¹⁸International Institute for Population Sciences (IIPS). *Longitudinal ageing study in India (LASI). Fact sheet 2010*. Mumbai: International Institute for Population Sciences, 2010.

MWPSC (AMENDMENT) BILL, 2019

In December 2019, the Lok Sabha passed an amendment bill to make amendments to the Act. The bill has been sent to the Standing Committee and could be debated during the next parliament session. The bill proposes to include daughter-in-law and son-in-law as well as adopted and stepchildren within the definition of children. It also suggests new provisions related to the welfare of senior citizens like removing the maintenance upper limit and so on.¹⁹

Proposed Amendments Suggested to the MWP Act, 2007:

- Extending the definition of maintenance and welfare to include comprehensive efforts to ensure the mental and physical well-being of parents and senior citizens
- Expanding the definition of "Children" in section 2(a) to include the son-in-law and daughter-in-law so that they can be held responsible for the care of seniors.
- The maximum maintenance cap of Rs. 10,000 per month has been removed from Section 9(2), enabling the tribunal to establish the appropriate maintenance amount in each case based on the facts and available resources.
- The tribunal now has a shorter window of time to rule on applications by using the date the application was received as opposed to the date notice was delivered to respondents. Applications filed by those who are 80 years of age or older are given preference, with a longer deadline.
- Better rules for institutions (such as senior citizen care facilities and daycare facilities) and senior home care services.
- Using the natural justice principles to grant children and family members the right to appeal.
- Adding the option to file applications to the tribunal online will make it easier for senior folks to get maintenance.
- Extending the maintenance officer's responsibilities to offer senior citizens a single point of contact
- The appointment of "Special police units for Senior Citizens" in each district as well as "Nodal Officers for Senior Citizens" in each police station.
- A single phone number should be assigned to a national senior hotline in order to promote the safety and security of elderly people.

¹⁹ Government of India (2013). The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 requires serious amendments. New Delhi: Government of India, 40–46.

Most of the changed provisions in the amendment bill are reasonable. While the Parliament is still discussing the amendments, there is an urgent need for the said amendments to be implemented for the welfare of senior citizens.

GLOBAL COMPARISONS OF SENIOR CITIZENS' SOCIAL PROTECTION

Population aging is a worldwide phenomenon. As a result of global aging initiatives, numerous nations have created policies, programs, and laws to safeguard senior populations.²⁰ Many countries, including China, Bangladesh, and Singapore, have legislation like the MWP Act of 2007 that mandates that children provide support and maintenance for elderly people. The scope of the laws, the methods of application, and the consequences if the pupils fail to complete their assignments vary.²¹ Numerous industrialized nations, like Australia, the United Kingdom, Sweden, and Norway, have strong systems in place for the social care of senior citizens, and there is legal protection for their right to use publicly funded social services in these nations. Various nations have different social welfare systems.²²

CONCLUSION

The challenges of giving elderly folks proper care and support have been made more challenging by the sociocultural changes linked to global economic and social development. The traditional concept of relegating elder care to an exclusive filial obligation has gradually given way to having legal processes in place to assure its availability as state action. Initiatives related to global aging have helped shape Indian policy and legal procedures in this field. The MWP Act of 2007 mandates statutory provisions to support parents and senior persons' maintenance and welfare. The MWP Act, 2007, has strengths, limitations, and issues that have been made clear by experiences with its implementation over the past ten years. Nevertheless, there are countless chances to support the effective use of this Act in the future. In order to manage the anticipated growth in the senior citizen population and care demands in the future, adequate social care systems for seniors must be built. Ageism is like targeting our future selves. Maintenance of senior citizens is a significant problem for India as

²⁰ Mehra A. Grover S (2019). Agarwal A, et al. Prevalence of elder abuse and its association with psychiatric morbidity in a rural setting. *J Neurosci Rural Pract.* 10 218–224.

²¹ Taylor RM (2017). IOM report 2014: elder abuse and prevention. Washington, DC: The National Academies Press.

²² Central Statistics Office (2016). Ministry of Statistics and Programme Implementation Government of India. Situation analysis of the elderly in India. New Delhi: Government of India. 7–9.

almost 50 percent of India's population are senior citizens²³. The advancement of society and growth of nuclear families, has worsened issues related to maintenance. The Act of 2007 has proved to be an effective legislation but it needs significant amendments. The Parliament must amend the Act to enable efficient implementation of this law, while the judiciary must take note of the need for reformative decisions for the upliftment of senior citizens. A set of standardised guidelines must be released to regulate senior citizens' care institutions. Such a system may mandate compulsory registrations, yearly filings, occasional inspections and establishment of model nursing facilities for the elderly.

²³ The Economic Times. Why Ageing is a challenge? Retrieved from <https://economictimes.indiatimes.com/news/economy/policy/why-ageing-citizenry-is-a-challenge-across-the-globe-particularly-for-india/articleshow/94423632.cms>.

CHAPTER: 5

RE-CONCILIATION: FAMILY COURT AS A 'MEDIATOR'

Dr Namballa Bhagya Lakshmi^{1}*

ABSTRACT

In India 'Marriage' has a significant and prominent place and, there is a famous saying 'Marriages are made in heaven'. The family is universally regarded as the primary unit of society. When the stability, faith and confidence of the members of the family are threatened by a dispute, the law is invoked. Family Courts are specialized civil courts, which deal exclusively with dissolution of marriage; "declaration of the matrimonial status of any person; declaration of ownership of properties of the parties concerned; interim order of injunction arising out of marital relationships; declaration of legitimacy of any person, or guardianship of a person, or the custody of or access to any minor; and suits or proceeding for maintenance. But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a lifetime, and sometimes litigation carries on even on to the next generation. Until 1984, matrimonial and other family matters fell within the jurisdiction of the ordinary civil courts of the country, where other civil matters were also litigated. However, most western countries had established special courts familiarly known as Family Courts to deal with diverse matters like divorce, separation, maintenance, custody of children, etc. It is generally accepted that litigation in family matters needs to be less formal, less inquisitorial and less adversarial. The aim of law is to reconcile or ameliorate the misery as much as possible.

Keywords- Alternative Dispute Resolution, Family Courts. Matrimonial Disputes, Mediation, Re-conciliation.

INTRODUCTION

'Family Court' the word itself is sufficient to understand the severity in rising the cases related to matrimonial bond. Marriage and family are two pillars of the any civilised society where marriage is considered as a

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sacrament. In India 'Marriage' has a significant and prominent place and, there is a famous saying 'Marriages are made in heaven'. Further, pertinent to note here is that Marriage as an institution has become the subject of great judicial scrutiny. There are a number of judicial provisions dealing with marriage and its various aspects. The result is that, in addition to the various advantages that these legal provisions may provide; the privacy of this institution has been threatened. In the advanced globalised era, the harsh reality is that marriages are made in heaven but broken at courts.

EVOLUTION OF FAMILY COURT

The need to establish the Family Courts was first emphasized by the late Smt. Durgabai Deshmukh, after a tour of China in 1953, where she had occasion to study the working of family courts, "Smt. Deshmukh discussed the subject with certain Judges and legal experts to setup the Family Courts. The family is universally regarded as the primary unit of society. When the stability, faith and confidence of the members of the family are threatened by a dispute, the law is invoked. In India, an impetus was given to the movement of Family Courts by the recommendation of the Law Commission in its 59th report. Family Courts in India are based on the Family Courts Act, 1984, on the premise that disputes within the family should be solved differently from the generally adopted traditional courts."²

An effective judicial system requires not only that just results be reached but that they be reached swiftly; "The objective of Family Courts is to promote reconciliation and secure speedy settlements of disputes relating to marriage and family affairs. The underlying idea is to provide an amicable atmosphere for settlement. Family Courts function under the administrative control and superintendence of the State Government or Union Territory Administration along with the relevant High Court."³

These Family Courts are specialized civil courts, which deal exclusively with dissolution of marriage; "declaration of the matrimonial status of any person; declaration of ownership of properties of the parties concerned; interim order of injunction arising out of marital relationships; declaration of legitimacy of any person, or guardianship of a person, or the custody of or access to any minor; and suits or proceeding for maintenance. But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a lifetime, and sometimes litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from

²59th Law Commission report

³Family Courts Act, 1984

suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases⁴.”

Speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice. In this context, there is an imminent need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution (ADR) mechanisms. The Family Court is a special court, which is mainly concerned with resolving family disputes. The Government of India established Family Courts with the objectives that family disputes are dealt with separately from general criminal cases so that they are handled with a humanitarian view and to enable women to approach the court easily without having to appear with general criminals.

Until 1984, matrimonial and other family matters fell within the jurisdiction of the ordinary civil courts of the country, where other civil matters were also litigated. However, most western countries had established special courts familiarly known as Family Courts to deal with diverse matters like divorce, separation, maintenance, custody of children, etc. It is generally accepted that litigation in family matters needs to be less formal, less inquisitorial and less adversarial.

MARRIAGE AND MATRIMONIAL CONFLICTS

“Marriage is a socially supported union between individuals in what is intended to be a stable, enduring relationship and it is the basis for the family. Marriage and the family rest on many beliefs, the most important of which is kinship⁵. Marriage is not only a social event but also legal commitment⁶. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage⁷. Family or matrimonial issues were considered too sensitive an area to be left to the mercy or adversarial jurisprudence of the present legal system which by its very nature involves a lot of mudslinging on either side⁸. Litigation in respect of family disputes requires a special approach. Litigation whether divorce, maintenance, alimony, child custody or any other matrimonial cause should not be viewed in terms of failure or success of legal action. The amicable settlement of family conflicts is a social therapeutic problem. These disputes should be reconciled within the family fold so as not to

⁴ Researcher previously practiced advocate and personal observation of researcher

⁵ Hemendranath Reddy & Manohar Gogia, Marriage & Divorce Law, ALT publications, Pg.8

⁶ Article: Rural Women-Legal Awareness by V. Hemalatha Devi, Supreme Court Journal -1990, Vol-3(sep-Dec)

⁷ Govt. Of India 18th Law Commission 217 Report pg.9 Para 1.2

⁸ Article: Family courts- Anti women by Nagasila accessed through manupatra on 6/12/2016

disrupt the family structure. Anyone can mediate; however, it is not a cakewalk. An understanding of human nature is paramount in effective mediation.

The aim of law is to reconcile or ameliorate the misery as much as possible. According to Bentham the aim of law, like life itself, is to promote the greatest good of the greatest numbers⁹. It is a crying need that there should be redressal of family law problems in a proper legal framework.

CONCILIATION

Conciliation process is particularly suited to divorces and other family law proceedings because there is likely to be a continuing relationship between the parties, especially if minor children are involved. Many divorcing couples find mediation allows them to avoid the high financial and emotional costs of a litigated divorce. Because settlement is generally quicker, costs are reduced. "Mediation also allows couples to avoid the risks of trial, protects confidentiality, and decreases stressful conflict. Mediation may also protect the children of a marriage from the pain of parental conflict. Because the parties work to create their own agreements, couples who mediate their divorce settlement often find greater satisfaction than those who go to trial. Moreover, the couples learn skills to help them resolve future conflicts¹⁰. Mediation is a forum in which a neutral mediator facilitates communication between parties to promote reconciliation, understanding, and settlement." Mediation and conciliation as a method of alternative dispute resolution has got legal recognition now. Courts also referred several matrimonial disputes to mediation centers to reconcile the parties. Therefore, feel that at the earliest stage i.e., when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centers.

"The Law Commission of India in its reports¹¹ had emphasized that while dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. Further it is also the constitutional mandate for speedy disposal of such disputes and to grant quick justice to the litigants and also strongly recommended the need for special handling of matters pertaining to marriage and divorce."

⁹ A.V. Dicey, *Law & Public Opinion In England*, 414 (Universal Law Publishing Co. Delhi, 3rd Indian Reprint, 2003).

¹⁰ Amy Vandervort-Clark JD, 'Divorce Mediation - Overview' (Findlaw, 28 June 2023) <<https://www.findlaw.com/family/divorce/divorce-mediation-overview.html>> accessed 30 October 2023.

¹¹ Govt. Of India Law Commission 45 and 59th Reports

The concept of family Court implies an integrated broad-based service to families in trouble, to preserve the family and to help stabilize the marriage. The family Court system visualizes laying down a less formal procedure, where legal technicalities and technical procedures are not to be followed, to do away with the traditional adversary or fault-oriented approach. The aim should be to provide dignified means for parties to reconcile their differences and to reach amicable settlements without the need for trial; help avoid frivolous litigation; encourage pre-trial negotiation and settlement. The main object of the Act¹² to provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage & family affairs and for the matters there with. "Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are pre-eminently fit for mediation. Section 9 of the Family Courts Act, 1984 enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results¹³. Section 23(2) of the Hindu Marriage Act, 1955, provides "Before proceeding to grant any relief under this Act, it shall be the duty of the Court, in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties. "The Hon'ble Supreme Court of India has pronounced a landmark decision "Salem Advocate Bar Association, Tamil Nadu v. Union of India"¹⁴, where it held that reference to mediation, conciliation and arbitration are mandatory for court matters. This judgment of the Supreme Court of India will be the real turning point for the development of mediation in India."

The Judiciary is currently inclining more towards mediation as the most viable option for dispute settlement. "Recently Apex court¹⁵ feel that though offence punishable under Section 498 A of the Indian Penal Code is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of the above 498 A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law.

¹² Family Court Act, 1984

¹³ Sushil Kumar Sharma V Union of India, AIR 2005 SC 3100 Para 18

¹⁴(2003) 1 SCC 49

¹⁵ Ram Gopal V State of M.P, 2010 SCALE 711

During mediation, the parties can either decide to Part Company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however they chose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, it will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes. Courts also recognize 'mediation' as an effective method of alternative dispute resolution in matrimonial matters and that is the reason why courts want the parties to explore the possibility of settlement through mediation in matrimonial disputes."

The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fibre of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under Section 498A IPC as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fibre, peace and tranquillity of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases¹⁶. Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualized by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, accused and his close relations¹⁷.

The Apex Court¹⁸ after noticing the positive features and need for this provision for given protection to women who have been subjected to cruelty during marriage has also drawn attention to its potential for misuse, when for momentary disputes or for oblique reasons entire families are roped in. It has also called on the members of the Bar to check misuse of this provision and not to file exaggerated complaints and to first endeavour to bring about reconciliation between the parties so that families are saved and there is peace in society. Even a short stint in jail drastically reduces the chance of compromise. The legislature and law commission have also

¹⁶ Preethi Gupta V State of Jharkhand, AIR 2010 SC 3363

¹⁷ Satish Sahni & Others V State of Punjab & Another dt 31/05/2012

¹⁸ B.S. Joshi V State of Haryana (2003)4 SCC

been called upon to consider bringing about pragmatic changes in the related provisions for furthering the aforesaid objectives.

Full Bench of Court¹⁹ in *Amaravathi & Anr v. State of Uttar Pradesh*²⁰ and a division bench of this Court in *Sheoraj Singh @ Chuttan v State of U.P. and others*²¹, thereafter the Magistrate concerned may try and bring about reconciliation between the parties either by himself, or in districts where some agency exists for bringing about mediation, conciliation or counselling, through the said agency. In cases where the Magistrate is not himself engaged in trying to bring about reconciliation between the parties, where Mediation/ Conciliation or counselling of the couples and their family members has been undertaken by some other agency, the said agency must report the fact of failure or success of the mediation/ conciliation etc. within a week of the conclusion of the exercise.

In *K. Srinivas Rao v. D. A. Deepa*²² the Apex Court issued directions to all courts dealing with matrimonial disputes to settle all matrimonial disputes at first instance through the process of Mediation. The Supreme Court directed Family Courts and Criminal courts to refer parties to Mediation Centres to settle disputes through settlement under mediation. Mediation is an alternative process of resolution of disputes by trained mediators.

The Supreme Court of India directed Family Courts in view of section 9²³ to make all possible efforts to settle matrimonial disputes especially in relation to maintenance, child custody etc. through the process of mediation and to refer parties to mediation centers with the consent of parties. The apex court observed that the family courts should endeavor settlement of disputes through the process of mediation even after the filing of failure reports by counsellors.

As the matrimonial disputes are mainly between the husband and the wife and personal matters are involved in such disputes, so, it requires conciliatory procedure to bring a settlement between them. Nowadays, mediation has played a very important role in settling the disputes, especially, matrimonial disputes and has yielded good results. To preserve future relationships Alternative Dispute Resolution Mechanisms are preferred²⁴ and it should be the solution for peace. It was so upset situation that the alarming rise in divorce cases in recent years, but mediation and conciliation offer a glimmer of hope for many couples to resolve their disputes either through separation or conjugation. Delhi Government Mediation and Conciliation Centres, and in Delhi High

¹⁹ Allahabad High Court

²⁰ 2005 Cri.L.J. 755

²¹ 2009(65) ACC 781

²² (2013) 5 SCC 226

²³ Family Court Act, 1984

²⁴ Madabhushi Sridhar, Alternative Dispute Resolution, Lexis Nexis pg.105

Court Mediation Centre, several matrimonial disputes are settled. These centers²⁵ have a good success rate in pre-litigation mediation.

Thus, it can be fairly concluded that legal recourse to mediation offers a much more viable and Justice centric outcomes. Experience reveals that long and protracted criminal trials lead to rancor, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful. There is a growing need of mediation and conciliation for matrimonial disputes in India and offers such an alternative which not only solves the disputes but also brings the two disputed parties closer to one and another, which helps break misunderstandings and develop new understandings. It is a flaw of human nature, and all humans are subject to the same. Thus, thing done by one party in the heat of the moment should be overlooked and an attempt should be made to create circumstances wherein a thing like that is never repeated. Breaking ties is not the solution but, it's just like a mirage in the desert for when one would reach the end, all that he/she would find is disappointment. Spouses, parents and families need to realize the advantages of ADR in the family structure. Matrimonial relief carved out of settlement will serve better than the results obtained by adversarial litigation involving time, effort, and finances and breaking-up of a family.

Such courts should Endeavour to save and stabilize the institution of marriage, rather than destroy it. It was with these social objectives in mind that India opted for the establishment of family courts by passing the Family Courts Act in 1984.

As observed by the Supreme Court, State Governments should establish Family Courts not only because it is so provided in the Act, but also to discharge its social obligation to provide a less formal platform for resolving family disputes. Under the Act, the State Government must establish one Family Court for every area in the State comprising of a town or city which has a population of one million or more. Family Courts may also be established for other areas in the State as the State Government may deem necessary.

The appointment of the Judges of Family Courts is made by the State Government, which may appoint one or more Judges for each such Court. Persons who are appointed Judges must have the necessary qualifications prescribed by the Act. Additionally, they must be committed to the need to

²⁵Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre

protect and preserve the institution of marriage and to promote the welfare of children.

Preference is to be given to women when making such appointments. However, no person can be appointed if he has attained the age of sixty-two years. When a Family Court consists of more than one Judge, each Judge can exercise any or all of the powers conferred on the Family Courts by the Act.

A civil suit cannot be filed to declare as null and void, a decree passed by a Family Court. As no specific procedure has been prescribed by the Act for deciding applications for custody of minor children, the only points to be ensured in appeal are whether the procedure which was followed by the Court conformed to the rules of natural justice and whether the paramount consideration in the mind of the Family Court was the welfare of the child. The jurisdiction of Family Courts has precedence over matrimonial and family laws statutes in force in India.

MEDIATION UNDER LEGISLATION

All the laws and legal rules relating to the settlement of matrimonial disputes are the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, the Family Court Act of 1984, Civil Procedure Code, 1908 and the Legal Service Authority Act of 1987. "The Legal Services Authority Act laid down the concept of arbitration, mediation, conciliation and agreement in order to dispute resolution. Where conflicts in courts of law are pending, the said law allows for the holding of Lok Adalat's. The concept of a family court means that dysfunctional families are provided with integrated, broad-based programs to sustain the family and help to stabilize marriage. To avoid the conventional adversary or fault-oriented approach, the family Court system envisions establishing a less formal process in which legal technicalities and technical protocols are not to be followed. The aim should be to provide a dignified means for parties to resolve their disputes and negotiate amicable settlements without resorting to litigation; to help prevent unnecessary litigation; and to promote pre-trial negotiation and resolution²⁶."

The main purpose of the Act²⁷ is to create Family Courts in order to facilitate conciliation and ensure a timely resolution of disputes relating to marriage and family affairs and related matters. Despite the fact that the Family Courts Act of 1984 was conceived on the simple assumption of quick resolution or reconciliation, litigation in metropolitan cities has become extremely contested and involves high financial stakes. In metropolitan cities, matrimonial litigation is becoming increasingly

²⁶ Legal Services Authority Act, 1987

²⁷ Family Court Act, 1984

complex, extending well beyond the idea of a quick settlement or reconciliation.²⁸

Unfortunately, the claimant does not fully comprehend the ramifications and repercussions of filing the case, which will result in unimaginable harassment, agony, and discomfort for the complainant, accused, and his near relatives.²⁹ “The ultimate goal of justice is to discover the facts, punish those who are guilty, and defend those who are innocent. In the vast majority of these allegations, uncovering the facts is a Herculean task. It is also not unusual for the husband and all of his immediate family members to be implicated. And after a jury proceeding has ended, it will be impossible to determine the true facts. In dealing with these cases, the courts must be highly vigilant and cautious. In dealing with these grievances, the courts ought to be exceedingly vigilant and careful and must consider pragmatic facts in the context of matrimonial litigation. The claims of abuse of intimate contacts between husbands who lived in other cities and who had never visited the site where the claimant was residing would have very different facial characteristics. The complaint's claims are to be carefully and carefully examined.”³⁰

Length and drawn-out jury cases have a history of causing animosity, acrimony, and resentment in the parties' relationships. It is also common knowledge that in lawsuits brought by the wife, whether the husband or the husband's relatives are required to stay in prison for even a few days, the hopes of an amicable solution are completely ruined. Suffering takes a long time and is excruciatingly uncomfortable. In India, there is an increasing need for matrimonial mediation.

“In recent years, there has been an uptick in matrimonial disagreements. Marriage is a religious ceremony whose primary goal is to help the young couple settle down in life and live happily ever after. However, small matrimonial quarrels escalate out of nowhere, frequently leading to the commission of heinous crimes in which family elders are also implicated, rendering those who should have counseled and brought about reconciliation powerless as they are named as defendants in a criminal case.” There are numerous other reasons that matrimonial lawsuits need not be encouraged so that the partners can reflect on their mistakes. There are several other reasons not to be mentioned here for failing to promote legal proceedings such that the parties can consider and resolve differences friendly by mutual agreement instead of fighting it in a Court of Justice, in

²⁸ Flavia Agnes, *Family Law Vol. II, Marriage, Divorce, and Matrimonial Litigation*, Oxford Publication Page.319

²⁹ Satish Sahni & Others v. State of Punjab & Another at <https://indiankanoon.org/doc/138110329/> visited on 13 April 2021

³⁰ Ibid para 27

which a "young" time is taken for years and years to conclude, in chasing cases in different courts. the parties lose their "young" days.”³¹

In the case of “*S. Thankikodi v. Ramuthayee*”³², the Court, when dealing with matrimonial cases, was required by section 23(2) of the Hindu Marriage Act, 1955 to attempt to reconcile the parties in the matrimonial case in the first instance. However, the Court states that it can only attempt to reconcile if it believes there is a possibility of saving the marriage, and not otherwise.

The Supreme Court of India issued a historic judgment in “*Salem Advocate Bar Association, Tamil Nadu v. Union of India*”³³, holding that mediation, conciliation, and arbitration must be used in court cases. The Supreme Court of India's decision would be a watershed moment in the history of mediation in India. However, the expansion of mediation should be carefully shaped so that the mechanism earns the confidence and respect of litigants.

CONCLUSION

Matrimonial disputes account for the majority of cases referred to mediation in court administered systems. “As a result, society requires mediators in this area that can handle disputes with compassion and empathy and assist parties in finding solutions to the issue of the dissolution of deeply personal relationships. Parties will quickly discover that mediation far outweighs the other types of conflict settlement, and they will seek it out sooner rather than later. Marriages cannot be quickly dissolved or interrupted because it is in the best interests of society's peace. It is in the public interest to preserve matrimonial relations and, to the extent practicable, to prevent them from being disrupted at the request of any of the parties to a marriage. This form of conflict resolution not only saves time, but also reduces acrimony and strained relationships that may arise from litigation.

In India, mediation is becoming increasingly common, especially in the case of marital disputes. If relief is deferred in a marital proceeding, the whole object of relief is nullified, and the parties are physically and emotionally wrecked, with little to no hope of remarriage. Alternative conflict resolution strategies are preferred to maintain future relationships and should be the remedy for peace. The situation was so tumultuous that there has been an unprecedented increase in divorce proceedings in recent years, but mediation provides a ray of hope for many couples seeking to

³¹ National Judicial Data Grid <https://njdg.ecourts.gov.in/njdgnew/index.php> visited 14 April 2021

³² AIR, 1986 Madras 263

³³ (2003) 1 SCC 49

INDIAN FAMILY SYSTEM: CONTEMPORARY ISSUES

settle their differences. via advice and conciliation services, it is our duty to protect marital relationships.

CHAPTER: 6

FAMILY COURTS ACT, 1984: IN PRACTICALITY.

Akshat Goswami^{1*}

ABSTRACT

The family court act was created to establish a system for quickly resolving interpersonal conflict. The statute transferred all cases from magistrate jurisdiction to special courts with a more party-friendly infrastructure. The measure also attempted to make the entire procedure more accessible to the parties. The measure was hailed by state legislatures, and family courts were established in all of the country's major cities. The legislation intended to create a reconciliation system that preserves the family structure. The legislators forgot about individual rights and autonomy behind this purpose. Many cases revealed the mechanism's ingrained patriarchy. Thus, while the legislation brought about the necessary transformation, it overlooked several critical issues that we should consider.

Keywords: Family Courts, Women, Child-care, Family disputes.

INTRODUCTION

The Family court Act of 1984 led to the establishment of family courts. Section 3 of the act gave the power to the State government, with the consultation of the High court, to set up a family court in the city or town whose population exceeds one million as well as the area where it may deem necessary. After the implication of the act, all the matrimonial disputes including restitution of conjugal rights, custody or guardianship of the child and many others, were shifted from the ordinary civil court to these special courts. The redressal of such conflicts involves serious emotional aspects. Social scientists assert that to avoid the pains of discordant families the ailments be diagnosed properly because special social diseases require special remedies (Ahmad 556).

It is quite agonizing how family disputes leading to divorce are seen as 'social diseases'. In Indian society, divorcees are still seen as a social taboo. In comparison to Western countries, India still has one of the lowest divorce rates in the world. Divorce rates globally have seen a monumental rise, and India too has witnessed the occurrence of this phenomenon as well (Prasad). The irony here is that the number of spouses who live separately is three times that of spouses who receive a divorce decision from the court (Swaddle). This indicates the presence of a social taboo

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regarding the concept of divorce. Along similar lines, the duty, under section 9 of the Family Court act, that has been conferred to the family court is to make efforts for resettlement. Thus, the main focus while addressing these disputes, the court tends to create consensus ad idem between the parties through conciliation, leading to reconstitution of the marriage.

This raises the question of whether family courts truly promote social harmony. Do they still adhere to the idea of assisting society's marginalised women? Is the operation devoid of flaws and efficient in resolving concerns that are brought before them? In the following sections, we will be analysing all these aspects.

DIVORCE- A TABOO

The Family court act brought all matrimonial disputes under a single umbrella. These courts see their role as dispensing social justice rather than promoting justice for women (Dommaraju 195). They ought to believe that they are dispensing a special remedy to rising 'social diseases. They believe in creating a society with no broken marriages. This shows the conservation approach of the family courts. The decree of judicial separation is preferable to the decree of divorce, no matter how noxious the marriage is for a woman. For example, in the case of *Animesh Trivedi V. Kiran Bagai*², the allegation of cruelty was substantiated with the shreds of evidence by the wife and the family court took them into their account, still, it passed the decree of judicial separation instead of the decree of divorce.

The concept of marriage is as old as the institution of marriage. In the early civilization of Rome and Egypt, the mere declaration of the separation, on any ground, was required to come out of wedlock. Divorce became more of a social concern with the establishment of religious institutions on governmental grounds. Divorce, according to the orthodox, is a sin against their religious norm. The Christian institution viewed divorce as an offence to natural law. In the Hindu Vedic literature marriages were referred to as a social union of not just one life but entire eternity. Islamic law lays various grounds for divorce but is advised not to go into the discourse of divorce (Swaddle). All these ideologies still dominate the mind of society as well as the policymakers.

The label of 'divorcee' affects women far more than men. In India, a male is twice as likely as a woman to remarry following a divorce. This taboo not only resists woman to file for divorce but also make them submissive to their husband. *REGINA v Kiranjit Ahluwalia*³ is one of the cases which show us how a woman being subjected to cruelty still be in a relationship. She was subjected to marital violence and was aware of the extramarital

² Animesh Trivedi V. Kiran Bagai, AIR 2012 Jhar 115.

³ REGINA v Kiranjit Ahluwalia, (1992) EWCA Crim 1.

affair, but she chose to remain with his husband for the sake of the children and her dependency. Thus, it is one of the important aspects that the family court should focus on while adjudicating the issues. They should be working in a way that helps in the upliftment of the vulnerable. The Convention on the Elimination of Discrimination against Women recommends that nations take steps to make the legal system more accessible for women spurring several nations to institute family courts based on the model of unmediated access to the law (Basu 469). The idea that Family courts have been established to rescue the women was envisaged in the 59th law commission report. The Proponents of the family court frequently argue that its operation does ultimately benefit the women's class, but these arguments are unrealistic.

THE FOOTING OF WOMEN IN FAMILY COURT

Under section 4 subsection (4), clause 'B' of the Family Court it is mentioned that while the appointment of the judges the preferences should be given to the woman. It leads to creating a presumption that the woman judge will sympathise more with the woman, who is the party in the case. First of all, there is a wide difference between law written and law enforced. During the workshop organized in March 2002 by the NCW, it was noted that there were only 18 women judges in the FCs in India out of 84 judges in all the 84 courts that existed at that time (Janwal). Secondly, subclause 'a' of the same subsection mentioned appointing a judge who is 'committed to the need to protect and preserve the institution of marriage as well as qualified because of their experience and expertise to promote the settlement of disputes by conciliation and counselling. It is clear that the act's main goal is to preserve the social institution of marriage, and it has been assumed that preserving marriage and safeguarding women are corresponding outcomes.

The urge to reconcile the marriage many times forces a woman to go back to the agony she has been facing for many years. It already took a lot of courage to come out and take a stand for themselves. The entire procedure is very time-consuming and labour-intensive. The women also become victims of the general anti-women bias in society which is reflected in the attitude of the judges, court clerks or peons who treat the women litigants with contempt while the men experience a certain camaraderie (the brotherhood of men) with the judge, the clerks or the peons depending upon the social strata they belong to (Advani). The entire atmosphere in the family court is full of hope and despair, moments of camaraderie, and negotiations with institutional power. But it is also full of categorical problems of such mediations-based family courts for feminist jurisprudence: institutionalizing feminist reform that may fall short of enacting gender justice (Basu 469).

Speed discourse, which was one of the major objectives of the family court act has somehow failed and the same has been observed by the jurists too. In the case of *Bhuwan Mohan Singh Vs Meena & Ors*⁴, the Supreme court said, 'It has come to the notice of the Court that on certain occasions the Family Courts have been routinely granting adjournments as a consequence of which both the parties suffer, or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets atrophied'. Thus, the delay in obtaining justice had a direct impact on the standing of women.

FAMILY OVER INDIVIDUAL

Section 9 of the Family court act tells the duty of the family court is to make the resettlement. The 'bad marriage' has a major impact on mental health, and during the proceedings, things are handled in such a way that one would assume, sure, it is the family over one's rights. Different tactics have been used during the proceedings that can manipulate one decision. For a quick instance, the family court section under the official website of the Delhi district court starts with the image which says 'Happy Family Lives together' with a happy child photo. These things may not seem as influential, but considering the future of a child, tends to affect a lot of decisions.

Section 6 of the Act also discusses the appointment of counsellors as assisting officer. The role of counsellors is to assist in the mediation between the parties as well as remove the veil from the demands and try to negotiate them with the other party. Often, counsellors' rooms are also full of pictures which try to cloud the decisions of both spouses. For instance, the room of counsellors inside the family court of Karkardooma court, New Delhi do contain hand-drawn pictures of the family union. As well as, near the desk also you will find the picture, with the tagline, 'Think-About your child'. All these images will be affecting the wife, who already has been going through a lot of mental traumas as well as discomfort from society. Many counsellors proclaim that securing a better deal for women clients and leaving them with a sense of having a vigilant ally is critical. Rather than assuming an absolute antiviolence stance, they depict their service as one that constructs strategic survival within an existing marriage (Basu 469).

As well as the qualification of the counsellor is not well defined by the act in itself. In the Indian context lack of trained personnel in the field of family

⁴ *Bhuwan Mohan Singh Vs Meena & Ors*, (2015) 6 SCC 353.

counselling is another factor to contend with. What is happening today is that personnel of voluntary organizations are called to function as counsellors and very often these people have no clue as to the role of a counsellor (Nagasaila 1735). There is also a high probability that they are not able to keep aside their personal biases. Lack of proper procedure, as well as infrastructure, also leads to chaos, and they are not able to deal with cases at the appropriate time. The time that they can spend with each party is a maximum of a couple of hours spread over three to four sittings. If conciliation and counselling are to be taken seriously, this is hardly the way to go about it (Nagasaila 1735). Further, the counsellors are underprepared for handling clients who are reluctant to attend conciliation meetings and for dealing with issues including psychological problems, superstitions, sexual matters etc. (Sriram & Duggal 97).

NO REPRESENTATION BY LAWYERS

Section 13 of the Family court act tells us about the right to legal representation, which also differentiates the working of the family court from the working of any session or district. Section 13 states, notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. The objective of the specific rule and the separation between regular court cases and cases in family court was to make the latter more informal. However, a specific area has not benefited any party, particularly women. The procedure followed during the proceeding of the case is very knotty for any layman. Merely stating that the proceedings are conciliatory and not adversarial does not make them so (Advani 5). The proceeding still requires a lot of work, like approaching the bench and presenting facts as well as holding out for maintenance that can be presented by the lawyer more efficiently. When a woman files for divorce and maintenance, the husband turns around and presses for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are meditating are aware of these strategies (Advani 7). A slew of paperwork about the husband's business and income are required to determine the maintenance amount, which is impossible to achieve without the assistance of a legal practitioner.

The counter to the said provision that is often put forth is that the parties to the case can get legal assistance after taking permission from the court. In that situation also, the financial burden will fall on the woman only. Specifically in the case of India, still women are financially dependent on their husbands. In terms of global data on women in the labour force,

Indian women continue to rank among the lowest in the world. The emphasis on reconciliation subordinates to women's right to maintenance. Removing lawyers, without adding any other discourse creates a situation which is very detrimental to women's rights. During the pendency of the case, the woman should be provided with legal aid, and the court staff should be made aware of any gender biases. Further steps should be taken to alleviate the burden on women's shoulders so that they can make their proper case and live a better life following the breakdown of their marriage.

THROUGH CHILD'S PERSPECTIVE

Section 5 of the statute also addresses the welfare of children, which implies that the family court should adjudicate the case while taking into account the needs of children born out of wedlock. The subject of child custody is one of the most delicate issues before the family court. The separation of the spouses can leave long-lasting trauma on the child as well as under whose custody the development of the child has been left at the subjectivity of the judges. In the case of *Thrity Hoshie Dolikuka vs Hoshiam Shavaksha Dolikuka B*⁵, it was observed how family disputes affect the mental health of the child. It is very tough for a child to choose between any of his/her parents. In this case, the child started crying and sobbing without any provocation that too in the presence of her mother. The court also observed that the child in this dispute case, is under considerable mental pressure and at present, she is not a normal child. Thus, the issue of child custody should be dealt with in a lot of delicacies. The age as well as the gender of the child plays a crucial role in deciding the custody of the child. As observed by the Madras High Court in the case of *Dr V. Sridevi vs Dr C.S Mani*⁶, if the child of the petitioner is a girl baby, then a female child always needs the help of the mother. Usually, the boys when they reach adolescent age, they want to share a lot of things with their father as a friend and the father also must treat the male child as his friend. Though taking this observation as a precedent will generalize the entire procedure of custodial arrangement. When deciding custody, the child's psychological and general development needs, including living standards, schooling, and physical development, must be considered. The particular arrangement should be created in such a way that the child does not have to make any sacrifices at any point in his life.

In the same case, *Dr V. Sridevi vs Dr C.S Mani*⁷, we have witnessed how many times the youngster has had to visit a psychiatrist and a children's welfare and care facility because of changes in the child's behaviour with

⁵ Thrity Hoshie Dolikuka vs Hoshiam Shavaksha Dolikuka B, (1983) SCR (1) 49.

⁶ Dr V. Sridevi vs Dr C.S Mani, (2019) MAD (DB) 2249.

⁷ Dr V. Sridevi vs Dr C.S Mani, (2019) MAD (DB) 2249.

his father that were different from his typical behaviour before custody was handed to mom. As well as usually children have to face a set of questions without even accustoming themselves to the court environment. Several visits to unwelcoming court infrastructure and the constant tussle between both parties always sideline the real needs of the child. As well as multiple instances were pulled out where family court miserably failed.

That instance includes taking in the consideration of the child's constant disclination to go with his father as well as failing to take note of the psychometric evaluation. The evaluation report clearly stated that the minor child is of an above-average intellect and quite comfortable in his present surroundings. The family court completely neglected the report and ordered to change the custody from mother to father on the illogical, unsound, and baseless ground that the child would be happy with the natural father, rather than with the mother. This case is just one of the examples showing how family courts have miserably failed in implementing the welfare approach written in the statute.

THE QUESTION OF MAINTENANCE

The family court has been entrusted with the economic element of the problem of maintenance. The suit for maintenance has been mentioned under the explanation of section 7, under sub-clause (f). Specifically for this section the family court also has jurisdiction over the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children, and parents) of the Code of Criminal Procedure, 1973. The Maintenance claims form the majority of the cases in the family court. According to the Agnes report on the Kolkata family court, maintenance claims account for 43% of all cases filed in the court, with women filing the majority of them. Men frequently file restitution cases in response to maintenance cases from women, requesting that women return to the marital household instead of seeking maintenance while being away from it, or that they forfeit the marriage through a divorce (Basu 469). Though the power has been vested with the family courts, the decree of the maintenance is always accompanied by a long-waiting period. Sometimes it gets delayed to such an extreme corner that it no longer gives any benefit to the woman or child. The Court observed that execution petitions following an order granting maintenance usually remained pending for a long period of time. In the case of *Rajesh V. Neha*⁸, the Supreme court recognized that if maintenance was not paid promptly, it would defeat the very object of the social welfare legislation.

The separation of the jurisdiction has further created deterrence for filling the maintenance claims. Certain districts are very large in Uttar Pradesh. A woman who wants to apply to section 125 (CrPC, which talks about the order for maintenance for wife, children and parents) was able to file a case

⁸ *Rajesh v. Neha*, (2021) 2 SCC 324.

in a magistrate's court very near her home but now under the Family Courts Act, the jurisdiction of all the magistrates will be immediately ousted once the notification is made and she must go to the headquarters of the district for every hearing and filing (Advani 38).

Another point of contention stands, from which date the maintenance should be granted, the date of application or the date of order. In *Gnanaselvi V. Illavarasan*⁹, the high court of Madras held, if maintenance is not granted from the date of application, the weaker section is sure to lose confidence in the justice delivery system. In the same case court observed, when a wife goes to court to seek maintenance, she must prove her inability from the date of application. The decision should be based on evidence that the wife was unable to support herself at the time of application. In general, the Magistrate/family court should issue an order directing maintenance from the date of the application. Despite this, the husband does not allow the proceedings to continue by raising one or more objections. It takes time to address all of the objections. Again, even after the order is issued, the husband rushes to the higher court to challenge it, and sometimes the husband obtains interim orders, resulting in additional delays. The Same court observed in the case of *P.N Duda V. P. Shiv Shanker*¹⁰ that, "justice cries in silence for long, far too long." Every trick is adopted by the contesting party to get away with the maintenance order or delay to an extreme extent so the true benefit which may be useless becomes fruitless. Leaving the deserted wife and the children in the long waiting period with never-ending visits to the courts.

CONCLUSION

Needless to say, enacting the Family Court Act was one of the initiatives taken to make the justice system less formal and more accessible to the public. It aims to create a space where both husband and wife can discuss their issues without any hesitation. With increasing civil disputes, they will function as one of the supporting pillars of the Indian legal system. Though the act was implemented, it hasn't been able to bring the drastic changes that are required by society. It intended to handle cases quickly, but it was unable to keep up with the growing number of conflicts, resulting in a backlog of cases before the Indian judiciary. Without a doubt, the parties have pressured the new system to avoid the maintenance decision. One of the depressing aspects is that these techniques are well-known among the general public as well as the bench, but no solution has been observed. The question of women's and children's welfare has also been sidelined by the approach of the courts to reconcile the marriage. There is a conservative approach that a woman is only safe in wedlock, and it is well seen among the judges as well as counsellors present in the family court. The section

⁹ Gnanaselvi V. Illavarasan, (1999) CriLJ 1008.

