

# Journal of Law Teachers of India

Volume 6 (Issue 2) 2015-16

## *Editorial Committee*

*Chief Editor*

**Prof. Ved Kumari**

*Dean & Head*

*Faculty of Law, University of Delhi*

*Co-Editors*

**Sarbjit Kaur**

**Sunanda Bharti**

*Members*

**Dr. Anu**

**Dr. Ashish Kumar**

**Dr. Arti Aneja**



Law Centre-I, Faculty of Law  
University of Delhi  
Delhi - 110007

Copyright © 2016, Law Centre-I, Faculty of Law, University of Delhi, Delhi- 110 007

*Mode of Citation:* 6(2) JOLT-I p\_\_ (2015-16)

## Law Centre-I

Umang Bhawan  
Chhatra Marg  
University of Delhi  
Delhi – 110 007  
India

*Phone:* +91 11 2766 7991

*E-mail:* [jolti.editor@gmail.com](mailto:jolti.editor@gmail.com)

*Website:* <http://lc1.du.ac.in/>

*Annual subscription:*

□400/- (Domestic); US \$25 (Overseas)

**ISSN: 2231–1580 JOLT-India**

*Published by the*

Professor in-Charge

Law Centre-I, Umang Bhawan, Faculty of Law, University of Delhi,  
Delhi - 110 007

*Printed at*

Delhi University Press

## Chief Editor's Note

I am happy to bring to you Volume 6, issue 2 of Journal of Law Teachers of India (JOLTI), the annual journal of Law Centre -1. I assumed stewardship of the Journal in 2016, being the Professor in Charge of the Centre. For the last eight years colleagues have dedicated themselves to steadily develop its quality. Every year has been a milestone of sorts, with the Journal gaining an ISBN number, wider circulation, contribution by myriad authors from India and abroad and today I am indeed proud to state that JOLTI is among the UGC recognized Journals. The Journal's steady rise in repute reflects our effort to encourage and accommodate both elaborate research papers and short notes/comments focused on contemporary legal areas.

This time, the annual call for papers was advertised on various academic and social media websites to ensure wider reach. This way the journal also seeks to establish an international orientation. We seek to publish work that employs a broad range of research methods, has a comparative approach and is interdisciplinary, though the final selection is never confined to any rigid criterion. We are also planning to give the Journal a digital platform and constitute an Advisory Board in the near future. We hope that potential contributors will keep these options in mind as they consider their research articles, notes, and case comments to submit.

The present, Volume 6, issue 2 materialises the efforts of various people. Dr. Sarbjit Kaur and Dr Sunanda Bharti, the Journal's Co- editors have worked diligently to further develop the house style of the Journal. Dr. Ashish Kumar organized the manuscript review process, among other contributions. Of course no peer-reviewed journal survives without the efforts of anonymous reviewers who take time from their busy schedules to provide valuable feedback on colleagues' work.. It is their contribution that improves the quality of the Journal and we thank them for their valuable inputs.

To introduce the volume briefly, this volume has a rich collection of essays covering a wide range of subjects. For instance data protection has been touched upon by Dr. Judit Bayer in the light of the Data Protection Directive in Europe. Article by Aman Cheema deals with the drug policy of India and maintains that a policy with criminal sanctions for drug use and possession

for personal consumption will be counterproductive to the health and social conditions of the drug user. Another article on a similar topic is presented by Dr. SM Singh, which gives suggestions towards strengthening of the drug control mechanism in India.

An interesting article is on euthanasia where the author Dr Debashree Sarkar deals with the sensitive issue by offering that State policy has to clearly lay down criteria for protecting socially vulnerable classes like women or those who are abandoned. The very controversial issue of commercial surrogacy is touched upon by Diksha Munjal. It calls out to the State to evolve a comprehensive education policy, amongst other things, to ensure proper development of the mother and the surrogate child.

The Uniform Civil Code and controversies surrounding this unrealised goal are discussed by co authors V P Shukla and Kaushik. The notes and comments section is sprinkled with variety of contemporary topics including Mediation, Legal Personality of Rivers, Gender Identity of Transgenders and Cement Cartelization.

I hope that you will find Volume 6(2) valuable and though provoking. We welcome your comments so that we may improve the journal in future volumes.

*Professor Ved Kumari*  
*Professor- in- Charge, Law Centre-JOLT-I*  
*Head and Dean, Faculty of Law*  
*University of Delhi*  
*Delhi, India*

# Contents

## Volume 6 (Issue 2) 2015-16

<i>Articles</i>		<i>Page</i>
1.	Data Protection Reform in the European Union- The Draft Regulation on Data Protection <i>Judit Bayer</i>	1
2.	'Mere Drug Consumption is a Crime': Is it time to Amend the NDPS Act, 1985? <i>Aman A Cheema</i>	19
3.	Death by Choice Reconsidered in the Framework of the Devlin-Hart Debate <i>Debashri Sarkar</i>	32
4.	Commercial Surrogate Mothers & Children: Contouring the Vulnerabilities & Challenges of Access to Justice <i>Diksha Munjal Shankar</i>	52
5.	Narcotics Drug Law in India: A Critical Appraisal <i>Surender Mohit Singh</i>	62
6.	Biased Debate- Relooking at Uniform Civil Code <i>Vaibhav Prakash Shukla &amp; Kaushik</i>	75
<i>Student Submissions</i>		
7.	Judicial Intervention in Sphere of Personal Laws: Instances and Justifications <i>Abhishek Shukla</i>	90
<i>Notes and Comments</i>		
8.	Ms. Ganga and Ms. Yamuna are juristic Entities and have a Right to Flow? An	105

	examination of Mohd. Salim v. State of Uttarakhand <i>Sunanda Bharti</i>	
9.	Mediation in the Consumer Protection Bill, 2015: An Introduction <i>Alok Sharma</i>	110
10.	Recognition to Third Gender- A New Dimension to Make Human Rights Mechanism More Humane <i>Srishty Banerjee</i>	123
11.	Cement Cartelization Case: (Re)Defining Moment for Competition Jurisprudence in India <i>Mausam</i>	132
<i>Book Review</i>		
12.	Text Book on the Transfer of Property Act by Avtar Singh <i>Sarbjit Kaur</i>	141

# Data Protection Reform of the European Union: The New Regulation on Data Protection

*Judit Bayer\**

## Introduction: Rationale behind Reform

Protection of personal data has been an important part of European constitutional culture since early in the twentieth century. The first laws appeared when automatized data processing became possible from the 1970's, and soon the theory of self-determination by the data subject emerged in the German Constitutional Court's judgement in 1983.<sup>1</sup> After the fall of the Berlin wall, the post-soviet countries applied strict data protection regimes, and with their accession to the EU in 2004 and then in 2007, an even higher proportion of Member States took data protection seriously. But the level of data protection is not equal, in spite of having a directive on data protection since 1995 (hereafter: Data Protection Directive).<sup>2</sup> Some countries, especially the United Kingdom, are more relaxed, their regime is closer to that of the United States. Others, like Germany or Hungary, foster stricter, more protective rules on personal data, presumably a lesson learned from their history of totalitarian dictatorships. While the European Union maintains a common market, and a common economic area,<sup>3</sup> the differences in the national rules in data processing have been causing a considerable financial and administrative burden on enterprises. This has been accelerating since the rapid development of the information society services and

---

\* Professor in Law, Law School, Department for Media and Information Law, University of Miskolc, Hungary. Email: [juditbayer@yahoo.com](mailto:juditbayer@yahoo.com).

<sup>1</sup> BVerfG. Urteil vom 15. Dezember 1983. Az. 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83 (Volkszählungsurteil). <https://openjur.de/u/268440.html>. English Text of the German Constitutional Court's decision is available at: <https://freiheitsfoo.de/census-act/> (last visited May 9, 2016).

<sup>2</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Official Journal L 281, 23/11/1995, pp.0031 – 0050, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML> (last visited May 9, 2016).

<sup>3</sup> The European Economic Area (EEA) provides for the free movement of persons, goods, services and capital within the internal market of the European Union (EU) between its 28 member states, as well as three of the four member states of the European Free Trade Association (EFTA): Iceland, Liechtenstein and Norway.

internet-based communication. Especially global firms, which are based outside the European Union, are in a difficult position when they cannot treat EU as a single legal unit, instead they have to adhere to different national rules on data protection from country to country.

The European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') is a multilateral international agreement concluded in the Council of Europe.<sup>4</sup>

The European Convention on Human Rights provides in its Article 8 that everyone shall have the right to respect for his private and family life, his home and his correspondence. The European Union's accession to the European Convention has been a subject of negotiation since the 1970's. A draft accession agreement was, however, annulled by the European Court of Justice (the Court of the European Union).<sup>5</sup> Therefore, the European Union is not bound by the European Convention on Human Rights, although its member states are. The European Union has a Charter of Fundamental Rights which also contains the right to respect for private and family life, and the right to the protection of personal data.<sup>6</sup> The Charter's scope is rather limited: it extends to EU institutions and member states when they are implementing EU law.<sup>7</sup> It does not bind Member States in their national context.

The Data Protection Directive has set basic legal standards for automatic processing of personal data and has liberalised the transfer of personal data inside the European Union since 1995. However, it has prescribed for enterprises outside the EU to adhere to every country's national rules wherever they have an office. In spite of the common basic principles the national differences still remained significant.

---

<sup>4</sup> The Council of Europe was created by an international agreement, signed in London on 5 May 1949 and entering into force on 3 August 1949. Its purpose is to safeguard the ideals of the common heritage of its members (primarily democracy and human rights) and to facilitate economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the 28 Member States of the European Union.

<sup>5</sup> See, Court of Justice of the European Union, Press Release No. 180/14, Opinion 2/13, Luxembourg, Dec. 18, 2014, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>. (last visited May 9, 2016).

<sup>6</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/01, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited May 9, 2016).

<sup>7</sup> See, Article 51 of the Charter of Fundamental Rights of the European Union, 2012.

The EU issued another directive in 2002, the so-called E-Privacy Directive,<sup>8</sup> but it contains obligations only on providers of publicly available electronic communications services in public communications networks.

European directives are legal instruments which must be implemented by all European member states. They set down basic principles or the minimum content of rules, but member states have the freedom to choose the exact wording and regulatory tool of national legislation. They may add details to the framework, or incorporate it with other laws. The result is that national laws within Europe are harmonised, but not identical. As a result of harmonisation by directives, there are some differences between the data protection systems of the various member states. This was regarded as a major cost for enterprises both in and outside the EU, while a lack of trust and security for consumers.

Therefore, the Commission has initiated a major step forward in the field of legal harmonisation: instead of a directive, which is the usual tool for regulation in the EU, it opted for a more rigid legal tool, which unifies the legal regulation of member states, rather than only harmonises. This is the "Regulation" which is directly and literally applicable in all member states without any further action. The result is a common European legal rule, a single European law for data protection which will mean that companies can deal with one law instead of 28. A range of benefits are expected both for businesses and for citizens. Among others, international companies will have to deal with one law, and one single supervisory authority. The benefits from this is estimated to reach 2.3 billion Euros yearly. Small and medium enterprises will have fewer formal obligations, citizens' privacy rights will be extended.<sup>9</sup>

There still can occur discrepancies because of the different language versions: all documents are translated in all European languages, and all language versions are regarded as official texts. But language differences can be and should be overcome easily compared to differences in legislation. A more significant problem is likely to arise from the different implementation of the law in the national environment. This is meant to be dealt with through the so-called "consistency mechanism", which will be discussed below, where a European body is to decide in case there is a disagreement between the national supervisory authorities.

Besides the scattered legal environment, the change of economic sector was another reason for reform. Technological development brought about new areas

---

<sup>8</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). Official Journal, L201, 31/07/2002, p.0037-0047, available at <https://mg.mail.yahoo.com/neo/launch?.rand=2ikf18uce727e#8422876386> (last visited May 9, 2016).

where privacy is an issue: beyond electronic commerce and social networking, also cloud storage, drones, or the internet of things. Research and statistics show that consumers do not trust online services, and therefore they are less likely to use them. Just over one-fifth of European citizens trust Internet search engines, social networking sites and e-mail services (22%), to name a few. 70% of Europeans are concerned that their personal data held by companies may be used for a purpose other than that for which it was collected. 75% of Europeans would prefer to delete personal information on a website whenever they decide to do so, which is addressed in the “right to be forgotten” provision of the Draft.<sup>10</sup> To sum up, there is a public interest argument in protecting the rights of citizens, completed with the business interest of the EU to attract investment.

Last but not least, the right to privacy became incorporated in the Lisbon Treaty in 2007, thereby the EU has got now a legal basis to adopt EU level regulation in this field.<sup>11</sup>

### **The Reform Process**

For all these reasons, the Commission has initiated a reform of the data protection field in January 2012. This was preceded by a communication from the Commission in 2010 to the European Parliament and the Council about the concept of a new regulation, which was received positively.

The usual legislative procedure applied by EU decision-making bodies is the “co-regulation procedure”. This means the joint decision-making of the European Parliament and the Council, while the Commission is the initiator of the laws. Among other legislative procedures, this one grants the biggest power to the Parliament, practically the position of the co-decision maker.

The European Union generally holds extensive consultations with all major stakeholders for years. In this case it lasted for more than two years and included a high level conference in May 2009, and two phases of public consultation: the first about the fundamental right of data protection, and the second about the economic and transnational perspectives of data protection. In the first part of the consultation the Commission received 168 responses: 127 from individuals, business organisations and associations and 12 from public authorities. In the second phase of consultation it received 305 responses, of which 54 from citizens,

---

<sup>10</sup> Report of European Commission, *Attitudes on Data Protection and Electronic Identity in the European Union*, SPECIAL EUROBAROMETER, 359, June 2011, pp. 2, 7, available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_359\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf) (last visited May 9, 2016); See also: TRUSTe Privacy Index, *EU cookie compliance, Tracking and Consumer Awareness Edition*, available at <https://www.truste.com/resources/privacy-research/eu-compliance-tracking-awareness-index/> (last visited May 9, 2016).

<sup>11</sup> Treaty on the Functioning of the European Union (TFEU), Art. 16 (Effective from 1 December 2009).

31 from public authorities and 220 from private organisations, in particular business associations and non-governmental organisations.<sup>12</sup>

After this consultation period the Commission issued its proposal in 2012. The Parliament<sup>13</sup> finally supported the proposal with overwhelming majority after two years in March 2014, but recommended several amendments. The Council<sup>14</sup> was slower in coming to a compromise: it reached a “general approach” in June 2015, raising hopes that the proposal could be finalised within the same year. The Council and the Parliament have to agree in the common text together with the Commission, with a view to reaching overall agreement. The Council’s “general approach”, however, was less than an agreement in the text, which was still developed at the end of the year.

The process was slowed by the colliding interests of some member states in the field of data protection. For example, Germany fears that its strict privacy regulation will become diluted, while the UK is concerned that a replacement of its currently liberal regulation will place additional burden on foreign enterprises, which were inclined to choose the UK or Ireland as their European main residence, for their loose privacy regulations.

Despite all difficulties, by December 2015 the three decision-making bodies reached a common position, which is that they agreed to a final text.<sup>15</sup> After closing this manuscript, all decision-making institutions formally voted, and the Regulation got promulgated in the Official Journal in all the official languages on May 4, 2016. It will enter into force on 24 May, 2016, but it will be applicable only after May 24 2018.<sup>16</sup>

### **New Elements of Regulation**

The regulation is going to deliver some new rules in several aspects of data protection, while reinforcing the old principles of informational self-determination. (Informational self-determination was first established by the German Constitutional Court, in its decision relating to a general census.<sup>17</sup> The

---

<sup>12</sup> The final text of the Regulation is now accessible from the Official Journal of the European Union, available at [http://ec.europa.eu/justice/data-protection/reform/files/regulation\\_oj\\_en.pdf](http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf) (last visited May 9, 2016).

<sup>13</sup> Parliament is directly elected by the people in European Union.

<sup>14</sup> The Council is the representative body for member states, consisting of ministers of the member states.

<sup>15</sup> EC Press Release, Agreement on Commission's EU Data Protection Reform will boost Digital Single Market, Brussels, Dec. 15, 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-6321\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6321_en.htm) (last visited May 9, 2016).

<sup>16</sup> EC Press Release, Reform of EU Data Protection Rules, Brussels, Dec. 15, 2015, available at [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm). (last visited May 9, 2016).

<sup>17</sup> *Supra* n. 1.

German Constitutional Court declared that all individuals have the fundamental right to make their own decisions as regards the disclosure and use of their personal data. The limits of this article allow the detailed introduction of a few – presumably – most influential changes only.

### *Scope*

Rather ambitiously, the Regulation extends its territorial scope beyond the European Union in certain cases. The territorial scope has two main principles: (1) if a company is established within the European Union and processes<sup>18</sup> personal data then it is subject to the regulation regardless of whether the processing takes place within the Union or outside of it. Establishment in this context means the effective and real exercise of its activity through stable arrangements, regardless of its official form, whether a branch, subsidiary or formal residence. (2) If a company processes the personal data of persons who are in the European Union, then it is subject to the regulation regardless of the place of establishment, or the place of processing. The term “persons who are in the Union” may sound informal, but it is meant to include every person who, even if only temporarily, is on the territory of a member state. No formal residence, let alone citizenship is required to deserve the protection of the regulation. The processing should happen in relation to the offering of goods or services whether for payment or for free, or the monitoring of behaviour as far as the behaviour takes place within the European Union. This latter sentence extends the scope of the regulation to cookie-placing on European computers as well, among others. The question may arise that if a user from India uses an online service in Europe, then is her behaviour regarded as taking place within the European Union? This would imply that an Indian service which she also uses and which tracks users’ online behaviour, should be obliged by the Regulation to ensure safeguards or not track the Indian users’ European activity. This interpretation is logically possible.<sup>19</sup>

The Regulation considers pseudonyms as personal data, too, insofar that the pseudonym can be attributed to a natural person by the use of additional

---

<sup>18</sup> 'Processing' means any operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction: EU Regulation No. 679/2016, Art. 4(3). (This Regulation is published and it will take effect in May, 2018).

<sup>19</sup> Art. 3 of the Regulation (EU) No XXX/2016 of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation), (*hereinafter Regulation*), available at [http://static.ow.ly/docs/Regulation\\_consolidated\\_text\\_EN\\_47uW.pdf](http://static.ow.ly/docs/Regulation_consolidated_text_EN_47uW.pdf) (last visited May 9, 2016).

information. To determine, whether the person can be identified, all possible ways and factors shall be taken into consideration: available technology, time needed for identification, costs. This applies to electronic identifiers that users are given by their devices, applications, such as Internet Protocol addresses, cookie identifiers or RFID tags.<sup>20</sup> The idea is that little pieces of data, although individually cannot identify a person, but when aggregated, they have the potential to give a whole personal profile.

Anonymous information is one which does not relate to an identified or identifiable natural person, and the relationship cannot be re-established. Such information does not count as personal, it does not need to be protected, and therefore data protection regulations do not apply. This can be the case for statistical and research data collections.

### ***Explicit Consent***

If processing of personal data is based on consent, that consent shall be explicit. The currently effective Data Protection Directive requires “unambiguous consent”, although the interpretative provisions define “consent” as a freely given, explicit and informed expression of one’s intention. However, the new Regulation’s interpretative provisions are far more detailed than that. Not only means consent any “freely given, specific, informed and unambiguous indication of his or her wishes”, but it should be “a statement or (...) a clear affirmative action.” This means that silence or passive behaviour of the data subject does not qualify as consent; it is not enough to leave a pre-ticked box as it is, but the data subject must tick the box him or herself, or actively choose technical settings for the services, or express any other statement or perform a conduct which clearly indicates the person’s acceptance of the proposed processing of their personal data.