¹⁰ P.N Duda v. P. Shiv Shanker, (1988) 3 SCC 167.

of the statute that was enacted made the system less adversarial, but it put many other things at risk. Non-compliance with the family court judgement is one of the other issues that needed to look upon. The goal of establishing a family court was to benefit society and the legal system, however, the concept has been limited to the wording of the statute, and its implementation has received no attention. The statute may have evolved the infrastructure of the courts, but it cannot change the presiding officer's mindset. There are still some gaps that need to be filled to be the supporting pillar of the Indian legal system.

CHAPTER: 7

REVISITING THE FAMILY COURT ACT: EVALUATING LIMITATIONS AND PROSPECTS FOR CHANGE

Annu Khan^{1*}

ABSTRACT

The Family Court Act of 1984 is a federal law that created a system of courts specifically to deal with family law issues and where the emphasis should be on negotiation and reaching socially desirable outcomes and the elimination of strict standards of procedure and evidence. The Law Commission also emphasized in its 59th Report (1974) that when handling family law conflicts, the court should take a very different approach than it does in regular civil processes and that it should make reasonable settlement efforts before the trial. A special method must be used in suits or other legal proceedings involving family-related issues, according to a 1976 amendment to the Code of Civil Procedure (E.L.Bhagiratha Rao's, 2007, p.341). However, the courts haven't used this conciliatory process very often, and they still treat family issues in the same way they handle other civil cases, with just an adversary mindset predominating. This research paper focuses on the functioning of family courts, speedy trial of family disputes, and promoting conciliation relating to marriage and family affairs. The provisions of family courts should apply to every district irrespective of their respective populations because it amounts to inequality when the act applies only to people living in cities with a huge population.

Keywords: Family courts, speedy trial, conciliation, marriage and family affairs.

INTRODUCTION:

The idea of forming Family Courts was first raised by the late Smt. Durgabai Deshmukh. Before pitching the idea to Prime Minister Pt. Jawaharlal Nehru, Smt. Deshmukh held conversations on the subject with several judges and legal experts during a 1953 trip to China where she had the opportunity to examine the operation of family courts. The

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Delhi Family Court's recent opening is an important step in light of this. Aieshwarya Narayanan².

Family courts were first established due to increasing pressure from various women's associations, charitable organizations, and individuals for the creation of special courts to serve as a venue for the quick resolution of family-related conflicts. The importance of a non-adversarial approach to family conflict resolution was emphasised, along with the promotion of conciliation and the quick resolution of issues involving marriage and family affairs. The Committee on the Status of Women proposed in 1975 that all issues about the "family" be handled separately. In addition, the Law Commission emphasised in its 59th report from 1974³ that when handling family law disputes, the court should adopt an approach of radical steps that is different from the current standard of civil proceedings and that these courts should make reasonable attempts at settlement before the start of the trial. All family-related conflicts should be heard by judges, social workers, and other skilled staff members, without severe procedural requirements. A unique method must be used in lawsuits or court proceedings involving family-related issues, according to a change made to the Code of Civil Procedure. Family conflicts are still handled by the courts, however, in the same adversarial manner as other civil disputes. As a result, there was an urgent need for family courts to be established in the public interest for the swift resolution of family disputes.

A part of the broader trend of laws affecting women being changed was the Family Courts Act, which was passed in 1984. The Family Courts Act was given presidential sanction on September 14, 1984. The Act has a commencement clause that allows the Central Government to implement the Act in a State by publishing a notification in the Official Gazette. Several dates may be set for various States. The Act has been divided into six parts which are as follows: preliminary part, family court, jurisdiction, procedure, appeals and revision, miscellaneous part the last one.⁴

Meaning of the term “Family”:

The idea of a family has been evolving quickly. The vestiges of the organised family can be found in the clan culture when males lived in groups and clans. Studying how human civilization came to be

² Aieshwarya Narayanan,S.(2020) ‘Analysis of Family Court’,Retrieved from <https://indianlawportal.co.in>

³ E.L.Bhagiratha Rao's(2007)Marriage Laws & Family Court Act(7th ed) AsiaLawHouse,Hyderabad.

⁴ The Family Court Act,1984.

structured into families is incredibly fascinating. Hence, the idea of fatherhood, sisterhood, brotherhood, motherhood, etc. was created. The term “family” has not been defined in the Family Court Act. Burgess and Locke define "a family" as a group of people who are related through marriage, blood, or adoption and who live together in a single household. They also define a family as people who interact and communicate with one another while fulfilling the social roles of mother and father, son and daughter, brother and sister, and husband and wife.⁵ The term “family” is defined in the following words-

Family means and includes the following:

- a) A man and his wife living together,
- b) Any child or children born to them, to this man, or this wife
- c) Any child or children that this man and his wife are responsible for supporting.
- d) A woman not having a husband or not living together with her husband any child or children being maintained by her,
- e) A man not having a wife or not living together with his wife, any child or children being an issue of his and any child or children being maintained by him,
- f) A woman not having a husband or not living together with her husband any child or children being maintained by her,
- g) A man or woman including his or her brother, sister, ancestor or lineal descendant
- h) Any other combination specified in clauses (a) to (d) CrPC.⁶

The term “family” according to the Muslim Waqf Validating Act 1913 includes all relatives more or less dependent on the settlor head of the family and according to that a daughter-in-law living with an Indian householder is a member of the family undoubtedly.

According to Kerala Land Reforms Act, the term “family means” husband, wife and their unmarried children.

⁵ H.K.Saharay(2011).Family Law in India(2nd ed) EasternLawHouse PrivateLtd.

⁶ The Code of Civil Procedure,1908

According to Partition Act the term “family” means a group of persons related through blood and living in one house or under one roof or management and is not limited to a body of persons who can trace their descent from a common ancestor.⁷

MEANING OF THE TERM “COURT”:

The Family Court Act does not define the word "court"; rather, section 2(d) of the Act merely states that "court" refers to a family court established by section 3.

Family Court is a court that declares the rights of the parties and resolves disputes using the state's judicial authority granted to it by a statute. In a Family Court, the litigating parties have the right to be heard in favour of their cause, to present evidence to support it, to cross-examine one another, and to present evidence. According to the legislation, the Family Court must resolve the conflict and render a decision based on the evidence presented by the parties. Family Court satisfies every need and contains all the necessary components. The Family Court is a district court or subordinate civil court to which the C.P.C. and Cr.P.C. have been applied by section 10 of the Act, according to section 7 of the Act.⁸

When it comes to resolving problems within families, alternative dispute resolution (ADR) techniques like counselling, mediation, and conciliation have been more prevalent since the passage of the Family Court Act in 1984. The main objective of the Family Court Act is to save the pious institution of marriage by making conciliation and settlement between the spouses and also to reduce the burden of ordinary courts by settling matrimonial disputes outside the court. But the Act cannot be implemented properly because of the rapid increase in matrimonial disputes. The concept of family has been changing rapidly because nowadays people become more practical, realistic, materialistic, and insensitive towards human emotions and their values and because of this notion the concept of marriage and its value vanishes and fades away and divorce is become too common in the present society and due to the rise in matrimonial cases the provisions of the Family Court Act cannot be implemented as it was intended to be by the lawmakers of the country. Due to the backlog of cases, the family court start working like ordinary courts and the basic objective of speedy justice in matrimonial disputes for which these special courts were constituted cannot be achieved. This research focuses mainly on the functioning of working of family courts and to focus on the urgent need of constituting more family courts in every district or town

⁷ H.K.Saharay(2011).Family Law in India(2nd ed)

⁸ Ibid.

because it amounts to inequality when the provisions of the Act only apply to people living in cities with a huge population. There should be a family court in every district irrespective of their respective population. The 14th finance commission had recommended constituting 235 Family Courts in the district where the same were not accessible during 2015-2022. At present there are a total of 743 Family Courts are working across the country.⁹

This research highlights the urgency of the accessibility of these special courts to every aggrieved person. The main objective of the Act was to promote reconciliation and expedite the resolution of family disputes while decreasing costs and technicalities but due to the increase in matrimonial disputes and lack of accessibility of these special courts, the provision of the Act could not be implemented.

THE OBJECTIVES OF THE FAMILY COURT ACT, OF 1984:

By establishing Family Courts, the Family Court Act of 1984 hopes to promote compromise and hasten the resolution of disputes affecting marriage, families, and related concerns.

1. To establish a Specialized Court that will only handle family law cases so that such courts have the necessary knowledge to handle these cases quickly. Hence, the two most important criteria for creating such a court are knowledge and speed. To establish a framework for settling family-related conflicts.
2. To offer a cheap remedy.
3. To allow for flexibility and a casual atmosphere in the conduct of procedures.
4. To attempt to protect the institution like marriage through conciliation, mediation and by counselling.¹⁰

AN ANALYSIS OF THE ACTUAL FUNCTIONING OF THE FAMILY COURT ACT 1984:

EXTENT AND APPLICABILITY OF THE FAMILY COURT ACT:

The Family Court Act applies to the whole of India excluding the state of J & K and shall come into force on 19th November 1986 The Family Court Act, 1984 (2022) p.2. This Act applies to Hindus, Sikhs, and Jains under the Hindu Marriage Act 1955, and all other persons under the Special Marriage Act 1955. The provisions of the Family Court Act do not apply to Christian, Muslim and Parsi religions.

⁹ Family Court Department of Justice (2022) Retrieved from <https://doj.gov.in>

¹⁰ E.L.Bhagiratha Rao's, 2007

(H.K.Saharay,2011,p.289).This study focuses on the point that it is high time and need of an hour to adopt one uniform legislation for all family disputes irrespective of religion.

CRITERIA FOR THE ESTABLISHMENT OF A FAMILY COURT ARE VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION:

The State governments are given the authority to establish, for each region in the State including a city or town, a place with a family court with a population of over a million. The qualifications for appointment as a Family Court Judge are the same as those for appointment as a District Judge, which calls for seven years of judicial experience or seven years of advocacy experience. Through mediation and counselling woman would be preferred for appointments as Family Court Judges.¹¹

This research study recommends that there should be Family Court in every district irrespective of their respective population as it is violative of the right to equality and because the concept of family and marriage has been changed completely and cases of divorce, child custody and other family-related disputes increasing day by day and there is lack of special courts to resolve such matrimonial disputes on time.¹² For family courts to be successful, factors such as the selection procedure, tenure, and training of presiding officers are critical. Judges of District and Sessions are most frequently appointed through transfers. Many issues with this procedure have been brought up. The methods and ideologies of ordinary civil and criminal courts differ significantly from those of a family court. It is difficult for judges who are well-versed in the adversarial pattern of dispute resolution to adjust to the demands of emotionally charged and tense plaintiffs in family disputes. Legal experts have made the argument that family courts should appoint judges at the District court's senior levels. The problem, however, is that few senior judges accept these transfers to family courts as tribunals where they are unable to apply their talents of "judging" by the legal principles of civil and criminal law and the norms of evidence.

CONTRIBUTION AND ROLE OF SOCIAL WELFARE ORGANISATIONS, COUNSELLORS, AND OTHER FAMILY COURT PERSONNEL:

The Act states that candidates for the family courts must be committed to the need to defend and protect the institution of marriage and promote conflict settlement. The State Government to collaborate with organizations that support the well-being of families, specifically

¹¹ Legislative Department(n.d.)The Family Law Court Act,1984.

¹² Dr. Paras Diwan(2013).Family Law(10th ed)Allahabad Law Agency

women and children, or work in the social welfare sector to collaborate with the Family Courts in carrying out their duties. The State Governments must also decide how many and what kinds of counsellors, officers, etc. will work with the Family Courts.

The role of counsellors in family court plays a very important part. For the judges to refer the case to the counsellors at any moment for additional talks and settlements as well as to perform supervisory duties, they should be designated as full-time and permanent members of the Family court. If this model is adopted nationwide, a significant amount of valuable judicial time could be saved and used for the swift resolution of cases, which was also one of the goals of creating a separate forum for family disputes. Additionally, the minute details of matrimonial disputes could be amicably resolved. It is to be suggested that there is a need for the incorporation of the provision in the Act regarding the strict, proper and regular training of counsellors to handle reluctant clients to attend conciliation meetings, and who are dealing with the issues like psychological, sexual and superstition.

JURISDICTION OF FAMILY COURTS:

The Family Court has all the power of a District Court or Subordinates Civil Court in respect of suits and proceedings. In addition, the Family Court shall have and exercise the jurisdiction granted to a Magistrate of the First Class by Chapter 9 of the Cr. P.C. of 1973, which relates to the maintenance of a wife, children, and parent, as well as any other authority that may be granted by any other law.

It is recommended that the family court's authority should also extend to para-family issues. It currently lacks authority over any issues involving dowries or juvenile detention. There are more delays in Family Courts in comparison to Magistrates Courts in maintenance proceedings under section 125 of Cr.P.C. Delay is caused because of the compulsory requirement of counselling in Family Courts and the process of transferring the case from Magistrates Courts to the Family Court causes more delay and the purpose of speedy justice for which these courts were established could not be achieved.

THE PROCEDURE FOLLOWED BY THE FAMILY COURT:

Family Court must make sure that the parties are assisted and persuaded to settle and to do this, these courts must adhere to the High Court's prescribed procedure. The court may adjourn the case for as long as it deems necessary to decide if it appears to the Family Courts that there is a likelihood of a settlement between the parties. If the Family Court or either party so desires then the proceedings may be held on camera. The ability to hire legal and welfare specialists is

another authority granted to the family court. According to Section 13, if a party appearing before a Family Court does not have legal representation, the court is duty-bound to allow a legal expert as *amicus curiae* in the interest of justice. Affidavits can be used as evidence as well, and the family court has the right to summon and question anyone on the facts stated in the affidavit. The decree of the Family Court is succinct and straightforward and contains the point of determination. The execution of the Family Courts decree is according to the rules of C.P.C, 1908 and Cr. P.C, 1973. An appeal against the decree or order of the family court lies to High Court.

ROLE OF JUDGES AND LAWYERS:

The Family Courts Act was created to promote negotiation and secure a rapid resolution of problems relating to marriage and family affairs, which was recognised by the honourable judges of the family courts and other issues related thereto. Every effort should be made to choose judges who are dedicated to the need to safeguard and preserving the institution of marriage and advance the welfare of children. These individuals should also be qualified due to their experience and expertise in promoting the resolution of disputes through conciliation and counselling. It was proposed that when adjudicating upon the complaints the judges must bear in mind that only ideal spouses constitute an ideal family. There is no need for attorneys or family courts if the spouses are perfect for one other. So, it is the responsibility of the judges to consider ways to resolve any disagreements or misunderstandings between spouses. There was also a need for the creation of a unique hiring process or a set of unique standards to act as standards when hiring judges for the family courts.

Section 13 limits the involvement of attorneys in family courts, which has led to a variety of structural and legal issues. To guide litigants through the intricate web of court proceedings, attorneys must be present. Conciliators or counsellors lack the knowledge and experience necessary to complete this role. In support of this, a variety of issues affect marginalized and uneducated people, particularly women. A woman with very limited literacy cannot be expected to provide evidence in court that will support her position, they don't know what to say to the judge during cross-examination, or even doesn't understand what is relevant or not. Without a robust programme for legal aid and other forms of assistance, these women find it difficult to approach the family court and they prefer to approach the local panchayat for the redressal of their problems to avoid this complexity the assistance of lawyers is very important.

**ROLE OF THE JUDICIARY IN THE EFFECTIVE IMPLEMENTATION
OF FAMILY COURT:**

It was stated in the case of *Bhuwan Mohan Singh V. Meena*¹³ AIR(2014). that the Family Court must adopt and facilitate the procedure of conciliation and dispose of family disputes expeditiously and in a speedy manner

*K.Sivaram V. K. Mangalamb*¹⁴ and *Shail Kumari Devi and another V. Krishan Bhagwal Pathak Alias Kishun B. Pathak*¹⁵. In this case Justice Dipak Mishra and Justice V. Gopala Gowda observed that delays in decisions violate not only human rights but also the Family Court's fundamental upholding of an individual's dignity. It had come to the notice that the Family Courts have been routinely granting adjournments.

*R.V.R 2023*¹⁶ The Kerala High Court held that a Family Court does not have the jurisdiction to entertain a defamation claim; the Court observed there must be a proximate relation to the marital relationship of the parties. A division bench of Justice Anil K. Narendran and Justice P.G Ajithkumar observed this view (LiveLaw n.d. , para 10)

*Smt.Vandana Goyal V. Prashant Goyal*¹⁷, The High Court of Madhya Pradesh, Gwalior Bench recently said that the requirement of a cooling period of six months under Section 13B (2) of the Hindu Marriage Act is a directory and not mandatory.

*Prabhat V. XXX & Anr*¹⁸ Chhattisgarh High Court observed that merely because the father is the natural guardian of his minor son, custody cannot be automatically decided in his favour unless he or she should have an attachment with their minor child.

In this case *Shiju Joy. A V. Nisha*¹⁹ on Justice A. Mohamed Mustique & C.S Dias asked to resolve the problems caused to the litigants due to inordinate delay in disposal of cases by Family Court in the state. It was also observed that the misuse of Article 227 by the advantageous group caused perceived injustice and other causes like lack of infrastructure, untrained staff, and docket explosion also defeat the purpose of speedy disposal of the cases.

¹³ (2015) 6 SCC 353

¹⁴ 1990 CriLJ 1880

¹⁵ CIVIL APPEAL NO. 4666 OF 2008

¹⁶ 2023 LiveLaw (Ker) 145.

¹⁷ MISC. PETITION No.4682 of 2022.

¹⁸ 2022 LiveLaw (Chh) 82.

¹⁹ OP (FC).NO.352 OF 2020

*Anup Disalva & Anr. V. Union of India*²⁰ The Division Bench of Justice A. Mouhamed Mustaque and Justice Shoba Amamma Eapen said that the law at present differentiates parties based on their religion when it comes to matrimonial disputes. The Kerala High Court said that the Union Government should seriously consider having a uniform marriage code in India to promote the common welfare and good of spouses in matrimonial disputes

The Family Courts (Amendment) Bill 2022 was presented to Lok Sabha on July 18, 2022. The bill amends the Family Courts Act of 1984. Under the Act, state governments may establish Family Courts. The federal government may declare specific dates for the Act's implementation in certain states. The Himachal Pradesh and Nagaland governments established Family Courts in their respective states as a result of the Act. But, the federal government has not increased the Act's applicability to these states ([newsonair.gov.in](https://www.newsonair.gov.in))

LACUNAS UNDER THE FAMILY COURT ACT, 1984:

1. **Lack of Awareness:** There is a lack of awareness about the existence and the functioning of the general public. As a result, many individuals are unaware of their legal rights and the process for resolving family disputes through the Family Court system. This often leads to delayed or ineffective resolution of disputes, with parties resorting to other methods like arbitration or mediation.
2. **Backlogs and Delay:** Divorce litigation continues to be highly contentious, and there are backlogs in cases, despite the family courts' mandate of non-adversarial litigation and consultation leading to swift settlements.
3. **The mandate of Personal Appearance of Parties:** The personal appearance of parties is mandatory under the Family Court Act and sometimes or infect many times it causes great hardship to the petitioners who may not be able to present themselves on the specified date.
4. **Lack of Consistency in Rules and Procedure:** When it comes to norms and processes, there is no consistency. Each High Court establishes its own set of guidelines and practices. The stringent standards of procedure were removed from the Code of Civil Procedure, but the Family Court continues to handle family conflicts in the same way as other civil proceedings.
5. **Absence of Lawyers:** The absence of Lawyers in the Family Court makes things worse for the layman who is not able to

²⁰ 2022 LiveLaw (Ker) 645

understand the complicated procedure of law and becomes dependent on the mercy of court peons or other staff to make them understand the rules of law and especially the woman who is not aware of the results or understand the suggestions given to them by the court.

6. **Counsellors Role:** The role of counsellors play a very important part in mediation and conciliation but it was observed that many of the Family Courts do not have good numbers of counsellors and many counsellors are simply employed on a part-time basis and they keep changing frequently and not properly trained. In this situation, it causes great hardship to a woman who has to explain her difficulties every time to the new counsellor on a fresh basis.
7. **Lack of Sustaining Rights:** Other issues related to substantive law continue since the Family Courts are governed by procedural law. Family Courts were established to handle issues that emerge during divorce, restitution of marital rights, claims for alimony and maintenance, and child custody. The establishment of a Family Court makes no substantial change to the law governing marriage. The creation of Family Courts won't transform women's status until the legislation is drastically changed to grant rights to women and create new rights in their favour. As a result, the Act has not proven to be a useful tool for delivering justice to women.
8. **Attitude and Position of Family Court Judges:** The judges selected for the Family Courts do not have any special training or experience in handling Family Court cases, nor do they have any training in mediating disputes, which is a prerequisite outlined in the Act.
9. **Lack of proper Infrastructure:** Unsatisfactory conditions are a common problem for the Family Courts. The judges have no appropriate place to sit, and the working environment is typically filthy and uncomfortable. The children cannot meet their divorced parents in a designated location. The Family Courts lacked facilities like photocopying, paid public telephones, the availability of stamps, stationery, and internet stores, among other basic amenities for the general public. The litigants endure countless challenges in the absence of essential infrastructure. The Act also includes provisions for legal assistance services for those litigants who are more economically vulnerable. The Rules allow for tape recorders to be used to capture testimony during trial processes that may be used at the appeals stage, but this suggestion would be too ambitious for the family courts, which already lack sufficient provisions for paper and office supplies should be made first.

If these gaps aren't filled, women's quest for justice will be hindered rather than helped by the family courts.

10. **Lack of Women Judges in Family Court:** When it comes to norms and processes, there is no consistency. Each High Court establishes its own set of guidelines and practices. The stringent standards of procedure were removed from the Code of Civil Procedure, but the Family Court continues to handle family conflicts in the same way as other civil proceedings.
11. **Criteria for establishing Family Courts are confined to Population:** The state government after the consultation with the High Court and by notification establish in every area or city or town a Family Court whose population exceeds one million, these criteria completely violate the concept of the right to equality.
12. **The term "Family" has not been defined:** The term "family" has not been defined under the Act. The family courts do not have jurisdiction over issues having significant financial repercussions that harm the family, such as testamentary problems. The family courts only deal with issues involving women and children, such as divorce, maintenance, adoption, etc.
13. **Limitation in addressing issues like Domestic violence:** The Act provides for seeking protection and restraining orders, but its implementation is often hindered by a lack of sensitivity and understanding towards victims of domestic violence.

SUGGESTIONS AND RECOMMENDATIONS FOR THE EFFECTIVE IMPLEMENTATION OF THE FAMILY COURT:

1. The family court judges are overworked with caseloads, emotionally spent on intensely personal matters, and unable to pursue their scholarly interests. It is advised that the higher Judiciary and the State Administrator should regularly update Family Court Judges on changes to the legislation, legal system, and constitutional frameworks as well as provide them with guiding principles. Gender sensitization training or course should be made essential for the recruitment of Family Court Judges.
2. Counsellors' roles should be clarified. They ought to increase women's negotiating power. While negotiating terms of reconciliation, and settlement, regarding the amount of maintenance, issue of custody and access of children, protection from domestic violence, or right of residence in the matrimonial home, the counsellors were to depart from the preventing framework of "neutrality" and gender justice.

3. A Family Court Judge should have a five-year term. Because the process entails learning additional abilities, two to three years was believed to be an extremely short duration for one to be able to perform effectively. It is time for a transfer by the time he or she becomes accustomed to the task at hand and is capable of altering the rules of procedure. By using a less legalistic and technical and more humanistic approach to dispute settlement, judges should be able to resolve the problem.
4. When making decisions about family matters, Family Court Judges must have a sympathetic, humane stance. Judges in Family Court require additional training to advance this framework.
5. A drafting committee may be established to design the regulations to bring uniformity to the laws governing Family Courts across the nation.
6. The Family Court should allow a woman to file a case in the district or town where she resides, not necessarily where the marriage occurred, where the husband lives, or where they last shared a home.
7. Every district, town or village should have a Family Court irrespective of their respective population so that the aim of achieving speedy justice in matrimonial disputes should be achieved.
8. It was also suggested that judges consult with social workers, NGOs, and probation officers who might, among other things, infer from the family's level of living when determining the husband's income or assets to determine the amount of maintenance. To ensure that the wife receives her payments on time, it was further recommended that the maintenance be paid to the court at the start of each month. It is the responsibility of the court to see that a wife is placed back in the same residence when she is expelled from it despite an order of an injunction. The spouse should not be permitted to present his position in a matrimonial procedure where interim maintenance has been issued and has not been paid. It was advised that the National Commission for Women do a thorough study to determine the precise situation of family courts and their functioning and success rate. The study should be supported by State Commissions and at least two NGOs from the relevant regions. It was demanded that independent machinery to carry out maintenance orders should be in place when maintenance is given under Section 125 of the Criminal Procedure Code.
9. It was recommended that the ability to issue a new summons for the other party should only be used rarely. The

wife should receive the summons personally to prevent ex-parte rulings. To prevent delays, substituted service should also be provided right away.

10. A distress warrant may be issued under section 128 of the Criminal Procedure Code, which gives the Magistrate the authority to carry out the court's ruling and sell the husband's movable property. It was suggested that similar coercive measures be used by the family courts as well. In the case of salaried individuals, whether in the public or private sector, the pay can be attached when the family court has issued the maintenance order under S. 125 Cr.P.C.
11. Advocates' public appearances cannot be prohibited. The fundamental justification is that a judge, counsellor, or another social professional, etc., will be a third party to the parties involved in the dispute. The people closest to the litigants are the advocates. Every family court starts by bringing the parties in front of the conciliators and making every attempt to settle. Only after the conciliators report that the conciliation is impossible or has failed would the issue of the presence of lawyers come up. The key question is whether having a lawyer present will benefit or hurt a family court's performance. That is an important matter. It was suggested that the participation of attorneys be constrained by a clause allowing the court to revoke their vakalatnama if they employ stalling strategies such as needless adjournments. Lawyers won't be able to request adjournments if the court is granted this kind of control. It was stated in the case of *Komal S. Padukone V. Principle Judge, Family Court, Bangalore* that if one party is allowed to be represented by a legal practitioner the other party should also be allowed to be represented by the legal practitioner (<https://newsonair.gov.in>).
12. To enhance the operation of Family Courts and ensure gender justice, the State Women's Commission on the Ministry of Woman and Child Welfare should conduct a gender-specific analysis of its operations. It should then make pertinent recommendations to the relevant state government and High Court.
13. In cases involving children, the best interest of the child should be the top priority. This means ensuring that the child's needs are met and that their well-being is protected.

CONCLUSION:

In conclusion, while the Family Court Act in India has helped to streamline the process of resolving family disputes, it has several limitations that hinder its effectiveness. To address these limitations,

there is a need for greater awareness and education about the family court system, greater sensitivity towards victims of domestic violence, adequate resources and infrastructure, and more tailored approaches to resolving family disputes. Only then can the Family Court Act be truly effective in protecting the interests of families in India. The effective working of the family court is critical to ensuring that justice is delivered in family law matters. To achieve this, the court must have competent judges, an efficient administration system, a robust protocol to protect vulnerable parties, access to expert resources and be transparent and accountable to the public. By implementing these key factors, the family court can function effectively and ensure that justice is served to all parties involved. The Family Court Act has been amended since 1984, recently Family Law Amendment Bill (2022) was passed But that was only for the state of Nagaland and Himachal Pradesh, there is a need of an hour to strengthen family laws in India and more to adopt one uniform family law for the country irrespective of the religion.

CHAPTER: 8

DOCTRINE OF ‘BEST INTERESTS OF THE CHILD’: A CRITICAL ANALYSIS

By Arushita Singh^{1}*

ABSTRACT

Custody-related decisions, as well as planning and termination of parental rights, are just some of the decisions the courts make that have lasting effects on children's lives. The "best interests" standard is applied in a substantial number of cases where a court issues a ruling concerning the parents and the child. Although the doctrine "best interests of the child," does not have an absolute and universally accepted definition, it is commonly used to describe the considerations made by the courts when determining what services, actions, and orders will be in the child's best interest and who is best suited to take care of the child. The ultimate safety and well-being of the child are of material concern in making 'Best interests of the child' decisions. Recently, the courts in India have been adjudicating the issues concerning the custodial rights of parents by recurrently giving special emphasis to the doctrines of 'best interests of the child' and 'welfare of the child'. They have laid down certain contours to consider while dealing with such sensitive cases. This paper endeavours to analyse the doctrine of the best interest of the child in light of the custodial laws prevalent in India and how it can be worked upon in order to better meet the needs of changing contemporary society.

Keywords- Best interest of the child, Custody , Guardianship, Welfare of the child, Parental rights.

“It is easier to build up a child than it is to repair an adult.”

- Frederick Douglass (1817-1895)

INTRODUCTION

When family and matrimonial tussles are taken to legal forum, the husband and wife may know what they want and be able to employ attorneys to help them obtain it. In the chaos, the adults are more likely to be busy with their own issues and be put in a situation where they would opt for what is best for them and which may not be best for their child. Additionally, the parents may experience emotional stress in their matrimonial issues to an

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extent that the immature child may be left bereft of adequate care and affection in his tender days. Such difficult events may scar the child for his lifetime, impede his overall development and greatly affect his well-being. Therefore, we have the “best interests of the child” or “welfare” principle—a child-centric philosophy that endeavours to safeguard the needs, interests, and well-being of the child in the ongoing turmoil. When the matters at stake are anticipated to have major effects on the child's present and future, the best interests of the child are taken into consideration.² Since a child is incapable of determining what is best for him, decisions are made on his or her behalf by the courts by complying with the “best interests of the child” or the “welfare of the child” principle. If an issue pertains to the custody of a minor child, the case is to be resolved solely and primarily on what would best serve the interest and welfare of the child, not on the basis of the legal rights of the parties.³

There is no particular set of prerequisites in order to comply with the standard of best interests of the child. This is simply because this principle has a very subjective nature and is applied to varied facts and circumstances of each case.⁴ Therefore, UNHCR gives us certain guidelines to keep in account while making decisions in matters pertaining to child custody or guardianship which can be considered as successful compliance with the best interests of the child standard.⁵

This principle was first expressly incorporated in the Geneva Declaration on the Rights of the Child (1924) and the United Nations (UN) Declaration on the Rights of the Child (1959) respectively. It is also one of the cornerstones of the UN Convention on the Rights of the Child (UNCRC)⁶. India is also a signatory of these conventions and has taken active steps to

² UN Committee on the Rights of the Child (CRC), *General comment No. On the right of the child to have his or her best interests taken as a primary consideration* (Art. 3, para. 47), 29 May 2013, CRC /C/GC/14. Retrieved from <<https://www.refworld.org/docid/51a84b5e4.html>>

³ Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Anr. (AIR 1987 SC 3)

⁴ Marit Skivenes. (December 2010). *Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?* .53(4). Acta Sociologica. Retrieved from <<https://www.jstor.org/stable/25782154>>.

⁵ UNHCR Guidelines on Determining the Best Interests of the Child. (May 2008).

⁶ The Convention on The Rights Of The Child was adopted by The UN General Assembly on November 26/1989. The best interests of the child principle is derived from Article 3 of UNCRC, which says that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”

advance the ideals enshrined in these esteemed conventions formulated for safeguarding the rights and interests of the child.⁷

In the same pursuit, the doctrine of "best interests of the child" has been recognized by the Indian courts in their judicial rulings pertaining to custody and guardianship matters. Numerous pieces of legislation have been enacted in India to implement the doctrine, including the Juvenile Justice (Care and Protection of Children) Act of 2015, Section 17 of the Guardians and Wards Act of 1890, and Section 13 of the Hindu Minority and Guardianship Act of 1956. The 257th Law Commission Report threw light upon the welfare of the child principle, emphasizing its significance and laying down suggestions for the legislative bodies to consider while implementing such a purposeful but volatile standard in the Indian legislative framework.⁸

(I) Evolution of the Principle

Traditionally in Common Law, the father had always been the default guardian of his child's person and property. The father was given complete discretion over his child's upbringing, including but not limited to, the child's moral upbringing, religious upbringing, and financial support. Since women's identities were merged with their husbands' at marriage, mothers had no legal standing to exercise power over their children.⁹ Gradually, the courts began to acknowledge mothers' claims, if not outright rights, to child custody as divorce grew more common and women were able to establish their own legal identities and places of residence. Several pieces of legislation, beginning with the Custody of Infants Act, of 1839 in the United Kingdom, had made it possible for mothers to seek custody of their small children. Nonetheless, the right of the father to have custody of the child has always been seen to be paramount.¹⁰

The breakdown of absolute paternal control over children in English law was facilitated by two changes. To begin, the courts have, in a number of cases, used their *parens patriae jurisdiction*, essentially a super parental authority of the state, to strictly scrutinize and if necessary, disregard the

⁷ The Convention was formally opened for ratification on 26 January 1990, and the Government Of India ratified the CRC On 11 December 1992.

⁸ 257th Law Commission of India Report.(2015). '*Reforms In Guardianship And Custody Laws In India*'. Retrieved from < https://lawcommissionofindia.nic.in/cat_custody/ >

⁹ LaFave and LeAnn Larson . (1989). *Origins And Evolution Of The "Best Interests Of The Child" Standard*. 34. South Dakota Law Review, Pp. 459–513.

¹⁰ Aron Degol And Shimelis Dinku. (2011). *Notes On The Principle "Best Interest Of The Child": Meaning, History And Its Place Under Ethiopian Law*. Mizan Law Review. 5(2).

father's natural guardianship and grant custody based on what was best for the kid. Second, the British Parliament passed a number of laws that gave both the mother and the father equal legal standing when deciding guardianship and custody and changed the focus from paternal rights to solely, the wellbeing of the child.¹¹ The Custody of Infants Act of 1873 eliminated restrictions on petitions from adulterous mothers and extended the mother's right to custody until the age of sixteen. While the court has the authority to appoint and remove guardians, the Guardianship of Infants Act of 1886 gives mothers equal say in matters of custody, visitation, and testamentary guardian appointment. The Guardianship of Infants Act of 1925 stipulated that the well-being of the new born must be the "first and paramount consideration" in resolving a custody dispute between the mother and the father.¹² Last but not least, the Guardianship of Minors Act of 1973 provided mothers the same authority over their minor children that fathers did under common law. The court has the authority to make a decision based on the welfare of the child if the parents are unable to do so.¹³ By paying adequate weight to what is best for the child rather than paternal preference, the best interest standard facilitates decision-making on custody matters in a manner opposed to the initial paternal predominance in traditional times. The best interest criterion is really "gender neutral" in its application, and it is now recognized in both common law and civil law systems, including those in the United Kingdom, the United States of America, and France.¹⁴ In the late 1900s, many US states departed from the obvious preference of the father and tended to favor the mother in child custody matters through the employment of the *Tender years doctrine*. This standard basically meant that children lacked the fortitude to deal with drastic changes in their living circumstances and that any such adjustment made without giving due consideration to the child's needs and interests can be detrimental to his well-being. This doctrine was finally superseded by the doctrine of the best interests of the child.¹⁵

¹¹ Re, O'Hara, (1990) 2 IR 232 .

¹² Dr. N. Krishna Kumar. (2015). *Best Interest Principle: A Central Feature Of Family Law*. International Journal Of Research And Analytical Reviews. 2(4).

¹³ Supra 7.

¹⁴ Philip Alston And Bridget Gilmour-Walsh. (1996). *The Best Interest Of The Child- Towards A Synthesis Of Children's Rights And Cultural Values*. Unicef. Innocenti Studies .

¹⁵ Jaimee L. Hartenstein. (March 2016). *Tender Years Doctrine*. The Wiley Blackwell Encyclopedia of Family Studies.

(II) Whether “best interest of the child” principle should be a primary consideration?

During the drafting of the UNCRC convention, there were debates regarding whether the "best interest" principle ought to be "the paramount" or "a primary" factor.¹⁶ In the end, it was decided to embrace the suggestion that "the best interests of the child should be a primary consideration." This weaker formulation's acceptance was primarily justified by the possibility that there would be situations in which the conflicting interests of, among other things, "justice and society at large should be of at least equal, if not greater, importance than the interests of the child." Therefore, it appears that the goal implied in choosing this formulation is to guarantee that there is enough flexibility, at least in certain extreme situations, to allow the interests of people other than the child to prevail.¹⁷

(III) Landmark cases recognizing the principle

The idea that the child's well-being should be of paramount consideration is just as abstract as the concept of acting in the 'best interest of the child'. In making the decision, it is necessary to weigh several complicated and at times contradictory interests in addition to legal, social, and ethical concerns. It is challenging to establish universal guidelines since every situation is different. An aspect or factor that is crucial in one situation might not be as important in another. This doctrine has been recognized by the Indian courts in their numerous judicial rulings pertaining to custody and guardianship matters.

i. The desire of the child is different from what would be in the best interest of the child: Rohith Thammana Gowda vs the State of Karnataka

The apex court in this case held that the wish or desire of the child cannot be equated with the best interests of the child, since the former can be ascertained through interaction whereas the latter has to be decided by taking into account all the relevant facts and circumstances of the case. This distinction between both of the concepts shall be kept in mind when considering the views and interests of the child in custody matters. Additionally, the immaturity of the child might cloud his judgement for which decision would be in his best interest. Thus, while his wish and

¹⁶ Supra 9.

¹⁷ H. J. Steiner And Philip Alston. (2000). *International Human Rights In Context: Law, Politics And Morals*. 2nd Ed. ,Oxford University Press.

desire is a material consideration, it solely cannot be determinative of the child's best interests.¹⁸

ii. Relevance of Financial well-being: Suresh Babu v. Madhu

The relative wealth of the parents is occasionally still important, but the courts now place a greater focus on the child's welfare than on one parent's better economic standing. In this instance, the father raised the eighteen-month-old girl while the mother was expelled from the marital home. The mother, who resided with her grandparents, filed a custody request in accordance with Section 25 of the Guardianship and Wards Act.¹⁹ The mother was given custody by the judge. The court ruled that the term "child's welfare" should be used broadly and not just in reference to the child's physical and financial well-being.²⁰

iii. Natural Guardian Superseded : Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi

In this case, the children were living with their maternal uncle after the unnatural death of their mother. The father was facing criminal charges for cruelty and harassment of the mother, his wife, in connection with her death. Before the Supreme Court, the children, who were capable of expressing their wishes, expressed their willingness to remain with their maternal uncle, who, according to them was looking after them very well. In the interest and welfare of the children, the father's legal rights were superseded, and custody was awarded to the maternal uncle instead of the father.²¹ This case is significant because the rights of a natural guardian were bypassed to protect the interest of the children.

iv. A working wife is no material consideration : Thirty Hoshie Dolikuka v. H.S. Dolikuka

This case illustrates the principle that whether a woman works or not is irrelevant in judging her ability to take care of her child. The mother's fitness to act as a custodian of her child was unaffected by whether she worked outside the home for a living or was a housewife. It has now become an established principle that a mother cannot be denied custody just because she is working.²² The belief that the child's relationship with both parents is paramount was also reiterated by the Supreme Court in *S.N*

¹⁸ Asha Bajpai. (2005). *Custody and Guardianship of Children in India*. Family Law Quarterly. 39(2). Symposium on Comparative Custody Law.

¹⁹ Guardianship and Wards Act, 1890

²⁰ A.I.R 1984 (Mad.) 186 (India)

²¹ (1992) 3 S.C.C. 573 (India).

²² A.I.R. 1982 S.C. 1276 (India)

*Nirmala v. Nelson Jayakumar*²³ wherein it was held that no parent should be denied access to the child without adequate justification.

v. Welfare of the child over parental rights: Vasudha Sethi vs. Kiran V. Bhaskar

The court held in this case that the principle that the welfare of the minor shall be the predominant consideration and that the rights of the parties to a custody dispute are irrelevant, thus best interests of the child can override the parental rights. It was also stated that there cannot be a straitjacket formula for the determination of the welfare of the child, since the same is dependent on several variables and the facts of each case have their own set of complexities.²⁴

*Saraswatibai Shripad Ved v. Shripad VasANJI Ved*²⁵ duly held that "it is neither the wellbeing of the father nor the welfare of the mother, that is the foremost factor for the court." The child's best interests should always come first when making such decisions.

In the case of *Gaurav Nagpal v. Sumedha Nagpal*²⁶, The Supreme Court ruled that "welfare" must be given its broadest possible meaning, with the child's spiritual and moral development being given equal weight to his physical health. The court considers several variables, including the child's age, the quality of the home they are in, the parent's financial situation, etc., to arrive at a decision that is in their best interest.

In *Nil Ratan Kundu v. Abhijit Kundu*²⁷, The Supreme court held that "the opinions of the child would be of critical significance to the judgment, depending on his or her maturity level but the final judgment lies with the court". According to the court, resolving child custody disputes needs a "human touch" since they are a "human problem" A court is not constrained by statute, strict requirements for the admissibility of evidence, or the legal procedure while making a custody decision. The court must give the child's moral and ethical aspirations equal or more weight than the "child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings".