Although the regulation does not require written form of consent, the data controller should be able to prove that consent was given.<sup>21</sup> In addition, the controller should make sure that the data subject did know at the time of consenting to what processing actions he or she had given consent, especially the identity of the controller, and the purposes of the processing. If the consenting declaration had been pre-formulated by the controller (like a privacy policy is), the controller shall ensure that it is as short and easily understandable as possible. (Critique had often been expressed regarding the too long and scholarly formulation of privacy policies.) Remarkably, the Regulation makes an attempt to eliminate the issue of hierarchical relationships, where consent is usually not a matter of choice. It provides that in situations where the data subject has no genuine and free choice, and is unable to refuse or later withdraw consent

---

<sup>20</sup> The Regulation, Recital (23)-(24).

<sup>21</sup> The Regulation, Art. 7(1).

without detriment, consent cannot be a valid legal basis for data processing.<sup>22</sup> This is also the case when there is a clear imbalance between the situation of the data subject and the controller, especially if the controller is a public authority and it seems unlikely that consent was freely given, or the performance of a contract is made dependent on the consent despite the data processing is not necessary for the performance.<sup>23</sup> This means, that in such situations only law can give the authorisation to handle certain type of data, except if the data is strictly necessary for the case.

An earlier version of the Regulation was even stricter: it provided that in cases where there is an imbalance between the situation of the data subject and the controller – which is a typical case also in employment relationships – consent shall not be regarded as freely given, but the final version formulates somewhat softer. However, the recitals seem to retain the idea, which serve as a reference point for interpretation, and also allow that Member States of the European Union may – either in law or in collective agreements – provide for specific rules on the processing of employees’ personal data especially what regards processing on the basis of consent.

Consent can be withdrawn at any time, and withdrawal shall be as easy as giving consent. Withdrawal of consent, however, does not affect the lawfulness of processing between consenting and its withdrawal.<sup>24</sup>

Other bases for processing, apart from consent can be: if processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; processing is necessary for compliance with a legal obligation to which the controller is subject; processing is necessary in order to protect the vital interests of the data subject or of another natural person; processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.<sup>25</sup>

### ***Rights of Individual***

One intended purpose of the regulation is to provide as much control as possible to individuals about their personal data. According to the Eurobarometer survey, 67% of European citizens surveyed were concerned about not having complete

---

<sup>22</sup> The Regulation, Recital 32.

<sup>23</sup> The Regulation, Recital 34.

<sup>24</sup> The Regulation, Art. 7.3.

<sup>25</sup> The Regulation, Art. 6(1a-f).

control over the information they provide online.<sup>26</sup> Beyond providing the rights that have been already ensured in the Data Protection Directive (the right to object, the right of access, right to rectification), the new Regulation will provide some new rights to individuals in order to grant more control to them as data subjects.

Among these an easier access will be granted to information about one's data, information on how it is processed, the right to data portability (transfer personal profiles between service providers); the right to get notification as soon as possible about data breaches or hacking, the right to get an inaccurate data corrected without delay, and the right to be forgotten.<sup>27</sup>

### ***Right to be Forgotten***

The right to have one's personal data erased from the internet has raised great interest worldwide. Initially, a Spanish individual Manuel Costeja Gonzalez opened Pandora's box when he demanded that the journal La Vanguardia, a daily journal with large circulation, deletes two notices of announcement for a real-estate auction that related to the recovery of his social security debts. The notices appeared 12 years earlier in 1998, and Mr. Costeja Gonzalez claimed that the proceedings were fully resolved since then. He also asked Google to remove the link to the notice from among its hit lists which appeared when his name was used as a search term. The Spanish Data Protection Office turned to the European Court of Justice for instruction. It asked four questions:

- (1) Does Google and Google's activity fall under European jurisdiction? – especially considering that it has a subsidiary office in the territory of a member state, that it provides temporary storage, it locates and indexes information on servers of a member state, it uses a domain name pertaining to that member state, and arranges for searches and the results thereof in the language of that member states?
- (2) Does locating personal information, indexing it, storing it, and finally making it available count as "processing personal information", or even "controlling personal information"?<sup>28</sup> And if yes, may the Spanish Data Protection Authority directly impose an obligation on Google to

---

<sup>26</sup> VěraJourová, *Data Protection Factsheet*, Eurobarometer, June 2015, available at [http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet\\_data\\_protection\\_eurobarometer\\_240615\\_en.pdf](http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_eurobarometer_240615_en.pdf) (last visited May 9, 2016).

<sup>27</sup> The Regulation, Arts 16-18.

<sup>28</sup> 'Controller' means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law; 'processor' means a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller: The Regulation, Arts 4, (5-6).

withdraw from its indexes an item of information published by third parties? And can Google be excluded from liability, if the personal data was and is lawfully published by third parties?

- (3) shall the data subjects' right to erasure and blocking of data, and the right to object, provided for by Article 14 of the Data Protection Directive, extend to demanding search engines to refrain from indexing personal information which is published on third parties' web pages?

The ECJ answered all questions positively in its judgement.<sup>29</sup> The judgment stirred huge controversies, some critiques – especially freedom of expression organisations – arguing that it was a threat on free speech and transparency.<sup>30</sup> Many held that the judgment created a wrong precedent by pushing an internet intermediary to censor lawfully published speech. Although the ECJ's judgement held nothing more than Google can be obliged to remove the link between the individual's name and the objected content. I would call emphasis to the fact that *La Vanguardia*, the journal was not obliged to remove the objected content, and that was not even a question.

The final consolidated text of the Regulation grants the right to control publicized personal information online practically only in those cases when removal would have a legal basis anyway, even under the currently effective rules of the Data Protection Directive, while also adding a few exceptions under which other rights or interests should prevail.

The conditions for the right of removal are the following:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the legal basis for data processing was exclusively the consent of the individual and consent was withdrawn;
- (c) the data subject objects to the processing of personal data – which right is granted by the Regulation (and also by the Data Protection Directive) and there are no overriding legitimate grounds for the processing, or the processing happened for direct marketing purposes;
- (d) the data have been unlawfully processed;

---

<sup>29</sup> *Google Spain SL and Google Inc. v. Agencia Espanola de Protección de Datos (AEPD)*, Court of Justice of the EU (Grand Chamber) C-131/12, Judgment delivered on May 13, 2014.

<sup>30</sup> In this regard ARTICLE-19, a UK registered Human Rights Organization, founded in 1987, has published popular articles; *See, Right to be Forgotten: ARTICLE 19 calls on Google and Data Protection Watchdogs to Protect Free Speech*, Oct. 16, 2014, available at [https://www.article19.org/resources.php/resource/37733/en/right-to-be-forgotten:-article-19-calls-on-google-and-data-protection-watchdogs-to-protect-free-speech;Rights that are being Forgotten: Google, the ECJ, and Free Expression](https://www.article19.org/resources.php/resource/37733/en/right-to-be-forgotten:-article-19-calls-on-google-and-data-protection-watchdogs-to-protect-free-speech;Rights%20that%20are%20being%20Forgotten:%20Google,%20the%20ECJ,%20and%20Free%20Expression), July 8, 2014, available at <https://www.eff.org/deeplinks/2014/07/rights-are-being-forgotten-google-ej-and-free-expression> (last visited May 9, 2016).

- (e) the data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
- (f) the data subject was under the age of 16 or, if provided for by Member State law, younger, but at least 13 years of age. In these cases the parent's consent is also necessary, but even if that was given, the data subject is entitled to demand erasure of his or her data later.<sup>31</sup>

If the controller published the data in question, it is obliged to take reasonable steps, including technical measures, to inform other controllers which are processing the same data, that the data subject has requested erasure of the data, of any links to it, or copies or replications of that personal data. This is more than the original ECJ judgement, practically all appearances of the information may be erased.

There are several exceptions to this right, when freedom of expression shall prevail, and the request for erasing shall not be performed. The exceptions are broadly defined, for example: if the information is necessary for exercising the right of freedom of expression and information; for complying with a European or Member State legal obligation, or for performance of a task carried out in the public interest. Further legitimate ground for refusal is if the controller has the official authority to exercise its duty to which the data is needed; or if the data is necessary in the interest of public health and originally it was processed in relation to health issues.<sup>32</sup> If it was used for archiving purposes in the public interest, or scientific, historical research, or statistical purposes in accordance with Article 83(1) of the Regulation in so far as erasing the data would seriously impair or make impossible the achievement of the objectives, can also be grounds for rejection. Finally, if the data is necessary for the establishment, exercise or defence of legal claims.

If the controller transferred the data to other recipients, it shall inform those about any rectification, erasure or restriction of processing in relation to the right to be forgotten, unless it proves impossible or demands disproportionate effort. The data subject must be informed about these recipients, too, upon request.

#### ***Right to Data Portability***

Individuals will be entitled to transmit their personal data that they provided to a data controller in a structured and commonly used, machine-readable format (e.g. user profile) to another data controller without any hindrance. They are also entitled to have the data directly transmitted by one controller to the other, if technically feasible. This right applies only when the individual provided the data him- or herself on the basis of consent or a contract, and if they are processed automatically. Service providers shall be encouraged (by member states) to develop interoperable formats, to enable portability, but this shall not be treated

---

<sup>31</sup> The Regulation, Art. 17.

<sup>32</sup> The Regulation, Arts 9(2)(h), (hb) and 9(4).

as an obligation. When other individual's personal data are affected, these shall be treated according to the Regulation.<sup>33</sup>

#### ***Notification of Personal Data Breach***

If a breach occurs to personal data, the controller shall notify the supervisory authority without delay, but at least within 72 hours. If the notification is sent later than that, reasoned justification shall be attached about the reason for delay (the deadline is counted from the minute of becoming aware of the breach.) If a data processor reveals a data breach, it shall notify the data controller without delay.

Exception to the rule is, if the incident is unlikely to cause harm to rights and freedoms of individuals, in this case no notification is required. However, if it is likely to cause harm, then also the data subject shall be notified without delay, unless appropriate technical and organisation measures are applied to make the data unreadable to any unauthorised person (such as encryption), or subsequently measures are taken which protect the rights of the individuals.<sup>34</sup> In case individual notification is not possible because of the high number of individuals, a public communication shall be published instead to provide the adequate information to the data subjects.

The supervisory authority is entitled to oblige the controller to inform the data subjects in case of a breach, or to decide whether the protective measurements are appropriate.

#### ***Impact Assessment and Prior Consultation***

In certain well outlined cases of processing personal data, the controller is obliged to carry out a prior assessment about the impact of the planned operation. Typically when new technologies are used for processing personal data, and – taking into account the nature, scope, context and purposes of the processing – it is likely to endanger individuals' rights and freedoms. Supervisory authorities are expected to prepare a list of the kind of operations which require impact assessments, but examples given in the Regulation are: automatic profiling of personal traits especially if legal decisions are based on those processing, if public areas are monitored systematically and on a large scale, and processing special category data in large scale.<sup>35</sup> Authorities also may list those processing activities which do not require an impact assessment – these lists must be approved by the European Data Protection Board.<sup>36</sup> If several member states are affected, the

---

<sup>33</sup> The Regulation, Art. 18.

<sup>34</sup> The Regulation, Art. 32.

<sup>35</sup> The Regulation, Art. 33(2a-2b).

<sup>36</sup> The Regulation, Art. 58(1).

supervisory authority should apply the consistency mechanism<sup>37</sup> as discussed below.

If the impact assessment reveals that individuals' rights are indeed at risk, the controller is required to consult with the supervisory authority (prior consultation). If the authority finds it necessary, because the planned action would not comply with the Regulation, in particular if the data controller has not sufficiently identified or mitigated the risk, it shall give advice to the data controller and the processor in writing within eight weeks which can be extended for a further six weeks.<sup>38</sup>

Also member states shall consult the supervisory authority during the preparation of a legislative measure to be adopted by a national parliament which relates to the processing of personal data.

### *Certifications*

The Regulation recommends to stakeholders in charge establishing a certification mechanism to create data protection seals and marks, which provide a quick information to users and businesses about compliance with the Regulation or even higher, voluntarily adopted rules. Addressees of the recommended action are member states, supervisory authorities, the European Data Protection Board and the Commission, however, ideally, such a mechanism should exist at the Union level. The certificate is awarded for a period not longer than three years. The whole mechanism is yet to be worked out, but the Regulation sets out framework rules on the requirements of certification bodies and the procedure. The detailed rules may seem a little complex, but the final outcome is likely to make life easier for consumers. It is of crucial importance that the certificates are transnational and subject to the one-stop-shop mechanism in order to be credible.

The European Data Protection Board shall specify the requirements for accreditation of certification bodies. It shall keep a register of all data protection seals and marks and make them available to the public. It is the Board's task to specify the requirements necessary for certification and accreditation the certification bodies.<sup>39</sup> The criteria approved by the European Data Protection Board may result in a common certification, the European Data Protection Seal.<sup>40</sup>

### *The Consistency Mechanism and the One-Stop-Shop Mechanism*

The Regulation created two mechanisms that complete each other: the one-stop-shop mechanism and the consistency mechanism. The idea behind this apparently complicated system was to fusion two objectives. First, that the Regulation's effect and implementation should be truly Union-wide, so that

---

<sup>37</sup> The Regulation, Art. 33(2c).

<sup>38</sup> The Regulation, Art. 34.

<sup>39</sup> The Regulation, Art. 66(1)(cd).

<sup>40</sup> The Regulation, Art. 39(2a).

business enterprises encounter a single legal environment and simple bureaucracy, and that they have to deal only with one authority even if they have branches or provide services in several member states. Second, that citizens can turn to their local authorities in their local languages when they claim protection of their rights. Further reasons for maintaining the local authorities were to reap the benefit of practical knowledge in the local environment, and last but not least, the obligation to fulfil the principle of subsidiarity.<sup>41</sup> The one-stop-shop mechanism creates a single contact point for businesses, eliminating the custom of forum-shopping that has prevailed until now. The consistency mechanism ensures that local supervisory authorities exchange information, cooperate and take joint decisions. All supervisory authorities shall delegate one member to the European Data Protection Board which is entitled to pass binding decision in several cases, and solves disputes between local authorities.

Thus, the Regulation provides for the member states to maintain an independent supervisory authority at the national level, and sets out rules on their guarantees of independence, tasks and powers. Each supervisory authority shall delegate one member to the European Data Protection Board – it therefore consists of the head of one supervisory authority of each member state, and the European Data Protection Supervisor, or their respective representatives. During the drafting period of the Regulation, many discussions were led on the composition of this Board, or whether the Commission shall take this role, or whether the Commission should participate with voting right in the Board. Finally, the Commission will have the right to participate in the meetings of the Board but only without voting right. During the dispute resolution procedures, even the European Data Protection Supervisor shall have voting rights only on decisions which concern principles and rules applicable to the Union institutions, bodies, offices, and agencies.

The European Data Protection Board is the key player in the so-called “consistency mechanism” which serves to ensure consistent application of the Regulation. This is particularly important because of the “one-stop-shop” mechanism created by the Regulation. This means that all enterprises need to register at and abide by only one authority, even if they operate in several countries of the Union. However, citizens are entitled to lodge complaints at the authority that is closest to them. In case a citizen in Poland complains against an international company whose competent authority is in Belgium, the two authorities shall cooperate in order to settle the case.

The Regulation provides for two roles for the supervisory authorities in the procedure, depending on the context of the case. The authority for the main

---

<sup>41</sup> According to the principle of subsidiarity, all decisions shall be taken as closely as possible to the citizen. The EU may take action only when the matter cannot be solved because of the volume, the scope or the international nature of the subject matter. Defined in Article 5 of the Treaty on European Union, 1992

establishment of the company should act as the “lead authority”. Other authorities in the procedure are so-called “concerned authorities”, either because the controller or processor has an establishment on the territory of their Member State, or because data subjects residing on their territory are substantially affected, or because a complaint has been lodged with them. It is the lead authority which is competent to adopt binding decisions in the case, however, it is obliged to its best effort to maintain a close cooperation with the concerned authorities and keep them informed about all matters in the case without delay and strive to reach consensus with the concerned authorities. (All correspondence shall take place electronically.) However, when the decision to be taken is one which rejects the complaint by the data subject in whole or in part, such a decision should be adopted by the supervisory authority at which the complaint has been lodged. The lead authority is entitled to request mutual assistance from other concerned supervisory authorities, and ask to conduct joint operations, especially for carrying out investigations or for monitoring the implementation of a measure in another Member State.<sup>42</sup>

Each supervisory authority should be entitled to deal with local cases. However, if an authority is not the lead authority, it is obliged to inform the lead authority about the case, and the lead authority is entitled (and obliged) to decide, whether it will deal with the case within the one-stop-shop mechanism. This is reasonable if the expected decision is to contain obligations on the data controller or the processor, making enforcement more practical. If the lead authority decides to deal with the case, the original authority should have the possibility to prepare a draft for a decision which the lead authority shall take utmost into account.<sup>43</sup> Any concerned supervisory authority may raise an objection with reasoning against a draft decision prepared by the lead authority. In case no consensus is reached, the lead authority must submit the case for dispute resolution by the European Data Protection Board.<sup>44</sup> The Board shall pass its binding decision by two-thirds majority of its members, within four weeks from submission of the case, which may be extended by another months if the complexity of the case requires. If the Board couldn't come to a decision within this period, a further two weeks can be added, to pass a decision with a simple majority.<sup>45</sup>

The Regulation's consistency mechanism have been widely criticised by experts, arguing that it interferes with the competence of the national authorities. However, this is the price to be paid for maintaining the network of national authorities at all, rather than merging them into one supranational European data protection authority. The network of local authorities has a practical relevance when dealing with local issues, and serving citizens in their local language and

---

<sup>42</sup> The Regulation Art. 54a.

<sup>43</sup> The Regulation, Recitals 97a-c.

<sup>44</sup> Dispute Resolution is described in Art. 57 of the The Regulation.

<sup>45</sup> The Regulation, Art. 58.

territory. However, also an international forum is needed in order to create a truly consistent, unified regulatory system. The international cooperation of authorities and the dispute resolution system will be responsible for fulfilling these tasks at a supranational level. The European Data Protection Board could also be regarded as a predecessor for a future supranational European body. However, at this point, it is not supranational but international – all members represent their national supervisory authorities, and are not likely to take a supranational view of the problems of data-protection. The same can be observed in the Council of Ministers, as opposed to the European Commission: the first is an international gathering of national representatives of governments, whereas the latter a supranational body, its Chair elected by the European Parliament. The Commission is able to represent the common interest of the Union, whereas the Council is the venue of fight and bargain between the individual member states for their own interests.

The European Data Protection Board's examination and opinion may be requested by any supervisory authority or by the Commission in case a problem emerges in the cooperation of supervisory authorities. Supervisory authorities must take utmost account of the opinion of the European Data Protection Board and respond within two weeks whether they maintain or amend their draft decision. In case the supervisory authority concerned replies that it does not intend to follow the opinion of the Board, the Board shall start a dispute resolution procedure. This procedure is closed with a binding decision of the European Data Protection Board. It shall also be applied in case there is a disagreement in matters of competence between authorities.

In certain, narrowly defined cases, supervisory authorities are required to consult the European Data Protection Board prior to making a decision. These cases include among others adopting a list of the processing operations that require an impact assessment, or approving binding corporate rules. The European Data Protection Board is also entitled to issue guidelines, recommendations and best practices with the view to encourage consistent application of the Regulation and in certain, narrowly defined areas. Among these are defining the detailed rules for the notices of data breaches, for example what is regarded as high risk for the data subjects' rights and freedoms, what should count as undue delay, when is a controller or processor obliged to notify, etc.<sup>46</sup> Also specifying the criteria and requirements for data transfers based on binding corporate rules can be subject to a guideline or recommendation issued by the European Data Protection Board.<sup>47</sup> The Board is also entitled to give the Commission an opinion on adequacy of the level of protection in a third country or international organization.<sup>48</sup> It would be

---

<sup>46</sup> The Regulation, Art. 66(1)(b-be).

<sup>47</sup> The Regulation, Art. 66(1)(bd).