²³ (1999) 3 S.C.C. 126 (India)

²⁴ (2022) SCC OnLine SC 43

²⁵ (1941) 43 BOMLR 79

²⁶ (2008) DRJ 100 329

²⁷ (2008) 9 SCC 413

(IV) Potential issues with the principle

There are certain concerns regarding the mechanism and application of this principle, which have been observed both in international as well as Indian contexts.

i. An ambiguous and uncertain standard

The first issue is that the concerned standard is so indeterminate that appellate courts often find errors in the decisions of the trial court especially when the issue pertains to child custody. When the welfare principle is not properly applied or is overlooked by the trial courts, higher courts have to be approached at considerable cost, both in terms of time and money. Many cases do not reach the higher courts for a lack of resources, and the child's interest suffers in these cases. Even in cases that do reach superior courts, the child has to go through unnecessary trauma and further litigation.²⁸ Simply put, a court cannot determine what is in the best interests of the kid. The events preceding the judicial decision are frequently obscure and strongly contested since they occurred in personal space and secrecy, thus proving them presents enormous evidential challenges. Decision-making also becomes challenging because the courts and experts must evaluate parents at a period in their lives when they are experiencing emotional turmoil.²⁹

ii. Long and tedious legal battles

Another concern is that the legal battles sometimes result in the child remaining with a person with whom the child should not remain. Moreover, the lengthy battles also violate the right to have speedy trial of the child. Trial courts have to be sensitized to the rights of the child and need to become more child friendly. Specific problems include the fact that judges are not equipped and trained to determine the actual wishes of the child and see through external influences on that opinion. Multidisciplinary opinions must be provided to the judge by various experts and organizations in order to arrive at a truer determination of the best interest of the child.³⁰

iii. Allows for Judge's prejudice

Academics have long bemoaned the welfare test's fuzziness and indeterminacy, citing how it permits "gender biases and subjective value

²⁸ Jonathan Herring. 'Farewell Welfare. (2005). Journal Of Social Welfare And Family Law. 27(2).

²⁹ Ibid.

³⁰ John Eekelaar. (2002). *Beyond The Welfare Principle*. Child And Family Law Quarterly. 14.

judgments to replace objective considerations" and allows for "capricious decision-making".³¹ The final decision of the judge is prone to get infected with prejudice and create problems for the parties because their ideals don't line up with the normative political, cultural, or religious norms. One specific complaint that is sometimes made is that, under the guise of the welfare principle, a judge can use her or his own prejudice and gives way to his ideological inputs to determine the case.³² The heavily subjective nature of the power granted to the judge means that, so long as he or she does not claim to be applying it as a conclusive rule of law, a judge can consider almost any factor which could possibly have a bearing on a child's welfare and assign to it whatever weight he or she chooses. Indeed, many have complained that the courts have, in applying the welfare principle, discriminated against various groups. In this respect, the principal has been criticized in various ways: as a means of reinforcing patriarchal power over women and children³³; as working in a way that is prejudicial to gay and lesbian parents³⁴; as operating against the interests of fathers³⁵; as working against the interests of minority cultures.³⁶ A fair objection is not so much that judges improperly impose their own views on people, but, rather, that the welfare principle is so vague that it leaves a judge with little to go on but her or his own moral values, or those of experts. In one significant case, when determining a child's best interests, it was stated that: 'judges are tied by the invisible threads of their own convictions.'³⁷

iv. Disregards parental rights and interests

It is pretty obvious that there will never be a rigid formula for settling custody disputes. Upholding this belief, the courts have created a fluid scenario that is vulnerable to manipulation and abuse by stating that what defines a minor's primary interest is always a "question of fact." This might encourage the parents to simply redefine their rights and claims in terms of the "best interest" of the child.³⁸ It is respectfully argued that the

³¹ Supra 3.

³² James, A., James, A. & McNamee, S. (2003). *Constructing Children's Welfare In Family Proceedings*. Family Law. 33.

³³ Susan Maidment. (1984). *Child Custody And Divorce: The Law In Social Context*. Croom Helm, London, Pp.1-324.

³⁴ Helen Reece. (1996). *The Paramountcy Principle: Consensus Or Construct?*. Current Legal Problems. 49(2). Pp.267-289.

³⁵ Millar, P. & Goldenberg, S. (1998). *Explaining Child Custody Determinations In Canada*. Canadian Journal Of Law And Society. 13. Pp. 209-244.

³⁶ Supra 29.

³⁷ Rockwell V Rockwell (1998), 114 B.C.A.C. 189 (CA).

³⁸ Shantanu Bishnoi. (January 31, 2022). *Supreme Court Rules Parental Rights Irrelevant in Custody Battles: Why the Decision May Backfire – the Leaflet*. The

Supreme Court has also opened the door for biased assumptions and ideological viewpoints of judges to be included in a court's analysis of child custody disputes. As per the interpretations of the welfare principle by the courts, the well-being of the child is actually the only factor to be taken into account. The court can thus take the course of action that best serves the child's interests, regardless of how that course of action may affect the child's parents, any other children, or the interests of the larger community. In fact, it appears that the standard allows the court to provide a ruling that could cause significant harm to others even when it modestly increases the welfare of the kid.³⁹

v. Does not help in negotiation and paves the way to lengthy and costly litigation

Another issue with the welfare principle's indeterminacy is that it does not give couples a clear set of rules to refer to when debating decisions about their children. It is said that the likelihood of a lawsuit decreases with the clarity of the legal position. A couple might look for alternative ways than going for litigation because of the realisation that there is no purpose in going to court because the outcome will be so predictable. The more unpredictable the situation, the more probable it is that someone would take the issue to court in the hopes that the judge give a decision in their favour.⁴⁰

CONCLUSIONS & SUGGESTIONS

Children can be easily neglected since they lack both the voice and vote in sensitive and mature family matters. It is fair to assume that children's interests would be neglected in court proceedings unless some effort was made to prioritise them. The "best interests of the child" is a much-needed attempt to alleviate this unintended injustice meted out to the children.

The modern standard of the best interests of the child has weaknesses, but it is better than the previous, more strict standards. The gender-based norms of the past that favoured one parent over the other ignore the realities of modern family life and the unique needs of children. It is wonderful that through a targeted approach, we are prioritising the innocent child, especially when we consider the child's vulnerability and

Leaflet – An independent platform for cutting-edge, progressive, legal, and political opinion. Retrieved from < <https://theleaflet.in/supreme-court-rules-parental-rights-irrelevant-in-custody-battles-why-the-decision-may-backfire/> >

³⁹ Supra 17.

⁴⁰ Stephen Parker. (1994). *The Best Interests Of The Child: Principles And Problems; The Best Interest Of The Child; Reconciling Culture And Human Rights*. International Journal Of Law, Policy And The Family. 8(1).

the fact that he or she had no control over the marital bond, pregnancy, or the parents' decision to separate.

However, the insensitive disregard for parental needs and interests in the application of this principle is one aspect that demands careful scrutiny and certain modifications accordingly. Recognizing the rights of parents will incentivise the weaker party in the case, mostly the mother, to assert her claim in a rights-based language, whose standing in a custody dispute is oftentimes questioned due to the presence of economic disparity between the couple. This will also provide a holistic view to the judges of the complex human issues involved in the custody dispute. The rights of parents should be considered as a secondary yet significant interest and positive efforts should be put to balance them with the notion of the 'best interest' of the child. If the interests of different parties to a case cannot be reconciled, then the welfare principle must prevail.

According to a research, from 1995-2010, judicial rulings which engaged with the best interests of the child principle were not made according to rational and justified reasoning and rather, weighed heavily on the personal preferences and values of the judges deciding the case.⁴¹ This seriously threatens the principles of law and respect for child's rights. To address such shortcomings, the legislative bodies shall specify the considerations which could share the most commonality amongst different individual cases and there shall be an objective assessment of the facts and circumstances of the case to maintain fairness. Also, there is a need for a non-biased and progressive-minded panel to adjudicate such cases that would accommodate the needs and interests of a changing modern society. Judges with rigid, inflexible ideological beliefs and values may not be fit to decide such sensitive custody and guardianship matters which are dependent on numerous variables. The Court should make sure that the information it applies is sound and genuine and that it has a foundational understanding of children's needs, such as connection, permanence, and attachment.

Uncertainty and inconsistency may be both the greatest strength and greatest weakness of the 'welfare principle.' The vices of indeterminacy are well documented. Its benefits are that it enables courts to produce results that are flexible and responsive to the individual needs of each child. A rule-based standard can have a potential inflexibility that might fail to consider the individual circumstances of each case. In the face of such challenges, it is a belief among academicians and scholars that, the technique of creating of welfare checklist may "minimize the drawbacks of the best-interests standard while retaining its virtues," suggesting that it is a viable alternative to the fuzziness of a best-interests or welfare test.⁴²

⁴¹ Supra 3.

⁴² Supra 27.

There are several examples of countries following this model; the United States is especially successful because of the diversity of approaches to welfare principle that exists there. The welfare principle should be interpreted in a way that gives a balanced weight to the views and interests of children and the affected parties as most children's rights advocates would want. Courts are moving in that direction, even if rather slowly.

CHAPTER: 9

EVOLUTION OF THE INDIAN ADOPTION SYSTEM: A JOURNEY FROM *LAKSHMI KANT PANDEY* CASE TO ADOPTION REGULATIONS, 2022

Ankana Bal^{1*}

ABSTRACT

The journey to uphold the child's best interest in adoption began with the Lakshmi Kant Pandey judgment. Since then, India has been continuously evolving and strengthening its adoption mechanisms. In the last thirty-eight years, India has developed a robust system where children remain protected in shelter homes and in adoptive families. In Lakshmi Kant Pandey judgment the Supreme Court of India laid down a rudimentary structure. Based on it, a secular, modern, digitalised adoption system following the international-standard has been set up. This paper evaluates the journey of the Indian adoption system from 1984 to 2022.

Keywords: Adoption, Lakshmi Kant Pandey judgment, CARA, JJ Act, Adoption Regulations

INTRODUCTION

In the foreground of BIC, Convention of the Rights of the Child, 1989 (CRC) was drafted. The CRC changed the perspective of children's human rights jurisprudence. Since the CRC came into force, the state-parties mandated the incorporation of BIC in all aspects of child-related legislation and policies. But India's journey to adopt BIC started in 1984, before the CRC took place. the Indian government ordered an investigation after the London Daily Mail newspaper published an expose about a Kolkata-based adoption agency was selling babies to a U.S. organisation in 1982.² A PIL also was filed in the Supreme Court on the news report, i.e., *Lakshmi Kant Pandey v. Union of India* (LKP judgment).³ The Supreme Court, for the first time, institutionalised the concept of BIC in India while setting up rule of procedure for the adoption system. In this process the Court adopted the "tried-and-tested" method. The first

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² (August 25, 1982). Calcutta slum babies reported sold to U.S. families. *United Press International*. <https://www.upi.com/Archives/1982/08/25/Calcutta-slum-babies-reported-sold-to-US-families/4860399096000/>

³ 1984 SCR (2) 795.

judgment came on 27th September, 1984. To implement the main judgment, the responsible bodies faced some technical complications and ambiguities. Hence, the Supreme Court clarified and modified the main judgment with three supplementary judgments of 1985, 1986 and 1991.

For the institution of adoption, BIC not only means a child's right to have a family, a family name, and inheritance rights, the process starts by giving shelter and basic human needs to the abandoned children and protecting them from illegal inter-country adoptions. In consequence of LKP judgment the adoption mechanism of India was founded – the substantive law, the rule of procedure, and the institution The Juvenile Justice (Care and Protection) Act, 2000, the Juvenile Justice (Care and Protection of Children) Rules, 2001 (Model), and Central Adoption and Resource Agency (CARA) were the foundational mechanisms. Since then, India has gradually built a strong system to protect the children from illegal adoptions over the last thirty-eight years.

Under the current legal framework, the normative principle of BIC has been implemented in the following manner: (a) the child's best interests shall be of paramount consideration while processing any adoption placement; (b) preference shall be given to placing the child in adoption with Indian citizens with due regard to the principle of placement of the child in their own socio-cultural environment, as far as possible; (c) all applications for adoptions shall be registered on the Designated Portal (CARINGS) and confidentiality of the same shall be maintained by the CARA.⁴ The JJ Act, 2015, the Adoption Regulations, 2022, and a multi-layered vigilance system centralised by CARA are committed to ensuring the child's best interest in adoption. This article analyses how, from a "child-centric" perspective, the Indian adoption system has developed.

Lakshmi Kant Pandey v. Union of India

In 1982, the Indian government ordered an investigation after the London Daily Mail newspaper revealed that a Kolkata-based adoption agency was selling babies to a U.S. organisation. On the basis of the news report, a PIL also was filed in the Supreme Court, *i.e.*, *Lakshmi Kant Pandey v. Union of India* (LKP judgment). The Supreme Court institutionalised the concept of BIC in India. The first judgment came on 27th September, 1984 through which the Court established the rules of procedure. Since setting up an adoption system was a pioneering task, the Court adopted the "tried-and-tested" method in this process. To implement the main judgment of 1984,⁵ the responsible bodies faced some technical complications and

⁴ Adoption Regulations, 2022, Regulation 3, Fundamental principles governing adoption,
https://cara.nic.in/PDF/adoption%20regulations%202022%20english_27.pdf

⁵ 1984 SCR (2) 795.

ambiguities. As a result, the Supreme Court clarified and modified the main judgment with three supplementary judgments of 1985,⁶ 1986⁷ and 1991.⁸ The outcome of these judgments can be discussed in the following manner:

1. **Checks and Balance Formula** – Illegal Inter-country adoption (ICA) is an organised crime.⁹ Organised crime operates through several groups.¹⁰ The greatest challenge before the Supreme Court was to obligate these groups because they were, also, the immediate caretakers of the destitute children, and the custody and adoptions of the children were arranged by them. Therefore, through the “checks and balances” method, the Court established a constant inspection system for the intermediaries a multi-layered vigilance structure.

i) The Court made it mandatory for the nursing homes and hospitals to inform immediately to the district collector or the social welfare department, and the foster care home in the city or the town, upon discovery of an abandoned child.¹¹

ii) The application by the foreign parents must be filed through the recognised child welfare agency by the government of the country in which the foreigner resides. Foreigners were not allowed to apply directly to any agency in India. Here the Court tried to achieve two purposes: one, to protect the foreigners from being induced or persuaded to be paid any unreasonable amount;¹² Two, it is impossible for the Indian Courts or child welfare agencies to determine whether a foreign couple was eligible to be parents. An application sponsored by a foreign country’s agency, must be accompanied by a Home Study Report (HSR) along with other relevant documents.¹³

iii) The government of India was directed to publish a list of recognised placement agencies and all of their associate operating in each state

⁶ 1985 SCR Supl. (3) 71.

⁷ 1987 (1) 383.

⁸ MANU/SC/0020/1992.

⁹ Smolin, D. (2005). The Two Faced of Inter-country Adoption: The Significance of the Indian Adoption Scandals. *Seton Hall Law Review*, 35(2) 404.

¹⁰ Defining organized crime. *UNODC*. <https://www.unodc.org/e4j/zh/organized-crime/module-1/key-issues/defining-organized-crime.html>

¹¹ 1987 (1) 386.

¹² 1984 SCR (2), 797.

¹³ Ibid. The other mandatory documents are – a recent photograph of the family, marriage certificate, medical fitness certificate duly certified by a doctor, declaration of the financial status with supporting documents.

once in a year. Copies of such a list must be provided to the district judge, who will forward the same to the High Court.¹⁴ At the same time, the government was also asked to prepare a list of licensed social or child welfare agencies that are operating in each foreign country for the ICAs with the help of the foreign country and the Indian Diplomatic Mission in that country, and such a list shall be supplied to various High Courts.¹⁵

iv) The Court had also set up a scrutinising agency consisting of experts in the area of child welfare to make sure that the child supposed to be given up for adoption was legally free for adoption. If the biological parents voluntarily relinquished the child, then the parents understand the implications of giving the child up for adoption; the child welfare agency had made all the efforts to trace the biological parents of the abandoned child. If the Court felt doubt about how the child had been obtained by the agency, it might ask the scrutinising agency to make inquiries about it.¹⁶

2. **Monetary Limit** – The Court allowed the child welfare agency where the child was currently living to recover from the PAPs the maintenance expenses from the date of his selection of the child until the date the child leaves the agency. The cost must not exceed Rs. 60 per day.¹⁷ The agency could also recover the costs incurred in preparing and filing the application and prosecuting it in District Court. These costs included legal expenses, administrative expenses, preparation of the Child Study Report (CSR), preparation of medical and I.Q. reports, passport and visa expenses, and conveyance expenses. The costs might be fixed by the District Court not exceeding Rs. 4000.¹⁸ In the following judgments, the Court removed the upper limit of the per-day maintenance costs of the child and asked the District Court to determine the same at the time of disposing of the application.¹⁹ And the upper limit of the application cost had been extended to Rs. 6000.²⁰

3. **Preference Of In-Country Adoption Over ICA** – The Supreme Court ordered that every effort must be made first to find adoptive parents within the country. Keeping the child within the country not only prevents the illegal ICA but also eliminates the problems of

¹⁴ 1987 (1) 386.

¹⁵ 1984 SCR (2) 798.

¹⁶ 1985 SCR Supl. (3) 73.

¹⁷ 1984 SCR (2) 802.

¹⁸ 1985 SCR Supl. (3) 77.

¹⁹ Ibid.

²⁰ 1987 (1) 395.

assimilation of the child in the family of the adoptive parents that might arise on account of cultural, racial, or linguistic differences. So, ICA should be permitted after exhausting the possibility of domestic adoption by Indian parents. ICA should be permitted only after exhausting the possibility of adoption within the country by Indian parents. Since BIC strives to provide family for every child. So, adoption to foreign parents was preferable to allowing the children to grow up in an orphanage or an institution.²¹

4. **Adoption By Foreign Laws** – Since there was no statutory enactment for adoption in India, resort was made to the provisions of the Guardians and Wards Act, 1890, for the purpose of facilitating such adoption. But under the GAWA, only the couple could be appointed as guardians, not parents. As a result, the Court mandated that the child be adopted by the foreign couple in accordance with the laws of that country within two years since the day of the child's arrival.²² The Court also asked child welfare agency of the foreign country, that initially processed the application for a foreign couple, to submit progress reports along with the child's recent photograph. The reports must be submitted quarterly during the first two years and half yearly for the next three years.²³ Though the Court subsequently clarified that the progress report was a requirement until the adoption by foreign law was effected. After that, there was no necessity for strict observation.²⁴
5. **Representation Was Necessary** – In the main judgment, the Court said that every application of the foreign parents shall be sponsored by the child welfare agency of the foreigner's country.²⁵ In the following judgments, the Courts clarified that a foreign welfare agency was allowed to have a representative in India with certain conditions. The Court assessed that it would be difficult to execute the bond against the foreigner unless the bond was executed in favour of the Indian Diplomatic Mission in the country of the foreigner. It might therefore be safer to take the bond from the representative of the foreign child or social welfare agency in India so that if the condition of the bond is violated, the Court can proceed to enforce the bond against such a representative who would be an Indian national.²⁶ Several confusions were raised with this condition in the subsequent petition. The court explained that in an application by a foreigner, the representative of the

²¹ 1984 SCR (2) 796.

²² 1984 SCR (2) 798; 1985 SCR Supl. (3) 76.

²³ 1984 SCR (2) 802.

²⁴ 1985 SCR Supl. (3) 75.

²⁵ 1984 SCR (2) 797.

²⁶ 1985 SCR Supl. (3) 75.

recognised placement agency need not join as a co-petitioner, nor should the court insist on appointing such representative as joint guardian of the child along with the foreigner. Where a representative of the recognised placement agency has already been appointed joint guardian prior to the making of this Order, he or she will stand discharged with respect to the child being adopted by the foreign parents.²⁷

6. **Post-Adoption Monitoring Report** – The Court introduced the post-adoption monitoring system. According to it, the foreign child welfare agency that originally sponsored the adoption application, had to send to the district court and also to the child welfare agency from where the child was adopted in India a progress report of the child's adjustment in the family and settlement in the new society, along with a recent photograph. The reports should be sent quarterly during the first two years; within this period, the child must be adopted according to foreign law. Once the child was adopted, a half-yearly progress report for the next three years was a requirement.²⁸ In the 1985 supplementary judgment the Supreme Court relaxed this rule. The Court said that progress reports were necessary before adoption. After adoption had taken place, the Courts did not insist on strict observance of this requirement.²⁹
7. **Disruption Of Adoption** – If the foreign parents' family is disrupted before the child is adopted under the law of that country, it is the responsibility of the child welfare agency of that country to find a suitable alternative placement with the approval of the concerned child welfare agency of India, who would report the same to the court that issued the adoption order and the Secretary of Ministry of Social Welfare.³⁰ Although no solution had been given if the disruption in the family took place after the child was adopted.³¹

The Supreme Court laid down detailed rules of procedure to regulate and monitor ICAs. The domestic adoption procedure was not expressly mentioned in the judgment. The standard-procedure set out for domestic adoptions was the by-product of the judgment. In the aftermath of the LKP

²⁷ 1987 (1) 392.

²⁸ 1984 SCR (2) 797.

²⁹ 1985 SCR Supl. (3) 79.

³⁰ 1984 SCR (2) 798; SCR Supl. (3) 72.

³¹ 1985 SCR Supl. (3), 73.

judgment, through the institution, substantive law, and procedural rules the current system of adoption in India has developed.³²

THE ADOPTION MECHANISMS

1. The Substantive Laws

In the LKP judgment, the Supreme Court could not find any provision of the existing substantive law to construe the right to adopt. The Court several times mentioned the Adoption of Children Bill, 1972³³ and the Adoption of Children Bill, 1980.³⁴ Meanwhile, the Indian government ratified the UN Convention on the Rights of the Child, 1989 (CRC) on the 11th December, 1992. To give effect to the judgment of LKP, the provisions of CRC, and other international instruments,³⁵ the Juvenile Justice (Care and Protection of Children) Act, 2000,³⁶ the first consolidated child law of India, was enacted.

In the absence of any existing legal framework, the Court laid down elaborative guidelines for all the concerned authorities. The foreign parents were legally bound to adopt the child according to foreign law. But for Indian adoptive parents, there was no statutory provision for adoption. The JJ Act, 2000, introduced the concept of secular adoption in India. It defined

³² CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (29 May 2013) CRC/C/GC/14.

³³ The central government introduced the Adoption of Children Bill, 1972 in the *Rajya Sabha* but it was subsequently dropped due to the strong sentiments expressed by the members of the Muslim community as Islamic law prohibits adoption.

Rao, J. (1975, April-June). A Uniform Law of Adoption. A Critique on the Adoption of Children Bill, 1972. *Journal of the Indian Law Institute*, 12 (2), 288.

³⁴ Eight years later, on December 16, 1980, the central government again attempted to introduce Adoption of Children Bill, 1980 containing an express provision that it shall not be applicable to Muslims. Unfortunately, the Act has not been enacted into law.

(2022, June 4). Adoption or Children Bill, 1972-A Bill though not passed but borne out in the guidelines of Supreme Court. *The Lawmatic*. <https://thelawmatic.in/adoption-or-children-bill-1972-a-bill-though-not-passed-but-borne-out-in-the-guidelines-of-supreme-court/>

In 1990, the Christian Adoption and Maintenance Bill, 1990 was mooted by various Christian Organisations, but that too could not make its entry in the statute book.

Christian Law of Adoption in India. <https://www.christianfort.com/ICAA.htm>

³⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

³⁶ No. 56 of 2000.

adoption³⁷ as “the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges, and responsibilities that are attached to the relationship.”³⁸ The adopted child has given equal status as the natural-born child. The rule regarding adoption was defined only in one provision, section 41.³⁹ This section laid down “orphan, abandoned, neglected and abused” children are eligible for adoption through “institutional and non-institutional methods”.⁴⁰ Since the law primarily focus to prevent the illegal adoption, it recognised the children’s home and state government run institution as only the recognised adoption agencies.⁴¹

The Amendment Act of 2006 brought some substantial changes to the Principal Act of 2006 to address system adoption in a more holistic and sensible manner. By this time, CARA had become a fully functioning body. Therefore, the 2006 Amendment Act, along with the state government, authorised the CARA to lay down the detailed adoption rules.⁴² The 2006 amendment included private run institution as well as recognised adoption agencies in its scope.⁴³

In the case of *Shabnam Hashmi v. Union of India*⁴⁴ the Supreme Court declared that every person in India has the right to adopt a child, irrespective of their religion, caste, or creed. The Supreme Court, following in the footsteps of Bombay⁴⁵ and Kerala⁴⁶ High Court, declared the right of a child to be adopted and that of prospective parents to adopt. But the Court did not declare it a fundamental right.

³⁷ Adoption has not been defined under GAWA, HAMA.

³⁸ Juvenile Justice (Care and Protection) Act, 2000, Section 2(aa).

³⁹ JJ Act, 2000 Sections 42, 43 and 44 deal with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

⁴⁰ Ibid. Section 41(2).

⁴¹ Ibid. Section 41 (4).

⁴² JJ (Amendment) Act, 2006, Section 41 (3).

⁴³ Ibid. Section 41(4).

⁴⁴ MANU/SC/0119/2014: Also available at <http://cara.nic.in/PDF/Court%20Orders/2.%20Shabnam%20Hashmi%20Vs%20UOI%20&%20Ors%20CWP%20No.%20470%20of%202005.pdf>

⁴⁵ *In re: Manuel Theodore D’souza* (2000) 3 BomCR 244.

⁴⁶ *Philips Alfred Malvin V. Y. J. Gonsalvis & Ors.* AIR 1999 Kerala 187.

To incorporate the judgement of the *Shabnam Hashmi*, the JJ Act, 2000 was repealed and replaced by the JJ Act, 2015.⁴⁷ This Act introduced the concepts underline in the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993 (HAC).⁴⁸ The JJ Act, 2015 is the most consolidated child-law in India's history. It is the most elaborative adoption law of India. The Act not also defines the substantive rights of the adopted child and adoptive parents but also prescribes the procedure of adoption which becomes the guiding norms for the Adoption Regulations. The Act is built up on the principle of BIC and it takes utmost care to implement the same.

2. Rule of Procedure

The JJ Rules, 2001 (Model) were brief procedural guidelines. It prescribed that the surrendering, placing, and adoption of an abandoned child take place according to the directions issued by the Supreme Court and the procedure laid down by CARA. More or less, the Model Rules are the codification of the LKP judgment.

Juvenile Justice (Care and Protection of Children) Rules 2007 were the first detailed rules on adoption made in exercise of the rule making power vested by Sec. 68 of the JJ Act, 2000. Under Rule 33(2), guidelines issued by the CARA were made applicable to all matters relating to adoption.⁴⁹

The JJ Act, 2015 and the Adoption Regulations, 2017 together establish an international standard for a secular adoption system, incorporating the HAC. Adoption Regulations, 2017 introduced a centralised, online-based adoption system where all the children's shelter homes are mandatorily linked to the online portal. From filing an application to issuing an adoption order, all the documents and relevant information are uploaded into the online portal.⁵⁰

⁴⁷ Also Delhi gang-rape incident happened in December 2012 had tremendous impact on public perception of the Act. This Act allows 16-year-olds to be tried as adults.

(2014, July 14). Juveniles who commit rape should be tried as adults: Maneka Gandhi. *IBNLIVE*.

<https://web.archive.org/web/20140717191444/http://ibnlive.in.com/news/juvenile-s-who-commit-rape-should-be-tried-as-adults-maneka-gandhi/485770-37-64.html>

⁴⁸ India ratified the Hague Inter-country Adoption Convention on June 3, 2003. <https://www.hcch.net/en/news-archive/details/?varevent=4>

⁴⁹ Juvenile Justice (Care and Protection of Children) Rules 2007, <http://wcd-icps.nic.in/pdf/jjrules2007.pdf>

⁵⁰ Adoption Regulations, 2017, https://wcd.nic.in/sites/default/files/NTESCL_636194033071198891_english%20regulation_0.pdf

Adoption Regulations, 2022, is the revised version of the 2017 Regulations. In 2021, the power to pass an adoption order was transferred from the district court to the district magistrate. 2022 Regulations incorporate the change. In recent years, a record number of adopted children have been returned to the adoption agencies, which has raised concern among the adoption authorities.⁵¹ Therefore, in 2022, the Adoption Regulations declare that if the adoptive parents “disrupt” or “dissolve” the adoption, they shall be barred from adoption again.⁵² It has also added a new category for “hard to be placed” children for the older children and children with special needs, with a relaxed and speedy process of adoption.⁵³

3. Institutions

CARA is the central body of the adoption system in India. It determines the role, functions, and criteria for registration of authorities for all the subordinate bodies. The most significant part of the current adoption structure are the SAAs and CCIs where the children are placed and the children for adoptions are given. DCPU and SARA are the vigilance bodies. As a result, the analyses of these bodies are done in terms of importance rather than hierarchy:

3.1. CARA

The adoption institution in India has a pyramid structure. As a result of the court’s direction in the LKP judgment, the Ministry of Welfare set up the Central Adoption Resource Agency (CARA) in June 1990. CARA received the autonomous status on 18th March 1999, and attained the status of a Statutory Body by the operation of the JJ Act, 2015 on 15th January, 2016.⁵⁴ The JJ Act, 2015, links mandatorily all the shelter homes for children to CARA.⁵⁵ CARA is the nodal body of ICA and implements the

⁵¹ Khan, F., (2019, November, 12). Why Indian parents have returned 278 of 6,650 adopted children in 2017-19”. *The Print*. <https://theprint.in/india/why-indian-parents-have-returned-278-of-6650-adopted-children-in-2017-19/319437/>; (2020, January, 5). Over 1,100 adopted children returned to child care institutions in last 5 years. *India Today*. <https://www.indiatoday.in/india/story/over-thousand-adopted-children-returned-child-care-institutions-last-years-1634072-2020-01-05>

⁵² Adoption Regulations, 2022, Regulation 9 (4).

⁵³ Ibid. Regulations 2(13); 35 (2) (p); 53.

⁵⁴ RTI Manual of CARA, <http://cara.nic.in/PDF/RTI/RTI%20Manual%20of%20CARA.pdf>

⁵⁵ Missionaries of Charity founded by Mother Teresa, disagreed with single parent adoptions on religious ground and had therefore voluntarily given up its recognised status to run 18 adoption centres, housing hundreds of children in India. Dhar, S. (2015, October 15). Mother Teresa’s nuns no to single parent adoptions in India.

adoption programme in the country. In exercise of the rule-making power vested by Section 68 of the JJ Act, 2015 CARA laid down the detailed Adoption Regulations. The following are the functions of CARA:

- 3.1.1. At its inception, CARA aimed to prevent the child trafficking and profiteering that took place in illegal ICAs. CARA supervises both the in-country and ICAs. The LKP judgment mandated that all the applications of ICA be submitted to CARA through authorised FAA, or CA, or the Government department, or the Indian diplomatic mission in a foreign country. Therefore, CARA enters into bilateral agreements with foreign central authorities, and authorises foreign adoption agencies to sponsor applications.⁵⁶ Domestic adoptions are well regulated by the subordinate agencies. If an older adoptee is searching for his or her biological parents, CARA shall provide full assistance and counselling to the older adoptees.⁵⁷

From 17th September, 2021, CARA issues “No Objection Certificate” in the ICA made under Hindu Adoptions and Maintenance Act, 1956⁵⁸ complying with Article 23 of the HAC, as a result of the Delhi High Court’s judgment in the case of *Rajwinder Kaur and Ors. v. CARA and Ors.*⁵⁹ on 31st August, 2021 and followingly an e-gazette notification issued by the Ministry of Women and Child Development, from CARA.

- 3.1.2. Since CARA is the regulatory body for all CCIs and SAAs. Its primary responsibility is to establish uniform standards in children’s homes. To promote non-institutional child care for children who have been unable to find a family through adoption. CARA is responsible for determining the standard adoption procedure. It organises training and capacity-building activities, publicity and awareness-activities, advocacy knowledge base research, and documentation. CARA provides support and guidance to SARAs, District Magistrates, DCPUs, SAAs, and CCIs on adoption-related matters through trainings, workshops,

<https://www.reuters.com/article/india-adoption-sistersofcharity-idUKKCN0S91R920151015>

⁵⁶ Adoption Regulations, 2022, Regulation 41 (2).

⁵⁷ Ibid, Regulation 47.

⁵⁸ “E-gazette notification no. CG-DL-E-17092021-229759”. *Ministry of women and Child Development*. 2021, September 17. <https://egazette.nic.in/WriteReadData/2021/229759.pdf>

⁵⁹ Dated on 31 August, 2021. http://164.100.69.66/jupload/dhc/PMS/judgement/01-09-2021/PMS31082021CW2792019_153050.pdf

exposure visits, consultations, conferences, seminars, and other capacity-building programmes.

- 3.1.3. The Adoption Regulations, 2022, introduced a comprehensive, centralised database relating to children and PAPs for the purpose of adoption on the Designated Portal, known as the Child Adoption Resource Information and Guidance System (CARINGS).⁶⁰ All the adoption stakeholders - SAAs, CCIs, DCPUs, and SARAs - are registered on CARINGS. CARA regulates and monitors all in-country and ICAs. Through CARINGS.⁶¹ The progress of each adoption can be traced. The adoption order, conformity certificate and no objection certificate must be uploaded on the Portal.⁶² It is duty-bound to maintain the confidentiality of the centralised database.⁶³

3.2. SAA

The Specialised Adoption Agencies (SAA) are Child Care Institutes that are authorised to place children for. The SAAs provide care, protection, and medical treatment to the abandoned children. They are responsible for reporting all cases of admissions, restorations, transfers, deaths, and adoptions of children. On the CARINGS website, the PAPs apply to the nearest SAA. The concerned SAA is responsible for conducting the HSR, determining the eligibility of the PAPs to adopt a child, monitoring the child's settlement in the adoptive family during the pre-adoption foster care period and the post-adoption follow-up period, and helping the concern authority (district magistrate) pass the adoption order, make available a copy of the adoption order, and birth certificate.⁶⁴ The Adoption Regulations, 2022, detailed the SAAs' specific functions towards abandoned children, biological parents, adoptive parents and their counselling.

A shelter home, is not recognised as the SAAs, is known as Child Care Institution (CCI). The DCPU is also responsible for linking the CCI where adoptable children have been identified with SAA. The SAA shall complete the necessary documentation and formalities required for adoption of those children staying in CCI.⁶⁵

⁶⁰ Adoption Regulations, 2022, Regulation 41 (9).

⁶¹ Ibid, Regulation 41 (5).

⁶² Ibid, Regulations 55 (8); 57 (7).

⁶³ Ibid, Regulation 41 (10).

⁶⁴ Ibid, Regulation 30 (1).

⁶⁵ Ibid, Regulation 61.

3.3. DCPU

The DCPU is the monitoring body for the CCIs and SAAs within its local limits. It links the CCI with the SAA to facilitate the adoption of those children residing in the CCIs and ensures the abandoned children in a district are declared legally free for adoption and their details are duly uploaded on the CARINGS portal. If the abandoned child is an older child or a child with special needs, the DCPU plays a special role to ensure the medical check-up and placement of the child. It also ensures that the social workers shall, while conducting home studies verify the documents and information of the PAPs and complete the HSR within two months.

3.4. CWC

The CWC is the decision-making body in charge of monitoring the CCIs and SAAs within its jurisdiction. The CWC is critical in placing abandoned children in the shelter homes, keeping regular updates on the children staying in those institutions, and tracking the progress of the adoptions in progress or placing children in the foster care. Since CWC is a part of the Juvenile Police Unit, at least a member of the Committee shall always be available to take cognizance of the matter in an emergency.⁶⁶ Upon receiving an abandoned child, the CCI or the SAA shall inform the CWC within forty-eight hours. It must ensure that the orphaned child's information is uploaded to the CARINGS website within three-days.⁶⁷ The CWC shall use the Track Child Portal (*Khoya Paya*) to ascertain whether the abandoned child is a missing child or not. The CWC, in collaboration with the local police, makes every efforts to locate the biological parents or the guardian of the child. If the parents cannot be traced within thirty-days, then the CWC shall issue an order signed by at least three members declaring the child legally free for adoption.⁶⁸

3.5. SARA

Every state government must set up State Adoption and Resource Agency (SARA) to inspect and monitor the adoption programmes and activities. It shall publish the contact details of SAAs and CCIs in the state at least once a year. For the purpose of adoption, it is necessary to maintain a state-specific database on CARINGS of adoptable children, PAPs, children

⁶⁶ Learning the lesson from the Covid-19 pandemic time, the amendment Rules introduce a clause that in extraordinary situations, when the movement of the Child or the Committee is restricted due to unforeseen circumstances, the child may be presented before the Committee through virtual mode and the Committee shall physically interact with the Child at the first opportunity. (JJ Amendment Rule, 2022, Rule 13 (1-A)).

⁶⁷ Juvenile Justice (Care and Protection of Children) Model Rules, 2016, Rule 15-17.

⁶⁸ Adoption Regulations 2022, Regulations 6, 7.

given in in-country and ICAs; to ensure adequate number of social workers are available in the shelter homes; to trace the progress of each adoption; to keep an update of HSRs, CSRs, post-adoption follow-up reports; being the supervisory body, SARA is responsible for ensuring these.

THE CURRENT PROCESS OF ADOPTION

1. **Surrendering Of The Abandoned Children** – The JJ Act, JJ Model Rules, and Adoptions Regulations establish a multi-layered vigilance system. Receiving a child by a CCI or SAA requires the child to be produced within twenty-four hours to the CWC and reported to the local police station. The photograph and the details of the child have to be uploaded on the CARINGS with the order of admission issued by CWC. If the child is an older child, DCPU is entitled to insert the details on CARINGS. The DCPU, with the help of the local police, shall make efforts to trace the biological parents or the legal guardians. If the child is under two years of age, then for two months, and if over two years, then for four months, the local police shall try to find the guardians. When there is no traceability, the local police notify CWC. The three members of CWC shall issue an order declaring the child is legally free for adoption, and the concerned SAA shall upload the certificate within forty-eight hours.
2. **Preference Among The PAPs** – The Supreme Court determined the hierarchy among the PAPs, which was later on reflected in CRC, and HAC. The first preference is to be given to the Indian PAPs who reside in India. Then the non-resident Indian couple, overseas citizens of India card holder, PAPs with Indian origin, and the foreigners come chronologically in the preference list.⁶⁹ Children who fall into the “hard to be placed” category, on the other hand, are made available to all PAPs at the same time. The Adoption Regulations introduce the PAPs and child age group ratio, like: children up to age 2 years will be available to PAPs whose composite age is up to 85 years (individually, 40 years), etc.⁷⁰ If the PAPs do not select a child, the Adoption Committee shall debar the PAPs from applying for a year.⁷¹

⁶⁹ Ibid, Regulation 9.

⁷⁰ 2-4 years old children are to be available to PAPs whose composite age are 90 years (individually 45); 4-8 years children for 100 years of composite age of PAPs (individually 50); 8-18 years children for 110 years of composite age of PAPs (individually 55). Ibid, Regulation 5 (4).

⁷¹ Ibid, Regulation 11 (12).

3. **Preference Among The Children** – BIC implies that when different interests among an individual child or group of children are at stake, it is necessary to assess and choose their interests carefully.⁷² Children with special needs are given preference in adoption over normal children. The general adoption rule states that if the adoptive parents cannot be found at home, the child should be placed in a foreign country. Indian parents are reluctant to adopt a child with special needs or an older child. So, these children are more expeditiously made available to PAP in foreign countries. For these children, the Adoption Regulations, 2022 introduce a category of “hard to be placed” children.⁷³ Whereas a normal child is made available for two months to the Indian parents, and thereafter to the foreigners,⁷⁴ for a child with special needs, it is fifteen days.⁷⁵ Also, the SARAs are asked to make additional efforts with the waiting parents to arrange to adopt these children.⁷⁶
4. **CARINGS (online portal)** – In the LKP judgment, the Supreme Court set up the ICA procedure, where the PAP must be applied through the foreign country’s recognised child welfare agency. Following this process and as an improvement to it, currently all the applications, whether of Indian PAPs or foreigners, shall be filed on the online portal, supported by the relevant documents.⁷⁷ For ICA, the application must be sponsored by the FAA of the applicant’s residing country. The PAPs are permitted to choose two states for both the types of adoption. Registration on the portal deemed to be the registration in all SAAs of these states. Therefore, every application shall remain within the knowledge of CARA, the SARAs of two states, and their respective SAAs.
5. **Choice Of Child And Matching** – The PAPs will be given maximum three referrals with one month interval in between two consecutive referrals. If the PAPs do not reserve a child, out of three referrals, such parents shall be debarred for a period of one year, after which they shall be eligible for fresh registration and the foreign

⁷² Vandenhoe, W., Tukelli, G., Lembrechts, S., (2019). Article 3: Best Interests of the Child”, *Children’s Rights*, 2019, (62). Edward Elgar Publishing., UK.

⁷³ Adoption Regulations 2022, Regulation 2 (13).

⁷⁴ Ibid, Regulation 8 (a).

⁷⁵ Ibid, Regulation 8 (2).

⁷⁶ Ibid, Regulation 35, (2) (p).

⁷⁷ Ibid. Schedule VI - Aadhar Card, Birth certificates of the PAPs, Proof of income of last year, Certificate from a medical practitioner that PAPs do not suffer from any chronic disease, marriage certificate and Current family photograph etc.