<sup>48</sup> The Regulation, Art. 66(1)(ce). For this purpose, the Commission shall provide the information including correspondence with the government of the third country.

too long to list all the tasks of the Board here but a last important duty to mention is to maintain a publicly accessible electronic register of decisions taken by supervisory authorities and courts on issues dealt with in the consistency mechanism.<sup>49</sup>

### *Penalties*

The regulation sets out high fines for infringements of the rules and principles of data protection. Depending on which provision of the Regulation is violated, the fine can be up to 10 000 000 EUR, or in case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher; or up to 20 000 000 EUR, or 4% of the turnover.<sup>50</sup> The more severe cases include violation of the basic principles, or the data subjects' rights, or the rules on transferring personal data to a third country or an international organisation, or non-compliance with an order of the supervisory authority, or member state laws.

Member states may lay down penalties in their national laws, too. To define the type of penalties is up to the member states, as long as they are effective, proportionate and dissuasive. If a member state does not provide for fines, the fines of the Regulation may be applied by the competent supervisory authority and imposed by national courts. In any case, appropriate procedural safeguards must be applied, among them judicial remedy and due process.<sup>51</sup> Member states are encouraged to lay down rules on penalties for infringements which are not threatened with a fine in the Regulation. The Commission must be informed of such rules by the time the Regulation steps into effect, and also about subsequent amendments to it.<sup>52</sup>

Several circumstances are to be considered when determining the level of the fine: gravity and duration of the infringement, the number of data subjects affected, the category of personal data affected, and the level of damage suffered by them. Further aspects are related to the actions of the data controller: the infringement's intentional or negligent character, if action was taken to mitigate damages, the level of cooperation with the authority to remedy the infringement and mitigate adverse effects of it, the degree of responsibility of the controller and the processor, any relevant previous infringements, and some more.<sup>53</sup> A fine for several linked processions may not extend beyond the maximum fine for the gravest violation (no accumulation of fines within one procedure).

---

<sup>49</sup> The Regulation, Art. 66(1)(i).

<sup>50</sup> The Regulation, Art. 79(3).

<sup>51</sup> The Regulation, Art. 79(5).

<sup>52</sup> The Regulation, Art. 79(b).

<sup>53</sup> The Regulation, Art. 79(2a)(a-m).

**Conclusion**

The new Regulation on Data Protection in the European Union is an ambitious project. It has been duly prepared for several years, and the interests and opinions of several stakeholders were built into the final text. Beyond economic interests of the Union and the rights and freedoms of citizens, also national sovereignty of the member states and retaining the values of the previous data protection system were considered. Beyond close cooperation of the European Commission, the Parliament and the Council, significant input came from economic enterprises and non-governmental organisations. The Union's decision-making technique is one of reaching consensus through a series of negotiations. This is necessary because the Union still consists of sovereign states which either voluntarily follow the agreed norms or the Union falls apart. Therefore, European Union decision-making processes are often complicated, and this tradition is reflected also in the Regulation's consistency mechanism. But in practice, these procedures yield better (and often, faster) results than those which included less careful negotiations.

The motivation behind the project of preparing this new piece of Union legislation was to find balance: between smooth flow of business activity and protection of customers' data; between interests of local citizens and global companies; between simple bureaucracy and fair procedures. We have every reason to believe that this project will be successful. If so, it will convey a crucially important message that respect for personal privacy does not hinder, on the opposite, accelerates the business of online services.

## ‘Mere Drug Consumption is a Crime’: Is it Time to Amend the NDPS Act, 1985?

*Aman A. Cheema \**

### Introduction

The ‘drug problem’ is one of the most pressing crime stories of our times. Though it is often seen as a relatively simple issue of drug supply, user demand and associated crime, in fact, it is a highly complex subject, in which problems of international politics, the legacy of history and the subcultures of use, as well as the economies of drug markets, law enforcement and provision of treatment services all interact.<sup>1</sup> Drugs and alcohol have been the subjects of varying forms of control. Their history from the early twentieth century shows a varying degree of legal control ranging from lawful consumption of alcohol to declaring illegal the use of drugs such as cannabis and opium.<sup>2</sup> In regards to the latter, legal approach has not been consistent, since many drugs have been legitimately used in religious rituals, for medical treatment and for recreational purposes throughout the ages and around the world. As people were not fully aware of the dangers of addiction, many substances were openly advertised and sold as cures for all sorts of ailments. The most famous of these were Coca-Cola, which until 1903 was made from coca-leaf (used to process cocaine) and kola nuts (hence the name). In addition, many patented medicines such as Cocaine Toothache Drops and Mother Bailey’s Quieting Syrup, used to ‘soothe’ infants and young children, contained cocaine, morphine and heroin.<sup>3</sup>

Though drug use is very old in its origin, but drug abuse in the form of drug addiction in contemporary times has emerged as one of the gravest problems with vast and varied implications for humanity. In this regard, the World Drug Report published by the UN in 2015 has painted an alarming picture.<sup>4</sup> It is estimated that a total of 246 million people or 1 out of 20 people between the ages of 15 and 64 years, used an illicit drug in 2013. That represents an increase of 3 million over the previous years. The magnitude of the world drug problem becomes more apparent in view of the fact that more than 1 out of 10 drug users is a chronic user, suffering from drug use disorders or drug dependence. In other

---

\* Assistant Professor in Law, Panjab University Regional Centre, Civil Lines, Ludhiana, Punjab. E-mail: aamanamrit@gmail.com

<sup>1</sup> Eamonn Carrabine *et al.*, CRIMINOLOGY: A SOCIOLOGICAL INTRODUCTION 206 (Routledge, 2004).

<sup>2</sup> *Id.*

<sup>3</sup> Anthony Walsh & Craig Hemmens, INTRODUCTION TO CRIMINOLOGY 489 (Sage, California, 2014).

<sup>4</sup> *See*, United Nations, *World Drug Report 2015* (United Nations Office on Drugs and Crime, 2015) p. ix.

words, some 27 million people, or almost the entire population of a country the size of Malaysia, are problem drug users.<sup>5</sup>

### **Drug Abuse: Criminological Perspectives**

There is no unitary or simple answer behind the drug consumption. There are many interacting and simultaneously operating social and psychological factors, which cause people to use and often abuse the mind-altering drugs. Criminologists have advanced a number of theories behind causation of drug problem.<sup>6</sup> Some of the chief criminological perspectives floated in this regard are dealt with below:

*Sub Cultural Theory:* Some criminologists, focussing their research on lower class addiction, strongly believe that drug abuse has environmental basis. They opine that due to the fact that disproportionate numbers of drug abusers are poor, the onset of drug use can be tied to such factors as racial prejudice, devalued identities, low self-esteem, poor socio-economic status, and the high level of mistrust, negativism and defiance found in impoverished areas.<sup>7</sup>

Residing in a deteriorated inner-city area is often correlated with entry into a drug sub-culture. Youths living in the depressed areas, where feelings of alienation and hopelessness run high, often meet established drug users who teach them that narcotics provide an answer to their feelings of personal inadequacy and stress.<sup>8</sup> Thus peer influence plays a major role and furnishes a significant evidence of drug careers that actually grow stronger as people mature.<sup>9</sup> In other terms, shared feeling and sense of intimacy invariably lead the youths to become fully enmeshed in what has been described as the "drug-use subculture."<sup>10</sup>

*Psychological Theory:* However, some studies reveal that not all drug abusers reside in lower-class areas. The problem of middle-class substance abuse is also equally real. Resultantly, some experts have linked substance abuse to psychological deficits such as impaired cognitive functioning, personality

---

<sup>5</sup> *Id.*

<sup>6</sup> The various theories behind causation of drug-related crimes help in formulating the punishment for such kind of offenders.

<sup>7</sup> Larry J. Siegel, *CRIMINOLOGY: THE CORE 327* (Thomson Wadsworth, Belmont, 2008).

<sup>8</sup> See, C. Bowden, *Determinants of Initial Use of Opioids*, 12 *COMPREHENSIVE PSYCHIATRY* 136-140 (1971).

<sup>9</sup> Marvin Krohn *et al.*, *Reciprocal Casual Relationships among Drug Use, Peers and Beliefs: A Five Wave Panel Model*, 26 *JOURNAL OF DRUG ISSUES* 205-228 (1996).

<sup>10</sup> *Supra* n. 7.

disturbance and emotional problems that can strike people of any economic class.<sup>11</sup>

Drugs may help people deal with unconscious needs and impulses and relieve dependence and depression. People may turn to drug abuse as a form of self-medication in order to reduce the emotional turmoil of adolescence, deal with troubling impulses or cope with traumatic life experiences.<sup>12</sup> To cite few instances, survivors of sexual assault and physical abuse have been known to turn to drug and alcohol abuse as a coping mechanism.<sup>13</sup> Further, depressed people may use drugs as an alternative to more radical solutions to their pain, such as suicide.<sup>14</sup>

*Genetic Theory:* Substance abuse may have a genetic basis. People whose parents were alcoholic or drug dependent have a greater chance of developing a problem than the children of non-abusers and this relationship occurs regardless of parenting style or the quality of the parent-child relationship. Nonetheless, most children of drug abusing parents do not become drug dependent themselves, suggesting that even if drug abuse is heritable, environment and socialization must play some role in the onset of abuse.<sup>15</sup>

*Social Learning Theory:* Drug abuse may also result from observing parental drug use. Children whose parents abuse drugs are more likely to have persistent abuse problems than the children of non-abusers.<sup>16</sup>

*Conflict Theory:* This theory offers an explanation to drug abuse. It explains, "As the rich get richer, the poor poorer and economic opportunities shrink for the uneducated and the unskilled, drug dealers take firm root among the increasingly demoralized disorganized and politically powerless underclass."<sup>17</sup> It is noted, although most members of this class do not succumb to addiction, but the situation is enough to make the lives of the majority of this class unpredictable, insecure and dangerous<sup>18</sup> forcing them to resort to chronic and compulsive use of drugs.

---

<sup>11</sup> Peter Giancola, *Constructive Thinking, Antisocial Behaviour, and Drug Use in Adolescent Boys with and without Family History of a Substance Use Disorder*, 35 PERSONALITY AND INDIVIDUAL DIFFERENCES 1315-1331 (2003).

<sup>12</sup> *Supra* n. 7.

<sup>13</sup> See generally, Daniel Smithet *et al.*, *How does Trauma Beget Trauma? Cognitions about Risk in Women with Abuse Histories*, 9 CHILD MALTREATMENT 292-302 (2004).

<sup>14</sup> See generally, Sean Kid, *The Walls were Closing in and we were Trapped*, 36 YOUTH AND SOCIETY 30-55 (2004).

<sup>15</sup> *Supra* n. 7.

<sup>16</sup> See generally, Thomas Ashby Wills *et al.*, *Escalated Substance Use: A Longitudinal Grouping Analysis from Early to Middle Adolescence*, 105 JOURNAL OF ABNORMAL PSYCHOLOGY 166-180 (1996).

<sup>17</sup> *Supra* n. 3, p. 492

<sup>18</sup> Erich Goode, *DRUGS IN AMERICAN SOCIETY* 77 (McGraw Hill, Boston, 2005).

*Rational Choice Theory:* Substance abuse may be a function of the rational but mistaken belief that drugs can benefit the user. Some may use drugs and alcohol because they want to enjoy their effects: get high, relax, improve creativity, escape reality and increase sexual responsiveness. To cite an example, adolescent alcohol abusers believe that getting high will make them powerful, increase their sexual performance and facilitate their social behaviour.<sup>19</sup>

As can be seen from the foregoing perspectives, there are different theories that explain as to why people resort to drugs. However, not a single theory has proved adequate in comprehensively explaining the causes of drug abuse. Every individual is different given his genetic predisposition and environmental set up. Hence the causes can be manifold, with a complex combination of factors working behind individual drug addiction.

### **Repercussions of Drug Abuse and Addiction**

Prevalence of chronic drug use damages not only the addict and his family but also society and nation at large in multifarious ways as discussed hereunder:

*Economic Cost:* In economic terms, huge profits amassed by greedy and ruthless drug mafias, dealing in highly profitable business of drugs and psychotropic substances, damage the national economies.

*Social Consequence:* Drug abuse inflicts intangible costs on individual's family and the society. It puts strains on the marriage and child-parent relationship, leading to broken marriages and broken family. This in turn has devastating impact on the society. Moreover, the linkage of drug abuse with violence and crime jeopardizes social and public security.

*Physical and Psychological Impact:* There is undisputed evidence that drug abuse causes reduction in brain functioning. Further, it has deleterious effect on the normal reproductive functions, and causes long-term damage to the heart, lungs and psychomotor skills.<sup>20</sup> In psychological terms, inhibition of learning, thought fragmentation, loss of fluency or verbal expression, alienation, lack of motivation and direction, depression and confusion are natural outcomes of drug abuse.

*Moral Consequence:* Drug abuse corrupts the mind and leads to moral degeneration of the human being. Under its adverse influence, people are likely to become more materialistic and agnostic who are ready to do anything for the sake of money.

*Political Effect:* There is a definite linkage between drug traffickers, mafia group and terrorist organisations. It is often seen that the police-politicians-trafficker

---

<sup>19</sup> A. Christiansenet al., *Using Alcohol Expectancies to Predict Adolescent Drinking Behaviour after One Year*, 57 JOURNAL OF COUNSELING AND CLINICAL PSYCHOLOGY 93-99(1989).

<sup>20</sup> *Id.*

menace in countries such as India has turned small time criminals into millionaires.<sup>21</sup>

In view of the multifarious consequences of drug abuse, the national and international community has resolved to formulate legal responses to the prevailing and spiralling crises. Drug control laws in this regard aim to address the problem of drug trafficking by criminalizing drug consumption/addiction.

### **Criminalisation of Drug Consumption**

In the background of multiple theories behind drug use, a key question is often formulated as to whether the drug consumption is a crime in itself? Drug consumption per se is a juridical concept referring to the mere use of illicit substances, separated from other illicit acts such as possession, cultivation, transportation or supply. In simple terms, it would be a crime if one indulges in an act of act of smoking, injecting, inhaling or swallowing a drug, distinct from the crime of possessing it. Although, in practice, it would be impossible to use a substance without possessing it.<sup>22</sup> Given such understanding, varying legislative responses are crafted by countries around the world. While many countries fighting drug menace, for example France<sup>23</sup>, Finland<sup>24</sup>, Sweden<sup>25</sup>, UK<sup>26</sup> have categorically declared the drug consumption as a punishable crime, others such as Portugal<sup>27</sup>, Uruguay<sup>28</sup>, Netherlands,<sup>29</sup> USA<sup>30</sup>, etc. have liberalised their drug

---

<sup>21</sup> See generally, Vohra Committee Report 1993, *Criminalization of Politics* (Ministry of Home Affairs, Government of India).

<sup>22</sup> European Monitoring Centre for Drugs and Drug Addiction, *Decriminalization in Europe? Recent Developments in Legal Approaches to Drug Use* (Nov. 2001) p. 2, available at [http://eldd.emcdda.org/databases/eldd\\_comparative\\_analyses.cfm](http://eldd.emcdda.org/databases/eldd_comparative_analyses.cfm) (last visited March 24, 2017).

<sup>23</sup> *Id.* (In France, punishment is imprisonment upto 1 year and a fine upto 3000 Euros for simple consumption of all drugs).

<sup>24</sup> *Id.* (In Finland, punishment is imposition of fine or imprisonment upto 2 years for simple consumption of all drugs).

<sup>25</sup> *Id.* (In Sweden, punishment for simple consumption of all drugs is fine or imprisonment for a maximum of six months).

<sup>26</sup> *Id.* (In UK, punishment for smoking or using prepared opium is 1 year imprisonment and/or fine in summary proceeding, and 14 years and/or fine upon indictment).

<sup>27</sup> Portugal became the first European nation to take the brave step of decriminalizing possession of all drugs within its borders – from Marijuana to Heroin and everything in between since June 2001. Portugal formulated its decriminalization policy with a public health orientation. Those caught in possession are referred to a ‘dissuasion board’ that decides whether to take no further action (the most common outcome) or direct the individual to treatment services if a need is identified or impose an administrative fine. See generally, Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, LAW AND SOCIAL INQUIRY(2014), available at [https://www.law.berkeley.edu/files/Laqueur\\_%282014%29\\_-\\_Uses\\_and\\_Abuses\\_of\\_Drug\\_Decriminalization\\_in\\_Portugal\\_-\\_LSI.pdf](https://www.law.berkeley.edu/files/Laqueur_%282014%29_-_Uses_and_Abuses_of_Drug_Decriminalization_in_Portugal_-_LSI.pdf) (last visited March 24, 2017)

control regime by decriminalizing the mere possession of drug for personal consumption.

### **Legislative Responses to Drug Menace in India**

India, with an objective to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances<sup>31</sup> and check the menace of drug abuse and addiction caused by being a transit state, legislated the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The Act provides a deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend to twenty years. Along with envisaging severe punishments for drug traffickers, the Act criminalises and punishes drug consumption/addiction too.

Section 27 of the NDPS Act provides punishment for consumption of any narcotic drug or psychotropic substance. It reads:

Whoever consumes any narcotic drug or psychotropic substances shall be punishable –

- (a) Where the narcotic drug or psychotropic substance consumed is cocaine, morphine, diacetyl-morphine or any other narcotic drug or any psychotropic substances as may be specified in this behalf by the Central Government by notification in the Official Gazette, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to twenty thousand or with both; and
- (b) Where the narcotic drug or psychotropic substance consumed is other than those specified on or under clause (a), with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both.<sup>32</sup>

---

<sup>28</sup> See, Georgia Graham, *Drug Laws around the World – Does Anyone Get it Right?* The Telegraph (Oct. 30, 2014). Uruguay has never criminalized possession of drugs for personal use. In 2013, it became the first country in the world to fully legalize marijuana, thus going against the International Convention on Drug Control by allowing for production, sale and consumption of Cannabis.

<sup>29</sup> *Id.* The Netherlands have had a de-facto decriminalization policy since 1976. While remaining technically criminal, possession of upto 5grams of cannabis (30g prior to 1996) or 'one dose' of 'hard' (non-cannabis) drugs for personal use are not prosecuted. The police and courts operate on policy of tolerance for 'soft' drugs like cannabis.

<sup>30</sup> *Id.* In USA two states namely, Washington and Colorado delegalized recreational use of cannabis in 2012. Further, 18 states and District of Columbia allow the medical use of marijuana on prescription.

<sup>31</sup> UN General Assembly, Convention on Psychotropic Substances 1975, A/RES/3443; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, U.N. Doc. E/CONF.82/15.

<sup>32</sup> The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 27.

### *Judicial Interpretation*

The Bombay High Court in *Wessel case*<sup>33</sup> upheld that even the possession of small quantity for personal consumption is punishable by the law. The effect of section 27 is that when it is shown that a small quantity in possession of the accused is meant for personal consumption and not for sale or distribution, then the sentence to be imposed is to be governed by section 27 of the Act which provides for lesser term of sentence due to the contraband being meant for personal consumption. In *P.P. Beeran v. State of Kerala*,<sup>34</sup> the Supreme Court held that the Parliament has afforded substantial benefit to a person who possesses only a small quantity of narcotic drugs for personal consumption by providing a lesser punishment. In *Durant Case*<sup>35</sup>, the Supreme Court held that the burden to prove that small quantity is meant for personal consumption and not for sale or distribution is shifted on the accused under Section 27 since it is a plea in defence. In yet another case *Gauter Edwin Kircher v. State of Goa*,<sup>36</sup> the appellant a German national was convicted by trial court and awarded sentence of 10 years rigorous imprisonment and to pay fine of Rs. one lakh. However, the Apex Court found that only a small quantity of contraband was seized, and also prosecution failed to show that the accused was a drug peddler, hence the Supreme Court reduced the sentence to one year's rigorous imprisonment in view of possession of drug for personal consumption under Section 27 of the NDPS Act.