PAPs shall also be debarred for a period of one year if they do not reserve a child out of two referrals.⁷⁸

6. **Pre Adoption Foster Care** –The JJ Rules, 2007 defined pre-adoption foster care as placing the child for a temporary period with the PAP before adoption.⁷⁹ The Adoption Regulations mandate that within ten days from the date of matching and after signing the adoption foster care undertaking, the child shall be placed with the PAP.⁸⁰ The CARA shall issue the No Objection Certificate in favour of the proposed adoption within ten days from the date of receipt of the acceptance of the child. In the case of ICA, the PAP can take the child within India.⁸¹
7. **Adoption Order** – Since the LKP judgment, the power to pass the adoption order has been given to the district court. The court shall pass the adoption order within two months from the filing of the application.⁸² But CARA noticed that there were more than 1,000 pending applications before various courts.⁸³ Therefore, the JJ Amendment Act, 2021 transfers the power to issue adoption order from a district judge to district magistrate. The Adoption Regulations, 2022, laid down the functions and duties of the district magistrate. It is of the utmost importance to verify all the documents and relevant information about the adoption.
8. **Pre And Post Adoption Follow-Up Report** – The monitoring of the child's settlement is the responsibility of the SAA that is selected by the PAPs and responsible for placing the child with the PAPs. SAAs are responsible for conducting half yearly follow-up visits with the child from the time the child is placed in pre-adoption foster care until a period of two years after the legal adoption⁸⁴ and submitting the follow-up report to SARA.⁸⁵ In the case of ICA, quarterly post-placement reports during the first year and half yearly reports during the second year of the child's arrival in the receiving country are

⁷⁸ Ibid, Regulation 9 (3).

⁷⁹ JJ Rules 2007, Rule 36.

⁸⁰ Adoption Regulations 2017, Regulation 11; Adoption Regulations 2022, Regulation. 12.

⁸¹ Adoption Regulations 2022, Regulation 17 (2).

⁸² Adoption Regulations 2017, 12 (1) (6)

⁸³ Chandra, J. (2022, September 10). 1,000 adoptions pending, but new rule sows confusion. *The Hindu*. <https://www.thehindu.com/news/national/new-adoption-rules-create-confusion/article65875381.ece>

⁸⁴ Adoption Regulations, 2022, Regulation 24 (3) (j).

⁸⁵ Ibid, Regulation 35 (2) (n).

mandated to be submitted by the foreign adoption agency of the receiving state to CARA.⁸⁶ The follow-up measures shall, anyhow, continue for a period of two years even after the child acquires citizenship in the receiving country.⁸⁷ The Adoption Regulations, 2022, mandate that for both kinds of adoptions, the first follow-up report of the adopted child shall be done within three months from the date of pre-adoption foster care,⁸⁸ along with the post-adoption follow-up report on a six-monthly basis for two years from the date of pre-adoption foster placement with the adoptive parents.⁸⁹

- 9. Disruption And Dissolution Of Adoption** – The terms “disruption” and “dissolution” were introduced in the LKP judgment.⁹⁰ “Disruption” means the child being unmatched from the adoptive family due to the non-adjustment of the child with the adoptive family after placement, but prior to the completion of the legal process,⁹¹ and “dissolution” means the legal annulment of the adoption due to the non-adjustment of the child with the adoptive family, after passing the adoption order.⁹² In the judgment, the Court said that the foreign child welfare agencies that process the application of the foreign PAPs are responsible for taking care of the child and finding a suitable alternative placement for it with the approval of the concerned agency in India.⁹³ But the Court felt vulnerable where the child had already been adopted.⁹⁴ But afterwards, with the implementation of HAC and India’s own robust system through CARA, in case of disruption or dissolution of the adoption, the foreign adoption agency repatriates the child to the SAA where he or she was previously residing.⁹⁵ The District Magistrate shall annul the adoption, if two counselling sessions fail to resolve the issue.⁹⁶

⁸⁶ Ibid, Regulation, 20 (1), (7).

⁸⁷ Ibid, Regulation, Regulations 14 (3); 21 (5).

⁸⁸ Ibid, Regulation, 21 (5).

⁸⁹ Ibid, Regulation, 14 (1).

⁹⁰ 1984 SCR (2) 798.

⁹¹ Adoption Regulations 2017, Regulation 2 (7); Adoption Regulations 2022, Regulation 2 (8).

⁹² Ibid, 2017, 2 (8); 2022, 2 (9).

⁹³ 1984 SCR (2) 798.

⁹⁴ 1985 SCR Supl. (3) 73.

⁹⁵ Adoption Regulations 13 (6) (c); Adoption Regulations 2022, Regulation 20 (4), (5).

⁹⁶ Adoption Regulations 2022, Regulation, 14 (6).

CONCLUSION

To ensure the safety of the children, India has created a stringent system. The system is as per the international-standard.⁹⁷ The PAPs often complain that adopting a child is a lengthy process. In 2022, *The Temple of Healing v. Union of India*⁹⁸ case was filed before the Supreme Court to simplify the adoption process. The Adoption Regulations, 2022, have been an attempt in progress. Since it came into force in September 2022, we need to wait a while to evaluate the efficacy of the changes.

⁹⁷ Roy, E. (2021, October 30). Prospective parents' complain of delay in adoption process, ministry says looking into it. *The Indian Express*. <https://indianexpress.com/article/india/prospective-parents-complain-of-delay-in-adoption-process-ministry-says-looking-into-it-7598185/>

⁹⁸

https://main.sci.gov.in/supremecourt/2021/19630/19630_2021_2_31_37673_Order_26-Aug-2022.pdf

CHAPTER: 10

SURROGACY: AN AID TO AN UNHAPPY MARRIAGE

Dinky Garg^{1}*

ABSTRACT:

After the marriage almost every couple intends to have the child of their own so they can have their own family and a child is believed to complete the being. But due to some medical indications some couples are infertile and cannot have the child of their own genes through biological process. So, surrogacy has come as a boon for those couples who intend to have a child and continue their progeny with their own blood and genes they can have the child through surrogacy. In surrogacy, the biological mother is substituted by the surrogate mother. This process has a traumatized history which made India suffer with the hard lessons.

Keywords - Marriage, Infertility, Surrogacy, Commercial Surrogacy, Intended Parents, Surrogate Mother, Assisted Reproductive Technology.

INTRODUCTION:

One of the needed components for the effective and efficient working of the society is the family which is assisted by the institution of marriage. Marriage is the conjunction of man and woman to start the reproductive process; moreover it regulates and validates the sexual relation between males and females. As per the view of Malistone, marriage is considered as a contract for production and maintenance of children.² In patriarchal society like India it is believed that a child plays a vital role in constructing his parents socially and it is very important to have a kinship to continue one's own lineage but on the other hand issues like infertility makes it impediment for some couples to construct the child biologically. Infertility is an inability where couples are unable to conceive after unprotected coitus for one year or there is intervention of a certain medical condition due to which conception is barred.³ A couple who is unable to have progeny affect them emotionally, psychologically, socially and moreover influence many variables. As the society is developing, technology and science are also getting advanced in order to cure the problem of the society and make lifestyle easier and better. Undoubtedly, technology never fails to amaze us. It finds the problem of every solution with ease. By not overlooking the desire of child or one's kinship technology has put a step forward in order to culminate the infertility issue by introducing the

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² Dr. S.R. Myneni, *Hindu Law (Family Law- I)*, 140, (Asia Law House).

³ Section 2 (1) (j), *the Assisted Reproductive Technology ((Regulation) Act, 2021*.

process of split motherhood; Surrogacy. Surrogacy is a process where a woman bears and delivers the child for the intended couple with the intention to handover the child to the couple.⁴ Woman who intentionally and through free consent lends her womb and gets an embryo implanted in herself is surrogate.⁵ Couples who urges to become parents but cannot give the birth to the child and if the medical indication suggests them to have a child from surrogacy than they are termed as the intended couple⁶ and when these couple in order to avail the service reaches the respective clinics; Assisted Reproductive Technology Clinic and Assisted Reproductive Technology Bank they are termed as Commissioning Couple. In words of one syllable, surrogacy is the process where woman carries the pregnancy in which neither she is genetically related to the child nor even her husband, she just carry the child for the infertile couple who is unable to have a child.⁷ It is the method of reproduction which involves third party and a contract to handover the child to the contracting party i.e. Intended Couple.⁸

UNDERSTANDING THE AMBIT OF RIGHT TO MARRY AND RIGHT TO PROCREATION:

Marriage is dealt with as the union of man and woman so that their offspring can be recognized as legitimate. Marriage is the base ground so that one's legitimate and genetic progeny could continue. Marriage is also the ground on which the intended couple or women can avail the surrogacy procedure and the surrogate can only be a married woman. Parenting is the most beautiful and satisfying part of married life. Most couples believe that a child completes their being. Procreation is the process in which a woman gives birth to the child in order to raise the child till he attains his maturity to procreate and to make a family is the personal choice of an individual. Procreation balances nature; it is the integral part of our system and it puts the biological system into the place.

Right to marry and start a family is a universal right and it is also recognized by the Universal Declaration of Human Rights under Article 16, where it is stated that there should be no discrimination when the individual is of its full age group in order to form its family. Article 21 of the Indian Constitution also states that Right to Marry is the part of Right to Life. Article 23 of International Covenant on Civil & Political Rights, 1966; clearly states about the right to found a family. Right to Procreation is the personal choice of an individual and it is protected under Article 21 of the Indian Constitution. Right to Reproduction is the basic civil right

⁴ Section 2 (1) (zd), *the Surrogacy (Regulation) Act, 2021*.

⁵ Section 2 (1) (zg), *Id.*

⁶ Section 2 (1) (r), *Id.*

⁷ *Mr. Hasan Ezadi Chamkhorami v. Mrs Radha*, Decided on 10 March, 2021.

⁸ *K. Kalaiselvi v. Chennai Port Trust*, Decided on 4 March, 2013.

that has the constitutional protection in India. Surrogacy is the procedure for the infertile couple who cannot reproduce so the procedure of surrogacy being the part of reproduction does have constitutional support.

WAVE OF SURROGACY IN INDIA:

Indian patriarchal system is of the belief that child completes the woman and she is respected only when she can be mother and moreover it is her duty to provide her husband with a child so that his lineage could continue and it also proves the masculinity and sexuality of the husband.⁹ The concept of surrogacy is not new in India the mentioning of various instances of unconventional birth can be seen in epics and puranas, every mythology has a story of its own. The story of unconventional birth can be seen at the time of Mahabharata where these practices were termed as Niyoga Dharma; which was practiced where the king was infertile or died without having his heir. In bible there is also the mentioning of the story of Sarah and Abraham¹⁰, where the wife of the ruler of the tribe was unable to provide an heir to Abraham so she chose her slave Hagar as her surrogate in order to have the child and provide the ruler to the tribe. Beyond the shadow of doubt it can be stated that ideas of the present lifestyle are influenced by our historical events.

The process of Surrogacy became traumatized when in the year 2002 Commercial Surrogacy was legalized in India without any legislative backing which leads to exploitation to a significant extent. Commercial surrogacy is a process in which women are paid or compensated for her services; it even includes sale, purchase, buy, and trade of the embryo incentives that can be provided in any of its forms.¹¹ This was the parturition of the concept of “Rent on Womb”. After the legalization of the commercial surrogacy medical tourism increased with pace in India intended parents from the whole world visited India to avail the surrogacy services from India. Resembling to Dr. Norman Witzleb,¹² who was unmarried but wanted to have a child. When he visited India he found the procedure to avail surrogacy has no legislative backing and keeping in mind the liberal nature of the surrogacy procedure in India he contracted with a surrogate through agency; and later after the birth of the Child he obtained the custody of the child through court. This is only the one instance there are many more instances like this. Certain countries where practising surrogacy is banned or certain communities of couples cannot

⁹ Law Commission Report, 228th Report, “Need for Legislation to Regulate ART Clinics as well as Rights and Obligations of Parties to a Surrogacy”, August, 2009.

¹⁰ Elizabeth Fletcher “Egyptian Slave Girl Hagar Bible Woman”, available at, <https://womeninthebible.net-old-new-testaments/hagar/>, visited on January, 2006.

¹¹ Section 2(g), *Id.*

¹² *Dr. Norman Witzleb v. Jyotshana Mandal & Anr*, Decided on 18 November, 2011.

opt for the adoption or surrogacy so they come to India in order to avail these services from India. Like in the *Israeli Gay Couple's*,¹³ case, a gay couple from Israeli came to India to have the child through surrogacy procedure. One of them had donated the sperm and this procedure turned out to be successful. Without proper legislative backing anyone from anywhere can come to India and can hire the womb for their child who will be genetically related to them but birth will be given by surrogate. In Indian couples as well surrogacy became a trend termed as Fashion Surrogacy where when a girl does not want to give birth to child despite of being physically fit they hire the womb. These little steps took the exploitation to hype and made India “the Surrogacy Hub”.

Surrogacy was orphaned without any legislative backing on the other hand the India Council for Medical Research (ICMR) in the year 2005 gave National Guidelines for Accreditation/ Supervision of Assisted Reproductive Technology (ART) Clinics. ART is the technique through which pregnancy is obtained outside the human body and then the fertilized embryo is transferred to the reproductive system of the woman which is termed as Surrogacy.¹⁴ And the premises where the procedure of ART is carried out by a registered medical practitioner is termed as ART Clinics it is well equipped with technology required in this procedure.¹⁵ Storage of gametes and embryos, collection and supply of gametes for ART procedure to be carried out is stored in the ART Bank.¹⁶ In its report ICMR laid down the regulations regarding the status of the Child, and had clearly laid down the duties of the Surrogate Mother, Intended Parents and Clinics. In order to empower the Child so that exploitation could be curbed the ART procedure shall be carried after consent of both the partners and the child must be treated as the legitimate child of the intended parents all the other parties involved in this procedure whether they are donor or carrier will have no right over the child. Refusal for the custody of the Child by the Intended Parents cannot be entertained irrespective that the child is born with abnormality, if done so it will be an offence. During the time of the delivery surrogate should get herself admitted on her name and there she should mention that she is Surrogate so that if in future after the delivery any misfortune happens the death certificate should be issued on her name only. Surrogate should relinquish all her rights to the child after delivery. If any foreigner is an Intended Couple they shall surrogate a local caretaker. The incentives or the monetary benefits should be decided by the Surrogate and Intended Parents. Clinics are advised to provide the name of the Surrogate to the Intended Parents so that if a child in future

¹³ JT 2008 (11) SC 150.

¹⁴ Section 2 (1) (a), *the Assisted Reproductive Technology (Regulation) Act, 2021*.

¹⁵ Section 2 (1) (c), *Id.*

¹⁶ Section 2 (1) (b), *Id.*

wants to know about his parents. It further advised that in ART Bank embryos can be stored for the period of 5 years.

The necessity to regulate the surrogacy procedure was felt when the judiciary in *Baby Manji Yamada v. Union of India & Anr.*,¹⁷ went silent due to non-availability of law. Concerning the facts of the case, a Japanese couple availed the service of the surrogacy from India and before the delivery of the child the couple got separated and wife refused to take the custody of the child and the husband in order to get custody of the child came to India. He had even applied for the passport of the baby but was refused due to non-recognition of surrogacy in Japan. Mr. Yamada then thought about adopting the child in India; again he failed because a single man cannot adopt the child. Nor can he get the Indian Passport for his child as the mothers name was in question. This whole situation made the legislature pull up their socks in order to avoid bone of contention. Undoubtedly technology has empowered human life but if it is not controlled it can exploit even more. This case became the base to which has shown mirror to the legislature that there is a high need to regulate commercial surrogacy.

The Law Commission in its 228th Report elucidated legislation to synchronize regulation of ART as this procedure is growing rapidly and has also put forward Rights and Duties of the parties involved in surrogacy. Non-intervention of the law is sullyng the very procedure of the surrogacy as legislation is creeping since starting. Need of the hour is to have the pragmatic approach and to relinquish the old cocooned approach. Meticulously this report refers to the right to marry and start a family so that legality of the concept of surrogacy can't be questioned later. The draft bill prepared by ICMR to regulate the ART procedure was refuted on the ground that it was incomplete with lacunas. This law report stated that commercialisation should be completely banned; only life insurance should be mentioned in the surrogacy contract. Arrangement of finance should be done before for the surrogate child if any situation like *Baby Manji's* case happens or a commissioning couple dies before the birth of the child. At Least one of parents should act as donor and a single parent should also act as donor. Privacy throughout the procedure should be maintained for the donor as well as surrogate. Sex-selectivity should be prohibited and abortion cases must be dealt with as per Medical Termination Act, 1971.

It was a vile situation since 2002 there was no legislative backing; there were mere guidelines by ICMR and Law Commission Report 228th. This technology had created plague in society that destroyed the very nature of the surrogacy. Whole situation became a hard lesson that was suffered. At the end after so many failed attempts every year finally in the year 2022 surrogacy procedure in India got the legislative backing: the Surrogacy

¹⁷ (2008) 13 SCC 518.

(Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021.

PROCEDURE TO AVAIL SURROGACY SERVICE IN INDIA:

Every set of law contains certain rules to whom the availability of law can be made. This technology can be enjoyed by very few people as the legislature has put a lot more restrictions to empower the procedure of the surrogacy. In India only the intended couples and intended woman of Indian origin can avail the surrogacy service. The couples who due to medical indications are advised to opt for gestational surrogacy are intended couple¹⁸ and the woman who is a widow or divorce having 35 to 45 age and intends to avail surrogacy is the intended woman.¹⁹ Gestational Surrogacy is a process in which the fertilized embryo is implanted in the womb of the surrogate she is not related to genetically.²⁰ As the procedure of commercial surrogacy was sullied by negative interventions so legislature has completely put a ban on commercial surrogacy. If the surrogacy procedure is for altruistic purposes only then it can be given sanction by the Court.

To avail the surrogacy service it is compulsory for the intended couple or intended woman has to obtain the certificate about the medical conditions from District Medical Board indicating about the need for the Gestational Surrogacy (District Medical Board shall be under the chairmanship of either of the stated; Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of district and it should have atleast specialist firstly chief gynaecologist or obstetrician and secondly chief paediatrician of district).²¹ Intended couples or intended women must also get the order of the custody of the child before the child is born through surrogacy process from first class Magistrate. Application for the same shall be made by the intended couple or intended woman and surrogate mother which will act as birth affidavit of the child. It is essential for the woman if she wants to act as a surrogate mother she has to obtain a certificate from the appropriate authority.

Certificates to both the parties will be issued only when they fulfil the conditions that are laid down under Section 4 (b) and (c) of the Surrogacy Regulation Act, 2021. For being a surrogate a willing woman should be between the age of 25 to 35 years on the day of implantation and she should atleast have one child of her own. For the surrogacy procedure a woman can act as surrogate by donating her eggs or oocyte if required but not gametes. A surrogate can act as surrogate only once in her lifetime and she should be medical fit as per the certificate of registered medical

¹⁸ Section 2(1) (r), *the Surrogacy Regulation (Technology) Act, 2021*.

¹⁹ Section 2 (1) (s), *Id.*

²⁰ Section 4, *Id.*

²¹ Section 4 (iii) (a) (I), *Id.*

practitioner. In case of an intended couple the certificate is issued separately to both. As only married couples could avail the surrogacy procedure the female should be between 23 to 55 years and male should be 26 to 55 years on the date of certification. A couple should not have the surviving child either born from natural process, adoption or surrogacy, but if the child is medically unfit or has fatal illness or suffers from life threatening health issues and appropriate authority also approves that child's disease cannot be cured and issues a certificate from a District Medical Board.

Surrogacy procedure can be availed only from the registered surrogacy clinic. To get the registration the applicant must have a well established clinic with equipment, manpower and infrastructure with all the facilities to smoothly carry the surrogacy procedure and appropriate authority should be satisfied.

CONCLUSION AND SUGGESTIONS:

Infertility in India is not seen as a medical issue; it has a great taboo attached with it. Right to have a Family, Right to Marriage and Right to have a Child are considered as the most basic human rights. The procedure of Surrogacy had the motive to serve the best as it could to protect these human rights. But technology was discredited as it did not have legislative backing. This research states about the procedure of surrogacy and how it can give the childless couple a hope to have their own genetic child. The process of surrogacy will serve the basic motive of marriage.

Past lessons are just to make the future better, not bitter. The approach towards this wonderful technology should have open mind ideas attached to it. This procedure is to empower and protect the human rights not to exploit anyone. The laws to regulate the surrogacy procedure need improvisation. Rather than imposing restriction awareness is needed to empower the procedure.

Considering the eligibility criteria only heterogeneous couples can avail the surrogacy procedure in these acts there is no mention of LGBTQ community. This group of society is in much need of the Surrogacy procedure. They are being deprived of their basic human rights as well as Right to Technology.

It is firmly believed that Commercial Surrogacy has exploited the women, children and the very process of the surrogacy. This notion was of the time when the surrogacy procedure was orphan; it did not have any legislative backing. Carrying the same fear that Commercial Surrogacy will exploit the procedure of surrogacy will not work in the long run. Women were agreeing to be Surrogate for incentives and remuneration that they get for carrying the child. Now, the intended couple and intended woman have to struggle to get a surrogate in order to have a child. As most of the women will refuse and take the step back for altruistic purposes of surrogacy. This situation will lead the people to run away from the laws rather than abiding

by them. Rather than banning the commercial surrogacy completely some incentives in any form could be decided by the legislature that were to be paid to surrogacy would result in betterment.

CHAPTER: 11

SUCCESSION OF NON-FUNGIBLE TOKENS (NFTS) IN INDIA

Rusha Nimavat^{1*}

ABSTRACT

Purpose: Previous literature on succession of digital assets is limited to the social media accounts. This paper aims at studying the NFTs as a part of digital asset and its succession along with its complications.

Research Implication: NFTs are high value high risk digital assets which has to be a property for purposes of succession. However, there are not much provision either by law or by the platforms itself to succeed to such digital property of the deceased. The owner of such property has to by way of testamentary succession provide for its passing to the heirs. The aspect of digital wills is necessary to be codified and created for the same.

Findings: NFT has to be treated like an antique that the deceased possessed and has high value but in virtual form. Due to its monetary and artistic value, being in the digital form, it is classified as OMMA and User sensitive data categories of digital assets. It requires the succession of the NFT itself by way of fractionalization of multiple heirs and also the succession to the sensitive credential information to be able to access the NFTs and e-wallet since these are bought in another asset, cryptocurrency. Platforms should provide for nomination as a part of succession planning for the investor and have codified laws for succession of digital assets.

Originality/Value: Succession of NFT in India is a new area of research with not much literature going into the depth of the type of asset and way for succession. It also provides suggestions and complications revolving around succession of NFT.

Keywords: NFTs, succession, digital assets, cryptocurrency, wills, inheritance

INTRODUCTION

Succession is defined as the process and governance of the property of the deceased moving from him to his successors. The actual transfer of such property from the deceased to the heirs is known as inheritance. The personal laws of each religion - Hindus, Muslims, Parsis, Christians and Jews have codified their laws in respect of succession of property along with other familial matters. Over the years, the types of property owned by people have expanded with each having a unique set of characteristics.

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Largely, property has been classified as moveable and immovable property in its simplest manner and categorization. But with the advent of technology, it necessitated to dwell deeper into the types of property. From owning only agricultural land to owning shares in physical forms and now in digitalised Demat forms, all of which require to be governed by laws of succession. But, a new kind of ownership has emerged in the last few years, which is of the digital assets including the NFTs and cryptocurrencies. This paper aims at studying the succession of the NFTs, the legal implications of the same along with its governance. There are no codified laws in respect of NFTs to understand the category of property they fall under and how the value is particularly to be determined for purposes of succession. With the continuous growth in people investing in the NFT sector, there is a pressing need to develop an understanding of this new form of digital asset, its importance and the succession that will take place in the coming years inevitably.

What are NFTs?

Non-fungible tokens, or what is known as NFT, are basically digital files that are stored on the blockchain technology which provide ownership². Simply put, NFTs are creative art pieces which could be a painting, illustration, song, designs and so on put onto the network of blockchain as a digital file which ensures the ownership of such art pieces. The non-fungibility basically means that the art piece is not replaceable. A currency note is fungible in nature, in the sense, that it is replaceable and can be easily traded for another note. But an NFT is unique, it cannot be copied and replaced. Consider an actual physical painting, like the ‘Starry Night’ by Van Gogh, is only one in the world originally and it cannot be replaced. The concept of NFT is exactly the same but in the virtual form for digital creatives. This file will have a value and will be bought or traded in cryptocurrencies, commonly with ethereum, a type of cryptocurrency³. The internet is flooded with so much art content but it is difficult to know the actual creator. Simply taking the example of pinterest, which has a collection of inspirational photographs and designs for any search but it is rarely possible to know and give due credit to the owner/creator of the photographs. Firstly, a buyer of an NFT needs to own cryptocurrency in order to purchase and own an NFT. It is important to note the aspect of being a creator and an owner of the NFT. The buyer can own the NFT but it will always be traced back to the original creator who also receives

² Robyn Conti, *What Is An NFT? How Do NFTs Work?*, (Sept. 16, 2022), www.forbes.com/advisor/in/investing/cryptocurrency/what-is-an-nft-how-do-nfts-work/.

³ Mitchell Clark, *NFTs, explained: what they are, and why theyre suddenly worth millions*, The Verge (Mar. 3, 2021), www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.

royalty on the said art piece. The theory of demand applies here as well. If the demand for an NFT is created and is high, the value of the NFT will increase⁴. It is the blockchain technology, on which this operates which ensures the ownership. The blockchain as the term suggests is a chain or link of blocks and each such block stores data regarding the purchaser and seller, the value for which it is bought and also generates a unique hash for the transaction and also has the previous block's hash to be able to create a chain⁵. To simplify, the hash means the transaction ID, just like when money is transferred using Netbanking, it shows a reference or transaction ID. This blockchain is a public ledger and verifies and records transactions just like a bank does between two parties in a transaction.

SUCCESSION OF NFTs

On an understanding of the meaning and functioning of the NFTs, it is safe to classify them as intangible assets and as moveable property as defined under the General Clauses act⁶. When it comes to succession and partition of the property, various personal laws govern the rules of division as to who receives and in what share. But they come under a larger category, known as digital assets. NFTs can be further categorised as Organisation Managed Monetary Assets (OMMA) and User Owned Data⁷. The former includes all digital assets having a monetary value and managed by some organisation and the latter includes the cryptocurrency passwords, keys, private and public keys⁸. An NFT is bought with cryptocurrency. The cryptocurrency, a person holds, is present in an e-wallet. In order to access the account and e-wallet (eg. metamask), the user is provided with a public and a private key. Similarly, also while buying the NFT, the user opens an account with platforms which allow the buying and selling of the same, For eg: OpenSea. Thus, when succession of NFT is in question, not only the creative piece is to be inherited but also the digital accounts and wallets which require the passing on of the credential information of the same.

Cryptocurrency, just like shares, also are highly volatile in nature thus making the value of the NFT as well highly volatile and a risky asset. But it is important to note that shares have an investment value only to the investor and shareholder but an NFT not only provides an investment value

⁴ Ian Dean, *What are NFTs, exactly? Non-fungible tokens explained*, Creative Bloq (Aug. 31, 2022), www.creativebloq.com/features/what-are-nfts.

⁵ What is Blockchain Technology? IBM Blockchain | IBM, www.ibm.com/in-en/topics/what-is-blockchain.

⁶ The General Clauses Act, 20 § 3 sub 26 (1977).

⁷ Ram Govind Singh et al., A Digital Asset Inheritance Model to Convey Online Persona Posthumously, *International Journal of Information Security* (984-1003 (2022)).

⁸ *ibid*

or benefit but also is an artistic value provision to the investor. In a way, it can be seen as an antique item, which is very high in value and rare, as a property to inherit. The succession of NFTs have to be considered in a similar manner to that of the shares due to their similar characteristics. But digital assets, as mentioned above, requires also the sensitive credential information to be able to access those e-wallets which hold the assets. Thus, the best way of determining succession in case of NFTs would be by way of wills and beneficiaries⁹. A digital will, a novel concept, has to be brought into the legislation to give it the statutory force which provides for all details regarding the NFTs held by the deceased - the name of the NFT, number of NFTs held with their description, the value at which it was bought, the login credentials, the e-wallet access and the keys. The digital will should require digital signature of the maker and to be given the legal validity¹¹.

When it comes to inheritance of the NFTs, it requires to get into the technicality of the asset. Hypothetically, if shares were to be inherited by the heirs, the portfolio value is divided equally among all the successors. A share cannot be split up further and in case of an odd share, that particular share is sold, and the value is divided. Now, in the case of NFTs, there cannot be co-owners of a single NFT. But, an NFT can be fractionalized¹². Once it is fractionalized, it can have more than one owner. It is important to know that unlike a share, which can be easily sold for money, an NFT cannot be sold for money directly, but only for a crypto in which it is bought, and the value of the cryptocurrency can be realised. So, the successor inherits the cryptocurrency as well. Unlike a physical art piece, the virtual one can be fractionalized because the underlying asset is the cryptocurrency.

Also, succession of the credentials is also required to be able to access the NFT and the e-wallet for fractionalization and transfer to the heirs. Without the sensitive data, the digital asset becomes inaccessible and cannot be passed on. The NFT is a rightful property that should be succeeded by the heirs since it has a monetary value and with the increase in the ownership of the same in India, it is time it is given the due recognition. However, the succession of the NFT is not without complications and issues.

⁹ *Importance of Litigation Strategy*, Lexology (Apr. 23, 2018), www.lexology.com/library/detail.aspx.

¹⁰ *How to bequeath your digital assets*, www.moneycontrol.com/news/business/personal-finance/how-to-bequeath-your-digital-assets-6406221.html.

¹¹ Shalabh Agarwal & Asoke Nath, *A Comprehensive Study on Scope and Challenges in Digital Inheritance*, 7 International Journal of Scientific Research in Computer Science, Engineering and Information Technology 98-104 (2021).

¹² *Cryptovantage.Com*, www.cryptovantage.com/non-fungible-tokens/what-are-fractionalized-nfts/.

COMPLICATIONS IN SUCCESSION OF NFTs & SUGGESTIONS

The first and foremost issue of the NFT, is in regards to its validity and recognition in the legislation of India. Although, there has been tremendous growth in the crypto and NFT market in India as well. The Central Board of Direct Taxes (CBDT), in a positive move, included NFT in their definition of Digital assets for purposes of taxation. The concept of digital will, however, does not find place in the Indian Succession Act or the IT act¹³.

The second challenge in respect of NFT succession is the complexity of the process. Currently, the idea of inheritance is novel and not much developed. The statutes also do not recognise the same. More than the statutes, the platforms itself do not recognise inheritance. In case of shares, the depositories require the name of the nominee and provide a way for succession even without having access to the DEMAT credentials of the deceased. But, NFT platforms do not require any succession details¹⁴. Without the sensitive data, nobody can access the assets. There is no authority as well to verify the death of the person for purposes of succession. No authority or accountability when a death certificate is to be submitted to ensure and verify the succession process. The platforms, themselves, should allow digital succession planning and ways for digital wills to pass on the assets they hold.

In case of any dispute that arises between parties for succession, which is not an uncommon incident, there is no way for resolution since no law lies for their regulations and succession.

The Government should recognize the fact that with growing NFT holders, the need for succession of the same will arise in the coming years and without any proper legislation and procedure this would lead to a lot of accumulated wealth stored in the virtual form losing its utility value eventually.

With the complexity and the vastness of the NFT market, being highly technical and currently very niche. There should be a statute completely dedicated to the digital assets including NFT and cryptocurrency which

¹³ *India: Guidance on definition of virtual digital asset subject to new tax regime*, KPMG United States (July 11, 2022), home.kpmg/us/en/home/insights/2022/07/tnf-india-guidance-on-definition-of-virtual-digital-asset-subject-to-new-tax-regime.html.

¹⁴ Krystsina Savitskaya & Vladimir Bahanenka, *Actual Problems of Digital Succession*, UDC 86-87

also determines the mode for succession and any dispute arising out of it. Due to its technical nature, special tribunals to be set for their disputes to include experts from this sector.

CONCLUSION

Non-Fungible Tokens (NFTs), have been on a tremendous growth in India, with more and more younger generation understanding the usage and as investors trying to create a portfolio of this digital token. The ownership of the art piece and the creator both are easily identified and provided with due credit and monetisation to the creator of the asset. Since the younger generation has been investing in these assets, the question of succession has not been considered yet. Although there has been certain developments around the succession of digital assets like the social media accounts and emails, photos on the drive but there has been a bigger question of legality on NFTs. But if succession has to occur, the classification of NFTs has to be in a similar sense of shares by way of wills and nomination. The NFT platforms and e-wallets need to mandate the provision of nomination and uploading of death certificates. The CBDT has finally recognised NFTs for purposes of taxation which means that a law governing the digital assets including its succession would be in consideration. Also, the ease in fractionalisation of the NFT makes it easier for even a single high value NFT to be easily inherited by the heirs of the deceased. Thus, the succession laws for digital wills and NFT is although a long way to go, but even without a proper legislation, succession can be planned by the investor itself by provision in the will¹⁵.

¹⁵ *Leaving Digital Assets Through Your Will*, Nolo (July 25, 2016), www.nolo.com/technical-support-main/online-will-leaving-digital-assets-through-will.html.

CHAPTER: 12

INHERITANCE OF AGRICULTURAL LAND

*Vansh Bhatnagar**

ABSTRACT

Section 4(2) of the Hindu Succession Act, 1956 protected the application of the Act to the local and state laws governing the inheritance of agricultural land. Such laws are mostly patriarchal in nature and do not prefer females in the succession. This section was omitted by the virtue of the 2005 Amendment to the Hindu Succession Act. The omission of this section created a question of law regarding the constitutionality of such local and state laws, in so far as they are in contradiction to the amended Hindu Succession Act. The local and state laws are inconsistent with the 2005 amendment which made the Hindu Succession Act gender-neutral. This paper attempts to discuss the reason such laws are unconstitutional in nature by virtue of the 2005 Amendment.

Keywords: Hindu Succession Act, 1956; Inheritance of agricultural land; Section 4(2)

INTRODUCTION

The Hindu Succession Act, 1956 (“**HSA, 1956**”) was enacted to codify the law related to the succession of property amongst the Hindus. The Act was amended in 2005 to make the provisions of the original Act uniform for daughters and sons. The 2005 Amendment gave daughters an equal share of inheritance and coparcenary rights as those of sons. Prior to the 2005 Amendment, as per the 174th Report of the Law Commission, the rights of property to women could be traced back to when the Hindu Law of Inheritance (Amendment) Act was enacted in 1929.¹ The Hindu Women's Right to Property Act of 1937 brought about a number of significant reforms to the law governing coparcenary, partition, property alienation, inheritance, and succession. Later, these acts were overridden by the Hindu Succession Act, 1956. The 1956 Act gave significant rights but failed to

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¹ 174th Law Commission Report. (2000, May 5). Law Commission of India. <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082470.pdf>>

establish uniformity between the property rights of sons and daughters.² Section 4(2) of the 1956 Act specifically provided that nothing in the Act shall affect any provision for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. This section was removed through the 2005 Amendment, however, many states implemented provisions independent of the 2005 Amendment, to continue following the old law. This paper seeks to analyze the evolution of law related to the inheritance of agricultural rights in the context of HSA, 1956. The paper dwells on the state amendments and the judicial developments which interpreted such inheritance.

SECTION 4(2) OF THE HINDU SUCCESSION ACT, 1956

Section 4(2) of the Hindu Succession Act, 1956 was omitted by the 2005 Amendment to the Act. The section restricted the application of the HSA, 1956 to the laws governing the inheritance of agriculture. The effect of the Section was that the laws prevailing, which restricted the inheritance of women in agricultural lands, were not overridden by the HSA, 1956. The Mitakshara Joint Family system believed that giving rights to agricultural and business activities to daughters would weaken and dismantle the family system.

Learned author Mulla in his seminal commentary *Hindu Law* commented on the Section, prior to the Amendment, that the land policy in different states cannot be expected to be uniform and Ss 2, therefore, leaves such legislation relating to agricultural land undisturbed.³ The learned author further commented that the 1956 Act aimed to establish uniformity for all Hindus and not uniform law for all forms of property.

Agricultural land is undoubtedly an important form of property, especially in rural India. Ensuring equality on the basis of gender in such lands was crucial. It was concerning that despite 73.2% of rural women workers being engaged in agriculture – as opposed to 55% of rural men workers – only 12.8% of agricultural land holdings are owned by women.⁴

² Deo, S., & Mitchell, R. (2021, October 26). Inheritance Of Agricultural Land By Women: There Is Distance Yet To Travel. Live Law.

<https://www.live.law.in/columns/the-hindu-succession-act-1956-hsa-hindu-womens-right-to-property-act-1937-the-hindu-law-of-inheritance-amendment-act-1929-184347>

³ Mulla. (n.d.). Hindu Law, Overriding Effect of Act, Hindu Succession Act, (24th ed.). Lexis Nexis.

⁴ Ghosh, R. (2020, August 15). Empowerment Target: Ensure gender equality in agricultural land inheritance. Times of India Blog.

<https://timesofindia.indiatimes.com/blogs/talkingturkey/empowerment-target-ensure-gender-equality-in-agricultural-land-inheritance/>

Various states have laid down laws relating to the inheritance of agricultural land. The laws were mostly patriarchal in nature, i.e., the agricultural land is inherited by only male members. The local laws dealing with the inheritance and devolution of the agricultural land show an agnatic successionist approach in which priority is given to the agnatic male heirs. In such laws, the widow inherits only in the absence of such male heirs. Such laws are prevalent in Haryana, Himachal Pradesh, Jammu & Kashmir, Punjab, Delhi, and Uttar Pradesh. In Haryana, Himachal Pradesh, Jammu & Kashmir and Punjab, women are inhibited to become a legal heir, whereas in Uttar Pradesh and Delhi, daughters and sisters are recognized but come very low in the order of heirs. A woman can only own a small portion of the land in any of these states because the land ownership passes to the male landowner's heirs rather than hers upon her death. If she gets remarried or gives up the property, she also forfeits the land (i.e., fails to cultivate it for a specified period, usually a year or two).⁵

Section 4(2) of the HSA was deliberated in 2004 by the Parliamentary Committee in its 7th Report on the Hindu Succession Act, 1956. The Committee accepted that Section 4(2) hindered equality as it gave legislative powers to the states to enact laws unequal for daughters in the reference to agricultural lands. The Committee recommended the omission of Section 4(2) to prevent the overriding effect of such state laws on HSA, 1956. The recommendation of the Committee was accepted and as a result, Section 4(2) was omitted from the HSA, 1956 through an amendment in 2005. The elimination was intended to end gender inequality in the transfer of agricultural properties through inheritance.

Learned author Mulla writes that since the sub-section stands omitted by virtue of the amendment, the deeming function of non-applicability, created under it, ceases to operate with respect to any laws providing for the prevention of fragmentation of agricultural holdings or fixation of ceilings or even with regard to the devolution of tenancy rights in respect of such holdings.⁶

STATE LAWS AFTER THE 2005 AMENDMENT

The omission of Section 4(2) from the Act of 1956 has created a constitutional dilemma regarding the competence of the legislature to make laws regarding the intestate succession of agricultural land. The Section cleared the position of the HSA, in 1956 regarding agricultural

⁵ Gender and Legal Rights in Agricultural Land in India : (1995, March 25). Economic and Political Weekly. <https://www.epw.in/journal/1995/12/review-agriculture-review-issues-specials/gender-and-legal-rights-agricultural-land>

⁶ Supra n3

land. In simple terms, it excluded the scope of applicability of HSA, 1956 on the matters of the succession of agricultural lands. After the 2005 amendment, the position has become unclear as now, the Act does not find specific mention of agricultural land anywhere.

The distribution of powers to make laws on specific subjects is laid down in Articles 245 and 246 of the Constitution of India. Article 245 says, “(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.” Further, Article 246 lays down that the Parliament is empowered to make laws with respect to any of the matters in List I of the Seventh Schedule (“**Union List**”), and the Legislature of any State is empowered to make laws with respect to any of the matters in List II of the Seventh Schedule (“**State List**”) and both Parliament and Legislature of any State can make laws on the matters mentioned in List III (“**Concurrent List**”).

The issue of ‘agriculture’ falls under the ambit of Entry 18 of the State List of the Seventh Schedule. Whereas, the issue of ‘wills, intestacy, and succession’ are mentioned in Entry 5 of the Concurrent List. After the 2005 Amendment to the HSA, 1956, the issue of inheritance of agricultural land is questionable. The 2005 Amendment created a dilemma about the existing state laws which were earlier protected by Section 4(2) of the Act.

The 2005 Amendment was primarily an attempt to make the HSA, 1956 equal on the basis of sex. It provided that daughters will be considered as coparceners and will have equal rights in the property as sons. The omission of Section 4(2) was also in the direction of establishing such equality. The Amendment, however, did not clear whether the existing state laws on the inheritance of agricultural land will become void or not. The High Court of Delhi in the case of *Nirmala v Government of NCT*⁷ Held that the omission Section 4(2) from HSA, 1956 was a conscious decision of the Parliament. Hence, HSA will have an overriding effect on any other law in force, if the law is inconsistent to it, as was done in the Delhi Land Reforms Act, 1954, and other such laws. The High Court of Himachal Pradesh in *Roshanlal v Pritam Singh*⁸ opined a similar idea.

The High court of Allahabad, however, presented a different view. In the case of *Archna v Dy Director of Consolidation, Amroha*⁹, The High Court ruled that HSA would lose out to State tenurial law. The Court upheld the constitutional principle that, when two laws concern the same subject, the

⁷ 2010 SCC OnLine Del 2232 : (2010) 170 DLT 577 (DB)

⁸ 2015 SCC OnLine HP 3829

⁹ 2015 SCC OnLine All 262 : (2015) 111 ALR 63 : (2015) 127 RD 801

union statute will take precedence over the state legislation. The Court in the present case explained that the tenorial law of UP and HSA are not repugnant to one another since they deal with different subjects. The Court further ruled that even if there is a conflict between the State and Concurrent Lists in this case, the UP Act will take precedence because of the President of India's approval.

The diverse judicial opinions thus place a question about the constitutionality of the state laws pertaining to the inheritance of agricultural land. The author holds the position that the matter of inheritance of agricultural land should be looked at from Entry 5 of the Concurrent List, i.e. under the matter of 'wills, intestacy, and succession'. The primary idea behind this reasoning is that the 2005 Amendment has ceased to create a difference between the inheritance of agricultural land and the inheritance of non-agricultural land. The purpose of Section 4(2) of the HSA, 1956 was to make a difference between the two types of inheritances. As the 2005 Amendment has done away with that difference, the practice should not continue through other legislations. By virtue of Article 254, the Union laws prevail over the state laws with regards to the matters listed in the Concurrent List.¹⁰ If the subject Of 'wills, intestacy, and succession' is covered under the Concurrent List, by virtue of the 2005 Amendment, HSA, 1956 will prevail over the state laws governing the inheritance of agricultural laws.

JUDICIAL DEVELOPMENTS WITH REGARDS TO THE INHERITANCE OF PROPERTY BY DAUGHTERS

Various judicial precedents have ruled in favour of inheritance of property by daughter. Learned author Mulla writes, "By virtue of the new provision, a daughter of a coparcener in a joint Hindu family governed by the Mitakshara law now becomes a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son of a coparcener. The implications of this fundamental change are wide. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenary property."

The position of the law has, thus significantly changed after the 2005 amendment. An emphasis can be laid on the judgments regarding inheritance of agricultural law prior to the Amendment in order to understand the patriarchal set-up by Section 4(2). The Supreme Court in *Ambika Prasad Mishra v State of UP and Others*¹¹ said, "married women

¹⁰ Article 254, Constitution of India

¹¹ 1980 AIR 1762 : 1980 SCC (3) 719 : 980 SCR (3)1159

in our villages do need their husband's services and speak through them in public places". The Court further said "It is wrong if the land reforms law denudes woman of her property. If such be the provision, it may be unconstitutional because we cannot expect that home is the girl's prison and the woman's workhouse. But it is not."

While a plea to challenge the Uttar Pradesh Zamindari Abolition Act, 1950 was laid down in front of the Supreme Court, Justice VR Krishna Iyer in his judgment said while admitting "the advantage granted to major sons and not to daughters was discriminatory, he nevertheless justified the rule on the ground that ineffective terms the entire land goes to the father as the tenure holder (and not to the son) "for feeding this extra mouth."¹²

These judgments show the approach of the Supreme Court prior to the 2005 Amendment, but as mentioned earlier, the Court has now taken a progressive approach by virtue of the 2005 Amendment. The Court in 2018 delivered a landmark verdict in the case of *Vineeta Sharma v Rakesh Sharma*¹³ in which regardless of the father's existence prior to the 2005 Amendment, the Court had to determine whether the daughter had the same rights as a son in the coparcenary property. According to the decision rendered by a three-judge bench and written by Justice Arun Mishra, even if the father was not alive on September 9, 2005, a daughter's right to claim her share of the coparcenary property is unaffected because the right to be a coparcener for a son is by birth, and the same is true for a daughter following the 2006 Amendment. After this judgment, the Mitakshara Coparcenary system, which excluded the daughters, has been diluted to a greater degree and will be more or less nothing but a relic of the past.¹⁴

It also must be noted that Section 4(2) of the HSA, 1956 was not applied in the case of preferential rights. Section 22 of the HSA, 1956 laid down that where any of the Class I heirs proposes to transfer his or her interest in any immovable property of an interstate, or in any business, the other Class I heirs shall have a preferential right to acquire the interest proposed to be transferred. It was held in *Jeevanram v Lachmidevi*¹⁵ that Section 22 does not include interest in agricultural land of an interstate. This judgment, however, was overruled recently. By virtue of the 2005 Amendment, the Supreme Court in the case of *Babu Ram v Santokh*

¹² Supra n5

¹³ (2019) 6 Supreme Court Cases 162 : (2019) 3 Supreme Court Cases (Civ) 171 : 2018 SCC OnLine SC 3248

¹⁴ Jain, A. (2020, August 24). Vineeta Sharma v. Rakesh Sharma: Clearing the last hurdle towards gender equality in Hindu property law. Bar And Bench - Indian Legal News. <https://www.barandbench.com/columns/vineeta-sharma-v-rakesh-sharma-gender-equality-hindu-property-law>

¹⁵ AIR 1981 Raj 16

*Singh*¹⁶ has held that in the context of preferential rights, such right extends even to agricultural holdings. In this case, the Supreme Court observed the difference between the *inter vivos* transfer of land and transfer by succession. It observed that the Constitution empowers the states to govern the *inter vivos* transfer but it gives powers to both Centre and the state on the issue of transfer by succession. Therefore, the Section 22 will apply to agricultural land since the State law lacks a corresponding provision.

The judgments show that the evolution of law in reference to the inheritance of agricultural land has been in line with the 2005 Amendment, i.e., giving daughters equal inheritance rights as those of sons. The construction of these judgments takes to the point that the state laws repugnant to the 2005 Amendments cannot stand the test of constitutionality.

CONCLUSION

The omission of Section 4(2) from the Hindu Succession Act, 1956, by the 2005 Amendment was indeed a revolutionary step in order to provide daughters equal inheritance rights as those of sons. The 2005 Amendment has been constructed by the courts in a liberal way to include daughters in coparcenary in the widest ways possible. The 2005 Amendment, however, created a conundrum regarding the legislative competence of the Parliament and the state legislatures arising out of the Seventh Schedule of the Constitution. As submitted before, the issue must be construed under the Concurrent List and not the State List and, therefore, the law of the Parliament, which is the Hindu Succession Act, 1956 should prevail over the state legislations. The removal of Section 4(2) from the HSA should have an overriding effect of the different state legislations regarding the inheritance of agricultural land. This will ensure that daughters too get equal rights as those of sons in the inheritance of agricultural land across India.

¹⁶ 2019 SCC ONLINE SC 376; (2019) SCC 14 162

CHAPTER: 13

A LEGISLATIVE ELUCIDATE ON TRIPLE TALAQ; ANALYSING THE GLOBAL PERSPECTIVES

Ahammed Rifai KM^{1}*

ABSTRACT

From an Islamic perspective, marriage is a social contract, and divorce is seen as the natural process through which a marriage ends. The practice of divorce is seen as a necessary evil in society that should only be used as a last resort while the marital bond is regarded as a noble and sacred one. Practicing instant Talaq is a form among the different types of divorce according to Muslim personal law. It is crucial to examine how far the Muslim population across the globe has accepted Islamic values and how they have responded to criteria like Triple Talaq. The provisions regarding divorce are explained by the Holy Book 'Quran'. This paper titled "A Legislative Elucidate on Triple Talaq; Analysing the Global Perspectives" will extract the global perspective of the Triple Talaq in its utmost practicing law.

Keywords: Triple Talaq, Divorce, Islam, Women, Global.

INTRODUCTION

Having approximately 1500 years of history, Islam is regarded to be the second-largest religion in the world. Islam as a religion and as it is practised by the Muslim community, however, differ significantly from one another. Islam is the only faith that demands as many rights for women, as most Muslims do not adhere to these principles. The prophet of Islam brought revolutionary changes as regards the abominable status of women. The Holy Quran gave equal and independent space in society to women such as; political, spiritual, and social, moreover, the holy Quran especially indicates the men that women were treated equally and were created from an equal soul. Women were given equality and equal opportunity in spiritual matters and the same responsibility.

The Prophet Muhammad (peace be upon him) looked at the prevailing practice of divorce with strong disapproval and considered divorce as

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demolishing the foundation of society. However, it was not possible to abolish fully the existing customs of divorce without shaping the minds of the cultureless and half-barbarous community to a higher level. Gradually, Muslim husbands were allowed to practice the power to divorce only under certain conditions.

Practicing Triple Talaq or Talaq-al-Biddat is one of the domains which attract widespread criticisms under Islamic law. While many scholars and countries around the globe view this as the unacceptable or rather sinful form of divorce, that seems to be the most indulged in the law itself², until very recently. Under this mode of Talaq, the husband can revoke the marriage relation in the instant by merely writing or proclaiming the word 'Talaq' three times continuously to his wife. Triple Talaq is regarded as a not revocable and instant mode of Talaq which was first introduced by Umayyad's caliphate and was later practiced by the Hanafi School jurists³. This model has certain inherent ridiculousness. The circumstances a Muslim husband says "Talaq, Talaq, Talaq", then the wife becomes divorced and not lawful to him if such words were used by him, under coercion, or in a rage moment or an intoxicated mood and then in the next moment he regrets his act of pronouncement.

Triple Talaq is not supported or permitted in many Islamic countries and scholars and experts disagree on its legality. Several Muslim nations, including Saudi Arabia, Turkey, Iraq, Indonesia, Algeria, Tunisia, Malaysia, Iran, Pakistan, and Bangladesh forbid or do not perform triple Talaq. The practice tends to undermine women's self-esteem in addition to being unreasonable due to its hurried and unilateral nature.

1.1. BACKGROUND

In India, the findings of the judiciary are against the practice of instant Talaq or often addressed as Triple Talaq. Before the leading judgment by the Supreme Court in *Shayara Bano v. Union of India*⁴ various high courts in India have observed different views on practicing the Triple Talaq. One view is that Triple Talaq is even it is good in law but bad in theology and the other view that Islam does not allow Triple Talaq without any grounds and by giving suitable chances for reconciliation between the parties and Islam considers the settling matter in a good way is better than the divorce

² *Amiruddin v. Mst. Khatun Bibi*, (1917) 39 All.371

³ Dr. Moin Qazi, (2010) 'Tracing the history of Triple Talaq to look to the future' Qrius, <https://qrius.com/history-triple-talaq-future>.

⁴ *Shayara Bano v. Union of India & Others*, (2017) 9 SCC 1

according to the Quranic verses⁵. As per the teachings of the Quran to practice the Triple Talaq the parties should give the chance for reconciliation by appointing two arbitrators for settling the matter in a good way one from each party. Now India the practice of Triple Talaq was held unconstitutional and struck down in the famous case and the bill was passed in both sabhas on 30th July 2019 inserting the penal provision for the Triple Talaq practice without considering the interest of the opposition. Hence, it is crucial to examine how far the Muslim population across the globe has accepted Islamic values and how they have responded to criteria like Triple Talaq and is inevitable to extract the global perspective of Triple Talaq in its utmost legal practice of other countries in comprehending their status of subject matter.

2. TRIPLE TALAQ FROM A GLOBAL PERSPECTIVE

To understand Muslim women's status at the global level, very important to analyse how far Islamic principles have been embraced by the Muslim community residing at various corners of the world and their response to practices like triple Talaq, which are deemed as bad in practice even good in law. A perusal of the legislative framework prevalent in various countries across the globe would answer this search about the general status and condition of Muslim women. It would also help in understanding how far the Indian laws are at par with the current trend against triple Talaq.

In several Muslim countries around the world, the law no longer recognizes divorce by Triple Talaq as a legally valid one. Recently, many countries have come to realize that Triple Talaq doesn't have any recognition in Islamic sources and certainly practicing in any place in modern countries following Islamic law. The three pronouncements are taken as a single pronouncement of Talaq in most of these countries.

1. ALGERIA

Algeria is one of the theocratic States, which declares Islam as an official state religion. The Sunni of Muslims sector is regarded as the majority. As regards the practice of triple Talaq, the state has introduced "The Code of Family Law 1984"

⁵ Jiauddin Ahmed v. Anwara Begum, (1981) 1 GLR 358, Rukia Khatoon v. Abdul Khaliq Laskar, (1981) 1 GLR 375, Nazeer v. Shemeema, 2017 (1) KLT 300.

The 49th Article of the aforesaid Act reads: *“Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months.”*⁶

2. PAKISTAN AND BANGLADESH

On December 1971 Bangladesh separated from the control of Pakistan. There was following the British-made laws which were in practice in the British regime containing India and Pakistan for the issues of personal laws.⁷

Pakistan and Bangladesh are theocratic countries with Islam as an official religion in the states. The Sunni Muslims sector constitutes the majority. They have, to handle the matter regarding divorce, “The Muslim Family Laws Ordinance 1961” -Ordinance VIII of 1961 as amended in ordinance 114 of 1985).

The relevant provisions of the said law are as under-

“Section 7; (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with a fine which may extend to five thousand rupees, or with both.

(3) Save as provided in subsection (5), a Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1) the Chairman shall constitute an Arbitration Council to bring about reconciliation between the parties, and the Arbitration council shall take all steps necessary to bring about such reconciliation.

(5) If the wife is pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in subsection (3) or of pregnancy, whichever are later, ends.

⁶ The Code of Family Law, 1984.

⁷ Shahid, Ayesha, (2013) "Post-divorce maintenance for Muslim women in Pakistan and Bangladesh: A Comparative Perspective," International Journal of Law, Policy and the Family: p- 197-215.

(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband without any intervening marriage with a third person unless such termination is for the third time so effective.⁸”

3. EGYPT

Egypt is one of the most populous Arab countries, with the largest population of 77,505,756 as reported in July 2005⁹. Nearly all the population is concentrated notably in along the Nile delta, Alexandria and Cairo, and near the Suez Canal. Approximately 94% of the population in Egypt follow Islam as their religion, mostly Sunni Muslims.

In Egypt, the statute, “The Law of Personal Status 1929” (25 of 1929 later amended in 100 of 1985) governs the matters pertaining to divorce. It does not warrant the practice of triple Talaq. The relevant provisions of the Act are:-

“Article 1: A Talaq pronounced under the effect of intoxication or compulsion shall not be effective.

Article 2: A conditional Talaq which is not meant to take effect immediately shall have no effect if it is used as an inducement to do some act or to abstain from it.

Article 3: A Talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce.

Article 4: Symbolic expressions of Talaq, i.e., words which may or may not bear the implication of a divorce, shall not affect a divorce unless the husband intended it.¹⁰”

4. INDONESIA

The freedom of religion among Indonesians is guaranteed by the Constitution of Indonesia. However, as per the constitution, the six religions are officially recognised by the government such as Islam,

⁸ The Muslim Family Laws Ordinance, 1961.

⁹ Jamila Ahmed Chowdhary, (2006) “Family Court ADR in Egypt and some exemplary provisions for other Muslim Countries.” <http://www.diac.ae/ideas/journal/volume2sp2/chowdhurye.pdf>.

¹⁰ The Law of Personal Status 1929.

Hinduism, Buddhism, Catholicism Protestantism, and Confucianism.¹¹ The Sunni sector of the Muslim community constitutes its majority.

Indonesia has two laws that govern marriage-related matters. They are “The Law of Marriage 1974” 1 of 1974 and “The Marriage Regulations 1975” (law of 9 of 1975).

Article 38 of “The Law of Marriage 1974” 1 in 1974 provides, *“A divorce shall be effected only in the court and the court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of the marriage.”*

The Article 41 of the said act deals with the payment of alimony. It reads, *“In the event of a divorce both the parents shall continue to be responsible for the maintenance of their children. As regards custody of children, in case of a dispute between them, the court shall take a decision. Expenses of maintenance and education shall be primarily the father’s liability, but if he is unable to discharge this liability the court may transfer it to the mother. The court may also direct the former husband to pay alimony to the divorced wife”.*

As regards divorce, the Marriage Regulations 1975 (Regulation 9 of 1975) provides for the following:

“Article 14: A man married under Islamic law wanting to divorce his wife shall by a letter notify his intention to the District Court seeking proceedings for that purpose.

Article 15: On receiving a letter the court shall, within thirty days, summon the parties and gather from them all relevant facts.

Article 16: If the court is satisfied with the existence of any of the grounds mentioned in Article 19 below and is convinced that no reconciliation between the parties is possible it will allow a divorce.

Article 17: Immediately after allowing a divorce as laid down in Article 16 above the court shall issue a certificate of divorce and send it to the Registrar for registration of the divorce.

Article 19: A divorce may be allowed on the petition of either party if the other party: (a) has committed adultery or become addicted to alcohol, drugs, gambling, or another serious vice;

(b) Has deserted the aggrieved party for two years or more without any legal ground and against the said party’s will;

¹¹ Ropi, Ismatu. (2017) Religion and regulation in Indonesia. Springer.

- (c) Has been imprisoned for at least five years;*
- (d) Has treated the aggrieved party with the cruelty of an injurious nature;*
- (e) Has been suffering from a physical deformity affecting conjugal duties, or where relations between the spouses have become too much strained to make reconciliation impossible.”*

5. IRAQ

Islam is declared its official religion in Iraq. The majority in Iraq are Shia Muslims. Divorce in Iraq is governed by “The Code of Personal Status 1959” (188 of 1959 later amended in 90 of 1987)¹². The relevant provisions in the said Act are as under:

“Article 35: No divorce shall be effective when pronounced by the persons mentioned below:

(a) One who is intoxicated, insane, or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age, or sickness.

(b) A person in death-sickness or in a condition which in all probabilities is fatal and of which he dies, survived by his wife.

Article 37: (1) Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(2) If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.

Article 39: (1) When a person intends to divorce his wife, he shall institute a suit in the Court of Personal Status requesting that it be ¹³affected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of Iddat shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court.”

¹² Kelsey Cherland, (2014) “The Development of Personal Status Law In Jordan & Iraq,” CMC Senior Theses, 89, http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1926&context=cmc_theses.

¹³ The Code of Personal Status 1959.

6. JORDAN

Jordan forms a state of secularism. The Sunni sector of Muslims constitutes the majority in the state. "The Code of Personal Status, 1976" (61 of 1976.) is the law governing divorce in Jordan. The Code provides for the following:

"Article 88: (1) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep. (2) Bewildered is one who has lost senses due to anger or provocation, etc., and cannot understand what he is saying.

Article 90: A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

Article 94: Every divorce shall be revocable except the final third, one before consummation and one with consideration.

Article 98: Where an irrevocable Talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited."

7. MOROCCO

Islam is declared the official religion in Morocco. The Sunni sector of the Muslim sector constitutes its majority. Provisions pertaining to divorce are contained in "The Code of Personal Status 2004" (Law 70.03 in 2004). The said law provides as;

"Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situated, or where the wife resides, or where the marriage took place"¹⁴. Such petition will mention the identity of spouses, their professions, addresses, number of children, if any, with their age, health condition, and educational status. It must be supported by a copy of the marriage agreement and a document stating the husband's social status and financial obligations"¹⁵.

Upon filing the petition, *"the court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be a withdrawal of the petition. If the wife abstains, the court will notify her that if she does not present herself the petition may be decided in her*

¹⁴ Article 79 Code of Personal Status 2004 (Law 70.03 of 2004)

¹⁵ Article 80 The Code of Personal Status 2004.

absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance".¹⁶

"Thereafter the court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including the appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court".¹⁷

"If reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife's post-divorce dues and maintenance of children".¹⁸

As per the laws of Morocco, a divorce which was occurred by a person insane or under provocation or coercion will not amount to a valid divorce¹⁹

On Triple Talaq, Code provides that multiple expressions of divorce, whether written or oral, will affect only a single divorce only. Further, all pronouncement of the Talaq by the husband shall have the effect of only revocable, except in a third-time divorce, divorce mutually consenting, divorce before consummation of the marriage, and the Talaq by Talaq-e-Tafweez or Khula.

8. SUDAN

Sudan is a state of theocratic Islam is considered as its official religion. The Sunni sector of the Muslim sector constitutes its majority. The "Law on Talaq, 1935" (No.4 of 1935) is the law governing divorce in Sudan.

According to the provision of the above statute, a divorce under the condition of intoxication or by threat or provocation will not amount to the valid one.²⁰ Further, it which is not meant to be effective that a contingent divorce immediately and the divorce occurred under the threat or the inducement will amount to the effect of the void.²¹

¹⁶ Article 81 of The Code of Personal Status 2004

¹⁷ Article 82 of the Code of Personal Status 2004.

¹⁸ Article 83 of the Code of Personal Status 2004.

¹⁹ Article 90 of the Code of Personal Status 2004.

²⁰ Article 1 of the Law on Talaq, 1935.

²¹ Article 2 of the Law on Talaq, 1935.

As regards triple Talaq, the pronouncement of many Talaqs in one situation will amount to the effect only on Talaq.²² The law also provides in the term that the expression by the husband stated during the pronouncement of divorce will get the effect of the divorce when only the husband intends and meant the divorce by using those terms²³.

9. UNITED ARAB EMIRATES

UAE is a state theocratic it has its Federal Constitution. Islam has been declared the official religion in the state. The constitution ensures the freedom of religion in the state. Shia sector of Muslims is the majority group in the state.

As per the laws of UAE²⁴, when a husband desires the legal divorce of the wife without the consent of the wife then he is liable to provide the wife reasonable compensation that his liability for the maintenance for the Iddat period. The amount of compensation will be decided by the court concerning the means of the husband and the hardship suffered by the wife on the part of the husband, but the amount of the compensation will not be above the amount of maintenance for which the husband is liable to pay concerning the status of the wife. The court will order them to pay the compensation as a total one-time amount or by the way of instalment capability of the husband and also will consider fixing and method of payment of the amount.

10. YEMEN.

Yemen is a state of theocracy; Islam is the official religion in the state. The Sunni group of Muslims sector is the majority group in the state. The rules and regulations regarding divorce are contained in the statute of "The Decree on Personal Status, 1992" (20 of 1992). The pronouncement of the Talaq by the husband of an insane or intoxicated condition will amount to ineffective if the divorce²⁵. Also, the words used for the divorce is a conditional to the act of the wife also will not amount to a valid divorce²⁶.

²² Article 3 of the Law on Talaq, 1935.

²³ Article 4 of the Law on Talaq, 1935.

²⁴ Article 140 of the Law of Personal Status 2005

²⁵ Article 61 of the Decree on Personal Status, 1992.

²⁶ Article 65 of the Decree on Personal Status, 1992.

Or the word used by the oath or the vow by the husband then if the oath or the vow is broken then also the divorce will not be effective legally.²⁷

With regard to triple Talaq, the law lays that a divorce will affect only a single revocable divorce²⁸.

The law further provides that a husband can revoke the wife from the divorce during the period of Iddat. After then a direct remarriage between them will be lawful²⁹. However, when a husband desires the legal divorce of the wife without the consent of the wife then he is liable to provide the wife reasonable compensation that his liability for the maintenance for the Iddat period. The amount of compensation will be decided by the court concerning the means of the husband and the hardship suffered by the wife on the part of the husband, but the amount of the compensation will not be above the amount of maintenance for which the husband is liable to pay concerning the status of the wife. The court will order the to pay the compensation as a total one-time amount or by the way of installment, the capability of the husband also will consider fixing the method of payment of the amount³⁰.

11. KUWAIT

Kuwait is one of the theocratic States. Islam is the official religion of the state and the Sunni sector of Muslims is the majority in the state. According to "The Code of Personal Status, 1984" (51 of 1984), according to the law, a Talaq should be done from a sound mind and with the intention, of the free will of the party for the legal validity of the Talaq. If a husband divorces in an insane condition, intoxication or he is in a condition of unknowing the nature of the act or under threat or coercion the divorce will not effective but void³¹.

The law of Kuwait does not recognize triple Talaq and provides that where the pronouncement of Talaq by more than one word, or writing or using the signs then only one Talaq will have legal effect³².

²⁷ Article 66 of the Decree on Personal Status, 1992.

²⁸ Article 64 of the Decree on Personal Status, 1992.

²⁹ Article 67 of the Decree on Personal Status, 1992.

³⁰ Article 71 of the Decree on Personal Status, 1992.

³¹ Article 102 of the Code of Personal Status, 1984

³² Article 109 of the Code of Personal Status, 1984

12. LEBANON

Lebanon is one of the secular States. Islam is declared the official religion in the state. The Sunni sector of the Muslim is the majority group in the state. As per the laws of Lebanon, divorce by a drunken person or made under threat or coercion will not have the effect of Talaq³³.

13. LIBYA

Libya is one of the theocratic States; it declares the official religion of the state is Islam Sunni sector of the Muslim sector constitutes its majority. "The Family Law, 1984" (10 of 1984 amended by Law 15 of 1984) embodies the law pertaining to divorce. As per the same, divorce is a process of terminating a marital contract so the divorce will be effective only if it is approved by a competent court.³⁴

The law further provides the nature of all divorce is revocable except in the case of Triple Talaq for the prescribed consideration the effect of this will be irrevocable before the consummation of marriage,³⁵ A divorce pronounced by a minor or insane person, or without the clear intention for the divorce, or if pronounced under coercion, shall not have legal effect³⁶.

Divorce by more than one number will be effective in only one Talaq and in the case of Triple Talaq the Talaq will have an immediate irrevocable effect³⁷. Thus, the law repudiates the practice of triple Talaq.

Further, for the divorce by mutual consent the approval court is required as the form of the divorce by mutual consent is approved one. If the parties are not ready to comply with the terms then they can approach the court for appointing an arbitrator to deal with the matter³⁸. According to the law, the divorce should be in the open court with the presence of the opposite party or in the presence of the representative.³⁹

³³ Article 104 and 105 of the Family Rights Law, 1962

³⁴ Article 28 of the Family Law, 1984

³⁵ Article 30 of the Family Law, 1984 (Law 10 of 1984 as amended by Law 15 of 1984)

³⁶ Article 32 of the Family Law, 1984 (Law 10 of 1984 as amended by Law 15 of 1984)

³⁷ Ibid

³⁸ Article 35 of the Family Law, 1984 (Law 10 of 1984 as amended by Law 15 of 1984)

³⁹ Article 47 of the Family Law, 1984 (Law 10 of 1984 as amended by Law 15 of 1984)

14. MALAYSIA

Islam is recognized as the official religion of the state. The Sunni sector of the Muslims is the majority group in the state. Even though, the states allow the practice of other religions as its policy of harmony and peace among the religion.

According to the provisions of the Islamic Family Law Act 1984 (Act 304 of 1984), the party who intends for the mutual divorce should follow the following certain procedures. the party should file an application to the court for the divorce with details containing the marriage particulars address, sex, name, age, and the number of children with their details and including the jurisdiction of the court to try their application and the application should state the reason for the divorce and the details of the steps taken by the mediators in a matter of the reconciliation of the parties by mediation and the provisions of maintenance of the wife and the children after the divorce and the source of the property and the other sources also contain in the application. If the provision of the maintenance is not contained the party can seek from the court an order for the maintenance also along with the application for divorce.

By getting the application filed from the party the court will serve to summon the opposite party for appearing in court to take consent of the party in the divorce by enquiring on the grounds of the divorce.

If the second party gives consent for the divorce and the court is satisfied after the investigation on the ground of the divorce then the court will direct the husband for the pronouncement of the Talaq of the wife instantly. The court will record the declaration of the divorce and will send the details to the concerned registrar for registration and the chief registrar also.

If the matter of the divorce appears to the court then when seeking the consent of the party the other party is not consent to the divorce then the court will try for the settlement of the matter by constituting the committee of the mediation constituting by a religious office in chairman and other two members acting as the representative of each party and the issues will refer to the committee by the court. When appointing the members the court will consider the close relations of the parties who will know the background and the circumstances of the parties and their issues.

The court will direct the appointed committee for conciliation to conduct the mediation between parties for the reconciliation of the parties. When the court is not satisfied with the act of the selected committee then the court can cancel the committee and constitute a new one for the purpose. If the committee is unable to the reconciliation then by the order of the

court the committee can try for reconciliation again after waiting for six months or more when the court recognizes. The Committee has powers such as requiring the attendance of the parties hearing the parties by giving each of them an opportunity of being heard making such inquiries as it thinks fit and adjourning the proceedings from time to time. Then the court may issue the certificate relating to the matter of the custody of the children, maintenance of the wife and her dependents and division of the property, and other marital issues.

The committee will avoid the matter to the court itself when the committee fails in deciding on the issue of reconciliation after their effort by submitting the report to the court on the matter.

Without the leave of the mediation committee, not anyone can be represented by a person, not his nearest relatives, and also for the proceedings before the committee no solicitor or advocate can represent the parties in the matter like in the court. Where the Committee reports to the court that the relationship can go forward between the parties then will order to continue their conjugal relationship, by dismissing the divorce application by the court.

When the Committee submits to the court a report that it is the parties cannot go with the marital relation peacefully then the court will direct the husband in the pronouncement of the Talaq, and when the husband refuses to pronounce one Talaq or when the court cannot ensure the husband's presence after a prescribed time then the court will refer the issue to the '*Hakams*' [arbitrators] in dealing with.

The practicing of Talaq by the husband himself or by way of the court will come into effect after the expiry of the prescribed period if Iddat and the if the wife is pregnant then the time will expire by the wife gets delivery of her pregnancy.

15. PHILIPPINES

The Philippines is a secular state. Christian communities are their majority. In the Philippines, a Talaq may be affected by a single pronouncement by the husband in the period of *thuhr* of the wife by the total time of abstaining he from the marital relation. The repudiations from the marital relation made during one *Thuhr* will consider as only one repudiation if it is any number too and the *thalaq* will be revocable until the expiry of the Iddat period. A husband has the right to take back his wife before expiry of the

Iddat period and before entering in to a new marriage. The repudiation shall become irrevocable if the husband fails to do so⁴⁰.

The husband should send the statement of the divorce by the consent of the wife to the registrar of the circuit within seven days of the divorce.⁴¹

A Muslim male who had pronounced a Talaq should serve the notice to the wife then he will send the notice to the clerk in the Sharia court in his jurisdiction where he resides, The Talaq will be in effect of the revocable until the expiry of the Iddat period. Then the clerk of the court will serve the notice for hearing to both parties or their representatives to appear in the court. the representative of the parties should be appointed by the court in constituting the scholar for the arbitration on the matter by concerning the report and other pieces of evidence the court will go for passing order regarding the matter in hand.⁴²

This Act also assures compliance to the provisions by penalising non-compliance with imprisonment for a term of two years or a fine not less than two hundred may extend to two thousand or both.

CONCLUSION

The above being the legislative trend as regards the Triple Talaq, instant divorce, it is notable that while it is imperative people move towards the reformation in the law argued by women of the community equally, in India, there is a need for a power full secular laws which deals on essentially civil matters.

According to related with fundamental rights Triple Talaq violates fundamental women's rights. The freedom of religion in religious practices is applied equally to the Muslim man as well as the woman. It is nowhere like permitting the male in oppressing and avoiding the women in the destitute condition.

India in the Muslim Women (Protection of Rights on Marriage) Act was enacted in 2019. The Act was passed following the landmark ruling by the Hon'ble Supreme Court in the *case of Triple Talaq* wherein the practicing the Triple Talaq was held unconstitutional. The act makes illegal the practicing of ripple Talaq and instant Talaq. The Muslim husband who pronounces Triple Talaq is liable to imprisonment for a term of three years and a fine as per the penal provision of the act.

⁴⁰ Article 46 of the Code of Muslim Personal Law 1977.

⁴¹ Article 85 of the Code of Muslim Personal Law 1977.

⁴² Article 161 of the Code of Muslim Personal Law 1977.

The type of offense under this act is cognizable and the police can take action according to the information received by the aggrieved women by the practice of the Triple Talaq or any relative of that woman. This provision was inserted in this statute for preventing outsiders from interfering in the issues. Under the provision, and also bail can be granted in this case by the magistrate after only hearing the complainant and finding the reasonable ground for granting the bail.

The statute provides the divorced wife the substitute allowance regarding their dependents which is calculated and determined by the magistrate such as the right of custody the offense punishable in this Act has also been compoundable that the court determines according to the status of the woman and the discretionary power of the magistrate.

This is a fact that more than 20 countries where Islam is the official religion have already set the laws and made enactment for the eradicating the socially evil practices in the name of Islam and misusing Islamic practices but we, the secular country has taken 70 years to think about that and enacting the law for eradicating such evils the so effective protests also the petition from the part of the activists and the aggrieved women.

The Muslim personal board in their argument contented that they will try to educate the Muslim community and they prevent them from such a bad practice in society. But the board started to criticise the parliament-enacted laws for the protection of the rights of Muslim women instead of the educating their community and the making awareness among the Muslims. This indicates that the Islam community itself is caring in the matter of Muslim women, in their journey towards protecting the gender equality and justice.

A law against practicing Triple Talaq is a welcoming one. The Muslim women were calling for a reformation in the personal law mainly for misusing the law relating the divorce by the husbands in Islam. Because Muslim women are entitled to legal protection in matters related to family law such as all other Indian women.

Despite the Quranic grants equal rights to women in matters of divorce; they have not been explained into reality for Muslim women. As a result, several women including the activist group started to protest against the practice of Triple Talaq and as a result of their activism the matter came into consideration of the Supreme Court and by the famous judgment on August 2017 the court declared it void. Even after the judgment, many incidents were having Triple Talaq throw women to a destitute conditions in many parts of India this takes into consideration enacting a law on practicing triple instant Talaq to protect the rights of Muslim divorced women in India. Gradually the parliament passed the act against Triple Talaq by penalizing the practice of Triple Talaq in India.

CHAPTER: 14

TO RAISE (21) OR NOT TO RAISE (18): A POLEMIC DILEMMA

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ABSTRACT

The core idea of this research paper, "To Raise (21) or Not To Raise (18): A Polemic Dilemma," is to deliberate on whether the legal age of marriage of women in India should be raised to 21 years or kept unchanged at 18 years. The paper advocates for gender-neutral legislation, i.e., the same minimum age of marriage for both men and women. This research examines raising the legal marriage age for women in India and keeping it at its current stipulated minimum age. It is a modest attempt to comprehend and appreciate the proposed policy by the government to increase the legal age of marriage of women to 21 years to correct the grave flaw of having different legal ages for different gender, thereby promoting gender equality. Through this research, a fair, gender-neutral idea has been advanced regarding how significantly the government's policies will influence young people and the course of India's development. The study aims to familiarize readers with the proposed legislation's contents and inform them of the possible outcomes of changing the country's minimum legal marriage age policy.

Keywords-Marriage, Minimum age, Gender-Neutral, India, Prohibition of Child Marriage (Amendment) Bill 2021

INTRODUCTION

India is among the fastest-growing economies in the world. The population's high literacy rate and India's rich diversity contribute to this advancement. In the present era, men and women are equally competitive. However, due to prevailing patriarchal attitudes and prejudice, women are generally less accepted in decision-making along with less participation in the labor force.

Gender equality is a fundamental right guaranteed by our constitution, which prohibits discrimination based on sex and gender. Unfortunately, even after 75 years of independence, India has laws encouraging gender

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inequality. These laws contradict the constitutional guarantee for gender equality concerning marriageable age by prescribing a considerably younger marriage of women than men and failing to sufficiently secure that requirement. It is crucial to highlight the discrepancy between men and women regarding their ability to exercise their right to marriage and reverse the gender inequity that these laws have established. Moreover, Indian society and its rigid restrictions have stopped women from making choices about their life and the age at which they wish to marry.

In the Victorian era, a person had to be 21 years old to get married. After 1823, it was lowered to 14 for boys and 12 for girls. Child marriage was social evil in colonial India, which saw girls typically married off between 10 and 12. In 1978, India saw a significant transformation when the legal age of marriage was raised to 21 for men and 18 for women. It must be noted that these are the minimum ages.

It is crucial to note that the term "minimum age" means that if a male/female marries at an age below the legal age of marriage, it will invite criminal prosecution under the child marriage law. The law establishes a minimum marriage age to forbid child marriage virtually. Even though there is a law against child marriage¹, child marriages still occur all over India today.

Personal laws from different religions each have norms that frequently correspond to custom. According to Section 5(iii) of the Hindu Marriage Act of 1955, females must be at least 18 years old to get married, and males must be at least 21 years old.² It is pertinent to note that child marriages are not prohibited, even though the underage spouse may ask for the marriage to be annulled. In Islam, a marriage between a minor and a person who has reached puberty is accepted. The Prohibition of Child Marriage Act of 2006³ and the Special Marriage Act of 1954⁴ specify a minimum consent age for marriage of 21 years for men and 18 years for women.

Section 4(c) of the Special Marriage Act⁵ specifies that the legal age for marriage for women is 18, while the age for men is 21, although there is no justification for this difference. Since the voting age and the legal age to give your consent and sign a contract are the same, the age to engage in a bond for life should also be the same.

¹ The Prohibition of Child Marriage Act, 2006

² Hindu Marriage Act 1955, section 5(iii).

³ Prohibition of Child Marriage Act of 2006

⁴ Special Marriage Act of 1954

⁵ Ibid, s.4.

The Supreme Court ruled in the landmark case *Independent Thought v. Union of India*⁶ that equalizing the marriage age for men and women is critical. Therefore, Why not implement equality in the age requirements for marriage when it is possible to make voting and the legal age consensually, willingly, and legitimately enter into a contract the same for both men and women? The Supreme Court ruled in the landmark case *"Independent Thought v. Union of India"*⁷ that it is critical to equalize the marriage age for men and women for men and women.

Equal laws are the source of equality and social changes, both inspired and influenced by laws. Since it will make the minimum legal age for marriage the same for girls and boys, this action can be described as a step toward gender neutrality.

WHY IS THERE A DIFFERENT LEGAL AGE FOR MEN AND WOMEN?

The phenomenon of having different legal ages of marriage for males and females is a prime example of "**legal gender difference**," a term used by the World Bank. Different legal norms "contribute to the assumption that wives must be younger than their husbands," according to the Law Commission consultation report. According to activists for women's rights, the law also supports the myth that women mature faster than males of their age and can thus marry earlier.

Despite numerous regulations, child marriages have been a significant issue in Indian society since the Middle Ages. A lack of stringent rules caused this, further enhanced by the introduction the Prohibition of Child Marriage Act of 2006⁸, which outlawed the practice and imposed severe penalties on those who committed it. The idea that "gender neutrality" should be respected is one of the advancements in this area. It claims that laws are essentially a codification of custom and religious beliefs and that there is no legal reason for maintaining different legal requirements of age for men and women to marry.

The government compiled data from the National Family Health Survey, which noted that the percentage of women between the age of 20 and 24 who were married before the age of 18 stood at 23% and solicited advice from the Jaya Jaitley Committee on Women and Child Development⁹ to correct this grave flaw. Later, the Lok Sabha received the "Prohibition of

⁶ *Independent Thought v. Union of India*, 1Writ Petition (CIVIL) NO. 382 OF 2013.

⁷ *Ibid.*

⁸ PWDVA, n 1.

⁹ Ministry for Women and Child Development, *Jaya Jaitley Committee Report* 2020.

Child Marriage (Amendment) Bill, 2021¹⁰. By increasing the minimum age for girls to marry legally from 18 to 21, the Bill aims to eliminate gender imbalance in marriage. It also renders the maximum age-neutral marriageable, making it equally applicable to all religions.

BACKGROUND OF THE PROHIBITION OF CHILD MARRIAGE (AMENDMENT) BILL, 2021

In 1860, the Indian Penal Code was the first provision to criminalize sexual intercourse with girls under the age of 10 through its prohibitions against the commission of heinous offences against them. The Age of Consent Act¹¹ increased the legal age of consent from 10 to 12 years old in 1891, and an amendment enacted in 1927 declared marriages performed before the legal age unlawful. The Sarda Act of 1929¹² also established the Child Marriage Restrain Act,¹³ which had a minimum age requirement of 14 for women and 18 for men. Following independence, criteria for marriage were established by the Special Marriage Act of 1954¹⁴ and, later, the Hindu Marriage Act of 1955¹⁵. The Sarda Act was revised in 1978, raising the minimum legal age for women to 18 and men to 21.

Ashwini Kumar Upadhyaya, a lawyer, filed a public interest litigation in 2017 and argued that having differing legal marriage ages for men and women breaches Articles 14 and 21 of the Constitution, which protects the right to equality and the right to live with dignity respectively.¹⁶ The Delhi High Court already notified the Center and the Law Commission of India in 2019, asking for their replies to this PIL based on this information. Due to recent occurrences, our Prime Minister, Shri Narendra Modi, stated for the first time in his Independence Day speech on August 15, 2021, that the government will determine based on the recommendations of the committee set up to reexamine the minimum age for women to marry.¹⁷ Due to this, the central government established a high-level committee whose fundamental purpose was to "study the proper age of motherhood and how to minimize the maternal mortality ratio" and deliver recommendations to the government.

¹⁰ Prohibition of Child Marriage (Amendment) Bill, 2021.

¹¹ Age of Consent Act, 1891.

¹² The Sarda Act of 1929.

¹³ Child Marriage Restrain Act, 1929.

¹⁴ Special Marriage Act, 1954.

¹⁵ Hindu Marriage Act, 1955.