In 2015, a Public Interest Litigation was filed before the Bombay High Court challenging the criminalisation of cannabis under Indian law. The law was questioned on the ground of RTI results which revealed that government had no answer to the query whether and how the cannabis is harmful to the human body. The petitioner contended that cannabis currently occupies an uncertain position under Indian criminal law, which allows certain forms of it to be consumed during religious festivals such as Holi. However, High Court dismissed the petition citing the reason that the legislature and not the court was the appropriate forum for declaring decriminalization or otherwise of cannabis. It reasoned:

We are afraid that this Court while exercising its writ jurisdiction under Article 226 of the Constitution of India cannot grant the reliefs...Apart from that, the petitioner has produced certain technical data regarding useful effects of Ganja etc. We are afraid that we are not experts in the field and the petitioner can raise this issue in the Parliament...<sup>37</sup>

---

<sup>33</sup> *Wessel Van Beelan v. State of Goa*, 2000 Cr.L.J. 271 (Bom.).

<sup>34</sup> AIR 2001 SC 2420.

<sup>35</sup> *Durant Didier v. Chief Secretary*, AIR 1989 SC 1966; see also, *Deepak Ghanshyam Naik v. State of Maharashtra*, 1989(1) Bom. C.R. 574.

<sup>36</sup> AIR 1993 SC 1456.

<sup>37</sup> *Aditya Barthakur v. Department of Health and Family Welfare and Others*, Cri.L.J. No. 18 of 2015.

The foregoing cases demonstrate that judiciary in India has treated the mere possession of narcotic drugs as criminal and punishable under the law. In this regard, the judgment of Bombay High Court in the aforesaid PIL of 2015 goes on to prove that courts in India are in no mood for adopting a liberal approach on this critical issue, and they have basically pushed the ball into the jurisdiction of lawmakers. To add to the woes, the burden of proof on the drug addict, to prove that drugs under his possession were meant for personal consumption, has made the law all the more draconian.

### **Decriminalisation of Drug Addiction**

Decriminalization means that certain acts no longer constitute criminal offences. In matter of decriminalisation of drug use, it does not mean that people can use drugs with impunity. Instead, it means that possessing small amounts no longer lands the possessor to a jail sentence.<sup>38</sup> In any case, following decriminalisation, it will be still illegal to use, possess, acquire or import drugs, but those acts are no longer taken as criminal offences inviting imprisonment, rather such acts are to be dealt with administrative sanctions or measures such as fine, suspension of the driving or firearms, or just a warning.<sup>39</sup> For example under Jamaican law, people caught possessing upto 2 ounces of cannabis can be fined, but not arrested or taken to court; drug users in Portugal can be forced to attend classes aimed at getting them back to the normalcy; similarly, people found with cannabis in Italy may have their driving licences confiscated.<sup>40</sup>

The proponents arguing for the decriminalization of drug use often point out a number of reasons which have not been taken into consideration while legislating for a rigorous narcotics' regime. Such factors are discussed hereunder:

*Criminalisation Informs Stigma:* Drug use is viewed as unacceptable and criminal, therefore people who use drugs, by default, are stigmatized as deviant criminals. 'Stigma' refers to a process of 'social spoiling' whereby an individual's status comes to be seen as tarnished and spoilt. In terms of drug use, stigma and criminalization operate together. Stigma is used to discourage drug use and criminalization is justified by stigmatizing drugs and the people who use them.<sup>41</sup> Stigmatism frequently leads to prejudiced and biased treatment of drug users. It gradually transforms into a sort of discriminatory yet acceptable, popular social behaviour against the drug users. Such discrimination causes ill effects on health

---

<sup>38</sup> See, The Economist Explains, *The Difference between Legalization and Decriminalization*, The Economist (June 18, 2014), available at <https://www.economist.com/blogs/economist-explains/2014/06/economist-explains-10> (last visited March 24, 2017).

<sup>39</sup> *Supra* n. 22

<sup>40</sup> *Supra* n. 38

<sup>41</sup> J. Ahern, J. Stuber & S. Galea, *Stigma, Discrimination and the Health of Illicit Drug Users*, 88 DRUGS AND ALCOHOL DEPENDENCE 188-195 (2007).

and welfare of drug users.<sup>42</sup> More often the stigmatized people are forced to distance themselves away from their community and family.<sup>43</sup> For them, staying hidden and concealing their drug use is often necessary in order to survive. They fear disclosure as that may entail discrimination, violence, harassment, social exclusion, arrest, torture etc.<sup>44</sup> Thus stigma serves to isolate and alienate drug users from health care services, reducing opportunities for education, employment, outreach and peer networking.<sup>45</sup> Further, they are socially viewed as indulgent in criminal or immoral activities due to which their tenancy rights are often forfeited.<sup>46</sup>

Incarceration due to drug addiction causes further stigma. The stigma attached to a person released from prison is not unknown. An incarcerated person once out of prison is treated poorly by others, not only in case of employment but also in housing and day to day activity because of his criminal history. Such stigmatization significantly impacts the drug user's transition from jail to home, potentially limiting his help-seeking intentions. A social construction about the criminal nature of a drug user, who is out from jail, acts as a continuing punishment rather than rehabilitation, resultantly, such person often relapses into drug use.

*Criminalisation Increases HIV/AIDS Pandemic:* Criminalizing drug is linked with potential increase in HIV/AIDS pandemic. Treating drug use as a criminal offence fuels the HIV epidemic via several mechanisms. Fear of arrest motivates drug users to go underground, away from HIV testing and HIV prevention services, placing them into high risk environments. Restriction on provision of sterile syringes to drug users results in increased syringe sharing,<sup>47</sup> which in turn, causes the potential risks of HIV/AIDS. In addition, lack of HIV prevention measures in prison often lead to HIV outbreaks among incarcerated drug users. High rates of incarceration among drug users with or at risk of HIV infection are a matter of deep concern, as such depressive scenario affords enough space for

---

<sup>42</sup> International Network of People who Use Drugs (INPUD) *Drug User Peace Initiative: Stigmatizing People who Use Drugs* (INPUD Secretariat, London, 2014), available at: [https://www.unodc.org/documents/ungass2016/Contributions/Civil/INPUD/DUPI-Stigmatising\\_People\\_who\\_Use\\_Drugs-Web.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/INPUD/DUPI-Stigmatising_People_who_Use_Drugs-Web.pdf) (last visited April 2, 2017).

<sup>43</sup> *Supra* n. 41.

<sup>44</sup> *Supra* n. 42.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See generally, Report of the Global Commission on Drug Policy, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic* (June 2012) p. 4, available at [https://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP\\_HIV-AIDS\\_2012\\_EN.pdf](https://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP_HIV-AIDS_2012_EN.pdf) (last visited on April 2, 2017).

indulgence in syringe-sharing, unprotected sex, etc., thus, undeniably fuelling the HIV transmission.<sup>48</sup>

### **Decriminalisation of Drug Consumption: The Portuguese Experience**

As noted before, Portugal became the first European country to adopt the decriminalization policy in 2001.<sup>49</sup> The policy emerged as a comprehensive response to increasing concerns in the 1980s and 90s about the proliferation of diseases such as HIV/AIDS, tuberculosis and host of other deadly ailments among the users of heroin and other intravenous drugs. While the new policy is, by and large, considered a success, but many critics fear that decriminalization would help establish 'acceptability' of the drug use in the society. Proponents, though, reject such misgivings. They opine that, "judging by every metric, drug decriminalisation in Portugal has been a resounding success"<sup>50</sup>, as it has enabled the Portuguese government to manage and control the drug problem far better than virtually every other western country. In this context, proponents further argue: "By freeing its citizens from the fear of prosecution and imprisonment for drug usage, Portugal has dramatically improved its ability to encourage drug addicts to avail themselves of treatment. The resources that were previously devoted to prosecuting and imprisoning the drug addicts are now available to provide treatment programs to addicts."<sup>51</sup>

A comprehensive stud<sup>52</sup> into the Portuguese experience with the implementation of new drug law has revealed the nature and impact of decriminalization policy adopted since 2001. Under the new policy those found in possession of drugs are not arrested, but sent to correction committees for the dissuasion of addiction. These committees have the power to impose warnings or administrative sanctions including fines, confiscation of driving licenses or even referral to treatment centres. In effect, in most of the cases, punishment is not inflicted on the drug users or possessors. Acting under the mandate of the new policy, the country has substantially increased investment in treatment and harm-reduction or prevention services, thus, in effect, fundamentally shifting the focus from penal approach to preventive or reformatory approach.

---

<sup>48</sup> *Id.*

<sup>49</sup> *Supra* n. 27

<sup>50</sup> Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, Cato Institute (2009) p. 1, available at [https://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald\\_whitepaper.pdf](https://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf) (last visited April 5, 2017).

<sup>51</sup> *Id.*, p. 28. See also, Glenn Greenwald, *What Portugal can Teach us about Decriminalizing Drugs*, Newsweek (May 7, 2015), available at <http://www.newsweek.com/greenwald-what-portugal-can-teach-us-about-decriminalizing-drugs-349992> (last visited April 5, 2017).

<sup>52</sup> See generally, Caitlin Elizabeth Hughes & Alex Stevens, *What can we Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50(6) BRITISH JOURNAL OF CRIMINOLOGY 999-1022 (2010).

The trends reported in the comprehensive research conducted by Hughes & Stevens (2010)<sup>53</sup> on the effects of Portuguese decriminalization policy of 2001 can be summed as follows:

- Since 2001, there has only been a modest increase in drug use reported by adults. Such a marginal increase is no bigger than that reported in other European nations.
- A visible reduction is seen in the drug use reported by school pupils.
- A shortfall is registered in cases of drug-related deaths.
- A visible reduction is reported in cases HIV and AIDS.
- A drastic increase is reported in the amount of drug confiscated by law enforcement authorities.
- A visible lessening of prison burden is reported ever since the implementation of new policy.<sup>54</sup>

Overall, it is reported that “contrary to predictions, the Portuguese decriminalization did not lead to major increase in drug use. Indeed, evidence indicates reductions in problematic use, drug-related harms and criminal justice overcrowding.”<sup>55</sup> Further, the Portuguese experience indicates that a country could end criminalization of users of all types of drugs, and not just marijuana, without enhancing the drug use and harms.<sup>56</sup> Such a policy, in order to be successful, requires a great deal of sustained investment in treatment, care and corrective services in the country.

The Portuguese experience demonstrates the potential advantages of decriminalization, and so, even while many critiques have lambasted the new policy, there is no serious political push in the country to turn back to old criminalization framework. There is now a wide unanimity among the policymakers in relation to the fact that decriminalization has emerged as a far more effective approach to managing Portugal’s addiction problems and other drug-related afflictions.<sup>57</sup> In view of the apparent success of the decriminalization policy, the Portuguese model is often pushed to be considered and replicated by other countries struggling to contain the mounting problems of drug use.

### **Should India follow the Liberal Path?**

Portugal’s experience casts doubt on the widely held assumption that decriminalization necessarily leads to increase in the most harmful forms of drug use. The various studies undertaken, following the adoption of the new policy in

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Under the new policy, drug use is treated as a medical issue, not a crime.

<sup>55</sup> *Id.* See also, P. Smith, *Portuguese Drug Reformers Look Beyond Decriminalization* (Dec. 1, 2010), available at [http://stopthedrugwar.org/chronicle/2010/dec/01/portuguese\\_drug\\_reformers\\_look\\_b](http://stopthedrugwar.org/chronicle/2010/dec/01/portuguese_drug_reformers_look_b) (last visited April 5, 2017).

<sup>56</sup> *Id.*

<sup>57</sup> *Supra* n. 50, p. 28.

2001, highlight the fact that Portugal has experienced an overall decline in drug use. Its decriminalization policy is often cited as a model to be replicated by countries such as India where the harsh rigours imposed by NDPS Act, 1985 have done little to alter the spiralling problem of drug use.

The fundamental base behind the Portuguese decriminalization policy is the recognition that people use drugs for a number of reasons such as poor socio-economic status, personality disturbance, unemployment, poor education, etc. Indian conditions, in this regard, present an even more fertile ground for drug use. Resultantly, the repressive drug laws of India have predictably not yielded the desired results, and hence, require drastic changes to deal with the menace of drug problems.

Regardless of the harshest punishment prescribed under the NDPS Act, India, of late, has seen exponential growth in drug supply, leading to creation of organized mafias that continue to ensure supply of banned drugs in a covert manner in the society. It is reported that India increasingly consumes more synthetic drugs such as cocaine, heroin, methamphetamine, and mandrax than naturally occurring psychotropic substances such as cannabis and hashish.<sup>58</sup> In medical terms, consumption of synthetic drugs is far more addictive and injurious to human health than natural psychotropic substances.

Recently, a Private Member Bill<sup>59</sup> was proposed in Parliament seeking to allow recreational use of certain drugs such as opium under medical supervision, the need of which has arisen in the background of destructive consequences of synthetic drugs.<sup>60</sup> The said Bill also seeks to treat drug users as patients rather than criminals. However, it remains to be seen whether the Bill is converted into an Act of Parliament, as till now no further progress on the Bill is reported. Even if it is converted into a law, it would only be considered “too little too late” in terms of bringing changes in approach of the policymakers, who till now, remains clear in treating drug users as offenders, and drug addiction as a serious crime against the society. Such an approach has only entrenched the social stigmatization of the drug users in India, thus creating enormous hurdles in effective handling of the spiralling drug problems.

---

<sup>58</sup> It is reported that Indian states of Punjab and Maharashtra lead the trend in smuggling and consumption of synthetic drugs. See, Deeptiman Tiwary, *Use of Synthetic Drugs on the Rise in India*, The Times of India (Nov. 25, 2013), available at <http://timesofindia.indiatimes.com/india/Use-of-synthetic-drugs-on-the-rise-in-India/articleshow/26334302.cms> (last visited April 10, 2017).

<sup>59</sup> The said Private Member Bill is sponsored by a Member of Parliament Dr. Dharamvira Gandhi. See, HT Correspondent, *Bill for Legalized Supply of Opium, Marijuana Cleared for Parliament*, Hindustan Times (Nov. 2, 2016), available at <http://www.hindustantimes.com/punjab/aap-mp-gandhi-s-bill-seeking-opium-legalisation-cleared-for-tabling-in-parliament/story-itanKX3vRrhuXJPdgnJD6N.html> (last visited April 10, 2017).

<sup>60</sup> *Id.*

**Conclusion**

The fundamental aim of the state should be to protect public health. The drug policy laced with criminal sanctions for drug use and possession for personal consumption will simply aggravate the behaviour, health and social conditions of the drug user. Such a policy that re-victimises the victim is neither necessary nor appropriate. As is evidenced, in matter of drug use, it is always cheaper to treat people than to incarcerate them. Therefore, in opinion of the author, India needs to imbibe and replicate the successful model of drug prevention and control as evidenced in the Portuguese decriminalization policy. Policymakers in India need to formulate a new and pragmatic drug policy having a health-centric approach, away from the current excessive focus on the criminal sanctions. The drug laws must be informed by the principle of treating drug user as any other human being needing the care of the State and society. Hence, it is high time the lawmakers in India shed their conservative outlook vis-à-vis drug use, adopt realistic measures, and decriminalize the mere possession of narcotics in line with contemporary drug law and policy.

## Death by Choice Reconsidered in the Framework of the Devlin-Hart Debate

*Debashri Sarkar\**

### Introduction

Articulating on the questions of beginnings and ends of human life presents a complex challenge within the jurisprudential discourses and has inherent dichotomous moral underpinnings. Such questions essentially concern the private realm of an individual and relate to some of the most intimate decisions that an individual may take in his/her lifetime, thereby bringing forth a complex agenda before the State to legislate.

This paper considers some questions pertaining to human death and law's engagement with the aspects of seeking death or the right to passively approach death by an individual.

The subject of 'death' in the legal parlance draws heavily from medical ethics and also prominently from theology. The tentative translation of the expression 'death by choice' is found in the mythological texts as '*ichchamrityu*'<sup>1</sup> whereby the body could be freed after performing all worldly deeds according to the volition of the person inhabiting it. This choice of death in the *ichchamrityu* sense was treated as a blessing or a boon. In the Hindu mythology, Bhishma was granted this power by his father as a boon (*vardaan*).

In the contemporary context, death by choice is a subject that forays into a wide variety of questions, viz., an analysis of the social and medical aspects of 'death', the element of 'choice' and the meaning and value of human life in the socio-political and religious context.

The right to die has been generally theorized upon as an extension of or the corollary to the right to life. The prevailing socio-legal semantics make use of the terms like suicide, euthanasia, mercy killing, etc., and therefore locate most of its theoretical background in the medical advancements and extending province of bio-ethics. The subject of termination of human life has been so widely contested over the years that it has spilled over to several fragments of consideration making it rather difficult to evolve a unanimous perspective on the questions raised within it. For instance, the subject of abortion, or involuntary sterilization, etc., belong to such volatile and dilemmatic moral zone that a singular view of law and policy on it has not yet been possible. This difficulty in generating a consistent view on such

---

\* Assistant Professor in Law, National Law Institute University, Bhopal. E-mail : debashrisarkar@rediffmail.com

<sup>1</sup> Mrinal Kanti Ghosh, LIFE BEYOND DEATH 109-112 (Genesis Publishing, 2003) Apart from this, Chandragupta Maurya, founder of the Maurya dynasty with his guru Jain Muni Bhadrabaahu adopted self-willed death by fasting till death as a disciple of Jainism.

decisions is also because of the constant struggle between the moral viewpoints of the individual *vis-a-vis* the State.

The human body and the autonomy over its usage, maintenance, treatment, etc. are foundational dimensions of choice that a person may exercise.<sup>2</sup> All such decisions belong to the private realm of an individual in which he is an autonomous free-willing agent. At the same time, human life is unquestionably the most important value that the law sets out to protect. Therefore, this topic essentially touches upon the dual aspect of law and morality and requires an understanding of the same. This component of 'duality' becomes prominent with different aspects that both 'law and morality' individually addresses. Both of these aspects present perspectives that are unique to each and at the same time have substantial inter-linkages desiring examination.

The entangling dimensions between law and morality have a rich and contentious literature of jurisprudential importance. The study of law and morality, therefore, has had varying deliberations and ever enlarging aspects of consideration that has been debated upon in the various stages of jurisprudential evolution.

The concern over determining the province and enforcement of the value that is not pure law but belongs more in the uncertain zone of morality took a rather new route with the historic Devlin-Hart debate published in the Wolfenden Committee Report in 1957. The debate evolved out of series of questions and concerns that were raised pertaining to the homosexual conduct of individuals and the offensive character of pornography. It was a dialogue between Lord Patrick Devlin and Prof. H.L.A. Hart posed two crucial questions of jurisprudence-one to what extent could a conduct be punishable based on larger social condemnation?. In other words, can something be made into an offence depending upon its innate immorality that is to be viewed through the lens of societal acceptance? Second, has the conduct that is made punishable for a larger social interest is sufficiently weighed against the considerations of individual liberty?

This debate although took up a multi-layered approach to the questions of homosexuality and pornography, the academic value of the debate has not lost its tenor in addressing several questions that are on the fringe between law and morality.

This paper attempts to examine the question of death by choice from the perspective of the Devlin-Hart debate and analyze its effectiveness in the contemporary philosophical landscape of India. What is the province of individual as well as community morality for the questions of death and the religious view of the human body? The *Santhara* ruling shall also be analyzed in this context. The questions raised by Lord Devlin and Prof. Hart among others, shall be analyzed in the larger context that is applicable in legislating upon the questions of human body, its jurisprudential value and the social sanctity attached to it, with specific reference to the right to die.

---

<sup>2</sup> John Harris, *THE VALUE OF LIFE* 115 (Routledge, 1992).

### The Debate: Lord Devlin's Stance

The crux of the Wolfenden Report was the basic question: Should immorality as such be a crime?<sup>3</sup> In the context of the present discussion, the question is, if seeking to terminate one's life is immoral as ordained by theology, then can such immorality lead to criminality by-passing the question of individual choice?

To this question, Hart answered in the negative and Devlin in the affirmative. A similar stand was taken by Mill and Fitzjames Stephen respectively<sup>4</sup>, about a century back and the combined effect of this stance divided the jurists into the so-called categories of liberal theorists and moralists- the latter came to be helmed by Lord Devlin's views.