¹⁶ Ashwini Kumar Upadhyay Vs. Union of India & ANR. [Writ Petition (Civil) No.95 of 2018]

¹⁷ 'PM Narendra Modi Independence Day Speech Full Text' (The Indian Express, 15 August 2023) <<https://indianexpress.com/article/india/prime-minister-narendra-modi-independence-day-speech-2023-full-text-8893141/>>

FORMATION OF THE JAYA JAITLEY TASK FORCE COMMITTEE

In June 2020, a committee was established by the "Union Ministry for Women and Child Development" headed by Jaya Jaitley to examine the minimum legal age of marriage of women. Additionally, it will also look at the relationship between maternal age and medical well-being as well as the nutritional quality of the mother and neonate, newborn or child, during pregnancy, delivery, and afterward. It will consider important factors such as the total fertility rate (TFR), maternal mortality rate (MMR), infant mortality rate (IMR), the sex ratio at birth (SRB), and child sex ratio (CSR) concerning the prospect of raising the marriage age for women from the current 18 to 21 years.¹⁸

PRO ET CONTRA

(I) Arguments in Favour of the Bill - Pro

(i) *Nutrition and Health*

According to a study published in the Lancet journal, children delivered by adolescent mothers are more likely to fall into the category of malnourished children. Due to the mother's poor nutritional status as a result of young age, lower education, less access to health services, poor complementary feeding habits, and poor housing situations," teenage pregnancy leads to undernutrition in children.

Several studies imply that the majority of teen moms are at risk for reproductive health issues, poor mental health, malnutrition, anemia, and infectious diseases and are at a high risk of developing diseases that are sexually transmitted as a result of a lack of knowledge. The risks of prematurity, intrauterine growth retardation, birth asphyxia, and perinatal problems are also higher for children whose mothers are underage. The mortality rates of children of teenage moms are also higher due to these health hazards.

Early pregnancy is one of the main consequences of child marriage, endangering the health of both the child and the mother. According to a recent survey, women are most likely to marry and have children before they turn 18 in regions like Bihar and Andhra Pradesh. These results may imply that child pregnancies also originate from child marriage, which endures because of the prevailing cultural structures of the Indian family system. These pregnancies negatively impact the health of the child and the mother.

¹⁸ Jaya Jaitley Committee, n 9.

Therefore, to reduce child pregnancies, the proposed Bill seeks to address issues associated with maternal mortality. According to data from the National Family Health Survey (NFHS), late marriages enable new moms to receive all the nutrients they need and give them the parenting skills they need to take proper care of their children. As previously stated, the Government of India's primary objectives in raising the legal marriage age for women are to decrease maternal death rates and improve the nutrition levels of females before giving birth.¹⁹

(ii) *Education and Health*

Women experience discrimination when it comes to access to opportunities in the field of education and jobs due to the prevailing patriarchal norms and social issues like child marriage and childbirth. The fact that women are frequently placed in disadvantaged societal positions regarding higher education, occupational training, achieving psychological maturity and skill sets, etc., is not esoteric knowledge. The legislative goal behind drafting such an amendment is that these cultural disadvantages reinforce women's dependence on men, as the declaration of objects and reasons of the Bill reflects. Despite this emphasis on work and education, India's female labour market participation and school attendance rates remain low.

According to a 2017 report by the "National Commission for Protection of Child Rights," 39.4% of girls between the ages of 15 and 18 in India drop out of high school and college. India has lower female literacy rates than middle- and low-income nations like Zimbabwe and Sri Lanka. Along with poor female literacy rates, India also has high secondary education dropout rates for girls.²⁰

Early marriage raises the possibility of domestic violence. The International Council of Research on Women (ICRW) reports that less educated women who are married and between the ages of 15 and 19 are more likely to have experienced physical abuse in the household. The couple, comprised of young females and older males, may be atypical, which is one likely explanation for this.

The lack of education that has resulted from marriage, home responsibilities, and other factors and therefore raising the legal marriage age is an indirect way to address other gender inequalities, including females dropping out of school in order to get married.

¹⁹ National Family Health Survey. <<http://rchiips.org/nfhs/>>

²⁰ (National Commission for Protection of Child Rights - WCD.NIC.IN)

(iii) *Employment Opportunities and Workforce*

Even though 65.4% more urban women enrolled in higher education in 2017–2018 compared to 2004–2005, just 17.3% of women with advanced degrees were employed in that year. These figures imply that women in urban India continue to be underrepresented in the labor field despite their education. These low rates among metropolitan women may be explained by the fact that, regardless of access to higher education, typical gender norms strongly influence women's job choices.

Because women must be financially independent in order to be able to manage their health concerns, women's autonomy is therefore restricted when they leave employment due to obligations of marriage, which also influences their health and well-being. With a minimum marriage age of 21, a woman will be in a better position psychologically, physically, and financially to defend herself against pressure or mistreatment from her family for getting married too young or against her will.

The action would solve not only the social problems facing the nation but also promote economic growth. The working population, or those between the ages of 15 and 49, makes up the great majority of people in India. However, the patriarchal culture of the nation prohibits it.

As more girls receive quality education and access government programmes, new pathways for employment will open up, accelerating progress. They will be better equipped to put their knowledge and skills to work and obtain respectable employment prospects as a result. To become financially independent and contribute to the national income, they might even immediately implement their ideas as startup and sustainable business concepts. Additionally, promoting and advocating for women's equality will increase their ability to travel safely throughout India

(II) Arguments Against the Bill - Contra

(i) *Freedom Of Choice*

Increasing the minimum legal age of marriage to 21 years of age will be counterproductive to women's social and economic freedom. In India, a female is usually entrusted to the care of a male all her life - as a child, with her father; as a wife, with her husband; and as a mother, with her son. It is a well-established practice that has long since existed in Indian society. Hence, if the minimum age of marriage of a woman is increased to 21 years, a woman who has attained the age of majority at 18 years of age will still be under her parents' control until she reaches the minimum age of marriage.

A relevant case that comes into play is that of Hadiya and Shafin Jahan, popularly known as the Hadiya case. The Hadiya case, which the Supreme Court decided, is centered around the decision of an adult woman to marry an adult man of her own free will, which her parents challenged. The court recognised that their Muslim marriage was valid since they were both of the age of puberty, and there was an offer and acceptance in the presence of two witnesses.

In cases like the Hadiya's and otherwise too, females may view marriage as an escape from their own families due to violence, abuse or poverty. Therefore, increasing the minimum age of marriage from 18 to 21 will prolong such females' suffering for three more years.

A study conducted by Partners for Law in Development, a Delhi-based non-governmental organization, was brought out as a report titled "Child Marriage Prosecutions in India". It studied at least 83 High Courts and district court verdicts over approximately ten years. This report elucidated that the Child Marriage Act, 2006, coupled with other acts such as the Protection of Children from Sexual Offences Act (POSCO), 2012 and the Indian Penal Code (IPC), 1860, was mainly used by the parents of the female as a tool against the male with whom their daughter had eloped. This act, therefore, has tremendous scope for misuse in terms of curtailment of freedom by giving the female's parents the iron rod to control their daughter's will. A tiny proportion of marriages brought to court under the Child Marriage Act 2006 are arranged marriages broken down due to compatibility issues, dowry, domestic violence, etc. Realistically speaking, the minimum age of marriage is used as a veil to disguise the intentions of those who intend to misuse the law.

(ii) Ill-Treatment of Girls

Another bane to consider is that increasing the minimum age of marriage will indirectly add pressure on families to educate their daughters for three more years. For economically low-income families especially, daughters may now be viewed as a burden on resources, time and energy. This view will increase the probability of violence, ill-treatment, sex-selective abortion and female foeticide. Further, it may result in fear among parents in rural and backward areas that their daughters might elope or get raped.

In this light, marriage would serve as a safety net for females from neither financially nor socially secure homes. Therefore, increasing the age of marriage may result in an increased crime rate against unwed girls.

(iii) *Inhibits Sexual Activity*

In India, marriage and chastity are viewed as sacred concepts, especially in the case of a female. Studies show that judges who preside over cases on the rape of women most of the time view her loss of chastity and virginity as the prominent harm done to her. However, it is a well-known fact that most boys and girls under the age of 18 are sexually active. That being said, marriage for a female at 18 years of age will finally allow her to possess the “legal license to have sexual intercourse” and free her from the societal taboo of having sexual relations while unwed.

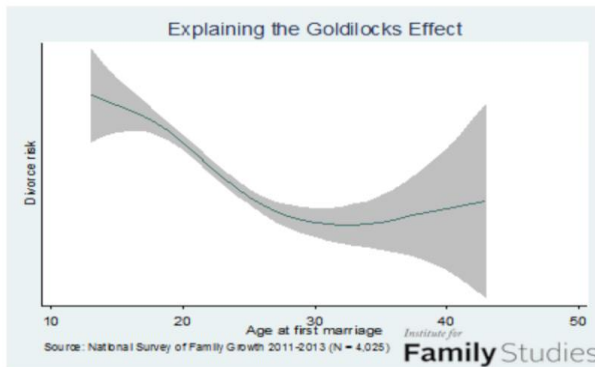
In introspection, “the Prohibition of Child Marriage (Amendment) Bill 2021” will invariably empower society to curtail a female’s freedom to have sexual relations while unmarried for three more years after she is legally allowed to give her consent for sex at 18 years of age. In the words of Senior Counsel NiteenPradhan, “the right to have sex falls under the right to life guaranteed by Article 21 of the Indian Constitution”. This Bill will indirectly curtail women’s freedom to have sex while unwed because of deep-rooted societal beliefs. It violates a woman’s fundamental right to life.

MINIMUM AGE OF MARRIAGE - A SOCIOLOGICAL PERSPECTIVE

“Nicholas H Wolfinger, a Professor of Family and Consumer Studies and Adjunct Professor of Sociology at the University of Utah”, proposed a theory on the age to get married. This theory is famously known as the Goldilocks Theory of Marriage and Divorce. Based on empirical data taken from the 2006-2010 and 2011-2013 National Surveys of Family Growth (NSFG), the Goldilocks Theory suggests that getting married early

increases divorce chances. It concludes that the best time to get married is in one's late twenties and early thirties, as there is significantly less chance of divorce at these ages. This conclusion is subject to factors like demography, religion, etc. The age at marriage, as evident from the graphical representation below, has a U-shaped relationship to the risk of divorce.²¹

In India, the average age of marriage for women has increased from 19 years in 2015-16 to 19.2 years in 2019-21. The Prohibition of Child Marriage (Amendment) Bill 2021 is welcome because it will increase the median age of marriage of Indian women, thereby reducing the number of divorces. Whether or not the Indian legislature considered the Goldilocks effect, increasing the age of marriage from 18 to 21 might decrease the chances of divorce.



MINIMUM AGE OF MARRIAGE - WHAT DOES THE WORLD THINK?

Interestingly, there exists an interplay of international law with family law in deciding the minimum marriage age.

With the implementation of the “Prohibition of Child Marriage (Amendment) Bill, 2021”, several provisions of the “United Nations Convention on the Rights of the Child”, which is the most widely ratified human rights treaty in history, will get violated. Some provisions at risk are identified, i.e., respect for children’s views, sharing thoughts freely, and freedom of thought and religion. This convention is rooted in the principle that children are not just objects whose wishes, opinions and freedoms belong to their parents. Instead, they are individuals with their rights. The convention states that childhood, which lasts until age 18, is

²¹ ‘Replicating the Goldilocks Theory of Marriage and Divorce’ (Institute for Family Studies) <<https://ifstudies.org/blog/replicating-the-goldilocks-theory-of-marriage-and-divorce/>> accessed 1 November 2023.

distinct from adulthood and is a privileged, protected period during which children must be allowed to grow, learn, play, develop, and thrive with dignity.

The Protocol to the “African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003” advocates for the legal age of marriage of women to be 18 years.

Females and males must both have the same minimum age of marriage. Not only should the rights of the parties entering into marriage be equal, the ages, too, ought to be the same. A gap of 3 years between the minimum age of marriage for males (21 years) and females (18 years) has always been a grey area in Indian law. Again, international law comes into the picture through conventions and committee recommendations.

“The Committee on the Elimination of Discrimination against Women” and General Recommendation in relation to Equality in Marriage and Family Relations, 1994 advocated for the minimum age of marriage for both males and females to be 18 years. This recommendation was given with the background that men and women assume equally important responsibilities when they enter into matrimony.

Further, paragraph 38 of the committee’s recommendations state that the countries that stipulate different minimum ages for men and women for marriage should abolish the same. The reasoning provided was that the age gap of the minimum ages of males and females incorrectly assumes that the intellectual development of females is different from that of males.

Similarly, Article 12 and Article 16(1) of the “Universal Declaration of Human Rights, General Assembly Resolution ²², when read together, state that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at the time of dissolution”.

ANALYSIS

The paper lays out the pros and cons of the Prohibition of Child Marriage (Amendment) Bill 2021, which aims to increase the marriage age for women in India. The paper concludes with the following analysis:

²² Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), 1948

By proposing a bill to increase the minimum age for women to marry, the Indian government has taken a commendable action. This action would not only solve women's social problems and promote their economic growth.

However, legislation by itself is insufficient to effect change. According to a report by the Ministry of Statistics and Programme Implementation in 2019, the average age of marriage for women has climbed to 22.1 years, significantly higher than the current and planned minimum legal ages. This increase applies more to urban women than rural women. We can deduce that this increase in age is voluntary and fueled by an increase in income and educational attainment levels. This realisation surmises that there must be simultaneous educational and economic changes for legislation to work.

There is a link between a female's academic attainment and her early marriage. Findings indicate that unmarried girls between the ages of 15 and 19 have significantly higher secondary completion rates across all states. Therefore, completing secondary education is vital for the empowerment of the female; therefore, delaying the age of marriage is crucial. Secondary education must be made a fundamental right to ensure that girls from low-income families have safe learning settings. In this light, the state should establish residential secondary schools in rural areas.

Education is critical in reducing child marriages. Hence, encouraging girls to pursue an education and attain financial independence will positively impact the enactment of any child marriage prohibition act. Running awareness campaigns about the importance of education at the grassroots level will facilitate this change and form a vital component of the solution. Additionally, subsidising education and healthcare will contribute to honouring Article 21 of the Indian Constitution regarding a female's right to live her life.

As for gender equality, the paper advocates for an equal minimum age of marriage of 21 years for both males and females. The paper discourages making the age of 18 for both a threshold, even if international conventions have recommended the same. The drawback of referring to international conventions is that crucial decisions like this need to be taken based on the population sample of a nation. In this case, females in India may have different nutritional levels, growth, cultural and societal circumstances, etc., compared to females in other countries. A nation must make legislation following domestic factors. Therefore, it is reasonable to assume that India's legislature will have considered all these domestic factors while drafting a bill to increase the minimum age of marriage. It is important to note that although the government can impose limitations on the right to marry, they must be reasonable and not contradict the Constitution's fundamental tenets.

CONCLUSION

Reforms that focus on women's issues can transform society as a whole. India will not advance to its full potential until both boys and girls are given equal support to realise their potential. Enhancing the value of girls requires funding their education and providing them with opportunities for sports, educational and financial literacy and participation. The community must work together to raise the minimum age at which women legally marry through social means. Some of these efforts include expanding access to education, enhancing nutrition, providing representation of women in employment, etc.

Most significantly, men and women must work together to change how girls are valued. India's men and women will not have their rights fully realised until society's concept of gender changes. Additionally, by raising the minimum age from 21 to 18 years, the years 18, 19 and 20 will provide women with the chance to realise and work on their abilities, opening up more employment opportunities, thereby making them financially independent.

The "Prohibition of Child Marriage (Amendment) Bill 2021" will be a medicine to mitigate the social evils in India. This curing process will simultaneously ignite the national economy and provide a higher Human Development Index. One must not forget, however, that amendments are only baby steps in the process - opportunities for education and employment, along with effective outreach in Indian society, will enable the Bill to reach its fullest fruitfulness.

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CHAPTER: 15

STATUS OF SAME-SEX MARRIAGES IN INDIA

Aarushi Singh^{1*}

ABSTRACT

Marriage is a sacred union of a man and a woman which is regulated by three major pillars in society, namely, religion, caste, and customary practices of respective religion and caste. Various religions have different ceremonial practices whereas within religions, where the castes are divided, these castes have differences in their ceremonial practices of marriage but the essence of marriage remains according to ceremonies that must be followed by the parties. Institution of marriage mainly covers the “sacred bond of a man and a woman” which means heterosexuality is one of the major conditions which is to be fulfilled by the parties which implies that either homosexual marriages are not allowed or in another instance, they are allowed but they are not recognized as a heterosexual marital union. This research paper will try to figure out if same-sex marriages have any legality in India, the challenges which are faced by the Indian Administration System in trying to inculcate it legally within the system, and if India is truly willing to accept the concept and provide the right to marry as a fundamental right to the “third gender” community of India.

Keywords- Heterosexuality, Homosexuality, Religion, Fundamental Rights, Third Gender

INTRODUCTION

Human beings, on earth, are the most complex creatures. They are obsessed with equal rights, resources, and opportunities but fail to apply the concepts in reality because if we had applied our demands in reality then there would be no need to protect women's rights, no need to provide them special opportunities to flourish. This theoretical and utopian thinking does not apply in reality because if it were, then the third gender would not have to face struggles and would not have asked everyone to accept them as they are through rallies and protests. Human beings believe everything which was imposed by society in ancient times can still be applicable only if they are a part of the majority crowd because minorities

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have suffered through and will suffer even more as they keep realizing their rights and opportunities.

Marriage is a social construction of a relationship between a man and a woman and is largely regulated by the norms of society. Marriage has religious sentimental values attached to this institution.² Technically, marriage is a contract but due to its traditional and religious value, it is also considered a sacred bond between a man and a woman. Some religions allow more than one marriage to a man whereas in other religions man and woman both shall marry one man or one woman and in any religion marriage of a man with a man or a woman with a woman is neither prohibited nor promoted.³ This social construct is a vital phenomenon because the re-creation of life and generation is linked with marriage.

Families depend upon marriage, giving human beings the right to legitimate intercourse which also helps humans to procreate and provide heirlooms to the family. It is considered that children before marriage are illegitimate, implying that human beings should marry before thinking about procreating.

Edward Westermarck says "Marriage is a relation of one or more men to one or more women which is recognized by custom or law and involves certain rights and duties both in the case of the parties entering the union and in the case of the children born of it."⁴ Malinowski defines marriage as a contract for producing and maintaining children,⁵ whereas Robert Lowie says, "Marriage is a relatively permanent bond between permissible mates."⁶ According to H.M. Johnson, "Marriage is a stable relationship in which a man and a woman are socially permitted without loss of standing in the community, to have children".⁷

Sociologists with different understandings of marriage have given definitions based on their perspectives but there is no universally accepted definition of marriage because marriage is closely linked with society, religion, and customs which are different for different religious

² Mondal, Puja, Essay on Marriage: Meaning, Functions and Forms, Your Article Library. <https://www.yourarticlelibrary.com/marriage/essay-on-marriage-meaning-functions-and-forms/8592>

³ Ibid.

⁴ Abdul, What is the Definition and Characteristics of Marriage, Preserve Articles. <https://www.preservearticles.com/definition/what-is-the-definition-and-characteristic-of-marriage/30038>

⁵ Ibid.

⁶ Ibid.

⁷ Dr. Arya, J. P., (2019) Definition & Forms of Marriage & Family [Powerpoint Slides] <https://www.slideshare.net/cpjcollege/definition-forms-of-marriage-family>

Status Of Same-Sex Marriages In India

practitioners and believers. For example, Hindu marriages can be solemnized according to customary rights such as seven steps taken by the bride and bridegroom together before the sacred fire,⁸ thereafter registration of the marriage⁹ under Section 8 of the Hindu Marriage Act, 1955 is essential whereas Muslim marriages are like contracts where consent of the parties are given more importance than any religious customary practice, thereafter the parties provide their consent by signing the document in front of Maulwi (priest).¹⁰

GENDER ACCEPTANCE FOR THE INSTITUTION OF MARRIAGE

There are two genders accepted in society, namely male and female whereas there are people who are born in the body of a male or a female but do not wish to be identified as their respective chromosomal identification. Some people identify themselves as the respective chromosomal set-up they are born in but their sexual orientation is different from the one acceptable in society. For example, a person born with XX chromosomal set-up considers himself to be more identical to the XY chromosomal set-up. In another situation, a person born with XY chromosomal set-up may have sexual interest or feelings for another person with XY chromosomal set-up. Society has recently acknowledged this gender and is calling it a third gender/ transgender, whereas transgender is in itself a type of third gender. This particular "third gender" is a home for many individuals who do not identify themselves as males or females and an umbrella term for genders like Agender, Aliagender, Bigender, Cisgender, Novigender, Aporagender, Cishet, Transexual, Intersex, and Transgender.

Agender individuals consider that they do not have any gender, they identify themselves as androgynous.¹¹ Cisgender individuals are individuals who are born with a particular set of chromosomes and who accept it as their gender identity.¹² Gender-fluid are the type of people who do not identify themselves as a male or a female and they may express themselves as one gender and another gender on the next day.¹³ Another gender is gender-queer, these people are open about their sexual orientations and they appear beyond genders or a mixture of a male and a

⁸ Hindu Marriage Act, 1955, s 5.

⁹ Hindu Marriage Act, 1955, s 8.

¹⁰ Pandey, Abhishek Kumar, Concept of Marriage in Muslim Law. Legal Services India. <https://www.legalserviceindia.com/article/1162-Concept-of-Marriage-in-Muslim-Law.html>

¹¹ Glossary of LGBTQ+ and Gender Terms, Portland Oregon, <https://www.portlandoregon.gov/article/730061>

¹² Ibid.

¹³ ibid

female gender. Aliagender considers themselves as not fit for any current schemas or gender constructs.¹⁴ Aporagenders are non-binary gender identities which are described as one which is neither male nor female, nor any combination of the two. Bigenders are individuals who are identified as people with two distinct genders. It does not define the percentage level of both genders.¹⁵ Cishet is a term that refers to someone who is both cisgender and heterosexual.¹⁶ There are so many undiscovered genders in the world than the recognized ones, heterosexuality is a minor section within the huge umbrella term of “gender”. It is ironic how a smaller subset is given rights and responsibilities and the larger subset was utterly ignored in society.

The institution of marriage recognizes only heterosexuality whereas the third gender is struggling with the enforcement of their legal and fundamental rights. Legal marriages for the third gender seem another dream which will take some time to come true in India. Utopian as well as realistic ideas of marriage are similar, both say marriage is an exclusive commitment of one individual to another to always be there for each other through thick and thin, sharing all the burdens and benefits. Many sociologists have mentioned that marriage is a union of a man and a woman to be able to rear children together but if the practicalities are to be overlooked then marriage and procreating children have no link other than the religious sentiments of the communities, which is why single mothers and fathers are looked down upon by the societies.¹⁷ Another observation of the definitions is that dedication and commitment are foundations of any relationship or marriage which do not expressly define why this commitment is necessary to be shown by a man towards a woman and a woman towards a man explicitly. Commitment and dedication are gender-neutral terms of the English language, why cannot marriages be gender-neutral as well?

Same-sex marriage or gay or lesbian marriage is a marriage between two individuals belonging to the same biological gender identity. The legalization of same-sex marriage is characterized as “redefining marriage” by many opponents. The legalization of same-sex marriage was initialized by various nations by enacting the first law during the early 21st century. As of January 2023, there are 32 nations around the world where homosexual marriages are legal among which 22 nations including Australia, Ireland, etc., legalized same-sex marriages by enacting proper legislation to provide and protect the rights of the queer community and

¹⁴ Ibid.

¹⁵ Abrams, Mere, 68 Terms that describes gender identity and Expression, Sexual Health Blog Post, <https://www.healthline.com/health/different-genders>

¹⁶ Ibid.

¹⁷ Supra note 6.

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another 10 nations including Brazil, Colombia, Costa Rica, etc., have legalized it through legislation changing court decisions. 2 nations, namely South Africa and Taiwan are currently working on their legislation for legalizing same-sex marriages because the courts mandate them to do so.¹⁸

Whereas, the last few decades have changed the outlook of society on homosexuality. Especially youth have come out to be a great support for LGBTQIA+ Community. In 1974, homosexuality was not considered a mental disorder and abnormal behavior of an individual in many nations but in India, homosexuals have been a subject of violation by the state and society.¹⁹ The legalization of homosexuality in India was a journey full of thorns. It started back in 2003 when the Indian Government said that legalizing homosexuality will 'open the floodgates of delinquent behavior'.²⁰ In 2009, in the case of *Naz Foundation v Government of NCT of Delhi*²¹, Delhi High Court struck down Section 377 stating that it violates the fundamental rights mentioned under Articles 14, 15, 19, and 21 of the Constitution of India. It was found Section 377 was a legal prohibition against private, adult, consensual, and non-commercial same-sex conduct that violated fundamental rights. However, Section 377 explicitly made an act of sodomy a criminal offence but there were no explicit mentions of homosexuality or hemophilic offences under the Indian penal code. In another case, *Suresh Kumar Kaushal v Naz Foundation*²². The Supreme Court of India overturned the decision of the Delhi High Court and re-instated Section 377, saying, "Court's interference was not required within this matter and re-criminalized sexual intercourse as against the order of nature."²³

Later in the case of *Fazalrab v State of Bihar*²⁴, where a man was accused of having homosexual relations with a boy with the consent of the boy. The court decreased the punishment given to the man from 3 years of rigorous imprisonment to 6 months of rigorous imprisonment based on the consensual relationship the man and the boy shared. In 2017, in the

¹⁸ Marriage Equality Around the World, Human Rights Campaign, <https://www.hrc.org/resources/marriage-equality-around-the-world>

¹⁹ Anand, Aman & Chauhan, Ashish. (December, 2022) Same- Sex Marriage” The Current Conflict and The Way Forward, LiveLaw Blog Post <https://www.livelaw.in/columns/same-sex-marriage-supreme-court-lgbtqicommunity-fundamental-rights-article-14-217731>.

²⁰ Ibid.

²¹ *Naz Foundation v Government of NCT of Delhi* [2009] 160 Delhi Law Times 277.

²² *Suresh Kumar Kaushal v Naz Foundation* [2013] Civil Appeal No. 10972 of 2013

²³ Ibid.

²⁴ *Fazalrab v State of Bihar* [1982] AIR 1983 SC 323

judgment of Justice *K.S. Puttaswamy v Union of India*²⁵, the Supreme Court held that the Right to Privacy is closely linked with the Fundamental rights provided by the Constitution of India to the citizens of India. The court also ruled that the sexual orientation of a person is also a personal matter which comes within the ambit of privacy. Finally, in 2018, the Supreme Court agreed to hear petitions regarding the validity of Section 377 and the government stated that it would leave the matter in the Supreme Court's hands. So, in *Navtej Singh Johar & Ors. v Union of India*²⁶, Supreme Court ruled that Section 377 is unconstitutional as it violates the fundamental rights of autonomy, intimacy, and identity which implies that homosexuality was made legal in India.

RIGHT TO MARRY AND INDIAN SOCIETY

Marriage is a social institution that is created by human society to control and regulate the life of a man whereas legally it is a social contract between two parties that joins together their possessions, income, and lives. The primary objective of the institution of marriage was to bear offspring to make the family name grow in society.²⁷ Under Hindu laws, the Hindu Marriage Act 1955, Section 5 deals with the institution of marriage which makes it a personal religious sacramental law and not a civil contract.²⁸ According to Muslim law, marriage is a contract that legalizes the procreation of children and makes them entitled to legitimate status in society.²⁹ According to Christian Law, one of the earliest creations of God was the institution of marriage by producing Adam and Eve (a man and a woman respectively) which makes a heterosexual marriage a traditional form of marriage. Christianity believes in traditional marriages and does not promote same-sex marriages.³⁰

In *Arun Kumar v Inspector General of Registration*³¹ Madras High Court opined that the word 'bride' used in Section 5, Hindu Marriage Act, 1955 includes transgender people who identify themselves as women and refusal to register such marriage will be a violation of Article 14, 19(1)(a)

²⁵ Justice *K.S. Puttaswamy v Union of India* [2017] 10 SCC 1.

²⁶ *Navtej Singh Johar & Ors. v Union of India* [2018] AIR 2018 SC 4321.

²⁷ Prof. Shaikh, Anisa. Right to Marry Under Right to Life: Panoramic View, Legal India. <http://www.legalindia.com/right-to-marry-under-right-to-life-panoramic-view>

²⁸ Supra note 7.

²⁹ Supra note 9.

³⁰ Wadne, Vishakha, Marital Rights of Same- Sex Couples: A Socio- Legal Issue in India, Legal Services India. <https://www.legalserviceindia.com/legal/article-4391-marital-rights-of-same-sex-couple-a-socio-legal-issue-in-india.html>

³¹ *Arun Kumar v Inspector General of Registration* [2019] W. P. (MD) No. 4125 of 2019

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and 21, 25, of the Constitution. The Judgment was regarding cis-trans marriage which can help legalize same-sex marriages as well.

Article 14 of the Constitution³² states, "Equality before the law cannot be denied to any person by the State and equal protection of law, shall be provided by the State within the territory of India." This Article incurs a positive and a negative responsibility on the state. The positive responsibility is that State should provide equal protection of the law to every individual within the territory of the State and the negative responsibility is that State cannot discriminate based on Caste, religion, place of birth, and race. This Article prescribes that the State can only differentiate when a reason is required. After *Navtej Johar case*³³, Supreme Court decriminalized Section 377 and held that homosexuality is 'normal' which implies that the State cannot differentiate between homosexual and heterosexual marriages and they should be legalized. In the case of *NALSA v Union of India*³⁴, Supreme Court held that under Article 15 of the Constitution of India³⁵. The term 'sex' includes 'gender'. Moreover, the legislation which is prohibiting same-sex marriage is clearly in violation of Article 15 and should be struck down. *NALSA judgment* also mentions that freedom of expression under Article 19(1)(a)³⁶ includes freedom to identify an individual's gender identity. The Supreme Court held that personal integrity and Self-identity are subsets of fundamental that are provided to the transgender community under Article 19 and State is bound to protect them under Article 14.

The right to marry is a subset of the Fundamental Right under Article 21³⁷ of the Constitution of India which says, "No person shall be deprived of his life and personal liberty except according to the procedure established by law."³⁸ In the case of *Francis Corallie Mullin v Administrator, Union Territory of Delhi*³⁹, Supreme Court opined that the right to dignity is an essential attribute of the right to life and liberty under Article 21 and said, "expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings is an integral part of mental development of human being as well as it is essential for evolution that is one reason why societies are given so much importance in any culture. So,

³² The Constitution of India, 1949, a 14.

³³ *Navtej Singh Johar v Union of India* [2018] AIR 2018 SC 4321.

³⁴ *NALSA v Union of India* [2014] AIR 2014 SCC 438.

³⁵ The Constitution of India, 1949, a 15.

³⁶ The Constitution of India, 1949, a 19(1)(a).

³⁷ *The Constitution of India, 1949, a 21.*

³⁸ Ibid.

³⁹ *Francis Corallie Mullin v Administrator, Union Territory of Delhi* [1980] Writ Petition (cri.) 3042 of 1980.

barring homosexual marriages would be a violation of the right to have the dignity to express oneself freely. Supreme Court in *Justice K. S. Puttaswamy and Anr. v Union of India and Ors.*⁴⁰ held that Article 21 includes the right to privacy and in *Shafin Jahan v Asokan K. M. and Ors.*⁴¹ Establishing that right to choose a marital partner is an integral part of the right to privacy. Article 16 of Universal Declaration of Human Rights (UDHR)⁴² states, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and start a family. They are entitled to equal rights as to marriage, during marriage and at dissolution of marriage."⁴³ India does not provide any marriage right to anyone in the nation directly but various covenants are present in the constitution which makes the right to marry a constitutional right and not a fundamental right of a human being.

In India, two types of discrimination can be seen, namely, based on religion and based on caste. This discrimination does not allow inter-caste marriages as well as inter-religion marriages in India. Inter-caste marriages are marriages in which parties belong to the same religion but not the same caste. Such marriages are prohibited by Hindu customs and traditions which results in a loss of reputation in society, cultural differences, superstitious beliefs, etc, and are not supported by the elders in the family itself.⁴⁴ Any Hindu law does not prohibit inter-caste marriage, they are not just given priority in society by the people. Moreover, the Supreme Court has interpreted that the right to marry is within the ambit of Article 21 of the Constitution which provides the free will to an individual to marry whoever they want after attaining the age of majority.⁴⁵ In society, it is seen that marriages are a bond shared by the families of the parties and they manipulate the right to marry of the parties by interfering in the institute. The ultimate right is with the parties whereas aid and advice are given by the families and loved ones. Such aid and advice may also have a negative impact if a person wishes to marry a person belonging to another caste.

The same religion and different castes possess so much struggle, it cannot be imagined what would be the scenario if someone wishes to marry a person from another religion altogether. Religion has far deeper and

⁴⁰ *Justice K. S. Puttaswamy and Anr. v Union of India and Ors.* [2017] 10 SCC 1

⁴¹ *Shafin Jahan v Asokan K. M. and Ors* [2018] SCC 201.

⁴² Universal Declaration of Human Rights, a 16.

⁴³ Anand, Aman & Chauhan, Ashish. (December, 2022) Same- Sex Marriage” The Current Conflict and The Way Forward, LiveLaw Blog Post <https://www.livelaw.in/columns/same-sex-marriage-supreme-court-lgbtqi-community-fundamental-rights-article-14-217731>.

⁴⁴ Ibid.

⁴⁵ Supra Note 37.

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broader effects on how a person is leading in their life, their way of thinking, and even their day-to-day life. Religion determines what a person would become in his life spiritually which is highly influenced by the societies created by people belonging to the same religion.⁴⁶ Inter-religion marriages are more complicated than inter-caste marriages because they bring about drastic changes in culture and traditions, for example, a cow is considered a god in Hindu culture whereas there is no such thing that exists in Christianity.⁴⁷ Islam does not believe in praying to the idols of God and believes that God exists everywhere, it is not necessary to see God whereas Hinduism and Christianity beliefs are different. There are various religions apart from these which makes the subject even more complicated to pursue.⁴⁸ In Indian societies where inter-caste and inter-religion marriages are still considered taboo, same-sex marriages are perceived as a greater threat to society as well.

SAME-SEX MARRIAGE AROUND THE WORLD

Belonging to the LGBTQIA+ community is a constant pain because everywhere everyone will make you realize how not normal an individual is, workplaces, passenger buses, daily journeys every place will tell the story that this person is not normal.⁴⁹ There is constant pressure on them to prove themselves useful to society, to just fit in but society being harsh and brutal just does not want to accept them. Mutual respect and acceptance are brighter in those 32 nations where same-sex marriage is legalized but it is still a long way to go because earth consists of 196 nations.⁵⁰

In 2015, the United States, Supreme Court in *Obergefell v Hodges*⁵¹ lifts the State level ban and held that such a ban on same-sex marriage is unconstitutional and arbitrary. Since, then same-sex marriages are legal

⁴⁶ Trigunayat, Samarth. (August 21, 2014), Inter-Caste & Inter- Religious Marriages: Social and Legal Issues. Lawoctopus. lawctopus.com/academike/inter-caste-inter-religious-marriages-social-legal-issues/

⁴⁷ Shauni. Problems Faced by Inter-Caste, Inter-State and Inter-Religion Marriage, Your Articles Library. <https://www.yourarticlelibrary.com/marriage/problems-faced-by-inter-caste-inter-state-and-inter-religion-marriage/47633#:~:text=Some%20of%20the%20major%20problems,parental%20disapproval%20and%20social%20criticism.>

⁴⁸ Supra note 46.

⁴⁹ Justin, LGBT Rights Around the World, InfoGraphicWorld Blog Post, <https://infographicworld.com/lgbt-rights-around-world/>

⁵⁰ Angelo, Paul J. & Bocci Dominic (January 29, 2021) The Changing Landscape of Global LGBTQ+ Rights, Council on Foreign Relations. <https://www.cfr.org/article/changing-landscape-global-lgbtq-rights>

⁵¹ *Obergefell v Hodges* 576 U.S. 644.

nationwide in the United States, overruling *Baker v. Nelson*⁵². The court ruled that refusal to recognize the licenses of parties to same-sex marriage is in violation of the Due Process and the Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.⁵³

The Parliament of the United Kingdom passed legislation in 2013 which allowed same-sex marriages in England and Wales. In 2014, the Scottish parliament passed another law making same-sex marriages legal.⁵⁴ Before 2014, same-sex married couples were covered under civil partnerships. Another Harsh reality is that some nations have expressly stated their intentions of not introducing any legislation for the legalization of same-sex marriage such as in Northern Ireland where the executive expressed their intention clearly. It will be covered under civil partnerships only. Same-sex marriage is punishable by death in nine countries around the world.⁵⁵

India is a secular nation where the State does not interfere in the religious matters of the individuals and respects all religions equally. There are majorly four religions in India, Hinduism, Christianity, Islam, and Sikhism.⁵⁶ The majority of the population believes in Hinduism. There is much evidence of the presence of homosexuality in ancient India such as “*Shikhandi*” from *Mahabharata* who was a homosexual being⁵⁷. In Ancient literature, *Rig-Veda* evidently shows the presence of homosexuality.⁵⁸ There were sculptures in the temple Khajuraho in India which depicts acts between women and men based on pleasure and fertility and not marital relations. The *Kamasutra* literature specifically talks about the acts of sexual pleasure between individuals which also defines various

⁵² *Baker v. Nelson* 191 N.W.2d 185 (1971).

⁵³ Human Rights Campaign Foundation, The Journey of Marriage Equality in the United States, <https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states>

⁵⁴ UK Parliament, The Law of Marriage, [https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage/#:~:text=Marriage%20\(Same%20Sex%20Couples\)%20Act,couples%20in%20England%20and%20Wales.](https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage/#:~:text=Marriage%20(Same%20Sex%20Couples)%20Act,couples%20in%20England%20and%20Wales.)

⁵⁵ Ibid.

⁵⁶ Scroope, Chara (2018), Religion. Indian Culture, Culture Atlas Blog Post, <https://culturalatlas.sbs.com.au/indian-culture/indian-culture-religion>.

⁵⁷ Allard, Syama (June 14, 2021), Shikhandi: The Mahabharata's Transgender Warrior, Hindu American Blog Post, <https://www.hinduamerican.org/blog/shikhandi-the-mahabharatas-transgender-warrior>

⁵⁸ Ashwini, Yogi (February 17, 2016) Mystic Mantra: Homosexuality and the Vedas, Deccan Chronicle, <https://www.deccanchronicle.com/opinion/op-ed/170216/mystic-mantra-homosexuality-and-the-vedas.html>

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homosexual acts.⁵⁹ However, homosexuality lost its essence with time, as *manusmriti* itself provides deterrent punishments for females who are involved in homosexual acts with another female, and later during British colonization destruction of artifacts, sculptures, or any homosexual expression was done.⁶⁰ Similarly, in Islamic culture which is extracted from the Quran, homosexuality is considered a sin and is a punishable offense against God and it is said that whosoever is involved with homosexuality will rot in hell.

ISSUES AND CHALLENGES FACED BY SAME-SEX MARRIAGE

The major challenge in Indian society regarding same-sex marriage will be accepted because acceptance cannot be enforced by law. Legislatures can enact laws, and law enforcement agencies can execute them but execution will always fall behind until the acceptance of the people at large is not there. Secondly, it needs to be understood that change is a slow process like evolution. Back in 1998 people used to think that humans will have flying cars by the end of 2020 or 2030 but in 2023 when the reality is seen, we still have not been able to get rid of poverty. Change cannot be imposed in a blink of an eye which is why suffering is a journey as well. Change takes decades to arrive meanwhile those who wait for it struggle through it.

Another major challenge faced by India will be awareness, especially in rural areas. It is a fact that in rural areas people still do not completely understand how to use a smartphone, and thinking about marriage to the same gender is a far-fetched goal for them. Hence, the government needs to execute more awareness programs to make people understand that it is normal. Apart from the awareness campaigns and enforcement issues, homophobia is common in India because of which hatred and disgust are seen in the society for homosexual couples, marriage alone is an unimaginable instance.

Dowry⁶¹ is prohibited in India on paper but in practical essence, it is still practiced in a large part of the nation. Same-sex marriage can also be able to put a ban on the dowry system. Usually, dowry is given by the bride's family to the groom and his family in order to provide a healthy happy environment to their daughter at the in-laws' house but in same-sex marriages, it is difficult to determine which bride among two brides should be entitled to dowry or which groom among two would have dominance

⁵⁹ khajuraho Temples: The symbolic approach of sacred union of divine <https://www.lgbttourismindia.com/blog/khajuraho-temples>

⁶⁰ Supra note 57.

⁶¹ Dowry Prohibition Act, 1961, s 2.

in the relationship.⁶² Determination of parties is important in dowry. Hence, same-sex marriages can successfully reduce the number of dowry cases as well which is another reason why societies do not want to allow same-sex marriages to become legal.

Indian societies are not evolving for the betterment of the people but the people who take part in these societies are trying to inculcate themselves within the criteria and eligibility of being a part of these societies. It is considered human instinct. In ancient times when humans were hunter-gatherers who were always on the move in search of food and shelter, it was a common behavior to keep moving in a crowd of people rather than walking alone because it is riskier. Similarly, in modern societies, because we share the same instinctive teachings of our hunter-gatherer ancestors, keeping peace in a crowd is considered more comfortable rather than individualism. These societies are closely knitted with religion and traditions and the traditional view does not recognize same-sex marriages which makes it difficult for the people to accept them. Homosexuality promotes individualism which is against the concept that our ancestors have been teaching us as a survival skill. It is said that if same-sex marriages are made legal then it will hamper the current traditional ideas and sanctity of marriage which will also affect the patriarchal system of societies. The intimacy of any sort is not approved unless it is legitimized in the form of marriage where socially approved sexual access takes place.

CONCLUSION

Marriage is a sacred bond that is created by society to create a proper system of procreation of children and to spread the bonding of humans with each other. Marriage as an institution is based on the commitment and dedication of both parties to the institution towards each other. Definitions by various sociologists may have suggested that parties to a marriage can only be heterosexual individuals but it does not suggest that parties cannot be homosexual identities. Homosexual people are as human as heterosexual people, they do not look any different than what a normal human being looks like, which means they are entitled to all the rights that heterosexual communities have been enjoying. All the fundamental rights should be given to them irrespective of their sexual orientation.

Article 21⁶³ says the state cannot interfere with the private personal activities of an individual and all individuals are entitled to Article 21 which implies that every individual is free to choose his private intimacy and autonomy whether they belong to a queer community or not. The right

⁶² Maheshwari, Vidhan, Same Sex Marriage: Is It The Time For Legal Recognition, Legal Services India, <https://www.legalserviceindia.com/articles/semar.htm>

⁶³ The Constitution of India 1949, a 21.

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to marry is one such right that can be enjoyed by any individual within his personal sphere. It should be independent of the societal norms and utopian ideas of marriage. If two people are able to co-habitat for the rest of their lives, able to give respect to each other and support each other then it should not matter whether these people belong to which section of society. Societies are created by humans to be able to survive not otherwise.

There should be a nexus between the classification and the object sought to be achieved by the legislation to enact a reasonable and just legislation and in the case of same-sex marriage it is absolutely arbitrary and unreasonable to punish homosexual individuals for having choices that do not match the choices made by the society for their members which section 377 failed to create and got repealed by the Supreme Court of India.

There are various benefits to same-sex marriages such as an increase in the number of adoptions. Since homosexual people are unable to rear children but want to succeed in a healthy family so they can opt for adoption which will decrease the number of orphaned children. Proper rules and regulations can be drafted in the Adoption Act. A new Act has been introduced in the parliament in 2022 known as Surrogacy (Regulation) Act, 2022 which came with Surrogacy Regulation Rules which have laid down rules and regulations regarding surrogacy procedures. Surrogacy procedures can be another way of having children for homosexual people if they wish to have their own children. There are other technical methods as well with which bearing children has become easier for homosexual couples. However, the procedures for adoption, surrogacy, or any other methods are complicated and require amendments but the improved legislation can be a way forward to same-sex marriages.

The most useful suggestion to recognize same-sex marriage is either to enact proper legislation or amend the existing laws in favor of same-sex marriages. This mission will be hasty because marriage, customs, traditions, and societies are interconnected with each other, and marriage is considered an aspect of the personal laws in India. However, another solution is amending the existing legislation which is achievable by including the third gender within the ambit of the Special Marriage Act of 1954. The main objective of this Act was to achieve secularism. Gender-neutrality can be termed as a subset of secularism. Another solution could be giving civil partnership status to all homosexual marriages which will protect the rights of homosexual couples as much as it protects the rights of heterosexual couples, as it is a successfully applicable concept in Scotland.

Change in India can be seen as on January 06, 2023, the Supreme Court of India asked all the High Courts to transfer all the petitions to the Apex Court regarding the legality of Same-sex marriages. This authoritative ruling may bring greater change to the current status of homosexuality and

same-sex marriage as once it was done by the Apex Court by repealing Section 377.⁶⁴

⁶⁴ Sharma, Padmakshi, (January 3, 2023) Supreme Court To Hear Petitions Seeking Recognition Of Same-Sex Marriage On 6th January, LiveLaw Newsletter <https://www.livelaw.in/top-stories/supreme-court-to-hear-petitions-seeking-recognition-of-same-sex-marriage-on-6th-january-217947>

CHAPTER: 16

RIGHT TO FAMILY AND THE LGBTQ+ COMMUNITY IN INDIA

Shipra Tiwari^{1*}

ABSTRACT

Family is one of the most vital aspects of one's life. A person needs their family for various purposes at various stages of life-be it emotional, physical or even financial reasons. Family aids in a person's overall development and well-being. One might think three years after the Supreme Court read down Section 377 of the Indian Penal Code in Navtej Singh Johar v. Union of India, decriminalizing 'carnal intercourse against the order of nature' between consenting adults, the conduct of the legislature and the society at large would begin to change, to view family as something more than a heterosexual union for the purpose of reproduction. However, that is not the case. The Indian legal system still retains and passes laws that turn a blind eye towards practices that are prejudicial and biased against the interests of the LGBTQ+ community, especially when it comes to laws regulating the family. This paper analyses surrogacy, adoption and abortion laws in India and examines them on the touchstone of state obligations under international conventions, national law, and judicial pronouncements to throw light on the heteronormativity and queerphobia surrounding the Indian family system.

Keywords- Right to Family, LGBTQ+, Queerphobia, Surrogacy, Adoption, Abortion, Parenthood.

INTRODUCTION

The Supreme Court of India in Navtej Singh Johar v Union of India,² decriminalized Section 377 of the Indian Penal Code to the extent that consensual intercourse 'against the order of nature' between two people of the same sex does not qualify as a criminal offense any more. Prior to the Navtej Singh Johar judgment, the Apex court had, in National Legal Services Authority v Union of India,³ acknowledged the existence of non-binary gender identities and legally recognized transgenders as the third gender, giving them the right to self-determination and identification of gender.

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²Navtej Singh Johar v Union of India(2018) 10 S.C.C. 1.

³National Legal Services Authority v Union of India(2014) 5 S.C.C. 438.

Despite the Supreme Court's decision regarding the identity and rights of the LGBTQ+ community, the legislature has done little towards accepting the community, sensitizing the society towards them, granting them equal protection of law, or protecting their fundamental rights. The only substantial step taken is the Transgender Act⁴ that proudly boasts of 'providing for the protection of the rights of transgender persons and their welfare', but was dubbed to be the 'murder of gender justice'⁵ by the trans people themselves.

A major aspect of a person's life that the legislature fails to recognize to be as important to the LGBTQ+ community as to the 'straight' or the cisgender heterosexual people, is family. The legal recognition granted to families in India is largely heteronormative, i.e., they assume the gender binary, and that sexual relations are most fitted only between people from the opposite sexes- believing heterosexuality to be the preferred, or 'normal' sexual orientation. They are exclusionary in nature- the provisions and the system failing to acknowledge the existence of the LGBTQ+ community and to provide for their welfare.

THE LGBTQ+ MOVEMENT AND THE INVOLVEMENT OF THE JUDICIARY

Broadly speaking, a social movement is a loosely organised but sustained campaign in support of a social goal, typically either the implementation or a change in the society's structure or values.⁶ The LGBTQ+ movement is the constant struggle of the said community with themselves, their families, and the society at large- a struggle for identification and bringing out a change in the heteronormative ideals of the nation, and the laws that are reflective of these ideals. It raises the issue of sexual and gender identity and looks up to the state to redress their grievances. The movement holds that the heterosexual norm of the society is not the only form of expression of gender and/or sexual identity, but is merely one of its forms. Thus, we as a society need to break free from the assumption that gender is binary and heterosexuality is the only real orientation, and stop treating LGBTQ+ community and their orientation as a pathological condition.⁷

⁴Transgender Persons (Protection of Rights) Act, 2019.

⁵Lalwani, V. (2019 November). Explainer: Despite criticism, the Transgender Persons Bill was just passed. What's Next. *Scroll.in*. Retrieved from <https://scroll.in/article/944943/explainer-despite-criticism-the-transgender-persons-bill-was-just-passed-whats-next>.

⁶Britannica. Social Movement. In *Britannica*. Retrieved on 20th January, from <https://www.britannica.com/topic/social-movementlast>.

⁷Srivastava, S.S.(2014). Disciplining the 'Desire': 'Straight' State and LGBT Activism in India. *Sociological Bulletin*, 63(3).

In light of this growing awareness, the Delhi High Court in *Naz Foundation v Government of NCT of New Delhi*,⁸ for the first time read down Section 377 of the Indian Penal Code to be unconstitutional, being violative of the right to dignity, privacy, freedom of expression etc. In 2014, in *NALSA v Union of India*,⁹ the court discussed gender identity at length and recognized people falling outside the gender binary as third gender, giving them equal protection of fundamental rights, and directed the state governments to come up with mechanisms to help them fully realize these rights. The Supreme Court noted how Article 14 and Article 19(1)(a) of the Constitution of India were drafted with gender neutral terms 'all persons', indicating that the fundamental rights do not extend only to the male and female genders, but third genders/transgenders as well. The court also stated that the discrimination faced by the transgender community was in violation of their fundamental right to equality and included the right of gender expression through dress, words, or behavior to be included in the freedom of expression. The Constitution of India prohibits discrimination based on sex under Article 15 and Article 16. The Court interpreted these Articles and stated that 'sex' is not limited to biological attributes, but also gender based on self-perception.

However, the judiciary took two steps backwards in *Suresh Kumar Koushal v Naz Foundation*,¹⁰ when the Supreme Court overruled the Delhi High Court judgement, stating that the law does not criminalize a particular group of people for their identity or orientation, rather it criminalizes the conduct of people who indulge in 'carnal intercourse against the order of nature'. It was further held that just because the law is being misused against a community does not make it unconstitutional. While the Delhi High Court in deciding the *Naz Foundation* case showed empathy and acumen in protecting the rights of a marginalized community, the Apex Court in *Suresh Kumar Koushal* decided that it did not need to exercise its power to protect the rights of 'a miniscule fraction'¹¹ of society. The judgement is the manifestation of a society that is too rigid to step out of the traditional social values in order to be able to appreciate anything that is not the 'norm'.

Subsequently, the Mental Healthcare Act, 2017, in its definition of mental illness, debunked the misconception that anything beyond heterosexuality is a mental illness, stating that non-conformity with the moral, social, cultural, work or political values or religious beliefs prevailing in one's community shall not be determinant of mental illness.¹² Thus, by drafting

⁸*Naz Foundation v Government of NCT of New Delhi*, 160 D.L.T 277.

⁹*NALSA v Union of India*, (2014) 5 S.C.C. 438.

¹⁰*Suresh Kumar Koushal v Naz Foundation*, (2014) 1 S.C.C. 1

¹¹*Id* at 59.

¹²Mental Healthcare Act, 2017 S 3.

the Mental Healthcare Act, the Parliament has made an attempt to do away with the stigma attached to the LGBTQ+ community and the belief that gender identity and sexual orientation that is not 'normalized' is a mental illness, at least in the letter of the law.

The minimis rationale of the Suresh Kumar Koushal judgement was first rebutted in Justice K.S. Puttaswamy v Union of India¹³ where the Apex Court held that the fact that a few, as opposed to a large number of people are being subject to violation of fundamental rights does not excuse the violation, and found sexual orientation to be included in a person's right to privacy. Later, in Navtej Singh Johar v Union of India,¹⁴ the Supreme Court overruled the Suresh Koushal judgement and unanimously held Section 377 IPC to be unconstitutional to the extent that it criminalized sexual conduct between consenting adults of the same sex. The court reiterated the *NALSA* judgement to hold that gender identity is intrinsic to one's being and denying the expression of the same would be violative of right to dignity under Article 21 of the Constitution. The Court also relied upon the *Puttaswamy* judgement in stating that denying the LGBTQ+ community the right to privacy would be a violation of their fundamental rights, and also laid down that gender identity is an essential component required for enjoying civil rights. Thus, the Supreme Court after an extensive analysis, upheld expression of gender identity and sexual orientation to be the fundamental rights of the LGBTQ+ community.

The year 2021 witnessed another major leap towards the protection of the rights of the LGBTQ+ community when the Madras High Court in Sushma v Commissioner of Police,¹⁵ noted that 'ignorance is no justification for normalizing any form of discrimination', and banned conversion therapy in the state. Therefore, from Suresh Kumar Koushal, where the Court adopted a rigid interpretation of the law and dismissed the LGBTQ+ community as a 'miniscule population', to the Madras High Court judgement where a judge sought professional counselling to fight his own biases and understand the issues of the queer community in a better way,¹⁶ the judiciary has come a long way when it comes to accepting the identity of the LGBTQ+ community and protecting their rights. However, this is just the first step towards the creation of a society where the queer people of India and the members of the LGBTQ+ community would be able to feel safe, accepted, and appreciated, and a lot more needs to be done.

¹³Justice K.S. Puttaswamy v Union of India,(2017) 10 S.C.C. 1.

¹⁴Navtej Singh Johar v Union of India,(2018) 10 S.C.C. 1.

¹⁵Sushma v Commissioner of Police,W.P. No. 7284 of 2021.

¹⁶PTI. (2021. June). Madras High Court Judge Explains How He Overcame Prejudice Against LGBTQIA+ Community.*LiveLaw*. <https://www.livelaw.in/top-stories/lgbtqia-homosexual-gay-lesbian-madras-hc-anand-venkatesh-overcome-prejudice-175342>.

RIGHT TO FAMILY LIFE- A FUNDAMENTAL RIGHT?

The Constitution of India does not explicitly guarantee a fundamental right to family. However, the Right to Family does find place in international human rights instruments that India is a party to, and which, under Article 51(c) of the Constitution of India, the State shall endeavor to respect. Right to Family life can be understood as the Right to enjoy family relationships without excessive interference from the State.¹⁷ It includes the relationships between an unmarried couple, an adopted child and adoptive parents, or foster child and foster parents.¹⁸

“The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.¹⁹ In this light, the Universal Declaration of Human Rights, 1948 prohibits arbitrary interference with one’s family.²⁰ The Declaration also acknowledges family to be the fundamental and foundational unit of a society, which warrants that it be protected by the society and the state.²¹ Although under the declaration, the right to found a family is limited to ‘men and women’²² without discrimination on the basis of ‘race, nationality or religion’ only, the spread of legal and social awareness of the rights of the community after 1948, when the Declaration was adopted, the words ‘sexual orientation’ and ‘gender identity’ should be read within the Article.

The Right against arbitrary interference with one’s family²³ and the duty of the State to protect the family²⁴ also finds place in the International Covenant on Civil and Political Rights. Further, the International Covenant on Economic, Social and Cultural Rights also states that the “widest possible protection and assistance be provided to the family...particularly

¹⁷Article 8: Respect for your Private and Family Life. Equality and Human Rights Commission. Retrieved on 20th January 2023, from <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life>.

¹⁸*Id.*

¹⁹The Universal Declaration of Human Rights, (adopted 10 December 1948 Preamble.

²⁰*Id.* Art 12.

²¹*Id.* art 16(3).

²²*Id.* art 16(1).

²³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (ICCPR). Art 17.

²⁴*Id.* art 23.

for its establishment.”²⁵ It also obliges the state to take steps for creation of such circumstances where medical services are provided to all.²⁶ It also protects citizens’ right to take part in cultural life,²⁷ and to avail benefits of scientific progress and its application,²⁸ which includes medical advancements that would enable the members of the LGBTQIA+ community to establish a family.

In *Huag (FC) v Secretary of State for the Home Department*²⁹ the importance of family in a person’s life was noted, whereby the court stated that human beings, being social animals, depend on others, family being the unit that is most depended on, for the emotional, mental, physical or even financial needs. In this light, the Delhi High Court recently allowed an IAS officer’s plea for inter-cadre transfer on the basis of marriage and noted the contention of violation of right to family life as holding ‘much weight’.³⁰ The Court relied on Article 8 of the European Convention on Human Rights and stated that there is “*no doubt that the right to meaningful family life, which allows a person to live a fulfilling life and helps in retaining her/his physical, psychological and emotional integrity would find a place in the four corners of Article 21 of the Constitution of India*” when the right to family life of a heterosexual couple has been acknowledged, there seems to be no reasonable justification as to why the same should not be recognized for the LGBTQIA+ community as well.

The United Nations Development Program in its report on the Hijra/Transgender Women of India stated that the various problems faced by the community needs a variety of solutions and actions, including transgender specific social welfare schemes, and long-term actions to bring about a change in the negative attitude of the public, and to increase awareness about the community. The report recommended that these changes be reflected in the policies and laws, the attitude of the government, health care providers, and the health care system and practices in general.³¹

Therefore, the LGBTQ+ community, much like any other citizen of India, is entitled to establishing a family as a matter of fundamental rights

²⁵International Covenant on Economic Social and Cultural Rights, 993 U.N.T.S. 3 (ICESCR).Art 10(1).

²⁶*Id.* art 12(d).

²⁷*Id.* art 15(1)(a).

²⁸*Id.* art 15(1)(b).

²⁹*Huag (FC) v Secretary of State for the Home Department*, (2007) U.K.H.L. 11.

³⁰*Lakshmi Bhavya Tanneeru v Union of India*, W.P.(C) 5533/2021.

³¹Chakrapani, V. (2010)*Hijras/Transgender Women in India: HIV, Human Rights, and Social Exclusion*, UNDP INDIA, <https://archive.ny.u.edu/handle/2451/33612>.

HETERONORMATIVE LEGISLATIONS

Surrogacy

The word ‘surrogate’ originates from the Latin term ‘surrogates’, which means substitute. Surrogacy is “a practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby to give it to someone who cannot have children.’

The Surrogacy (Regulation) Act, 2021

Under the Act, surrogacy is ‘a practice whereby a woman bears and gives birth to a child for an intending couple with the intention of handing over the child to the intending couple after birth’.³² Section 2(q) of the 2020 Act defines an intending couple to be a couple who intend to become parents through surrogacy, provided they have been medically certified to be infertile. However, the Act defines a couple as a “legally married Indian man and woman above the age of 21 and 18 years respectively.”³³ Since same sex marriages are still not legally recognized in India, lesbian and gay couples, despite being warranted equal protection of fundamental rights, stand excluded from being able to commission a surrogacy. The Act, by using gendered terms, also reinforces the gender binary, despite the Supreme Court ruling on the non-binary nature of gender and declaring transgenders as third gender. Thus, a couple, when either or both members are transgender, cannot commission a surrogate unless they obtain a ‘change in gender certificate’³⁴ under the Transgender Persons (Protection of Rights) Act, the process for which is arbitrary, insulting, and violative of fundamental rights as it requires the person to show a proof of surgery, thus coercing them into a medical procedure that they may not want.

While the Act did make changes to the Surrogacy Regulation Bill, 2019 - like doing away with Section 2(p), (which provided the definition of infertility), keeping in mind the condition of people like ‘absent or abnormal uterus, irreversible damage or destruction of uterus due to tuberculosis, removal of uterus due to cancer, fibroids, etc., or people with chronic medical condition where normal pregnancy is ruled out and it is medically proven beyond any doubt that surrogacy is the only option’,³⁵ and included the definition of ‘intending woman’ in order to include a divorced or widowed woman between the age of 35 to 45 years who intends to avail surrogacy- yet, it failed to amend the 2019 Bill to be

³²The Surrogacy (Regulation) Act, 2021. S 2(zb).

³³*Id.* S2(g).

³⁴The Transgender Persons (Protection of Rights) Act, 2019, S7.

³⁵Report of the Select Committee on Surrogacy (Regulation) Bill, 2019. (RS) 25. Retrieved on January 20, 2023, from https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf.

inclusive of the LGBTQ+ community, reflecting the heteronormativity spread across the society, especially the legislature.

Adoption

Numerous international human rights treaties, most notably the 1989 Convention on the Rights of the Child, establish the positive obligation of State to ensure the preservation of children's rights and well-being. Hindus in India are subject to The Hindu Adoption and Maintenance Act 1956, which regulates adoption whereas other religions' personal laws do not contain a comparable statute. The Juvenile Justice (Care and Protection of Children) Act, 2000, which allows for adoption on a secular basis, comes into effect in this situation. The Act grants everyone the ability to adopt, as well as the ability to adopt. The Central Adoption Resource Authority (CARA) has developed adoption regulations in accordance with Section 41(3) of the Act, based on the Supreme Court's ruling in *Lakshmi Kant Pandey v Union of India*.³⁶

The Hindu Adoption and Maintenance Act's sections 7 and 8 refer to parents as husband and wife. Therefore, a Hindu same-sex couple is completely barred from adopting a child in the absence of legal recognition of same-sex marriages. While one partner may adopt a kid as a single parent, this does not grant the other partner parental rights over the child. Even the guidelines formulated by CARA are biased against homosexual couples, by stating that '*no child shall be given to a couple for adoption unless they have at least two years of a stable marriage*'.³⁷

As far as transgender couples are concerned, although the Hindu Adoptions and Maintenance Act uses gendered terms, they have the option to adopt under the Juvenile Justice Act, which uses the gender-neutral term 'person'. No religion or gender is excluded from the adoption process covered by the Juvenile Justice Act of 2005 and the Adoption Regulations of 2017. This law allows anyone who meets the requirements to adopt a child. With the Madras High Court identifying transgender person's right to marry in 2019,³⁸ the CARA guidelines seem to be the appropriate course for them to adopt a child.

Abortion

Exclusionary Language of The Medical Termination of Pregnancy Act, 1972

Before the MTP Act came into force, induced abortions were treated as a criminal offence under Section 312 of the Indian Penal Code, 1860.

³⁶Lakshmi Kant Pandey v Union of India, 1948 A.I.R. 469.

³⁷Guidelines for Adoption (CARA Guidelines).S 6(1).

³⁸Arun Kumar v The Inspector General of Registration, W.P. (MD) NO. 4125 OF 2019.

Therefore, although the Act was a welcome change in the contemporaneous scenario, in the twenty first century, it fell short of the legitimate expectations of the target population.

There have been lengthy discussions and debates around how the Act fails to respect the bodily autonomy of women and their right to make reproductive choices, the Act, as well as its critics have failed to acknowledge one fact- that is- pregnancy affects anyone with a uterus, not just women. The language of the Act is exclusionary of the transgender community in that it is drafted in a way that shows that the Act is concerned with pregnant women only. Section 3 of the Act states that in order to legally terminate a pregnancy, the medical practitioner, or practitioners, as the case may be, have to be of the opinion that the continuation of pregnancy would pose a risk to the life of the 'pregnant woman'. Similarly, the other provisions of the Act focus on the physical and mental health of the pregnant woman, thereby leaving no scope of relief for the transgender and non-binary population of the country who were assigned female or intersex at birth, to be able to legally terminate an unwanted pregnancy.

The then Union Minister for Health and Family Welfare, Dr Harsh Vardhan, in the Rajya Sabha acknowledged the scope for increasing the upper gestational limit for terminating pregnancies due to the passage of time and advancement in medical technology.³⁹ It is rather disappointing to note that while the legislators were mindful of the advancements in medicine and medical technology, they failed to consider an entire class of citizens, who have always been around, and are affected by the concerns that the Act seeks to resolve.

Transgender, non-binary, and gender expansive people who were assigned female at birth experience pregnancy and might want to terminate it. In fact, a United States study targeting the said population revealed that 12% of the respondents had been pregnant at least once in their lives, out of which 21% had opted for abortion.⁴⁰ A pregnancy, abortion, or the use of gendered terms at abortion clinics, medicine packaging, etc, may lead to gender dysphoria among transgender and non-binary people, which may severely affect their mental and physical well-being.⁴¹ In the Suchita

³⁹Rajya Sabha Discussion on March 16 2021, <http://164.100.47.7/newdebate/253/16032021/Fullday.pdf>.

⁴⁰Moseson, H. (2021). Abortion Experiences and Preferences of Transgender, Non-Binary, and Gender Expansive People in the United States. *American Journal of Obstetrics and Gynaecology*, 224(4). <https://www.sciencedirect.com/science/article/pii/S0002937820311261>.

⁴¹Lloyd, N. (2021). Transgender and Non-Binary people like Me get Pregnant and Have Abortions too. *WOMEN'S HEALTH*. Retrieved on 20th January 2023, from <https://www.womenshealthmag.com/health/a36807604/transgender-non-binary-abortion/>.

Srivastava⁴² the Supreme Court laid down the ‘best interest test’ that requires the Court to decide the course of action keeping in mind the best interest of the concerned person, rather than the interest of the guardians, or society at large. When the law seeks to terminate pregnancies, the concerned persons should be anyone who conceives a child, and not just a part of the affected population.

Although the Act is not openly transphobic or spiteful, it does bring out the effect of marginalizing an already marginalized community. Gender does not determine the possibility of getting pregnant and the Act fails to go beyond the gender binary. The presumption that everyone affected by a pregnancy and seeking an abortion must be a female goes on to show the deep-rooted biases around gender and motherhood in the society. However, recently, the Apex Court in a landmark decision stated that the term ‘woman’ in the Act is not limited to cis-gender women, but also trans-gender and gender queer people who are capable of giving birth.⁴³

CONCLUSION

The rampant queerphobia in Indian society is not news to anyone. But the fact that the laws and the education system that imparts skills to medical practitioners is as biased as the rest of the society is quite unfortunate.

The present state of affairs raises a question on the exclusionary language of public policy. The policies, although not explicitly queerphobic (in most cases), or openly spiteful of the community, lack inclusivity in their language, which hamper the overall wellbeing of the queer individuals. The lack of intersectionality in the language used by the drafters is reflective of the heteronormative standards set in the minds of the people, and brings out the effect of pushing the marginalized communities further into the fringes.

It is clear that the existing legislations on surrogacy, adoption and abortion are violative of the fundamental rights of the LGBTQIA+ community enshrined under Article 14, creating unreasonable distinction between members of the community and their cis-het counterparts, and Article 21, being violative of their right to life, dignity, family, health and family life. Although the judiciary has taken up an active role in the protection of the interests of the community, the legislature still lags behind.

Admittedly, bringing about legislative changes would not be the end of the issue. The problem is not merely the exclusionary language of the law, but

⁴²Suchita Srivastava v Chandigarh Administration, (2009) 9 S.C.C. 1.

⁴³Yashee. (2022, October). Supreme Court says Abortion Rights not Limited to Cis-Gender women: What this term means. *The Indian Express*. Retrieved on January 21, 2023, from <https://indianexpress.com/article/explained/sc-abortion-rights-cis-gender-women-what-this-means-8189914/>.

lies in the deep-rooted biases against the community in the society as a whole. Even the medical field is not free from such biases. The current medical curriculum describes sodomy, lesbianism, and oral sex as sexual offences, and cross dressing or 'transvestism' as a sexual perversion.⁴⁴ It also uses the term 'gender identity disorder' which is an obsolete term used to describe transgender persons. The appropriate term would be gender incongruence, which denotes a person's gender identity to be incongruent with the gender assigned to them at birth, and is not a disease or disorder. The curriculum is clearly outdated and vitriolic towards the LGBTQ+ community. The National Medical Council also noted how various textbooks, especially books on forensic medicine, toxicology and psychiatry spread misinformation through unscientific and derogatory remarks about the community, and requested all medical colleges, universities and institutions to not approve such books.⁴⁵

Therefore, what is needed is long-term projects to spread awareness in order to end the prejudice. LGBTQ+ activists and allies are already doing their part to fight for the safety and security that they rightfully deserve. Campaigns along the lines of the ones undertaken to tackle issues that the society deems taboo- like menstruation,⁴⁶ AIDS,⁴⁷ tuberculosis,⁴⁸ domestic violence,⁴⁹ etc. should be launched, so that the required changes are reflected in the attitude of the government, the general public, health care providers and healthcare system. The existing social welfare schemes should be opened up for the community, and newer schemes drafted specifically for the welfare of the community should be enacted.

⁴⁴Competency Based Undergraduate Curriculum ForThe Indian Medical Graduate. Medical Council of India, <https://www.nmc.org.in/wp-content/uploads/2020/01/UG-Curriculum-Vol-I.pdf>.

⁴⁵Jyoti, D. (October, 2021). Amend Discriminatory Info on LGBTQIA+: NMC to Institutes, *Hindustan Times*, <https://www.hindustantimes.com/india-news/amend-discriminatory-info-on-lgbtqia-nmc-to-institutes-101634149481724.html>.

⁴⁶PTI. (February 25, 2018). Rajasthan Dealing with the Taboo Around Menstruation with Special Campaigns. *The Indian Express*. <https://indianexpress.com/article/india/rajasthan-dealing-with-the-taboo-around-menstruation-with-special-campaigns-5077504/>.

⁴⁷PTI. (February 25, 2006). Govt. to Launch AIDS Awareness Ad Campaign. *The Economic Times*. <https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/govt-to-launch-aids-awareness-ad-campaign/articleshow/138740.cms?from=mdr>.

⁴⁸(April 14, 2017). Government of India Teams Up with Amitabh Bachchan for #IndiavsTB. *Economic Times*. <https://brandequity.economictimes.indiatimes.com/news/advertising/government-of-india-teams-up-with-amitabh-bachchan-for-indiavstb/58176553>.

⁴⁹*Bell Bajao*. United Nations in India. <https://in.one.un.org/page/bell-bajao/>.

It remains a fact that exclusionary language, especially against women and the LGBTQ+ community, is normalized when it comes to public policy. Language is a reflection of reality and as long as legal systems, social constructs and institutions are created exclusively by cisgender, heterosexual people, they cannot be inclusive enough to cater to the needs of the queer people. Therefore, representation of the members of the community in the legislative and policy making process is the need of the hour.

CRITICAL ANALYSIS OF THE NEED OF LEGALIZING AND LIBERALISING THE CONCEPT OF PRENUP AGREEMENT IN INDIA.

Bhoomija Pandey^{1*}

ABSTRACT

In the present era right to life and liberty has encompassed diverse aspects of human life, one of such aspect is the institution of marriage. Marriage is still to a large extent is governed by the canons of religion, many a times it is seen that due to financial constraints or social pressure either of the spouse has to bear the brunt of the other. In today's dynamic and globalising society, it is crucial to understand the needs and aspirations of individuals so that they can live a peaceful and happy married life, and even in the case of dissolution of marriage none should suffer the trauma of litigation and useless allegations. Thus, it is the need of the hour to not just legalise but also liberalise the concept of "prenups" in India. Though such a step may seem ahead of its times but it is important to implement to promote well-being of not just individuals but also society and nation at large. The article seeks to highlight some of the aspects in which way prenups could be liberalised and the need to do so. It also highlights the predicament of female spouses in a marriage and how the legalising of prenups would help them out.

KEYWORDS- Life, liberty, marriage, religion, liberalise, prenups.

INTRODUCTION

Indian civilization is one of the most prominent one. The institution of marriage has always been acknowledged as a pious and sacrosanct tie which once tied cannot be untied. If we look into the ideology of *Sanatan Dharma*, it could be found that the wife is called 'Ardhangini' [half organ] of her husband and the husband is regarded as 'patiparmeshwar' [husband given the status of God], this signifies the notion that it is only after marriage that a person become complete and because husband was bestowed with the responsibilities of maintaining, loving, caring and protecting his wife therefore he was equated with God for her.

However, in the present scenario the picture has changed as the concepts of individuality and independency have become predominant. Moreover, the ideas and orientations of sologamy, same-sex marriages, live in

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relationships etc are gaining legal recognition . In the light of such transitions in the institution of marriage, it is required to regulate and review it with the lens of practicality rather than spirituality. One of such ways to regulate marriages is introduction and legalisation of the concept of prenups or pre-marital agreements which are entered into by the spouses before marriage. However, the question is to what extent and in what manner it should be legalised in order to maintain not only the social fabric but also individual freedom and dignity.

PRE-NUPTIAL AGREEMENTS: THE GENERAL PERCEPTION

As per Merriam-Webster Dictionary, *prenuptial agreement* is an agreement made between two people before solemnising marriage that establishes rights relating to property and support in the event of divorce or death². Thus, the two people that are going to be husband and wife prepares a list of their assets , estates and liabilities and chalk out the scheme of distribution of such assets , estates and liabilities and the provisions of maintenance in case of dissolution of marriage. Apart from financial aspect, the aspect of custody of child may also be included in it.

It could be seen that the concept of prenuptial agreements is largely concentrated towards economic or financial aspect of marriage, also, it deals with allocation of such finances after the breakdown of marriage and does not make any provision for events before the breakdown of marriage. It is due to such aspect that the idealists discredit it on the ground that such agreements foresee marriage as contracts which could be repudiated at one's will and thus promote divorce. They also argue that such agreements destroy the very charm of marriage which is based on love, affection and understanding rather than money.

However, it is argued that it is too idealistic to view marriage as everlasting union in today's world where litigations relating to maintenance, divorce and separation are on hike. Moreover, it is better to plan the events in advance than to create havoc later on. Also, the institution of marriage flourishes on the foundation of love, trust and harmony and mere agreement prior to marriage envisioning result of its dissolution would not

² Merriam Webster online Dictionary, retrieved from <https://www.merriam-webster.com/dictionary/prenuptial%20agreement> .

CRITICAL ANALYSIS OF THE NEED OF LEGALIZING AND LIBERALISING
THE CONCEPT OF PRENUP AGREEMENT IN INDIA.

be a reason for divorce as for divorce there are various other grounds prescribed by family laws.

POSITION OF PRENUPTS IN INDIA

India is a multicultural land, therefore family affairs are governed by the personal laws of respective religions. As far as Muslim law is concerned, the marriage is regarded as a contract and thus a “*Nikahnama*” [a contract of marriage] is made to be signed by the bride, such instrument contains the provision of “*mehr*” [dower] which is the consideration for marriage to bride. However, under Muslim law which is not yet codified, Muslim women are placed in a disadvantageous position as they do not have much rights post marriage, they are supposed to be subservient to the needs of their husband, also, they do not have any right to claim divorce from their husband. The basic philosophy of Muslim personal law is based on patriarchy therefore it would be just to conclude that the *nikahnama* is mostly made under the undue influence of his father and husband, she has least role in deciding for herself the terms of marriage.

As far as Christian Marriages are considered Section 40³ allows the court to consider the terms of any existing pre-nuptial agreements between warring couples at the time of passing judgment on the division of assets⁴. Thus, it hints towards legalisation of prenuptial agreements.

As far as Hindu marriages are considered, they are regarded as sacrament and sacrosanct, a tie which once tied remains till eternity. *Manu* declared that the due performance of the religious rites, faithful worship, performances of *yagnas*, the highest conjugal happiness, and the heavenly bliss for ancestors and oneself—all depend upon the wife⁵.

Even in the case of “*Ratneshwari Nandan v. Bhagwatisaran*”⁶ where there was a property matter wherein the validity of marriage of a lunatic was challenged. The point raised was that Hindu marriage is both a *Samskara*[ritual] and a Contract, and a lunatic being unable to give

³ Christian Divorce Act, 1869

⁴ Rohin Dubey, [21 Aug. 2021, 9:12 am] *Are pre-nuptial agreements enforceable?*, Bar & Bench, <https://www.barandbench.com/columns/are-pre-nuptial-agreements-enforceable> accessed on 04-06-2022.

⁵ *Manu Smriti*, IX, 64-68.

⁶ 1950 SCJ 514

consent (consent being a necessary element of contract), his marriage is invalid. In this case a vast, varied and versatile discussion on Hindu Law was made in the light of various scriptures, authorities on Hindu Law and Judicial decisions and the Federal Court held that Hindu marriage is a sacrament. Thus, Marriage according to Hindu law is a sacrament and a holy union for the performance of religious duties⁷.

Although marriages in Hindus has always been regarded as a sacrament but the enactment of several legislations such as Hindu Marriage Act of 1955 (*An Act to amend and codify the law relating to marriage among Hindus*), Hindu Widow remarriage Act of 1950, Prevention of Domestic Violence Act of 2005, Prohibition of child marriage Act of 2006, Indian Penal Code of 1860, Civil marriage act of 1954, etc brought drastic changes in the nature of marriage. These legislations have acted their best to make marriage a paradise rather than a suffocating shackle.

In light of the above, the High courts in various judgements⁸ have refused to enforce prenuptial agreements. Even if they could be entertained, the pre-requisites of entering into such agreements is that the parties should comply with the provisions of Indian Contract Act, 1872 which lays down the law regarding competency to contract⁹, validity of contracts¹⁰, voidness of contracts¹¹, etc. Thus, the terms of the contract must not be opposed to “public policy”, must not be forbidden under any law or must not prejudice the rights of either of the parties. The expression “public policy” is ambiguous in nature as society is dynamic and so is its policy, hence it is inclusive term capable of varied interpretations.

EFFICACY OF PRENUPTS

“1.36 million people in India are divorced. That is equivalent to 0.24% of the married population, and 0.11% of the total population,” laid a 2016 BBC report¹². On the other hand if we look into the records of domestic violence during coverture, the data is shocking as the rate of reported cases

⁷ Swarajya Lakshmi v G G Padma Rao AIR 1974 SC 165

⁸ A.E. Thirumal Naidu vs Rajammal Alias Rajalakshmi (1967) 2 MLJ 484 <https://indiankanoon.org/doc/1642949/>; Sribataha Barik vs Musamat Padma AIR 1969 Ori 112 <https://indiankanoon.org/doc/1911881/>.

⁹ Section 11 Indian Contract Act, 1872.

¹⁰ Section 10, section 2[h] Indian Contract Act, 1872.

¹¹ Section 24-30 Indian Contract Act, 1872.

¹² Deeksha Bhardwaj, [3 February, 2019 10:28 am IST] *Does India's low rank on global divorce rate indexes mean happy marriages or social pressure?*, The Print, <https://theprint.in/talk-point/does-indias-low-rank-on-global-divorce-rate-indexes-mean-happy-marriages-or-social-pressure/187180/>.

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of cruelty by husband or relatives in India was 28.3 in 2018, an increase of 53% from 2001¹³. Thus, it is important to note that the women notwithstanding such torture in marriage bear the brunt of such marriage due to social pressure and financial constraints.

Although there are provisions of maintenance in various laws, but the justice is very expensive, hectic and time consuming due to which household women find litigation beyond their reach and opt to remain mum and continue with their sufferings. It is believed that the introduction of prenuptial agreements would help women raise their voice, also it would serve as a deterrent to the abuser as he would feel that the wife has right to claim the specified sum and assets by way of specific performance of contract.

Moreover, the provisions regarding custody of child and maintenance post divorce ensure that the child as well his/her parents don't indulge in gruesome, tiring and often embarrassing litigation and things could be smoothly settled. This would ensure best interest of the child by ensuring his/her emotional well being.

NEED OF LEGALISING AND LIBERALISING PRENUPTS

As stated, the number of divorce cases has been rising, what is even more alarming is the fact that the number of domestic violence cases are also hiking exponentially as seen during covid 19 pandemic lockdown, NCW[National Commission For Women] Chief Rekha Sharma said, *“Domestic violence cases have doubled from what it was before the lockdown. The cases of domestic violence are high in Uttar Pradesh,*

¹³ Dandona, R., Gupta, A., George, S. *et al.* (2022) Domestic violence in Indian women: lessons from nearly 20 years of surveillance. *BMC Women's Health* 22, 128. <https://doi.org/10.1186/s12905-022-01703-3> .

*Bihar, Haryana and Punjab*¹⁴.” Thus, it is the need of the hour to legalise prenups so that no woman should remain silent just because of financial constraints. It is also suggested that smooth and inexpensive process should be laid for enforcing such contracts to ensure its utility.

PRENUP OF EXPECTATIONS

Not just introduction and legalisation, but also liberalisation of prenups is important. By liberalisation it is meant that the terms of the agreement must not only include financial aspect but also personal aspects. There need to be “prenup of expectations”. It is said that expectation is the cause of all sufferings in a relationship. Gone are the days when marriage used to be mere formality or compulsion and once in marriage always in marriage was the supposed notion.

Nowdays, the society has become modern and global, women have become financially independent, they long for love, affection and have many dreams regarding their marriage, there are many aspirations and expectations with which they enter in the union of marriage such expectations may include that their spouse would take them for dinner every week or would cook for them twice in a week or would help her in household activities.

The same holds good for husband as well, he too might have certain expectations from his future wife such as she would take care of his family or would pay attention to household chores along with her professional work. It is believed that chalking out such expectations and arriving at an amicable agreement would make marriage a paradise and it would reduce the chance of breakdown of marriage.

It is however, to be remembered that such terms can be altered at any subsequent time. moreover, it has to be ensured that neither party is unduly influenced or misrepresented by the other party i.e the consent must be free which is defined under section 14¹⁵.

PRENUP OF DECLARATION

It is many a times seen that during litigation either for divorce or for maintenance or for custody, the counsels of opposite sides levy fake charges upon each other and concoct stories to strengthen their locus standi. Such charges may include dowry demands before marriage,

¹⁴ Esha Roy, [April 3, 2020 11.42.15 pm] *Domestic violence, abuse complaints rise in coronavirus lockdown: NCW*, The Times Of India, <https://indianexpress.com/article/india/domestic-violence-abuse-complaints-rise-in-coronavirus-lockdown-ncw-6344641/> assessed on 04-06-2022

¹⁵ Indian Contract Act, 1872.

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compulsion to stay with in laws before marriage or likewise. A prenup having declaration by wife that she or her family members are not asked for dowry before marriage or she was not compelled to leave her job before marriage would give some relief to the husband, in this way litigation could be saved from the clutches of unnecessary hassle of facts. It would also make laws and judgement more unbiased and clear.