The Wolfenden Committee in its concluding remarks tended to tilt in favour of Hart's ideal of liberty and stated<sup>5</sup>:

The function of the criminal law is to preserve public order and decency, to protect the citizen from what is injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable. It is not the function of the law to intervene in the private lives of our citizens.

The Report suggested that the law, which previously made consensual homosexual relations in private an offence should be changed, primarily because as Hart stated that the law had no part to play in decisions about morality.

Lord Devlin, on the other hand, stated that "the criminal law as we know is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else."<sup>6</sup> A key issue behind the debate over legal moralism is the extent to which a moral code should shape our laws.

Devlin claims that it is not possible to set limits to the power of the State to legislate against immorality. The crux of his claim is roughly that any human conduct takes place within the arena of a social fabric and, therefore, has to be viewed in the light of such societal morality. The components of this society include not only political ideas but also moral ideals about the way its members should behave and govern their lives. Therefore, the society is held together by invisible bonds of common thought.<sup>7</sup> Whatever threatens those common bonds threatens society. Society, thereby has a right to protect itself against threats to those common bonds, such threats may be from within or from outside.

---

<sup>3</sup> Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 986 (1966).

<sup>4</sup> Gerald Dworkin, *Law and the Enforcement of Morality*, 40(3) WILLIAM & MARY LAW REVIEW 927 (1999).

<sup>5</sup> Wolfenden Report 1957, *Report of the Committee on Homosexual Offences and Prostitution*.

<sup>6</sup> Patrick Devlin, *THE ENFORCEMENT OF MORALS* 9 (OUP, 1965).

<sup>7</sup> *Id.*

Thus, one finds a potentially continuous debate about the balance between law, morality, freedom, and social control. The debate continues to face newer challenges as the contemporary societies face new dilemmas, resulting particularly from the developments of science and technology in numerous fields which pose new and unaddressed questions. The primary concern, therefore, that arises is with respect to competing interests that deserve a balanced approach of the self and de-valuation of the moral standards.

### **Legal Construction of Human Body**

The question of euthanasia or medically assisted death has emerged as a result of the advancements in medical technologies and the parallel development in the allied discipline of bio-ethics. In the context of this jurisprudential juncture, a crucial question deserving a closer scrutiny is of the human body. Substantial work on this issue has been done by Prof. Alan Hyde who suggested that law deals inadequately with human bodies across a range of contexts.<sup>8</sup> He demonstrates a variety of metaphors for the body from the lens of law, like, as property, privacy, autonomy, and care. Hyde advocates for varying conceptions of the human body, i.e., the physical embodiment and experiences like pain, ageing, menstruation, or other bodily experiences that shape the medical intervention in the human body. All such experiences have a direct relation with medical law that is wholly concerned with the physicality of the body. Hyde views this explanation as a narrow conception of the body that only concerns itself with the physical body. Although, he demonstrates a variety of metaphors of the body, as property, privacy right or machine, but each fails to capture important understandings of human bodies and how the social order seeks to relate to them.<sup>9</sup>

The social constructions of the human body have differed from the perspective of growth in the field of bioethics. The privatization of health-care putting emphasis on patient autonomy has shifted the health-care decisions of the doctors on the patients.<sup>10</sup> This has further propelled the question of autonomy in the western countries.

The thematic analysis of autonomy is significant to understand the validity and extent of individual decision-making with reference to perplexing questions about ends-of-life.

The common law tradition regards the human body as sacred and bodily integrity as a highly revered virtue. This legal doctrine gives rise to several important principles with respect to a political-social-medical and legal treatment of the body.

In *Schloendorff v. New York Hospital*,<sup>11</sup> Justice Cardozo stated: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." The claim of Justice Cardozo endorses a basic societal concept, recognized in the common law. Therefore, as an extension to

---

<sup>8</sup> Ruth Fletcher *et al*, *Legal Embodiment: Analyzing the Body of Health Care Law*, 16 (3) MEDICAL LAW REVIEW 321-345 (2008).

<sup>9</sup> *Id.*

<sup>10</sup> A.R. Jonsen, *THE BIRTH OF BIOETHICS*55 (OUP, 1998).

<sup>11</sup> 105 N.E. 92, 93.

this claim, the question, “what is the tentative right of a person with respect to one’s own body?” remains open and apparent. The discussion on decision making of oneself over his/her body and the extent of such decision to the level of taking away life from the human body has been fragmented and inconsistent over the past century and a half.

In a basic market scenario, as Martha Nussbaum puts it “all of us, with the exception of the ones who are independently wealthy and the ones that are unemployed, take money for the use of our body.”<sup>12</sup>

There is thus a quintessential acceptance of the proposition that an individual owns his body physiological and mental. With the idea of body as a property of the human, it is logical argument that the owner of the property is free to use it on his volition. The extension of the proprietary argument over the human body has also been strengthened with the on-set of privatisation of medical care where in patient autonomy with respect to the choice of his/her treatment has gained paramount importance. Now, the patient is no longer a passive participant in the treatment process

The ideal societal stance with respect to any human being was the recognition of his basic right to life. So sanctified has this right been that the primary agenda of any State is to preserve such human life and evolve strict sanctions for persons attempting to terminate the human life. Additionally, there have been clear and consistent safeguards with respect to the treatment of a dead human body as well. A corpse also has been given a symbolic sanctity wherein unauthorized taking of a dead body can also amount to theft.<sup>13</sup> Medically this value has been converted into the most profound obligation of protecting as well as prolonging the patient’s life to all possible extent.

The doctrine of informed consent is a primary means developed in the law to protect this personal interest in the integrity of one’s body. Under this doctrine, no medical procedure may be performed without a patient’s consent, obtained after explanation of the nature of the treatment, substantial risks, and alternative therapies.<sup>14</sup>

This value of informed consent has become an important facet of medical practice wherein the patients are treated not as dependent individuals but as independent consumers and in which the power of doctors is curbed.<sup>15</sup>

The patient’s ability to control his bodily integrity through informed consent also logically recognizes that this right also encompasses a right to informed

---

<sup>12</sup> Martha C. Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, 27 THE JOURNAL OF LEGAL STUDIES 693 (1998).

<sup>13</sup> See generally, Alexandra George, *Property in the Human Body & Its Parts Reflections on Self Determination in Liberal Society*, EUI WORKING PAPER (Law No. 2001/08).

<sup>14</sup> Cantor, *A Patient’s Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 6 RUTGERS LAW REVIEW 228, 237 (1973).

<sup>15</sup> Onora O’Neil, *AUTONOMY AND TRUST IN BIOETHICS* 19 (Cambridge University Press, 2002).

refusal. Thus, a competent adult generally has the right to decline medical treatment initiated or continued.<sup>16</sup>

The right to make certain decisions concerning one's body is also protected by the much revered constitutional value of privacy. While this right to privacy might apply in a case of seeking or refusing treatment, the common law right to self-determination embraces very succinctly the right to refusal of treatment.

The New Jersey Supreme Court in the landmark ruling of *re Conroy*<sup>17</sup> delved into the subject in detail. The court elaborated upon the question of right to refuse life-sustaining treatment and its varying considerations. The court stated that the starting point in analyzing whether life-sustaining treatment may be withheld or withdrawn from an incompetent patient is to determine what rights a competent patient has, to accept or reject medical care.

The basic right to autonomy and self-determination has been more or less guaranteed to every individual. It is also a quintessential aspect of bioethics and within this larger umbrella, features a person's right to refuse medical treatment. The courts and commentators have, however, articulated certain State interests when such right could be limited. They are: preserving life, preventing suicide, safeguarding the integrity of the medical profession, and protecting innocent third parties.

### **The Death by Choice: Some Aspects of Semantics**

The very ethical foundation of the medical profession is based on putting in all attempts to save and preserve life. This has been in consonance with the State interests as well.

In the literature and public debate, there are also arguments in favour of euthanasia and physician-assisted suicide. One such argument invokes the right to die. According to this argument, decisions concerning life and death should be up to the concerned individual. There are also very serious moral arguments against it and those could be broadly stated to be falling in two categories:

- (i) Fundamentally against State interest and ethical impermissibility of the medical profession and
- (ii) High probability of misuse if the right to kill or die is placed with ordinary individuals.<sup>18</sup>

For legislating on questions of policy, the State has to enshrine for itself clear goals and objectives that it seeks to achieve by way of delineating the exact province of its legislation. To demarcate such a province there is a general expectation of 'defining' the policy. Therefore, the subject of semantics gathers prominence. Some basic questions that the policy maker ought to ask oneself are what is it that is to be legislated upon? Is it legislating upon

---

<sup>16</sup> See generally, Mark A. Hall, *et.al.*, HEALTH CARE LAW & ETHICS (Wolters Kluwer, 8<sup>th</sup> edn., 2013).

<sup>17</sup> 486 A.2d 1209 (N.J.1985).

<sup>18</sup> Andrew Grubbs (ed.), PRINCIPLES OF MEDICAL LAW 1103-1119 (Oxford University Press 2004).

suicide in general? Or is it medically assisted suicide or passive euthanasia? Is it willing to regulate upon death ordained by religion or is it the complete autonomy over one's body that the State can endorse? These policy questions lead one to seek clarity over the definitional analysis of mutually similar sounding words in its pretext and context. There are different ways of bringing on the death of someone in an end-of-life situation. First is suicide or self-homicide. Suicide has been penalized in India as the Supreme Court has held that there is no right to die under Article-21 of the Constitution and attempt to suicide is a crime under Section-309 Indian Penal Code.

A second method is euthanasia, also called "mercy killing." Here, it is the third party that actually performs the death-causing act, and not the person himself who is seeking to die. There are different types of situations in which euthanasia might be carried out, and this leads to additional distinctions. For instance, active euthanasia is where a third-party performs a consciously overt action that brings about the death of the person. For instance, a doctor might actively perform euthanasia by administering a lethal dose of drugs to the patient, through pills or an injection. By contrast, passive euthanasia is when the third party allows the patient to die by not intervening.<sup>19</sup> Frequently this is done by taking a patient off life-support, or deciding to not put a patient on life-support to begin with.

The emergence of such semantics could be traced to the technical understanding of 'life'. In the medical sense, it was the beating of the heart that determined the life state of an individual. When the technology of life-sustaining treatment like the ventilator was invented, it helped in continuing the heart beat and keeping the basic functions of liver and kidney alive as a measure of prolonging the life of the patient. Such technology and medical care can now maintain the person's life for weeks, months, or even years. However, these life-saving advances in technology are very costly. If the life that can be saved has a very poor quality and society's limited resources could be used for other patients who would have a better quality of life and who want treatment, then it is not clear, to what extent does the State has an interest in always preserving the patient's life.

As much as 'life' deserves a connoted meaning, there is a yet another aspect of semantics that deserves consideration is the aspect of defining 'death'. There are terms like "brain death" and there is death by cardio-pulmonary criteria. There are cardiac-deaths, brain-deaths, or even a condition of permanent unconsciousness. The aspect falls under varieties of medical conditions and there has been a fragile consensus on the determining elements of death. In New Jersey, under the determination of death statute, people are dead when either their heart and lungs or their brain stop functioning.<sup>20</sup>

When a person has been declared dead that person's legal representative cannot insist that the patient be maintained on a ventilator. Indeed, in re

---

<sup>19</sup> James Fieser, *Euthanasia: From Moral Issues that Divide us and Applied Ethics* (2008) available at <http://www.utm.edu/staff/jfieser/class/160/6-euthanasia.htm> (last visited Dec. 27, 2015).

<sup>20</sup> *Supra* n. 16, pp. 548-550.

Bowman,<sup>21</sup> the court automatically assumed that the declaration of death by brain criteria foreclosed a choice of continued treatment.

Brain-death, coma, and the persistent vegetative state (PVS) differ in the extent to which there is function of the brain stem, the part of the brain that controls unconscious activity. In brain-death, there is a nearly complete and an irreversible loss of brain stem function. As a result, the brain is no longer able to regulate what are known as the body's vegetative functions, which include the functions of the heart, lungs, kidneys, intestinal tract, and certain reflex actions. Brain-dead persons appear to be in a deep coma in which they do not generally engage in any spontaneous movement. Moreover they do not respond to stimuli such as pain, touch, sound or light. Mechanical measures and other artificial support can maintain a brain dead person's heartbeat, breathing and other vegetative functions temporarily, but usually only for a few days or weeks after brain death occurs. A person who is brain-dead is legally considered as dead. As a consequence, patients and families have no choice over "life support"; treatment must be withdrawn, not as a matter of the patient's rights but simply as a matter of medical routine and out of proper respect for the deceased.<sup>22</sup>

In contrast, to brain-dead persons, patients in a PVS are still alive. Because they maintain relatively normal brain stem function, they can usually breathe air, digest food and produce urine without any assistance. They experience cycles of sleeping and waking. They may smile, utter unintelligible sounds, or move their eyes, arms, legs sporadically. Such patients also manifest a range of reflex actions to different stimuli; they cough, move their arms and legs.

Coma may be viewed as a condition intermediate between brain-death and the vegetative state. The brain stem retains some function, but not the range of activity seen in the vegetative state. E.g., coma is a sleep like state in which the eyes remain closed. The patient's breathing is impaired, and many reflexes are absent. Coma and the vegetative state also differ in their duration. The period of coma may last for two to four weeks, by which time the patient either dies, enters a vegetative state, or regains some degree of consciousness. The duration of the vegetative state, on the other hand, frequently lasts for more than a few weeks. Once it has existed for several months, it is characterized as a PVS. Patients can survive for years, in a PVS. In rare cases, patients have regained consciousness from this state, but these patients usually remain severely disabled neurologically.<sup>23</sup>

These days as the doctors have shifted the once purely medical decisions on the patient-the problem that arises is the competence of the patient to undertake the end-of-life decisions. This problem thus gives rise to an understanding of differing categories of cases wherein such decisions are taken.

---

<sup>21</sup> 671 P.2d at 420-421.

<sup>22</sup> Robert D. Truog *et al.*, *The Problem with Futility*, 326 THE NEW ENGLAND JOURNAL OF MEDICINE 1560 (1992).

<sup>23</sup> The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* 330 THE NEW ENGLAND JOURNAL OF MEDICINE 1572 (1994).

### Right to Die: Litigation and Legal Questions

The onset of litigation could be seen in the 1970s with the advent of respirator technology and life-supplying instruments. This changed the notions of life and death and thereby enlarged the functioning zone of the doctors. Life could be prolonged and death could be postponed. However, since the technology was new, there was no established medical standard that provided any sound basis to the actions of a doctor to continue or switch off<sup>24</sup> the ventilator.

In *Blackburn v. State*<sup>25</sup>, the early legal position of the State interest in protecting and preserving human life, was judicially articulated upon in the following words: "The life of those to whom life has become a burden- of those who are hopelessly diseased or fatally wounded- nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live. Assisted Suicide is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered."<sup>26</sup>

Over the years this basic rule has undergone dynamism with the effective development of medical technology. The second stage of the evolution of law in this field is concerning the right to refuse treatment-relies on the dichotomy between action and inaction. The courts although not delving much deep into the distinction between action and inaction, but rather concentrated between various forms of inaction. Another basis of evolution has been with the philosophical understanding of the human body vis-a-vis the question of right to die.<sup>27</sup> The philosophical basis of the body was that intervention is permissible only if one allows it. So, if X refuses the treatment gauging the consequences of futility, pain, etc., the doctor or any other third party can not interfere without his or her permission. This aspect thus gives rise to the question of competence to decide on such refusal.

#### *Patient's Competence to Decide*

The right to refuse life-sustaining treatment is most straight forward when the patient possesses decision making capacity and therefore is able to make informed and voluntary decisions about medical care. The value of privacy gives rise to the concern that it might conflict with state interests in the preservation of human life and defence of the right of the physician to administer medical treatment according to his best judgment.<sup>28</sup> Although it cannot be expected of a competent patient to endure the unendurable pain, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life, it still is a measure of great caution to conclusively suggest the possibility of any or no return. Initially, this competence was heavily restricted by the State. However, it was later, with the recognition of the constitutional ideals of liberty and privacy

---

<sup>24</sup> *Supra* n. 18, p. 1115.

<sup>25</sup> 23 Ohio St. 146, 163 (1873).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, p. 524.

<sup>28</sup> *Supra* n. 16, p. 521.

that the common law traditions recognized the right of a person over his body which would also include the right to control and decide the course of his treatment or no treatment at all. This emerged as a stronger relatable right rather than the abstract interest of the state in preserving life.

***Patient whose Competence is Uncertain***

In the vast majority of cases, the patients are whether competent or they are incompetent. In some cases, however, whether the patient can competently consent to or refuse treatment is not so easily decided.<sup>29</sup> Till now, there has not developed a readily applied standard for assessing patient-competence. In *Lane v. Candura*,<sup>30</sup> Ms. Rosaria Candura was a 77 year old woman with gangrene in her right foot and lower leg. Her physicians recommended amputation without delay, but Ms. Candura refused after originally agreeing to the surgery. She already had undergone two amputative operations on her right foot, losing a toe and part of a foot. In explaining her reasons for refusing a third surgery she said, she has been unhappy since the death of her husband two years earlier; that she does not wish to be a burden to her children; that she does not believe that the surgery would cure her; that she does not fear death but welcomes it. The court found that she is lucid on some matters and confused on others. However, looking into the overall circumstances the court held that Ms. Candura was competent to refuse treatment, noting that her competence had not been questioned until she withdrew her original consent to the surgery; that she had a right to make a decision about medical treatment and there is no evidence suggesting that her confusion or forgetfulness was interfering with her ability to decide about the surgery and that her case did not involve an incapacity of appreciating the nature and consequences of her act.<sup>31</sup>

There have been some tests suggested by the courts and commentators but nothing lucid has emerged in this category. There are times when the person's decision making ability is impacted by his socio-religious-cultural conditioning devoid of the medical and health logic; that can make the situation rather fragile and difficult to reconcile.

Issues of competence also arise for adolescents. Minors usually are held to lack decision making capacity, and parents usually have authority to make decisions on their behalf and the standard normally applied is the best-interests standard. However, the court also considers other aspects. In *Caldwell v. Bechtol*,<sup>32</sup> the Tennessee Supreme Court considered whether a woman five months shy of her eighteenth birthday could give consent to treatment by an osteopathic physician for her lower back pain. The court stated: Whether a minor has the capacity to consent to medical treatment depends upon the age, ability, experience, education, training and degree of maturity or judgment obtained by the minor, as well as upon the conduct and demeanour of the minor at the time of the incident involved. Moreover, the

---

<sup>29</sup> Daniel Marson & Kellie Ingram, *Competency to Consent to Treatment: A Growing Field of Research*, 2 JOURNAL OF ETHICS, LAW AND AGING 59 (1996).

<sup>30</sup> 376 N.E.2d 1232 (Mass. App. Ct. 1978).

<sup>31</sup> *Id.*

<sup>32</sup> 724 S.W.2d 739.

totality of circumstances, the nature of treatment, risks and probable consequences are to be considered.

*Patient who has no Competence*

The end-of-life decision becomes most crucial when the patient has no competence to make the choice. Most of the cases fall under this category thereby requiring a serious thought to create wide-encompassing procedural safeguards to ensure the best exercise of the choice.<sup>33</sup> The category comprising incompetent patients could be divided into broadly two groups. One the infants or small children who are not usually made aware of their medical condition and even if they are, they have practically no hand in determining the course of their treatment. Second is the group that involves ventilator dependent patients due to disorders of the nervous system that results in degeneration of the nerves controlling voluntary muscle movements or someone who is in a persistent vegetative state.