PRENUP OF RIGHTS

The concept of rights are given much emphasis in today's times, however, in Muslim law, a woman is granted very few rights, she does not have any right to give divorce to her husband, nor does she have right to refuse halala, nor does she have right to maintenance even after iddat period save as is provided under section 3¹⁶. Thus, apart from her nikahnama she could enter into a prenup agreement stating the conditions in which she could take divorce from her husband or could refuse halala or could claim maintenance even after iddat period. It is the need of the hour either to legislate on the rights of Muslim women or to grant them this right to enter into such binding agreements.

CONCLUSION

In the light of the above, it could be stated that today the women is walking hands in hands with men, they are speaking for themselves and are longing for love and equality. Both men and women want to lead their life on their own terms, no one wants to compromise. Thus, marriage is now more practical and needs oriented. Keeping in mind such dynamism, it is required to not just legalise but also liberalise prenuptial agreements in India. Though such idea could be regarded ahead of times still such step is required to pace with the fast globalising and modernising world. However, this does not mean that one should forget one's culture or one's religion, rather it means that a balance needs to be made between religion and individual demands and freedoms so that both society and individual can survive lovingly without any compromise and the right to life and liberty granted by our Constitution under Article 21 could be utilised in a wholesome manner.

¹⁶ The Muslim Women [Protection of Rights On Divorce] Act, 1986.

CHAPTER: 18

Home Is Where the Heart of Structural Violence Is: How the Construction of the Public-Private Binary in Caste and Gender Violence Reinforces the Separation between Criminal and Family Law

Anuka Bachawat^{1*}

ABSTRACT

The ongoing challenge of Exception 2 in Section 375 of the Indian Penal Code which decriminalizes marital rape, before the Delhi High Court,² prompts us to look closely at violence as it exists in homes. Clearly, there is something about the perception of violence in the home that makes it antithetical to criminality. The purpose of this paper is two-fold. Firstly, to explore how violence within homes is constructed, domesticated and invisibilized by socio-legal frameworks. In other words, this section will understand why instances of caste and gender violence within homes are not legally recognized as criminal offences. What is it about domestic violence against marginalized groups that place it outside the ambit of a public wrong? This will be explored against the backdrop of the socio-political power structures of caste and gender that surround the law.

Violence in family law and criminal law, is separated by unstable boundaries. Alison Young asserts that domestic violence and assault are distinguished on the basis that assault is a coercive act that occurs “in the street, in a public house, or in some other public venue”.³ Broadly, ‘public’ refers to the spaces in domestic and family life that the law enters.⁴ On the other hand, the ‘private’⁵ is the corner of the domestic and familial realm that the law is reluctant to enter, because its concerns are believed to lie outside the legal ambit. Domestic violence, by implication is not public and criminal; rather this decriminalization of the private leaves “conjugal violence in a border zone between criminality and civility, between

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² Apurva Vishwanath, ‘Explained: The Debate Over Marital Rape’ *The Indian Express* (New Delhi, 23 January 2022) <https://indianexpress.com/article/explained/explained-debate-over-marital-rape-7732470/> accessed 28 Jan 2022

³ Alison Young, ‘Imagining Crime: Selected Excerpt on Kiranjit Ahluwalia’, (1992) Sage 32

⁴ Partha Chatterjee, ‘The Nationalist Resolution of the Women’s Question’, (1987) Centre for Studies in Social Sciences

⁵ Ibid.

coercion and consent."⁶ Section I of the paper will explain how the family law framework from colonial India to the present, has created and sustained the public-private binary.⁷ Section II will attempt to deconstruct the public-private binary by showing that the caste and gender hierarchies of the public sphere are reproduced and amplified within the private sphere.⁸

This paper's second endeavor is to illuminate the potential of the right to privacy under Article 21 to dismantle the existing epistemic caste and gender violence within the home. Highlighting the duality of the Article 21⁹ right to privacy, the paper illustrates that while the 'private' is often deployed by Indian courts to avoid engaging with instances of caste and gender violence within the home, the right to privacy embodies the potential to secure accountability for this violence. Section III will extend this argument to the Puttaswamy¹⁰ judgement to say that the Article 21 right to privacy is animated by the competing claims of the preservation of family and the right to individual autonomy, such that the former is placed over the autonomy of individuals belonging to caste and gender minorities.

Section IV will demonstrate how the notion of privacy renders invisible, gender-based violence within the family by analysing judicial pronouncements on the restitution of conjugal rights (hereinafter RCR). In reading RCR as a private conjugal matter and excluding it from Article 21, the court overlooks the possibility of sexual violence that could accompany a woman's restitution to her conjugal home, thus freeing the husband of accountability.¹¹ Section V understands the role of domestic privacy in invisibilising caste-based violence through a close reading of four judgements¹² on The Scheduled Castes and the Scheduled Tribes

⁶ Alison Young, 'Imagining Crime: Selected Excerpt on Kiranjit Ahluwalia', (1992) Sage 32

⁷ Tanika Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal', (2000) Feminist Studies Volume 26, Issue 3

⁸ B.R. Ambedkar, 'Their Mechanism, Genesis and Development', *Dr. Babasaheb Ambedkar: Writings and Speeches*, (Bombay: Education Department, Government of Maharashtra 1979), Vol. 1 pp. 3-22

⁹ The Constitution of India, 1950 art. 21

¹⁰ Justice K. S. Puttaswamy (Retd.) v. Union Of India, AIR 2017 SC 4161

¹¹ Flavia Agnes, 'Hindu Conjuality: Transition from Sacrament to Contractual Obligations' in Archana Parashar and Amita Dhanda (eds), *Redefining Family Law in India* (Routledge 2008)

¹² Tunnu Singh v. State of Bihar, Dharamdas alias Kunjilal v. State of Madhya Pradesh, Parsa Somaiah v. State of Andhra Pradesh

(Prevention of Atrocities) Act, 1989 (hereinafter SC/ST Act).¹³ In these decisions, brutalities do not fall under the SC/ST Act¹⁴ unless performed in public. The interpretation of the word 'private' is used by courts to dismiss instances of caste-based violence and assault that take place in private or domestic spaces. The SC/ST Act¹⁵ deals with criminal matters that do not fall within the purview of family law. Yet, this section is relevant because it explores the relationship between caste violence and private domestic spaces, to illustrate, that the current legal construction of home limits individual autonomy, and privacy rights, to the upper-caste family. The concluding section ties together the analyses of privacy in RCR and SC/ST Act jurisprudence, to illustrate that violence in the 'private' domestic sphere is a product of patriarchal and upper-caste constructions of family. Looking at family law alongside the constructed gravity of violence in criminal law, pushes us to register the gravity of caste and gender violence within homes, rather than seeing it as trivial and mundane. Further, it promotes an interpretative approach to Article 21 where right to privacy is used to enable individual autonomy and dismantle caste and gender hierarchies.

Keywords - family law, domestic violence, criminality, public, private, caste, SC/ST Act, restitution of conjugal rights, Article 21

INTRODUCTION: CONSTRUCTION OF THE PUBLIC-PRIVATE BINARY IN FAMILY LAW

An important characteristic of colonial nationalist politics was its attempt to distinguish Indian cultural life, from modern British socio-cultural values.¹⁶ These areas were marked as the private domain and kept beyond the reach of British policy-makers.¹⁷ Women, as receptacles of culture, were confined to the private realm, while the public sphere was populated by men and left to be shaped by British legal frameworks. Partha Chatterjee highlights that the women of the private sphere, represented modern national culture and were constructed as "better than Western

¹³ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

¹⁴ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

¹⁵ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

¹⁶ Partha Chatterjee, 'The Nationalist Resolution of the Women's Question', (1987) Centre for Studies in Social Sciences p348

¹⁷ Partha Chatterjee, 'The Nationalist Resolution of the Women's Question', (1987) Centre for Studies in Social Sciences p348

women, traditional Indian women and low- class women".¹⁸ These educated, upper-caste women were to become ideal, educated housewives and continue to occupy the private sphere of the family.¹⁹

However, despite the Hindu nationalist commitment to British non-interference in family life, social reform movements brought about legislation so that law partly stepped into the private familial realm. Sati was legally outlawed by the *Sati Regulation Act 1829*,²⁰ while widow remarriage and child marriage, "followed only upon strenuous-and often dubious-reinterpretations of the scripture by liberal reformers".²¹ However, these reforms only dealt with mitigating violence against women who were about to get married or those whose husbands were deceased. In other words, the reforms were not meant for married women. Further, the reforms were for violence that took place in public. The ban on sati sought to curb its public spectacle in a funeral while child marriage was an equally public event. Thus, the position of the Hindu wife in the private familial realm was not contemplated by these reforms.

The rights of married women were partially addressed in post-Independence India by the introduction of the *Dowry Prohibition Act 1961*²² and the *Domestic Violence Act 2005*,²³ both of which acknowledge and seek accountability for violence against wives. While these reforms highlight the existence of violence in the privacy of the home, they fail to prioritise married women's autonomy which would dismantle patriarchal structure of which violence is borne. Married women's agency being neglected by 21st century family law reform is exemplified by the persistence of the restitution of conjugal rights under Section 9 of the *Hindu Marriage Act*²⁴ and the exclusion of marital rape from Section 375 of the *Indian Penal Code*.²⁵ Limitations placed on women's conjugal rights by RCR and the absence of a marital rape provision reveals that the state and judiciary seek to maintain a clinical separation of the public assault and private conjugal violence.

¹⁸ *Id.*

¹⁹ Chitra Sinha, 'Debating Patriarchy- The Hindu Code Bill Controversy in India 1941-1956', (OUP 2012)

²⁰ Bengal Sati Regulation 1829

²¹ Tanika Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal', (2000) *Feminist Studies* Volume 26, Issue 3

²² Dowry Prohibition Act 1961

²³ Protection of Women from Domestic Violence Act, 2005

²⁴ Hindu Marriage Act 1955 s9

²⁵ Indian Penal Code 1860

The Delhi High court in the *Harvinder Kaur*²⁶ infamously equated the introduction of constitutional rights within to introducing a bull in a china shop, while debating the constitutionality of Section 9 of the *Hindu Marriage Act 1956*.²⁷ Similarly, in the *Independent Thought*²⁸ case, the Supreme Court interpreted the *Prevention of Child Marriage Act* and the *POCSO Act* in consonance with rights under Articles 21 and 14, to recognize rape within child marriage i.e. non-consensual activity of a man with a woman below the age of eighteen. However, the judgement excludes the rape of married women over the age of 18 years²⁹ as such instances of violence are seen as too private for the State to interfere.

ARTICLE 21 RIGHT TO PRIVACY AND ITS LIMITATIONS

In 2017, the Supreme Court established the contours of the right to privacy in the highly publicized *Puttaswamy*³⁰ judgement. The basic tenets of the Article 21 right to privacy according to the *Puttaswamy*³¹ judgement, were that privacy is a natural right, and covers at least three aspects i.e. intrusion of the physical body, informational privacy and the privacy of choice.³² The judgement seeks to protect individual bodily autonomy through Article 21. However, the *Puttaswamy*³³ decision may prove problematic in family law because it insulates the liberty of the home from State intervention. Quoting the *Kharak Singh*³⁴ decision, the judgement says, “in the last resort, a person's house, where he lives with his family, is his “castle”; it is his rampart against encroachment on his personal liberty.”³⁵ The insulation of the home, effected by this interpretation of Article 21, fails to account for the patriarchal violence within families that necessitates State intervention.

Justice Chandrachud places both family and individual autonomy at the core of privacy in the following quote: “Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right

²⁶ *Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Delhi 66

²⁷ *Id.*

²⁸ *Independent Thought v. Union of India* 2017 (10) SCC 800

²⁹ *Ibid.*

³⁰ *Justice K. S. Puttaswamy (Retd.) v. Union Of India*, AIR 2017 SC 4161

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295

³⁵ *Justice K. S. Puttaswamy (Retd.) v. Union Of India*, AIR 2017 SC 4161

to be left alone”.³⁶ Thus, the right to privacy as laid down by the *Puttaswamy*³⁷ judgement, safeguards individual autonomy as well as the institution of family. The court does not propose any guidelines on which of the two aspects of privacy must be prioritized. The next two sections of the paper argue that the individual autonomy of the oppressed must be placed over patriarchal family formations, when the interpretation of Article 21 is not in consonance with egalitarian constitutional ideals. The following sections of this paper will provide instances of the misuse of the right to privacy to the detriment of caste and gender minorities, to caution against its oppressive potential. As family lawyer Malavika Rajkotia asserts, “we need to drill further (which *Puttaswamy*³⁸ leaves scope for) to focus on individual rights balanced with compelling rights of other members of the family”.³⁹

THE GENDERED ‘PRIVATE’: RCR JURISPRUDENCE

Although this paper deals specifically with Hindu personal law, the concept of RCR has been embossed into the personal laws of various religious communities. In addition to its presence in Section 9 of the *Hindu Marriage Act 1955*,⁴⁰ RCR can be found in Chapter VII of the *Indian Divorce Act 1869* for Christians⁴¹ as well as Muslim uncodified personal law⁴². Section 9 of the *Hindu Marriage Act 1955*⁴³ lays down that aggrieved parties can apply to the district court for a decree of restitution of conjugal rights “when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other”.⁴⁴ Essentially, an RCR decree compels the withdrawing partner to cohabit with their spouse. The disproportionate burden of the compulsion to cohabit is borne by women due to existing gender inequalities.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Malavika Rajkotia, ‘Thinking Privacy in Family’, 2019 *Seminar*, <https://www.india-seminar.com/2019/721/721_malavika_rajkotia.htm> last accessed 19 September, 2021

⁴⁰ Hindu Marriage Act 1955

⁴¹ Shivank Singh, “A Rights-Based Jurisprudence Demands Abolition of Legal Provision for ‘Restitution of Conjugal Rights’” *The Leaflet* available at <https://www.theleaflet.in/a-rights-based-jurisprudence-demands-abolition-of-legal-provision-for-restitution-of-conjugal-rights/> last accessed 28 Nov 2021

⁴² *Monshee Buzloor Ruheem v. Shumsoonissa Begum* 11 Moo Ind App 55

⁴³ Hindu Marriage Act 1955 s9

⁴⁴ Hindu Marriage Act 1955 s9

The first instance of resistance to RCR came through the *Rukhmabai*⁴⁵ case of 1885.⁴⁶ Here Rukhmabai resisted a decree of RCR by her husband when the court ordered her to either live with her husband or face imprisonment.⁴⁷ Eventually Rukhmabai did not have to comply with the decree.⁴⁸ However, married women's struggle against the limits to bodily autonomy imposed by RCR continues with the persistence of Section 9.⁴⁹ The constitutionality of RCR is pending before a Supreme Court bench as several pleas challenging the validity Section 9 were filed this year.⁵⁰

Over the years, RCR has been struck down and subsequently reinstated. The jurisprudence in *T. Sareetha v. T. Venkata Subbaiah*⁵¹ used the right to privacy under Article 21 to declare RCR constitutionally invalid. The judgment quoted *Kharak Singh*⁵² to assert that "the right to privacy forms a part of the right of personal liberty under Article 21".⁵³ It must be noted that this decision came in 1983, years before the *Puttaswamy*⁵⁴ ruling. Further, *T. Sareetha* relied on the US decision *Griswold v. Connecticut*⁵⁵ to highlight that the marital couple is not an independent entity but an association of two individuals, to highlight that the right to privacy belongs to individuals.⁵⁶ Building on this premise, the court ruled that the right to privacy cannot be subordinated by state interests in case of RCR.⁵⁷

⁴⁵ Dadaji Bhikaji v. Rukhmabai (1886) ILR 10 Bom 301

⁴⁶ Trends Desk, "Who was Rukhmabai Raut" *The Indian Express* Nov 22 2017 available at <https://indianexpress.com/article/who-is/who-was-rukhmabai-raut-4949058/> last accessed 28 Nov 2021

⁴⁷ Trends Desk, "Who was Rukhmabai Raut" *The Indian Express* Nov 22 2017 available at <https://indianexpress.com/article/who-is/who-was-rukhmabai-raut-4949058/> last accessed 28 Nov 2021

⁴⁸ *Ibid.*

⁴⁹ Hindu Marriage Act 1955 s9

⁵⁰ "SC terms 'important' pleas seeking striking down of provisions on conjugal rights" *The Hindu* Jul 8 2021 available at <https://www.thehindu.com/news/national/sc-terms-important-pleas-seeking-striking-down-of-provisions-on-conjugal-rights/article35210962.ece> >last accessed 28 Nov 2021

⁵¹ AIR 1983 AP 356 para 22

⁵² *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295

⁵³ AIR 1983 AP 356 para 22

⁵⁴ *Justice K. S. Puttaswamy (Retd.) v. Union Of India*, AIR 2017 SC 4161

⁵⁵ 381 U.S. 479 (1965)

⁵⁶ AIR 1983 AP 356 para 22

⁵⁷ AIR 1983 AP 356 para 22

However, a year later in 1985, the *Harvinder Kaur*⁵⁸ decision found Section 9 constitutionally valid on the basis that “the leading idea of RCR was to preserve marriage”⁵⁹ rather than to further gender discrimination. In upholding RCR due to its role in preserving marriage, *Harvinder Kaur*⁶⁰ places state interests over individual autonomy. This goes against the privacy-centric *T. Sareetha*⁶¹ decision. The Supreme Court, siding with *Harvinder Kaur*⁶² upheld the validity of RCR in the *Saroj Rani*⁶³ case. This indicates that the legal concept of privacy is not seen as compatible with Hindu marriage, which sees the couple as ‘twosome’ rather than a union of two autonomous individuals.⁶⁴ The consent of a wife on whom an RCR decree is issued, becomes immaterial to courts since it is absent from the coerced cohabitation clause that is Section 9. Further, the treatment of the woman after an RCR decree is issued, becomes an issue reserved for the privacy of her home and the members of the family rather than a rights issue for the court to grapple with. This is unlike cases of criminal assault which are non-compoundable⁶⁵ and dealt with by courts comfortably.

THE ‘PRIVATE’ IN CASTE: SC/ST ACT

This section illustrates that although classified as criminal, courts treat conjugal caste assault in the same quasi-criminal manner as domestic gender-based violence. We can extend understanding of intra-family violence derived from RCR jurisprudence to analyse inter-family caste violence in *SC/ST Act* decisions. The Statement of Objects and Reasons of the *SC/ST Act*⁶⁶ states that it was enacted given the rise in the number of attacks on individuals belonging to Scheduled Castes and Tribes. The new legislation was enacted in 1989 since existing laws like the *Protection of Civil Rights Act 1955* and the *Indian Penal Code* were found to be inadequate to curb these grave crimes.⁶⁷ Section 3(1)(x) of the *SC/ST Act* deals with caste violence in public spaces. When an individual “intentionally insults or intimidates with intent to humiliate a member of a

⁵⁸ *Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Delhi 66

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *T. Sareetha vs T. Venkata Subbaiah* AIR 1983 AP 356

⁶² *Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Delhi 66

⁶³ *Smt. Saroj Rani vs Sudarshan Kumar Chadha* 1984 AIR 1562

⁶⁴ *Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Delhi 66

⁶⁵ The Indian Penal Code 1860 s.302

⁶⁶ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁶⁷ The Statement of the object and reasons for SC/ST ACT 1989

Scheduled Caste or a Scheduled Tribe in any place within public view”⁶⁸ the action constitutes an atrocity under Section 3(i)(x) of the *Act*.⁶⁹ This section explores how the interpretation of the word ‘public’ invisibilizes caste violence and fails to safeguard the rights of Dalit families in ‘private’.

The cases analysed below are incidentally pre-*Puttaswamy*. This is because the search for the interpretation of ‘public’ in Section 3(i)(x) of the *SC/ST Act*⁷⁰ only yielded decisions before 2017. It remains to be seen how or whether Article 21 will apply to decisions on caste-atrocities. *Tunnu Singh and Ors v. State of Bihar*⁷¹ is an example of how courts refrain from classifying assault by upper-caste individuals in the home of a Dalit family as an atrocity under Section 3(i)(x) of the *SC/ST Act*.⁷² Here the victims, a married Dalit couple, were assaulted at the *darwaza* or doorway of their home, by upper-caste men.⁷³ The court did not find that an attack at the doorway of a home constituted a crime within public view.⁷⁴ The Madhya Pradesh High Court interpreted ‘public view’ under Section 3(i)(x) similarly in *Dharamdas alias Kunjilal v. State of Madhya Pradesh*.⁷⁵ The case involved caste-based slurs directed at an SC female Sarpanch by an upper-caste man.⁷⁶ The court dismissed the complaint under the *SC/ST Act* because the incident took place in the complainant’s home when no witnesses were present and thus the offence did not take place within public view.⁷⁷ Similarly, in *Parsa Somaiah v. State of Andhra Pradesh*,⁷⁸ caste slurs uttered in a Dalit complainant’s field was not seen as an offence in ‘public view’ under the *Act*.^{79, 80}

⁶⁸ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁶⁹ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁷⁰ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁷¹ *Tunnu Singh and Ors v. State of Bihar* 2008 (1) PLJR 264

⁷² The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 s.3

⁷³ *Tunnu Singh and Ors v. State of Bihar* 2008 (1) PLJR 264

⁷⁴ *Id.*

⁷⁵ *Dharamdas alias Kunjilal v. State of Madhya Pradesh* MPH 2012 (6)123

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Parsa Somaiah v. State of Andhra Pradesh* 2015 (1) ALD(CrL) 143 (AP)

⁷⁹ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁸⁰ *Parsa Somaiah v. State of Andhra Pradesh* 2015 (1) ALD(CrL) 143 (AP)

These cases exemplify how the legal separation of the public from the private protects perpetrators of caste. This is unsurprising in the context of B.R. Ambedkar's essay *Castes in India*⁸¹ which demonstrates that Indian Hindu society is based on caste segregation and violence through social practices like endogamy, sati and enforced widowhood. While these particular social practices are no longer the cornerstones of casteism, the failure of *SC/ST Act* jurisprudence to uphold the rights of Dalit families on their private property shows that society continues to be founded on caste-violence. To courts, the privacy of the home is impervious to the systemic caste violence of the public. The silent state sanction of this private violence reveals an impulse to preserve an upper-caste patriarchal status quo.⁸² There are two issues can be flagged in the above analysis. First, the cases analysed were decided before the *Puttaswamy* judgement⁸³ and leaves room the incorporation of Article 21 rights into caste violence jurisprudence. Second, caste violence in homes exposes the intricate boundaries between criminal and family law. It presents the possibility of inter-family caste disputes in domestic spaces bearing a greater affinity towards family law rather than criminality, thus disrupting the strict boundaries between the two areas of law.

CONCLUSION

This paper analyzed the implications of judicial interpretations of the 'private' on the agency of gender and caste minorities. Sections III and IV identified how the public-private binary adversely impacts the rights of Dalits and married women, by invisibilizing their autonomy in domestic spaces. Section II contextualized this analysis in the tension between family and individual rights in the Article 21 right to privacy as interpreted in the *Puttaswamy* judgement.⁸⁴ For the substantive realization of the ideals of the *Puttaswamy* judgement,⁸⁵ minorities' right to privacy must be interpreted with priority given to individual autonomy. The need for this approach is substantiated by the identification of the flaws in RCR and *SC/ST Act* jurisprudence. In the context of RCR, the agency of women and Article 21 rights must be placed above the preservation of the institution

⁸¹ B.R. Ambedkar, 'Their Mechanism, Genesis and Development', *Dr. Babasaheb Ambedkar: Writings and Speeches*, (Bombay: Education Department, Government of Maharashtra 1979), Vol. 1 pp. 3-22

⁸² B.R. Ambedkar, 'Their Mechanism, Genesis and Development', *Dr. Babasaheb Ambedkar: Writings and Speeches*, (Bombay: Education Department, Government of Maharashtra 1979), Vol. 1 pp. 3-22

⁸³ Justice K. S. Puttaswamy (Retd.) v. Union Of India, AIR 2017 SC 4161

⁸⁴ Justice K. S. Puttaswamy (Retd.) v. Union Of India, AIR 2017 SC 4161

⁸⁵ *Ibid.*

of marriage. Similarly, to facilitate caste-sensitive jurisprudence, ‘public’ under Section 3(i)(x) of the *SC/ST Act* must be interpreted broadly such that proven atrocities can be brought under the ambit of the statute, such that the individual autonomy of Dalits can be enabled. In addition to these practical suggestions, the paper reveals the patriarchal, casteist stakes of the law in preserving the distinction between criminal law and family law as well as the public and private. Alison Young who takes apart the public-private binary, and highlights the narrow interpretation of violence within the home, in her critique of the crimino-legal tradition says, “the domestic order can see only divorce, broken homes, child abuse, conjugal homicide”⁸⁶ yet “within the home, there is only the unhomely, the uncanny”.⁸⁷ Inter-caste violence in homes or the domestic subjugation of the agency of the wife, are unhomely to the *SC/ST Act* and RCR jurisprudence. Yet given the prevalence of these conditions on the ground, domestic violence and criminality is uncannily familiar and far from absent in the home. Therefore, dismantling oppressive socio-legal hierarchies demands, that the law acknowledge the constructed unfamiliarity of public violence that manifests in the form of criminality within marriage and caste violence in houses, in the familiar private space of the family home.

⁸⁶ Alison Young, ‘Imagining Crime: Selected Excerpt on Kiranjit Ahluwalia’, (1992) Sage 32

⁸⁷ *Ibid.*

CHAPTER: 19

MARITAL RAPE: AN IMPEDIMENT ON WOMEN'S RIGHT IN INDIA

Pratibha Sahu^{1*}

ABSTRACT

Women in India have not yet achieved equality or are able to fully exercise their rights as a result of the patriarchal structure of the country. The marriage relationship also reflects this imbalance which is a threat to gender neutrality and gender equality which our constitution aims to achieve. In Indian culture, there happens different types of violence against wives during marriage, one such is marital rape. In this case, consent is irrelevant. It is excluded from the Indian Penal Code's definition of rape in Section 375. In India, forcing a wife into sexual intimacy by a husband is therefore legal. Our judicial system ignores marital rape since the crime is not recognised as rape, despite the fact that it's a severe problem that our legislature has failed to acknowledge. Marital rape has very serious repercussions that go far beyond physical harm; it also causes emotional and psychological harm. This paper, attempts to examine the idea of marital rape, how it relates to the idea of gender equality, and how it violates the constitutionally protected rights of women under the different dimensions of Art. 14, 15, 19 (1) (a) and 21.

Keywords - Marital rape, Consent, Constitution, Gender equality, India.

INTRODUCTION

“Marriage Is Like An Unconditional Duties That

One Decides To Perform.”

-Bhagwat Gita

In India marriage is considered to be a sacred social institution – a collaboration of two souls - a sacred bond based on trust, mutual love and

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respect towards each other not to forget followed by a bunch of rights and duties arising out of it.

We have heard so many and so many beautiful things about marriage but the flashpoint that now catches the attention of most of the people is that whether the sanctity still persists in such a celebrated sacred social institution of marriage?

In India, in the recent past years the institution of marriage has been greatly questioned on the surface base that does marriage gives the ultimate rights in the hands of the man or the husband to dominate over the women or his wife (as they are considered to be weaker and stands on the lower footing) to get all his wishes and desires to be fulfilled either in a harmonious manner or by forceful imposition. A typical conservative and orthodox notion of the Indian society is that though marriage is a sacred institutional bond between a man and women but at the same time it is also a contract between the husband and the wife solely relying on the concept of 'consent', which is governed mainly by the customs, norms, values, morals and ethics that the society follows. As rightly observed by a British jurist, Matthew Hale: "Marriage was a legal contract by which a woman 'gave herself' to her husband for life."² It is because of this vague notion the sexual autonomy of a women gets diminished or comes to an end as it is considered that the women has surrendered herself to her husband and he has all the legal right over his wife which also means that by all legal means he is entitled to fulfil his sexual desires through his wife in accordance "***with her will***" in a peaceful manner or even "***without her will and against her consent***" in a coercive manner by applying his force and establishing his dominance over her.

Marital rape, also known as the spousal rape, is when someone participates in sexual behaviour with their spouse without their consent.³ Marital rape is when a man engages in sexual activity with his wife against her will, whether out of risk to their physical safety, out of a perpetrator's dishonesty, or for any other reason. Lack of authorisation is the most important factor; physical violence does not necessarily follow. Marital rape is the term used to describe acts of domestic abuse and sexual abuse that take place between married people. Although customarily acknowledged a right of spouses, sexual activity between partners is now widely seen as rape and is becoming more criminalised but India deviates

² Ishita Singh, *State Of Women's Sexual Autonomy In India*, HUMAN RIGHTS PULSE, (Jun 18, 2022, 10:02 AM), <https://www.humanrightspulse.com/mastercontentblog/state-of-womens-sexual-autonomy-in-india>.

³ Ishwar Singh, et.al, *An Insight To Marital Rape*, Vol. II, Indian Journal of Integrated Research in Law [2022].

it from the main stream and takes a different stand onto it and does not criminalises the immoral act of marital rape and over to that it exempts and safeguards marital rape from getting criminalised and penalised. India keeps marital rape outside the purview of “**Rape**” as defined under S.375 and S. 376 of the Indian Penal Code, 1860. Marital rape is put into exception under S. 375. This is despite the fact that rape is condemned by international accords.

Therefore, the consideration of marital rape as a legal act in India does not only inculcate the fear of insecurity into the hearts and the minds of the women but it also puts a dreadful impact on the women's sexual rights in India and gender equality. The non – penalising of marital rape which is a dreadful offence violates the sexual rights of women and overshadows the ideology of gender equality in India enshrined under Art. 14, 15, 19 (1) (a) and 21 of the Indian Constitution.

UNDERSTANDING THE CONCEPT OF MARITAL RAPE IN INDIA

Rape is rape, and marital rape is rape. These two concepts do not have much difference between them, other than the fact that the perpetrator of marital rape can only be the spouse and no one else.

When a husband engages in non-consensual sexual activity with his wife, it is rape in the marriage. Similar to this, when a wife engages in non-consensual sexual activity with her husband, it counts as marital rape. So, although marital rape is a crime regardless of gender, it is almost never committed by the woman; instead, the husband is responsible in the vast majority of cases. Few cases of wives raping their husbands have been publicly published anywhere in the world, although it does happen occasionally. Marriages inevitably involve sexual activity, yet marital rape is entirely antithetical to the concept of marriage.⁴

Rape occurs whenever someone engages in or an attempt to engage in sexual activity with a partner or mate without the partner's or mate's free consent. The Indian Penal Code, 1860 defines “rape” in the following manner:

— “**Section 375⁵- Rape** – A man is said to commit —rape if he—

⁴ Dr. Raj Kumar, Manish Dalal, *Marital Rape in India: A Critical Study*, (May 16, 2021, 10:30 AM), <https://ssrn.com/abstract=3847118>.

⁵ Indian Penal Code, 1860, ACT NO. 45 OF 1860, Acts of Parliament, 1860 (India).

- a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

Firstly - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

Explanation -1. — For the purposes of this section, “vagina” shall also include labia majora. **Explanation 2.** —Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. —A medical procedure or intervention shall not constitute rape.

Exception 2. —Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Act 13 of 2013 changed Section 375's definition of rape. The definition is broken down into three sections: first, the circumstances under which a rape will be considered to have occurred; second, the justification; and third, the exemption. While the entire section complies with the law, the exception 2 of the section breaches the fundamental rights of women. It violates a woman's right to a dignified, healthy life and her equality before the law.⁶

When a husband engages in sexual activity with his wife, who is over the age of 15, forcibly or against her will, it is not regarded as rape under section 375, exception 2 of the Indian Penal Code, 1860. As a result, section 375 of the IPC permits marital rape. Indian marriage laws reflect the heteronormativity of Indian culture, which supports patriarchy.

It is also because of the reason that since its inception, Indian society has been patriarchal or male-dominated. Due to the fact that victims of marital rape are typically women rather than males, it is for this precise reason that marital rape is typically not seen as a crime in Indian society. Marital rape would have been illegal in India long ago if males had been the victims. There aren't many people that advocate for outlawing and making marital rape a crime in India. The most crucial factor in the eradication of any social ill is society. A society cannot completely purge social evils unless the society as a whole rejects them. Marital rape continues to be practiced in India since the country's society has not yet come out against it.⁷

MARITAL RAPE AND THE CONSTITUTIONAL PROVISIONS

The founding fathers of the Indian Constitution were extremely familiar with the injustices suffered by women and other socially vulnerable groups. They designed a constitution that not only protected women's rights but also empowered the state to take affirmative action for their safety and advancement, keeping in mind the injustices women endured and their lowly standing in India's patriarchal society.

The Indian Constitution's Article 14 guarantees everyone's equality before the law and equal protection under the law. Equal protection under the law

⁶ Prateek Mishra, Marital Rape and Violation of Constitutional Provisions, Vol. II, International Journal of Law Management & Humanities [IJLMH], 2019

⁷ Harshika Mehta, *Marital Rape and the Indian Legal Scenario*, Vol. IV, Issue 3, International Journal of Law Management & Humanities [2021].

entails that the state must not deny its citizens the same rights. On the other hand, "equal protection of the laws" refers to the obligation of the State to provide preferential treatment to people in certain circumstances. Both statements aim to attain status parity. In the opinion of Dr. Jennings: "Equality before the law" refers to the idea that among equals the law should be equal and similarly applied, and that similar things should be treated equally.⁸ Absolute equality between persons is not recognized. Dicey described the initial phrase as follows: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without any legal justification as any other citizen"⁹

Courts in India have gradually expanded the scope of Article 14 by including the due process clause.¹⁰ Article 14's scope and reach encompass two aspects: it allows for appropriate classification that is based on discernible differences, and the differences must be rationally related to the goals being pursued.¹¹ Following an understanding of Article 14, it is simple to see how Section 375(, Exception 2, of the IPC violates the idea of equality. In a bare reading of exception 2 of section 375 IPC, it is stated that a husband may engage in sexual activity with his wife (assuming she is not a minor) without first getting her agreement. Whether or not she agrees, the husband's actions do not constitute rape. So, a married woman can currently only file a complaint against her husband for molestation rather than rape. The goal of the current exemption is to preserve family unity; hence classification has been formed based on marital status (i.e., married and single women). This exception, which grants privilege to a class of people that was arbitrarily chosen, namely husbands, has formed a class of legislation rather than creating proper classification. This categorization is inherently arbitrary, and no justifiable function is fulfilled by it. The state must apologise for its treatment of married women discriminatorily.

Article 15 is another provision of the Constitution that is infringed by this exception under 15(3). Absolute equality may in fact be a cause of inequality, hence the authors of the Constitution decided to add an exception to Article 15(1), known as Article 15. (3). While article 15(1) forbids discrimination on the basis of sex, article 15(3) gives the State the authority to take positive action on behalf of women and children. In addition to being discriminatory and violating the spirit of Article 15(3) of the Constitution, Exception 2 to Section 375 of the IPC also violates Art.

⁸ M. P. Jain, *Indian Constitutional Law*, (Eight Edition, Lexis Nexis) (2018).

⁹ Dicey, *Law of the Constitution* (10th edn.) 193.

¹⁰ E.P. Royappa v. State of T.N., (1974) 4 SCC 3

¹¹ M.P. Jain, *Indian Constitutional Law*, 7th edn., Lexis Nexis, 2016 pg. 881.

14's definition of arbitrariness. In fact, married women are now at a significant disadvantage because of the statute's exception to Section 375 of the IPC, which has never been advantageous to women. Article 15(3) of the Indian Constitution's altruistic concept is clearly at odds with this exception. In the case of *Independent Thought v. Union of India*¹², it was unequivocally declared that Art. 15(3) could only be used to pass legislation that benefited women, and that any measure that did the opposite would be in violation of this provision.

Everyone's right to freedom of speech and expression is guaranteed by Article 19(1)(a). A married woman's right to refuse sexual contact with her husband is not recognised under the law's contested clauses. As a corollary, the contested provisions prohibit married women from consenting to sexual activity, in violation of both provisions of Exception 2 to 375 and Article 19(1)(a). In *NALSA v. Association of India*¹³, the Supreme Court noted in paragraph 69 that Article 19(1)(a) of the Constitution guarantees everyone the right to freedom of speech and expression, which encompasses the freedom to express one's self-identified gender. Gender expression can take any shape, including clothing, language, actions, and behaviour. With the exception of the limitations set forth in Article 19(2) of the Constitution, there can be no limits on one's personal appearance or choice of clothing. The marital rape exemption cannot be supported under any of the headings in Article 19(2), hence this alone makes the clause subject to being overturned.

The Supreme Court has frequently acknowledged that rape infringes on a victim's right to life and right to privacy. In *Bodhisattwa Gautam*¹⁴, it was mentioned that rape violates the victim's most prized fundamental right, the right to life guaranteed in Article 21, ruins the victim's entire psychology and sends her into a serious emotional crisis. Rape is also a crime violating basic human rights. It was further established in *State of Punjab v. Gurmit Singh*¹⁵ that a rapist abuses a victim's privacy and personal dignity and causes substantial psychological injury in addition to bodily harm. The victim's entire personality is destroyed by it. Furthermore, the Supreme Court noted in that sexual assault is inhuman and an unconstitutional invasion of one's right to solitude and sanctity.¹⁶ Close vicinity of the victim and the perpetrator, as well as the nature of their shared relation, marital rape takes on new levels of heinousness as a crime. The mere fact that the attacker is the victim's spouse should not

¹² (2017) 10 SCC 800

¹³ (2014) 5 SCC 438

¹⁴ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490: AIR 1996 SC 922

¹⁵ (1996) 2 SCC 384

¹⁶ *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75

render rape within the boundaries of a married household constitutionally immune.

The choice of one's sexual partner, or sexual autonomy, is regarded as a component of individual liberty. According to Article 21, the right to life also includes the freedom to decide how to have children. Furthermore, the freedom to decline any sexual activity is regarded as an element of the right to reproductive health. The Exception eliminates a married woman's ability to exercise her right to consent to sexual encounters, asserts that a husband has complete sexual power over his wife, and shields him from legal action if he rapes her. In *Joseph Shine*¹⁷, it was decided that it would be disrespectful to a woman's liberty and dignity to assume that she consents to having intercourse with her husband during marriage.

One aspect of autonomy and privacy is a person's right to intimacy, including the right to intimacy or sexual seclusion. A person's self-affirming right to have sexual relations with another person of their choosing gives rise to the right to intimacy. An individual's sexual agency is being used. In *K.S. Puttaswamy v. Union of India*¹⁸, it was decided that maintaining personal intimacy, the sanctity of family life, marriage, procreation, the home, and sexual orientation all fall under the umbrella of privacy. The assumption made by Exception II—that a woman consents to having sex with her husband after marriage and that she loses her sexual agency—violates her right to privacy. An antiquated and stereotyped view of a married woman's place in marriage underlies the exception. Its foundation is the idea that a husband has complete authority over his wife's sexual agency, which she acquires during marriage. Therefore, in this case it was felt that maintaining one's privacy promotes their ability to exercise important life-controlling freedoms and safeguards their right to personal autonomy.

CONCLUSION

The Indian government and society need to recognise that marital or spousal rape is the worst type of family-level abuse against women. By tolerating rape during a marriage, we are still tolerating the antiquated idea that women are possessions. Husbands do not possess wives for sexual purposes. We need to investigate how forced sex during marriage violates women's autonomy as individuals. Under the guise of marital privacy, women's fundamental human rights cannot be abused.

Any type of rape is demeaning, embarrassing, and detrimental to the women's health (both physical and emotional). The victim's privacy and

¹⁷ *Joseph Shine v. Union of India*, (2019) 3 SCC 39

¹⁸ *K.S. Puttaswamy v. Union of India*, (2018) 1 SCC 809

personal dignity are violated during a rape. In addition to being physically violent, it frequently destroys the victim's entire personality. Marriage shouldn't serve as a defence for a rapist since they should be treated as rapists. "A rapist remains a rapist regardless of his relationship with the victim," according to the European Commission for Human Rights.¹⁹

In addition to being a crime against humanity, marital rape is also acknowledged as being a barrier to women's advancement.

Instead of just including marital rape in definitions of domestic violence and assault, it's time to recognise it as a violation of women's rights to bodily integrity and privacy. By reducing section 375 of the IPC, we acknowledge that rape committed within a marriage is only a sexual encounter and not a crime, and we regrettably tolerate this behaviour. It's time to understand that marriage is founded on mutual respect and trust rather than treating it as something sacred. Not marriage but rather a relationship is sacred. In a marriage, "no" also signifies "no."

RECOMMENDATIONS

The conclusion that marital rape is a universal social evil that has severely affected India follows this lengthy and rambling explanation of every facet of marital rape. It is important that the same be eradicated from the nation. The crucial recommendations that can help you accomplish that goal are as follows:

- India needs to completely prohibit marital rape.
- Both rape and marital rape must result in the same sentence.
- In order to prevent marital rape from being considered as an exception to the crime of rape, Exception 2 of Section 375 of the Indian Penal Code must be repealed as it abridges Art. 14, 15, 19(1) (a) and 21 of the Constitution.
- Marital rape needs to be classified as a gender-neutral crime.
- Marital rape legislation must also include a mechanism for punishment of the accuser in the event that false accusations of marital rape are made.
- To handle cases of marital rape, special fast track courts must be established throughout India with female judges and employees. It must be forbidden to hold such instances in the media.

¹⁹ CR v. United Kingdom, ECHR, Ser. A.No. 335-C (1995).