In *re Conroy*<sup>34</sup>, a situation had arisen when a decision to stop all medical treatments had to be taken not by the patient herself but by the doctors on the testimony of a friend of hers. The friend and nephew of the patient Ms. Conroy testified that throughout her life she avoided visiting the doctor and hospital. Once she was taken to the hospital for a condition of pneumonia and she snapped out of the place. According to her nephew, all Ms. Conroy and her sisters wanted was to have their bills paid and die in their own house. She, while competent had once refused to consent to the amputation of her gangrenous leg in 1982 and that her nephew now sought removal of the nasogastric tube because in his opinion, she would have refused the amputation and “would not have allowed the tube to be inserted in the first place.”

Ms. Conroy was a Roman Catholic. The Rev. Joseph Kukura, a Roman Catholic priest and an associate professor Christian Ethics at the Immaculate Conception Seminary in Marwah, New Jersey, testified that acceptable church teaching could be found in a document titled “Declaration of Euthanasia” published by the Vatican Congregation for the Doctrine of the Faith, dated June 26, 1980. The test that this document espoused required a weighing of the burdens and the benefits to the patient of remaining alive with the aid of extraordinary life-sustaining medical treatment. Life sustaining procedures could be withdrawn if they were extraordinary, which would embrace “all procedures, operations or other interventions which are excessively expensive, burdensome or inconvenient or which offer no hope of benefit to the patient.” Here what is to be seen is: what is the hope of recovery and of returning to cognitive life with the life sustaining treatment? In this particular case, the court stated that the means of care were not adding to the value of her life, which was outweighed by the burdens of that life. The relatives and the medical team therefore weighing all possibilities judged the situation and considered the removal of the tube as ethical and moral, even though the ensuing period until her death would be painful.

---

<sup>33</sup> *Supra* n. 16, pp. 550-552.

<sup>34</sup> 486 A.2d 1209 (N.J.1985).

The court laid down certain tests to probe into the concerns of life-sustaining treatment on an incompetent person. Since the condition of an incompetent person makes it impossible to ascertain definitively his present desires, a third party acting on the patient's behalf often cannot say with confidence that his treatment decision for the patient will further or frustrate the patient's right to control his own body.

#### ***The Subjective Test***

The life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved. The standard is a subjective one, consistent with the notion that the right that we are seeking to effectuate is a very personal right. The question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself. Medical evidence bearing in the patient's condition, treatment, and prognosis, like evidence of the patient's wishes, is an essential prerequisite to decision making under the subjective test.

#### ***Best-Interests Test***

For some incompetent patients it might be impossible to be clearly satisfied as to the patient's intent either to accept or reject the life sustaining treatment. For instance a minor, is a ward of the state, and the state supports the authority of its courts to allow decisions to be made for an incompetent that serve their best interests, even if the person's wishes cannot be clearly established. Life-sustaining treatment may be withheld or withdrawn from a patient when there is some trustworthy evidence that the patient would have refused treatment, and the decision maker is satisfied that it is clear that the burdens of the patient's continued life with the treatment outweigh the benefits of that life for him.

The basic question that arises here is not so much of the choice exercised by the patient or a third party but the quality and considerations that enable conjuring up such a choice. The arguments that this question brings about is as to who determines the "quality of life" before making the decision of "switching off" and also the question of life expectancy. Over a span of some decades now, the distinction between withdrawing and withholding was rejected. However, some commentators feel that it is worse to withhold than to withdraw. If treatment is withheld, then an opportunity is lost to see if the treatment would provide unexpected benefit.<sup>35</sup> Withdrawal generally occurs after it becomes clear that the treatment provides insufficient benefit.

#### **Indian Constitution and the Right to Die**

The Indian Constitution under Article 21 confers the right to life as the fundamental right of every citizen. The right to life under Article 21 of the Constitution has received the widest possible interpretation by the judiciary. The Supreme Court in *Vikram Deo Singh Tomar v. State of Bihar*<sup>36</sup> observed:

---

<sup>35</sup> Neil, Farber, *et.al.*, *Physicians Decisions to Withhold and Withdraw Life Sustaining Treatment*, 166 ARCHIVES OF INTERNAL MEDICINE 560 (2006).

<sup>36</sup> 1988 (Supp) SCC 734.

“The right to live with human dignity is the fundamental right of every Indian citizen”.<sup>37</sup>

The emphasis on the “dignity” element in life can be read as a subtle justification for a right to die if the life no longer remains dignified and has become painful and unendurable. However, if this is the plausible reading then it goes fundamentally against the tone of Section 309 of the Indian Penal Code. Section 309 of the IPC states “Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both”. This Section is based on the principle that lives of persons are not only valuable to them but also to the State which protects them. The State’s power under Section 309 IPC to punish a man for attempt to commit a suicide is questioned not only on the grounds of morality, but also on the constitutionality of the said provision. A lot of conflicting opinions have been given on desirability of retaining or abolishing Section 309 of the IPC because of some contrasting judgement given by various courts.

With the multi-dimensional aspects of Article 21 several judicial pronouncements emerged that attempted to locate “Right to Die” within the framework of Article 21. That means that every individual has a fundamental freedom to choose not to live. The main question that arises is whether right to life includes right to death.

First time it came for consideration before the Bombay High Court in *M.S. Dubal v. State of Maharashtra*<sup>38</sup> that struck down Section 309, as unconstitutional vide Art.21 of the Constitution which guarantees ‘right to life and personal liberty’. The Court said that ‘right to life’ include ‘right to end one’s life’ if one so desires. It was pointed out that right to life has both its positive as well as negative aspects. To put it positively it would include a right to die, or to terminate one’s own life. The blanket prohibition on right to die on pain of penalty, it was noted is unreasonable.

The Court noted: “If the purpose of the prescribed punishment is to prevent the prospective suicides by deterrence, it is difficult to understand how the same can be achieved by punishing those who have made the attempts... No deterrence is going to hold back those who want to die... because of the loss of interest in life or for self- deliverance.”<sup>39</sup>

This case was treated sympathetically by the Supreme Court and quashed the criminal proceedings against the accused.<sup>40</sup>

In 1985, Delhi High Court in a case while acquitting a young boy who attempted to commit suicide strongly advocated for deletion of Section 309, IPC and held that the continuance of the section is an anachronism unworthy of human society like ours. The effect of the provision is such that instead of

---

<sup>37</sup> *Id.*, para 2.

<sup>38</sup> 1987 Cr.L.J. 743 (Bom).

<sup>39</sup> *Id.*, para 20.

<sup>40</sup> *State of Maharashtra v. Maruti Sripati Dubal*, 1996 Cr. L.J. 4457(SC).

sending the young boy to a psychiatric clinic, it in fact sends him to mingle with criminals.<sup>41</sup>

### **Constitutional Validity of Section 309 IPC**

The Supreme Court in *P. Rathinam v. Union of India*<sup>42</sup> upheld the verdict given by Bombay High Court in the Dubal case and held that a person has 'right to die', therefore Section 309 of the IPC was violative of Article 21, hence it is void. A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. The 'right to live' in Article 21 of the Constitution includes the 'right not to live'. The court went on to say that a person who attempts to commit suicide does not deserve prosecution because he has failed. Before arriving at the conclusion, the Supreme Court took into consideration the cases argued before the high courts of some States, namely, Delhi, Bombay and Andhra Pradesh on the aforesaid issue and held that Section 309 IPC which has no justification to continue to remain on the statute book.

However, in 1996, a constitutional bench of the Apex Court in *Gian Kaur v. State of Punjab*<sup>43</sup> overruled its earlier decision of 1994 in *P. Rathinam*<sup>44</sup> and held that right to die is not a part of the 'right to life'. The apex court further held that Section 306, IPC as constitutional and said that 'right to life' does not include 'right to die'. Extinction of life is not included in protection of life.

Therefore, for Section 309, the court stated that the 'right to life' guaranteed under Article 21 of the Constitution did not include the 'right to die' or 'right to be killed' and, therefore, an attempt to commit suicide under Section 309, or even abetment of suicide under Section 306, IPC, are well within the constitutionally mandated, and are not ultra-virus.

### ***Law Commission of India***

The Law Commission of India, in the 210th Report recommended humanisation and decriminalisation of attempt to suicide. The Commission also recommended the repeal of section 309. The main emphasis of Section 309 according to the Law Commission was that it seems to serve no latent purpose. It said that it would be cruel and irrational to visit a person with punishment on his failure to die. Attempt to suicide is more a manifestation of a diseased condition of mind deserving of treatment and care rather than punishment. It would not be just and fair to inflict additional legal punishment on a person who has already suffered agony and ignominy in his failure to commit suicide. Section 309 provides double punishment for a person who has already got fed up with his own life and desires to end it. The provision is unreasonable and is not consistent with the overall understanding of prevention of life.

---

<sup>41</sup> *State v. Sanjay Kumar*, 1986 (10) DRJ 31.

<sup>42</sup> (1994) 3 SCC 394.

<sup>43</sup> (1996) 2 SCC 648.

<sup>44</sup> *Supra* n. 42.

### Vocalizing Euthanasia-The Historic Aruna Shanbaug Case<sup>45</sup>

This was a writ petition filed on behalf of *Aruna Shanbaug* by a journalist *Ms. Pinki Virani* of Mumbai claiming to be her next friend. This case is path breaking on many counts: One as it discussed comprehensively the various aspects of euthanasia and the moral perplexities involved with the questions; two, it is the first Supreme Court judgment on the point which could be called as an Indian version of many western end-of-life decisions. Third this was case of a rare variety where the true test of humanity and spirit for life could be seen. It was unprecedented in the history of mankind when a patient in persistent vegetative state not only survived for nearly four decades but also was taken care of by her fraternity, the nursing staff of the hospital as a rare display of solidarity, dedication and love.

To state the facts briefly: *Ms. Aruna* was a staff nurse working in King Edward Memorial (KEM) Hospital, Mumbai. On the evening of 27/11/1973 she was attacked by a sweeper of the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her during this act he twisted the chain around her neck. Due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. Her neurological report indicates damage to the cortex or some other part of the brain associated cervical cord injury. She had been rendered in a vegetative state for decades in the KEM Hospital.

The petition further stated that she is surviving only on mashed food which is put in her mouth, she is not able to chew or taste any food. Her excreta and urine are discharged on the bed itself. The petition states that judged by any parameter, *Aruna* cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a facade of life which is totally devoid of any human element.

Considering the overall futility of her purpose, it was prayed that she be stopped with the feeding and permitted to die peacefully.

To examine all aspects of the matter, the court requested for a complete medical examination of *Ms. Aruna* and formed a team of three doctors for the same. The report of the team of doctors endorsed the claims of the petitioner, but it threw some fresh light before the Court.

The report after going through her case history stated that though she survived, she never fully recovered from the trauma and brain damage resulting from the assault and strangulation. Her ordeal ended on May 18, 2015 as she died of pneumonia.

However, while she was in the vegetative state, the court identified three issues in her case:

If a person who is in a PVS, should withholding or withdrawal of life sustaining therapies be permissible or 'not unlawful'?

If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his/her wishes be respected when the situation arises?

---

<sup>45</sup> *Aruna Ramchandra Shanbaug v. Union of India*, (2011) 4 SCC 454.

In case a person has not previously expressed such a wish, if his family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?

The Court analysed several judicial opinions on the point and examined the medical understanding of death in the medical term. The Court conceded that death, whether understood in the cardio-pulmonary perspective or even neurological perspective refers to the most vital organ i.e. the brain. This organ is irreplaceable unlike, heart, limbs, kidney and, therefore, determine the most vital function of the human body. It is the irreversible cessation of all functions of the entire brain, including the brain stem. This definition basically refers to the functioning of brain stem<sup>46</sup> that regulates involuntary activity (such as response to light, respiration, heart beat etc.), if that still continues to function, then even if the person is unconscious is said to be living.

Hence, the Court concluded that Aruna could not be considered as dead.

As far as the next issue is considered, the court refrained from articulating on a point on which there is an absence of law. It clearly stated that there was an absence of a statutory provision that dealt with the procedure of withdrawing or withholding life support. But certainly, it could be permitted under certain circumstances and decision should be taken to discontinue either by parents, spouse or other close relatives or even in the absence of them by person or body of persons as next friend. It could also be taken by the doctors in charge of the patient. But, it has to be taken in the patient's best interests.

In this case, determining the fact, who could take such decision, became poignant. Her parents were no more, her relatives abandoned her. The nursing staff was taking care day in and day out, who could, therefore, be regarded as the closest to her in this case. It is their opinion that was to be taken into account which tilted towards life.

Hence, the Court ruling out active euthanasia in this country, aligning with the international standards, did permit passive euthanasia under certain circumstances. The Court also noted the fact that the Indian society is not mature enough to accept such forms of euthanasia without adequate legal protection.

## Religion and Death

An Indian perspective with special reference to *Santhara*: - Recently in a writ petition before the High Court of Rajasthan<sup>47</sup>, an interesting aspect was brought up. The petition was filed by an advocate practicing in Jaipur sought directions under Article 226 to the Central and State Governments to treat *Santhara*, the fast unto death practised by Svetambara Jains (*Digambara* call it

---

<sup>46</sup> See, The US Model Legislation, The Uniform Determination of Death Act, 1981, Sec. 1; Also refer to Sec 2(d) of Transplantation of Human Organs and Tissues Act, 1994 (India) which defines brain death as: "brain-stem death means the stage at which all functions of the brain-stem have permanently and irreversibly ceased....".

<sup>47</sup> *Nikhil Soni v. Union of India & Others*, Rajasthan High Court, Civil Writ Petition No.7414/2006, decided on Aug. 10, 2015.

*Sallekhana*), as illegal and punishable under the laws of the land.<sup>48</sup> Calling it suicide and, therefore, a criminal act, the PIL also sought prosecution of those supporting the practice for abetment to suicide. In other words, the practice was equated with some form of murder masqueraded in the garb of religion. The High Court ordered to declare a prohibition on such practice. The protests and controversy following the High-Court order triggered the Apex Court to put a stay on the verdict and consider the matter in detail.

*Santhara* or *Sallekhana* is the Jain practice of facing death voluntarily by a person who is suffering from old-age or has a terminal illness. It is prescribed both for the householder and ascetics. This practice has found mention since the foundation of Jainism and is religiously prescribed for persons suffering from an incurable disease or great disability or when a person is nearing his end. The practice according to the Jain religious texts, is a highly respected one among the members of the Jain community. It is believed that such practice echoes the fundamental sentiment of the Jain philosophy wherein it upholds the requisite of dignity in dying, to evolve a sense of closure of the body for the attainment of nirvana, self-purification and for the furtherance of non-violence.

The main question that arose out of the matter was the conflict between law and religion. *Santhara* stands as a classic example of the challenge that all faith-based societies face as they adopt modern, secular norms of governance, and the challenge is to reconcile individual freedom and personal liberty as well as a religious denominator's rights on the one hand and, on the other, with the fundamental right to life. The High Court verdict caused heavy furore and the Jain community called it as an unreasonable interference in their matters of religion.

The main objection with the practice as understood by the reading of the text of the writ petition seems to be two fold. One, is there a fundamental contradiction with the State policy with respect to suicide or voluntarily seeking death. Second, is the question of rightful exercise of choice equitably across all sections of community; a religious practice cannot be said to be dictating the essential State practice of constitutional significance. The second objection is with respect to the voluntariness of the consent and exercise of free choice by the individual. The petition stated that death by *Santhara* was not a fundamental right under Article 25, because it violated the right to life guaranteed under Article 21. It argued that religious freedom under Article 25 is subject to public order, morality and health.

The Bench said that it was not established that *Santhara* or *Sallekhana* is an essential practice of the Jain religion. Jain scriptures or texts do not say that *moksha* (salvation) can be achieved only by *Santhara*. According to the judges, it was one thing to argue that *Santhara* is not suicide, and quite another to say that it is a permissible religious practice protected by Articles 25 and 26.<sup>49</sup> The Court asked the State to stop the practice in any form, and directed that any

---

<sup>48</sup> Parthasarathy Suthirth, *The Flawed Reasoning in the Santhara Ban*, *The Hindu* (Aug. 25, 2015).

<sup>49</sup> V. Venkatesan, *The Santhara Debate*, *Frontline* (Sept. 18, 2015).

complaint made in this regard be registered as a criminal offence in accordance with Section 309 or Section 306 (abetment to suicide) of the IPC.

This case is one of the representatives of those incidents wherein choice of death is not strictly a medical decision but a tenet of religion. The Vedic texts also talk about sadhus and monks going in for *samadhis* and bring upon the end of their bodily existence. Representatives for the community have registered their dissent and argued that *Santhara* is an ancient religious practice aimed at self-purification. The vow of *Santhara* is taken when all purposes of life have been served, or when the body is unable to serve any purpose of life. It is not the giving up of life, but taking death in their stride.

These objections have been endorsed by the scholars of the Jain religion where they equate *Santhara* not with suicide but death with dignity. Shekhar Hattangadi, a film maker<sup>50</sup>, says a basic difference lies at the centre of the row.

We follow the West in legal and economic principles, while our faith is very similar to what is followed in the East." He further says "In Western philosophy, the Catholics consider the body to be a temple, while the Jains consider the human body to be a prison of the same temple. The conflict arises there itself.

The statement above is a poignant take on the fundamental difference in the philosophical perspectives over the human body and the various theological connotations of the same. The decision to opt for *Santhara* by the person is not overtly for the lack of resources, as the Jain community is one of the richest trading communities in India. The practice has a quintessential spiritual tone wherein most of the family members of the persons seeking *Santhara* have stated that it is a call from within and a choice that the person himself makes to embrace a dignified death. The practice is also not to be taken in all kinds of diseases or any life state- it is specifically and only taken when the person is suffering either from a terminal illness or due to age related problems. They choose to stop their treatments, chemotherapy sessions and slowly start to wane off any kind of solid or liquid intake. It is a choice between extreme pain and salvation.

The Honourable High Court, as many commentators have stated, mistakenly tend to view the practice as a religiously ordained suicide as they have a restrictive understanding of the place of human body within the theological sphere and tend to be affected by the Roman-Catholic perception of the human body. The understanding of death by choice has been heavily conditioned and affected by the perspectives of Christian morality and the other perceptions have failed to have made their presence felt. The idea of suicide in the Indian Penal Code is a British remnant as suicide was an abhorrent practice in England at the time the IPC was framed. The person who committed suicide lost property rights and was not even allowed to be buried in the graveyard. But now even the UK and the US have

---

<sup>50</sup> Hattangadi is the maker of the documentary *Santhara: A Challenge to Indian Secularism?* It has won several awards at film festivals. See, Milind Ghatwai, *The Jain Religion and the Right to Die by Santhara*, Indian Express (Sept. 2, 2015).

decriminalised suicide. This western understanding of suicide has found its way within the Indian legislative psyche and, therefore, does not find any other explanation appropriate of it. In the present scheme of things, *Santhara* could be placed near the category of euthanasia, and not suicide. The latter is undertaken due to reasons such as depression, anger, loneliness, loss of a dear one, mental trauma of any other kind, etc. *Santhara* on the other hand is believed to be a scientific process where the body is crushed in a gradual manner and has a cultural value to it. It has been practiced since the history of the inception of the Jain religion.<sup>51</sup>

The aspects that essentially merit consideration in this scenario are the ones of choice, voluntariness of choice and the Devlin ideal of community morality of such a choice.

*Santhara* requires a person to begin the fast after taking an irreversible vow. A person cannot go back on his or her decision on a second thought firstly because of the very aspect of irreversibility and second out of fear of social ostracization. A person undergoing *Santhara* is revered in high esteem almost like a demi-God with frequent visitors coming for their Darshan, amidst all this, a person can easily feel coerced to revert on such decision.<sup>52</sup> The situation is quite akin to that of Sati where the social pressure plays an extremely important part.

Nikhil Soni, on whose petition the Rajasthan High Court held *Santhara* illegal, claims he approached the court after hearing about the case of Bimla Devi Bhansali, who was allegedly coerced into *Santhara* by her family and whose cries for help were "ignored". Amidst the drum-beats and celebrations her frail cries for water went unheard or the celebrations were a deliberate attempt to overpower her cries. There is another set of reports that observe that more number of such *Santhara* deaths have been that of women, although the reports are unconfirmed in the absence of statistical data but a possibility of such exploitation can also not be discarded. These are the several aspects wherein legal framework can provide for a proper safeguard by determining the essential religious phenomenon and at the same time adhering to the international legal standards with respect to the end-of-life decisions.

*Santhara* and the Indian religious practices leave out several such questions and pose a serious challenge before the courts to harmonize between such competing interests of a multicultural society and yet carve out a zone for upholding the constitutional ideals and State policy.

## Conclusion

Legislating on human morality is one of the most difficult calls for the State and controversial for the judiciary. End-of-life decisions, especially the ones where community morality is involved is all the more an edgy terrain. The value that is morality and the value that is law both have their unique significance in regulating the societal conduct.

---

<sup>51</sup> *Id.*

<sup>52</sup> Tanushree Venkataraman, Manasi Phadke, *Santhara: Glorified Suicide or Essential Practice*, The Indian Express (Sept. 6, 2015).

The primary function of a State is maintenance of law and order which determines the argument that every 'right' or 'interest' calls for certain regulation. The State although restrains from criminalizing on the basis of immorality it cannot however "ignore disgust if it is deeply felt and not manufactured".<sup>53</sup> Lord Devlin uses the term disgust without much elaborating on the same. But it could be argued that he meant a sincerely felt moral disgust and not something which is artificial.

Devlin keeping in mind the practical aspects of such regulations and thereby refers to "toleration of the maximum individual freedom that is consistent with the integrity of society.., that in any new matter of morals the law should be slow to act... and more tentatively. That as far as possible privacy should be respected."<sup>54</sup>

The criminalisation of certain kinds of acts are also brought to question for the reason that they are not wrong in the real sense of the term as they do not harm others. As examples, Feinberg considers acts that set back interest but to which adversely affected party consents. He identifies such wrong as those that are violating that person's rights. He also often thinks in terms of there being no "victim" or that nobody has a complaint. In these cases, there are wrongful acts with nobody being wronged, hence, the notion of harmless immorality because harm requires that there is somebody who is wronged; immoral because it is wrong in the abstract. Thus the defender of the enforcement of morality must accept the idea of an immoral, wrongful act that is harmless-not because of a lack of setback to interest but because there is no one who is wronged in particular. This distinction between 'harm' and 'wrongdoing' with a category of 'harmless wrongdoing'<sup>55</sup> creates space for legislating upon acts that have an abstract understanding.

Similar arguments are put forth for instances of abortion, surrogacy, prostitution, organ sales, or consensual slavery.

In the present context, the Supreme Court in *Aruna Shanbaug* has laid down extreme caution in withdrawing life support from a patient in a PVS. In this context, there has to be legal understanding of the definition of death. There has to be a procedure for the reasonable accommodation of the varying understandings of death and if the patient in the particular case falls within any of those understandings. The understanding of the definition of death will help in determining the plausibility of life in its context for a particular decision of opting for death to be made. There also has to be a method established for the accommodation of the individual's religious or moral objection to the determination or choice of death according to State-accepted criteria. The State policy has to clearly lay down criteria for the patients whose death is chosen not by themselves but others in the nature of next friend, guardian etc. For the socially vulnerable like the women or those who are abandoned, clear State policy has to be evolved taking into account such vulnerabilities of persons involved.

---

<sup>53</sup> *Supra* n. 3.

<sup>54</sup> *Id.*, p. 1002.

<sup>55</sup> *Supra* n. 4, p. 936.

## Commercial Surrogate Mothers & Children: Contouring the Vulnerabilities & Challenges of Access to Justice

*Diksha Munjal\**

### Introduction

Commercial surrogacy in India is a big business. Surrogacy is just one of the many techniques that is available to infertile couples to achieve their dream of having a child.<sup>1</sup> Surrogacy is “an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate.”<sup>2</sup> Commercial surrogacy differs from altruistic surrogacy in terms of the amount of money paid to the surrogate mother. In altruistic surrogacy, while the payment is restricted only to the medical expenses incurred by the surrogate mother, in commercial surrogacy, the lady is paid something more than the mere expenses. It is this very amount of ‘something more than the medical expenses’ that acts as a bait to lure women to act as surrogates for potential commissioning couples.

It is however, not just the monetary benefit that a surrogate mother receives that promotes and sustains the ‘industry of commercial surrogacy’<sup>3</sup>. The existing Indian laws do not specifically address the subject area. The Indian Council of Medical Research provides for the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India.<sup>4</sup> These unenforceable guidelines which were framed in 2005 were a result of the attempt by the authorities to bridge the gap between the surrogacy arrangements and their implementation. The guidelines also acted as the blueprint for the drafts of the Assisted Reproductive Technology (Regulation) Bill of the years 2008, 2010, 2013 and the latest being, 2014. However, as aforesaid draft legislations are simply Bills, they do not have the force of law.<sup>5</sup> One can at best look into the Constitution of India and the Indian Contract Act, 1872 to get some insight on the

---

\* Research Associate, National Law University, Delhi. E-mail: diksha.munjal@nludelhi.ac.in

<sup>1</sup> Diksha Munjal, *Medical Tourism, Surrogacy & the Legal Overtones-The Indian Tale*, 56 JOURNAL OF THE INDIAN LAW INSTITUTE 62 (2014).

<sup>2</sup> National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), available at [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm) (last visited Sept. 23, 2016) (Hereinafter referred to as ‘ICMR Guidelines’).

<sup>3</sup> *Baby Manji Yamada v. Union of India* (2008) 13 S.C.C. 518. The Supreme Court of India referred to the area of commercial surrogacy as one reaching ‘industrial proportions’.

<sup>4</sup> *Supra* n. 2.

<sup>5</sup> Diksha Munjal & Yashita Munjal, *The “Wanted” Child: Identifying the Gaps and Challenges in Commercial Surrogacy in India*, 6 ASIAN BIOETHICS REVIEW 66-82 (2014).

enforceability of such arrangements and contracts. However, they too do not address the delicate issue of surrogacy which is a myriad of conflicting interests. Such a scenario provides a fine breeding ground for all sorts of illegal practices to mushroom. With no laws governing the area, the infertility clinics are happy devising their own rules and regulations. Better technological know-how at cheaper prices combined with easy availability of poor, uneducated who are ready to act as surrogate mothers, also go on to make India one of the most sought-after destinations in the world for commercial surrogacy.<sup>6</sup>

The existing situation which is already quite murky in nature also holds the potential of creating further and larger problems such as that of procreating a non-man's land. That is to say, since there is no law on the subject area, including the aspects of citizenship of the children born of such arrangements, there is a high probability of the increase in the population of stateless people<sup>7</sup> in the world. It is therefore apt to state that it is not just the surrogate mothers, but also the children born of such arrangements that are vulnerable.

The paper is a part of the doctoral research of the author which attempts to delve into the aspects of vulnerability of the surrogate mothers and the children they give birth to, through these arrangements. It endeavours to take a closer look at the concept of vulnerability by examining the factors which make the surrogate mothers and the children born through surrogacy vulnerable, respectively.

### **Meaning of Vulnerability**

In line with the aim of the paper to understand what vulnerability means in the contextual setting of commercial surrogacy, it is imperative to cull out and appreciate the conditions, both external and internal, which make the surrogate mothers and the children born from them vulnerable. In an empirical study, applying the case study method and employing the snowball sampling<sup>8</sup> technique, conducted by the author in January 2014 on commercial surrogacy in India, a number of factors surfaced which acted as a catalyst in making the surrogate mothers more vulnerable than ordinary pregnant women. The study

<sup>6</sup> Diksha Munjal, *Identifying the "Real Mother" in Commercial Surrogacy in India*, 18 GENDER, TECHNOLOGY AND DEVELOPMENT 387-405 (2014); T.M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS OF HEALTH LAW 193 (1996) [Krim addresses the issue of fertility tourism and the factors that contribute to it].

<sup>7</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 Sept. 1954. (Article 1 of the Convention defines a stateless person as, "a person who is not considered as a national by any State under the operation of its law).

<sup>8</sup> In snowball sampling, the researcher collects data on the few members of the target population he or she can locate, then asks those individuals to provide the information needed to locate other members of that population whom they happen to know. 'Snowball' refers to the process of accumulation as each located subject suggests other subjects. Because this procedure also results in samples with questionable representativeness, it is used primarily for exploratory purposes. See, Earl R. Babbie, *THE BASICS OF SOCIAL RESEARCH* 208 (Cengage Learning, 2010)

was conducted at a renowned infertility clinic in Anand district in the state of Gujarat. There was a total of 8 surrogate mothers who had been interviewed and also, 2 commissioning mothers. Due to the language barrier and sensitivity of the issue, most women were reluctant to give simple interviews which were to be conducted without any photography or videography. The handful of women who did respond to the requests were also extremely wary about the interviews being taken for some sort of media coverage on either the clinic or the issue. Be that as it may, informed consent of the participants was obtained after them being assured that the interviews would be used strictly for academic purpose and that the confidentiality of their identities would be maintained throughout the study.

The surrogate mothers, by and large, could only understand and converse in their native language i.e., Gujarati, and in addition to that, Hindi. Only 1 of the 8 surrogate mothers could understand parts of the English language. They had a very basic level of education and most of them had not studied beyond class 8 at school. With such elementary education, these women go on to sign surrogacy agreements, the content of which they little understand. All surrogate mothers belonged to small villages either in the district or in the surrounding areas. While some of the surrogates were working in small establishments drawing meagre salaries of up to Rs. 3000/month (about US\$45/month approx.), the men of the house earned the larger chunk making the household income go up to Rs. 15000/month (US\$200/month approx.) which was the highest household income from amongst the surrogate mothers interviewed. Commercial surrogacy, for people with such a weak financial position, often seems like striking a pot of gold. From earning Rs. 3000 a month, the woman would now be earning Rs. 41,500 (approx.) if we are to divide the lump sum into 9 months. It results in them fetching more than 10 times the money they used to earn each month. With the women earning up to Rs.3,75,000 from the surrogacy arrangement, many even saw themselves having a greater say in the home affairs, which would otherwise, culturally, not be the case<sup>8</sup>. Most of the women either had a proper house or their children's education has the top priority in terms of spending the earning from the surrogacy arrangement. Be that as it may, it is this very pecuniary bait which acts as a means for these surrogate mother to become more vulnerable than the women who would otherwise ordinarily be on the family way. The arrangement not only makes the surrogate mothers vulnerable in a number of ways but also the children they give birth to as a result of the agreement between them and the commissioning parents.

### **Debilitated Surrogate Mothers**

The situation in which the surrogate mothers are is appalling. The women who chose to be surrogates are motivated only due to the sole factor of money. None

---

<sup>8</sup> Steve Darné, *Hindu Men Talk about Controlling Women: Cultural Ideas as a Tool of the Powerful* 37 SOCIOLOGICAL PERSPECTIVES 203 (1994).

of the surrogates interviewed stated that they were there out of purely altruistic motives.

The surrogate mothers are housed in a small surrogate house or hostel so to say. They are confined there and are not allowed to go out of the premises. This also means that they cannot go out for something as simple as a stroll on the street. They are forbidden to even take the staircase that goes down to the open area of the complex where the clinic is located.

There are usually 5-6 women in a rather small room in the surrogate hostel. The room has single iron beds lined next to one another with barely a spacing of about 2.5-3 feet separating these. The women keep their belongings in their own little bags under their beds as there are no lockers/cupboards to place these. They are often visited by their husbands and children, but this too is a luxury for some who belong to villages which are not so close to the clinic.

The food for the women is delivered by a caterer who is appointed by the clinic for such purpose. Most women complained about the food as it was not to their liking. There existed no mechanism for these women, who due to their biological condition may have cravings for specific foods or to make any special requests for certain foods to their liking. Some women, as a survival technique, ask their husbands to carry some savoury or other snacks when they come to visit them which they can consume as a fresh change from the monotonous food.

Additionally, these women are not encouraged to maintain any contact with the commissioning couples. The couples, who could potentially positively uplift the spirits of the surrogate women are made to go completely missing from the environment of the surrogate mother. No meetings, no phone calls with them are allowed. All that the surrogates can do is simply watch television, which is common to all the surrogates accommodated in the surrogate house. There are other activities held such as those of embroidery, chocolate-making, henna deign application and the like. Though these may keep the surrogates busy (those who choose to be!), there are no concrete recreational activities made available. Against this backdrop, we can assess that the external conditions of the surrogate mothers only include limited access to the 'outside' world and the limited freedom and resources within the confines of the surrogate house. These layers of power and control added by the external agencies go on to make the surrogates helpless and debilitated.

In addition, there are internal conditions of the surrogate mothers which expose them more to the already existing grim external elements. The internal overlapping elements which fuel their vulnerable position include their poverty, their physical state during pregnancy, their delicate mental and emotional health owing to their physical state of affairs, lack of awareness, as well as being in a position that is subordinate to the clinic staff as well as the commissioning couples.

For a surrogate mother to understand that she possesses certain rights, she must be educated. If a layer by layer approach is adopted, and illiteracy, being one of the layers is removed, it can turn around the entire scenario. Basic rights instituted and established under the right to life<sup>9</sup> such as that of right to privacy, right to freedom of movement, right to reproductive autonomy and the like<sup>10</sup> cannot be wielded by someone who has had little education owing to poor socio-economic conditions.

The agreements signed between the commissioning parents and the surrogate mothers are in English language. This further cripples the position of the surrogate mothers who are only well versed with their local language - Gujarati. The women were asked if they had a Gujarati text version of the agreement to read and understand. Sadly, and quite predictably so, they had not got any such opportunity where they could have actually read and understood the contents. The women just simply saw the agreement, not read. Hence, it is reasonable to infer that none of the surrogate mothers interviewed had read through the agreement. Most cited that they had faith in what Madam (referring to the doctor heading the clinic) had to do and others asked their husbands to glance through it. It is however not out of place to mention that the husbands too were not too sound education-wise. On questioning the surrogate mothers, it was gathered that not a single one of them knew that they had the right to abort the child and not go ahead with the arrangement. When they were made aware about such a provision that did exist in the contract that they had signed, they were quick to say that this would hurt Madam and that they can't do this. They all said that they were told beforehand that on signing the agreement, they were now committed to take this to the very end, i.e. delivering the baby(ies). It can well be imagined how the consent of such women may be taken at the time of multifetal pregnancy reduction<sup>11</sup>, a very common procedure that takes place in pregnancies achieved through the IVF process<sup>12</sup>.

---

<sup>9</sup> Constitution of India, 1950, Art. 21

<sup>10</sup> *Supra* n. 5, 68-71.

<sup>11</sup> Multifetal pregnancy reduction refers to the process by which the number of embryos developing in the womb are selectively reduced. It usually takes place where the number of embryos developing is greater than two in number. See, P.V.V. Murthi, *It's Double Delight, Thanks to IVF*, *The Hindu* (July 02, 2013), available at <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/its-double-delight-thanks-to-ivf/article4872117.ece> (last visited Sep 23, 2016); see also, P Naveen & Amarjeet Singh, *Woman Gives Birth to 10 'dead' Babies in Madhya Pradesh*, *The Times of India* (Dec. 16, 2013), available at <http://timesofindia.indiatimes.com/city/bhopal/woman-gives-birth-to-10-dead-babies-in-madhya-pradesh/articleshow/27465751.cms> (last visited May 17, 2015).

<sup>12</sup> See, Claire Newell, *Abortions to Reduce Multiple Births on the Rise*, *The Telegraph* (Dec. 28, 2011), available at <http://www.telegraph.co.uk/news/health/8981504/abortions-to-reduce-multiple-births-on-the-rise.html> (last visited May 17, 2015).

The clinics, that enjoy being in the dominant position add the layer of power dynamics and often use this position to brainwash these poor, uneducated women through what they refer to as “counselling sessions” to carry on with the pregnancies as that is something in the nature of a pious deed. All women interviewed repeated the rhetoric of “to gain something, you have to lose something.” The deal between them and the commissioning couples and these surrogates is more of inconspicuous loss and less of conspicuous gain. The money they earn, would no doubt help the women secure a better future of the children or build a *pukka house* (a house made of concrete) for the family, but what she sacrifices in those 9 months and jeopardises for the future is invaluable.

Surrogate mothers, due to their physical state of being pregnant, naturally develop a bonding with the foetus. On being questioned on this aspect, the majority of the women said that they did have some feelings towards the child(ren) that they were bearing. However, as per the agreement the women have to give up the child after birth. The clinics, exploiting their superiority in terms of power and know-how, do not even let the surrogate mother have a look at the child. The buck does not stop here. For the purposes of nursing and lactating, there are apparatus used to pump out the mother’s milk for the child that is born. There is absolutely no contact permitted between the surrogate mother and the child she gives birth to. There is no window period allowed for by the ICMR Guidelines or the ART Bills for the surrogate mother to reconsider her decision of handing over the child, as is provided in some developed countries. This lack of teeth in the Guidelines and proposals in the ART Bills add to the insufficiency of legislative protection.

Be that as it may, the existing law of evidence in India however would recognise the surrogate mother and her husband as the legal parents of the child, and not the commissioning couple.<sup>13</sup> However, given the fact that the surrogate and her husband are not well educated and resultantly unaware of such a right that they could potentially enforce, they are yet again left in a situation where they can do nothing much about it. In the similar vein, assuming if the commissioning couple commits a breach of contract, in that scenario too, surrogate would not be able to do much due to her poor physical, mental, emotional, or financial inability to fight the situation.

Being on a footing that is inferior to that of the commissioning couples who are quite well off in terms of money, power, influence and even education, the surrogate mothers stand in a vulnerable position. There would be no legal aid available to the surrogate mother no matter what the situation may be – whether she decides to ‘breach the contract’ and keep the child, or the commissioning couple breaches the contract in some form such as refusing to take the custody of

---

<sup>13</sup> *Supra* n. 6, p.399.

a child<sup>14</sup> born with some defect<sup>15</sup>. A similar situation did arise in the case of Baby Manji Yamada whose commissioning mother refused to take custody after the commissioning couple divorced following the surrogacy agreement and the baby was virtually left as an orphan and finally stateless<sup>16</sup>. The surrogate mother who was commissioned in this case must have never even thought of filing a suit for breach of contract, leave alone filing one. Again, as these surrogate mothers do what they do for money, they often concoct stories about their pregnancy fearing odd reactions from people.<sup>17</sup> Living in secrecy, whether by their own choice, by making up stories, or by forced means when the clinics scurry them into the surrogate hostel rooms, they tend to lead a life of unspoken fears. The fear of social stigma as to what people and the society at large would say about them, should they make their identities known, incapacitates the surrogate mothers even more.

It is therefore not a single, independent and isolated factor but an amalgamation of various imbricated layers of internal elements compounded with the external elements that leave the surrogate mothers debilitated.

### **Insecure Children**

The children commissioned and born through surrogacy remain highly vulnerable. In India, currently, they are deemed to be born in a jurisdiction<sup>18</sup> where no law assures to them a secure future. Their status, compounded by lack of clarity on their citizenship, therefore, often runs into the contentious area of conflict of laws.

As stated above, till date, there is no law which regulates surrogacy in India. It is quite a strange thing for a country which has otherwise emerged as one of the most popular destinations for having babies born through such procedures. The external element of lack of any specific law and the presence of unenforceable

---

<sup>14</sup> TNN, *Aussie Couple Abandoned Surrogate Baby in India*, The Times of India (Oct.10, 2014) available at <http://timesofindia.indiatimes.com/india/aussie-couple-abandoned-surrogate-baby-in-india/articleshow/44766805.cms> (last visited May 18, 2015).

<sup>15</sup> AFP, *Couple Abandon 'Ill' baby with Surrogate*, The Times of India (Aug. 03, 2014) available at <http://timesofindia.indiatimes.com/world/rest-of-world/couple-abandon-ill-baby-with-surrogate/articleshow/39514159.cms> (last visited May 18, 2015). (An Australian commissioning couple in this case had abandoned the child commissioned through surrogacy in Thailand who was born with Down's Syndrome to a Thai surrogate mother).

<sup>16</sup> *Supra* n. 3. (It was reported that Baby Manji was issued a Certificate of Identity as is done in cases where the people are stateless, i.e. they are not considered to be the nationals of any country).

<sup>17</sup> Most women interviewed stated that they had told their close relatives and neighbours that they were going out of town for a job and would be back after about a year.

<sup>18</sup> See, Krishnadas Rajagopal, *Centre Told to Clarify Stand on Citizenship of Surrogate Children*, The Hindu (Sept. 04, 2014, as updated on Nov. 17, 2016), available at <http://www.thehindu.com/news/national/Centre-told-to-clarify-stand-on-citizenship-of-surrogate-children/article11120285.ece> (last visited May 18, 2017)

ICMR Guidelines<sup>19</sup> raises many concerns about the rights and well-being of surrogate baby(ies).

A baby born from surrogacy has a number of potential women who could be referred to as her/his mother.<sup>20</sup> The legal mother of the child could either be the surrogate mother, or the commissioning mother who may also be the adoptive mother or the anonymous lady (in cases where the gametes of the commissioning mother are not used) who provided the gametes for such an arrangement to take place.<sup>21</sup> However, who finally ends up being the mother in a question that is left unanswered. In the case of Baby Manji, who was marooned, had no name written in the column for “name of the mother” in the identity certificate.<sup>22</sup> Thus, if there is a medical emergency post the birth of the child, which requires the consent of the parents before it is acted upon, it is beyond the shadow of doubt what a disorganised situation it would be.

The Ministry of Home Affairs in its attempt to somewhat streamline the practice, brought out a set of new visa rules. The Ministry through these rules made it compulsory for the commissioning couples to obtain a medical visa if they intended to visit India for the purposes of commercial surrogacy. This was a radical change from the earlier practice wherein the couples would obtain a regular tourist visa and come to India to have a child through surrogacy.<sup>23</sup> The new visa guidelines framed in the year 2012 came into effect from November 1, 2013 and that too, retrospectively.<sup>24</sup> Of the many provisions provided therein, one of the provision states that only those couples can commission surrogacy in India, in whose respective countries commercial surrogacy is also legally recognised.<sup>25</sup> This is because, in such cases, the child would at least be able to secure for herself/himself a definite citizenship. While these latest visa rules do make it an improvised scenario, it, however, must not be overlooked that this is only an administrative action and acts as a stop gap arrangement.

The multiple layers of external elements that fortify the vulnerability of the children born through surrogacy coupled with the innate internal inabilities of an infant makes it a heart wrenching scene. It can be deduced that in case of the

---

<sup>19</sup> *Supra* n. 2.

<sup>20</sup> *Supra* n. 6, pp.395-401.

<sup>21</sup> *Id.*

<sup>22</sup> *Supra* n. 6.

<sup>23</sup> PTI, *No more Tourist Visa for Commissioning Surrogacy in India*, The Times of India (Oct. 30, 2013), available at <http://timesofindia.indiatimes.com/india/no-more-tourist-visa-for-commissioning-surrogacy-in-india/articleshow/24930064.cms> (last visited May 19, 2015).

<sup>24</sup> See, Guidelines issued by the Ministry of Home Affairs, Government of India vide letter no. 25022/74/2011-F. Idated 9<sup>th</sup> July 2012 regarding foreign nationals intending to visit India for commissioning surrogacy, available at <http://mha1.nic.in/pdfs/surrogacy-111013.pdf> (last visited May 19, 2015).

<sup>25</sup> *Id.*

infants born through surrogate mothers, it is the external elements which play a greater role than the inner elements. This is, however, not to suggest that the inner elements are in any way of lesser importance than the external elements. It is only naïve to point to the inabilities of a new-born child and hence, the vulnerability in such a case can be attributed more to the external elements.

### **Vulnerability & Responsibility: Two Sides of the Same Coin**

The vulnerable, often remain vulnerable due to the lack of a support system that would cater to their needs and be responsible for them. However, the question that often arises is that whether vulnerability warrants any moral obligations or legal duties which could ensure justice. The legislations in India do not define expressly who are the people who may be considered to be 'vulnerable'. It, however, tacitly provides for protection of certain people. Reflections of such protection can be seen in a number of legislations that include, but are not limited to the Constitution of India, the Legal Services Authorities Act, 1987, the Indian Contract Act, 1872, the Juvenile Justice (Care and Protection of Children) Act, 2000, the Protection of Women from Domestic Violence Act, 2005, the Mental Health Act, 1987, the Hindu Minority & Guardianship Act, 1956 and the Guardians and Wards Act, 1890. There is therefore a recognition, though not explicit, of people who may be vulnerable. However, through these legislations, people are 'labelled' as vulnerable with little or no consideration of the 'layers' that keep falling one over another making them vulnerable. The legislations meant for their protection can end up doing little in view of the fact that these people may be incapacitated in terms of exercising their right to self-determination, and enforcing duties of others.

In this context, Nickel puts forth the idea that the ground on which a group of people may be referred to as vulnerable may be based on the reasons that are either consent-based or fairness based.<sup>26</sup> According to him, generally, people are capable of protecting their own interests. However, a key question emerges as to whether they become entitled to special protection in the event of their incapacity to protect their own vital interests.<sup>27</sup> This is true when we refer to child or people of unsound mind.<sup>28</sup> Nickel goes on to support the premise that the lack of fairness is a reason for protecting the groups of vulnerable people.<sup>29</sup> Luna, though, seconds this and states that the lack of power or rights can be associated with the craving for fairness and justice.<sup>30</sup> According to her, there are different

---

<sup>26</sup> Philip J. Nickel, *Vulnerable Populations in Research: The Case of the Seriously Ill*, 27 THEORETICAL MEDICINE AND BIOETHICS 245-264 (2006).

<sup>27</sup> *Id.*

<sup>28</sup> Example of this can be found in a number of legislations where the court usually appoints a guardian to act on behalf of and in the best interests of children or people of unsound mind.

<sup>29</sup> *Supra* n. 26, p.247.

<sup>30</sup> Florencia Luna, *Elucidating the Concept of Vulnerability: Layers Not Labels*, 2 THE INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS 126 (2009).

vulnerabilities which operate in the form of layers.<sup>31</sup> She categorically points out that in the event of absence of justice and lack of rights, there may appear situations laden with the possibility of exploitation.<sup>32</sup>

Contextually, the issue remains whether the vulnerable surrogate mothers and the children they give birth to through surrogacy have the right to self-determination in exercise of their right to autonomy and hence, are fit to make a reasoned decision or whether such people are entitled to be protected through the blanket provisions under the legal system. The answer to such a complex situation cannot be a simplistic one. The key however remains in adopting an approach that recognizes the different layers of vulnerability and endorses for a robust support system by essentially reckoning the need of self-determination or autonomy in decision making on the part of such vulnerable people.

### **Conclusion**

Commercial surrogacy is an area which is rife with conflicting interests. Its twin objectives are to secure two families – one financially and the other in terms of an offspring, but, due to lack of appropriate measures, it ends up jeopardising the position of the two key members of the arrangement – the surrogate mother and the child commissioned and born through her. There is a greater responsibility that thus falls on the courts and the legislature to ensure protection of the vital interests of the surrogate mother and baby born out of surrogacy. Legislators as well as the courts must, in particular, scrutinise the situations which make them vulnerable to exploitations.

A sound system of education would go a long way in helping the surrogate mothers overcome their inner inabilities to deal with their situations especially the thick and harmful layer of illiteracy. To counter the risks posed by illiteracy, infertility clinic, offering surrogacy services, must put in place legal-aid team to help the surrogates as and when required. These external measures can provide robust support for the women. Further, for ensuring welfare of the surrogate children, India must come up with a comprehensive legislation that, *inter alia*, addresses with clarity the complex issues surrounding citizenship of such children. The courts too, while deciding cases involving this sensitive issue, must look to the best interests of the children.

The path ahead will be full of challenges for the surrogacy industry in India, but with correct measures in place, it can surely secure the larger aim – justice for the vulnerable people of the surrogacy industry.

---

<sup>31</sup> *Id.*, pp.128-129.

<sup>32</sup> *Id.*

# Narcotics Drug Law in India: A Critical Appraisal

*Surender Mohit Singh\**

## Introduction

In recent years, the problem of drug abuse has spread its limbs in almost every sphere of public life and has had corroding effects on the society where it has been most pervasive.<sup>1</sup> The problem of drug abuse is viewed as a far more serious problem than other social evils because it is associated with other offences such as organized crimes, human trafficking and money laundering as well as health hazards such as HIV-AIDS. According to World Health Organisation (WHO), drug dependence is a medical condition classified as a “multifactorial health disorder that often follows the course of a relapsing and remitting chronic disease”<sup>2</sup>. Given the debilitating effect of drug, most of the countries now form part of international drug control mechanism to strengthen international efforts in combatting the drug menace. The international mechanisms have acted like a catalyst, in the sense that they have been helpful in the formation of national level policy and regulatory frameworks. There is now an emerging uniformity around the globe in terms of approaching and responding to the problems posed by trafficking in narcotic drugs and psychoactive substances. In light of this background the article examines the roots of the NDPS Act, 1985, its need, objectives, salient features and shortcomings. Based on the discussion, it offers suggestions towards strengthening of the drug control mechanism in India.

## Historical Background of NDPS Act, 1985

Before 1985, there was no law which criminalised the possession and use of drugs, and so the social convention prevailed. Religious and mythological history had references to the usage of drugs, and throughout India marijuana and its various derivatives were sold freely, and were viewed in the same light as alcohol, and consumed, albeit in different forms.<sup>3</sup> Constitution of India mandates that the “State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are

---

\* Assistant Public Prosecutor in GNCT of Delhi and Research Scholar at Faculty of Law, University of Delhi. E-mail: surender.mohit@gmail.com.

<sup>1</sup> Law Commission of India, 155<sup>th</sup> Report on The Narcotics Drugs and Psychotropic Substances Act, 1985 (1997).

<sup>2</sup> See, UNODC/WHO, Principles of Drug Dependence Treatment, available at [https://www.unodc.org/docs/treatment/Principles\\_of\\_Drug\\_Dependence\\_Treatment\\_and\\_Care.pdf](https://www.unodc.org/docs/treatment/Principles_of_Drug_Dependence_Treatment_and_Care.pdf) (last visited March 12, 2017).

<sup>3</sup> Chaitanya Kediya, *Understanding the NDPS Act* (June 20, 2016), available at <https://factly.in/understanding-ndps-act/> (last visited March 19, 2017).

injurious to health"<sup>4</sup>. In pursuance of this goal, the government of India has initiated a variety of legal, preventive and therapeutic measures to reduce the demand for dependence producing substances. India is a signatory to the UN Single Convention on Narcotics Drugs 1961; the Convention on Psychotropic Substances, 1971; the Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. As a signatory to the UN single Convention, India was obliged to eradicate culturally ingrained patterns of drug use, including those involving cannabis and opium. It is believed that one of the reasons behind the NDPS Act coming into force was the Single Convention on Narcotic Drugs, an international convention aimed at preventing the production and sale of specified narcotic substances. It was far broader in its scope than previous treaties because it covered newer drugs that did not exist when the previous treaties had been drafted. However, the Convention is not in itself applicable to any nation, but instead recommends nations to adopt similar measures. On August 23, 1985, the NDPS Bill was introduced in Indian Parliament and assented by the President on September 16, 1985.<sup>5</sup>

### **Rationale for NDPS Act, 1985**

The statutory control over narcotic drugs was exercised in India through a number of central and state enactments. The principal Central Acts, namely the Opium Act, 1857 and 1878, and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug and drug abuse at national and international level, many deficiencies surfaced in the existing laws. Firstly, the scheme of penalties under the earlier acts was not sufficiently deterrent to meet the challenge of well organised gangs of smugglers. Secondly, the power of investigations of offences of illicit trafficking was not available to officers of many organizations concerned with the subject. Thirdly, the international conventions that have subsequently come into operation and to which India had become a party, required appropriate legal provisions in the national law for discharge of the treaty obligations. The earlier Acts lacked provisions for controlling the new drug of addiction, known as psychotropic substances.<sup>6</sup>

NDPS Act, 1985 consolidated and amended the laws relating to narcotic drugs. It introduced stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International

---

<sup>4</sup> Constitution of India, 1950, Art. 47.

<sup>5</sup> *Supra* n. 3.

<sup>6</sup> *See generally*, Dalal PK and Shivakumarat, *Critical Appraisal of NDPS ACT, 1985*, 18(2) INDUSTRIAL JOURNAL OF BEHAVIOURAL SCIENCES (Oct. 2008).

Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

### **Salient Aspects**

The Act is designed to fulfil India's treaty obligations under the Single Convention on Narcotic Drugs, Convention on Psychotropic Substances, and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The NDPS Act 1985 sets out the statutory framework for drug law enforcement in India. It prohibits the cultivation, production, manufacture, possession, sale, purchase, transportation, warehousing, consumption, inter-State movement, transshipment and import and export of narcotic drugs and psychotropic substances, except for medical or scientific purposes and in accordance with the terms and conditions of any license, permit or authorization given by the Government.<sup>7</sup> The Central Government is empowered to regulate the cultivation, production, manufacture, import, export, sale, consumption, use etc. of narcotic drugs and psychotropic substances.<sup>8</sup> State Governments are empowered to permit and regulate possession and inter-State movement of opium, poppy straw, the manufacture of medicinal opium and the cultivation of cannabis excluding hashish.<sup>9</sup> All persons in India are prohibited from engaging in or controlling any trade whereby narcotic drugs or psychotropic substances are obtained outside India and supplied to any person outside India except with the previous authorisation of the Central Government and subject to such conditions as may be imposed by the Central Government.<sup>10</sup> The Central Government is empowered to declare any substance, based on an assessment of its likely use in the manufacture of narcotics drugs and psychotropic substances as a controlled substance. Assets derived from drugs trafficking are liable to forfeiture. Both the Central Government and State Governments are empowered to appoint officers for the purposes of the Act.<sup>11</sup> Narcotics Control Bureau was set up by the Central Government in 1986 with the broad remit to coordinate drug law enforcement nationally. The NDPS Act is in effect a comprehensive code not only for the control and regulation of Narcotics Drugs and Psychotropic Substances; but also for the control of selected chemicals – commonly known as precursors – which can be used in the illicit manufacture of narcotic drugs and psychotropic substances, as well as for the investigation and forfeiture of drug related assets.

---

<sup>7</sup> The NDPS Act, 1985, Section 8.

<sup>8</sup> *Id.*, Section 9.

<sup>9</sup> *Id.*, Section 10.

<sup>10</sup> *Id.*, Section 12.

<sup>11</sup> *Id.*, Sections 6 & 7.

### *Administration of the NDPS Act*

The administration of the NDPS Act, 1985 falls within the domain of the Department of Revenue, Ministry of Finance and the Ministry of Home Affairs. Various enforcement agencies under the Central Government namely the Border Security Force (BSF), Customs & Central Excise, Revenue Intelligence, Central Bureau of Narcotics and the Central Economic Intelligence Bureau are involved in the administration of this Act. Designated agencies under the NDPS Act to effect seizures of drugs are Narcotics Control Bureau, Directorate of Revenue Intelligence, State Police, State Excise and Central Bureau of Investigations. Empowered agencies under the Customs Act, 1962 to interdict drugs include Coast Guard, Border Security Force, Indo Tibetan Border Police, and Central Reserve Police Force. In order to achieve the coordination of the multiple authorities and agencies, Narcotics Control Bureau was created under the mandate of the NDPS Act, by the Central Government in 1986.<sup>12</sup> A central agency, known as the Narcotics Control Bureau, is tasked with the responsibility of overseeing the activities undertaken by various law enforcement agencies and to ensure constant compliance with various international instruments that India has signed. The Ministry of Welfare is responsible for taking appropriate steps to prevent the occurrence of circumstances that result in this menace, for disseminating information about drug abuse, undertaking drives at the local, state and national level to spread greater awareness and to form a broad coalition of various stakeholders to attack the problem at its root. It is also responsible for providing medical assistance to drug addicts and to put in place systems for identifying drug users at an early stage in order to take corrective measures. Moreover, the Ministry of Finance looks into cases of drug trafficking, money laundering and other offences which are closely linked with drug abuse.<sup>13</sup>

In addition, Government of India has set up National Academy of Customs Excise & Narcotics or NACEN as the apex institute for capacity building in the field of indirect taxation. It also plays a significant role in international capacity building by imparting training to officers of various countries in the field of customs, drug laws and environment protection. In collaboration with United Nations Office on Drugs & Crime (UNODC), NACEN is imparting training on drug law enforcement to various Asian nations. The Government of India has entrusted NACEN the responsibility of knowledge exchange, experience sharing and training with various countries of the world.<sup>14</sup>

---

<sup>12</sup> For more details about the Narcotic Control Bureau, *see, About NCB*, available at <http://narcoticsindia.nic.in/about.php> (last visited March 19, 2017).

<sup>13</sup> *Supra* n. 3.

<sup>14</sup> For more details about the National Academy of Customs Excise & Narcotics, *see, About NACEN*, available at <https://nacen.gov.in/page/about-us> (last visited March 19, 2017).

### ***Main Offences and Punishments***

The quantum of punishment under the NDPS Act is based on the quantity of drugs found which are classified into 3 categories: small, less than commercial and commercial. As a result, the punishment may be as low as rigorous imprisonment for one year if the drugs found are in small quantity and as high as 20 years imprisonment for a large quantity of drugs. The amount of small and commercial quantity is specified by the Central Government. Section 8 mandates prohibitions and lays down punishments,<sup>15</sup> and Section 19 provides punishment for embezzlement of opium by cultivator.<sup>16</sup> As per Section 23, any person who engages in illegal import/export/ trans-shipment of narcotic drugs/psychotropic substances shall have to face punishment ranging between rigorous imprisonment for 1 upto 20 years and fine ranging between Rs. 10,000 and Rs. 2 lakh based on the quantity of the prohibited substance.<sup>17</sup> Section 24 provides punishment for external dealings in narcotic drugs and psychotropic substances<sup>18</sup>. Section 25 provides punishment for allowing premises, etc.. to be used for commission of an offence.<sup>19</sup> Any person financing illicit traffic or harboring an offender shall also face the same punishment.<sup>20</sup> Section 27 provides punishment for consumption of any narcotic drug or psychotropic substance.

---

<sup>15</sup> *Supra* n. 7, Section 8 explicitly prohibits the cultivation of opium, poppy, coca or cannabis plants as well as the production, manufacture, distribution including warehousing, transport, purchasing and selling of prohibited drugs and psychotropic substances. It also prohibits their financing as well as consumption and harbouring offenders guilty under the Act.

<sup>16</sup> *Id*, Section 19 lays down that any farmer who cultivates opium in accordance with a license but embezzles it shall be punished with rigorous imprisonment for a term ranging between 10 and 20 years and shall also be liable to pay a fine ranging between Rs. 1 and 2 lakh rupees. However, if the contravention pertains to ganja, the punishment would be significantly less i.e. rigorous imprisonment for a term which may extend up to 5 years and fine up to Rs. 50,000. In all the aforementioned cases, the court can increase the fine by recording the reasons for the same in the judgment.

<sup>17</sup> *Id*, Section 23 lays down that the production, manufacture, possession, sale, purchase, transport, import and export among states or use of narcotic drugs and psychotropic substances such as poppy straw, prepared opium, opium poppy, cannabis, etc shall result in: (i) In case of small quantity, rigorous imprisonment up to one year with/ without fine up to Rs. 10,000 and (ii) in case the quantity is between small and commercial, rigorous imprisonment up to 10 years and fine up to Rs. 1 lakh and (iii) in cases involving commercial quantity, rigorous imprisonment between 10-20 years and fine ranging between Rs. 1 and 2 lakh rupees.

<sup>18</sup> Sec 24 clearly states that any person who engages in external dealings in contravention of the Act shall be punished with rigorous imprisonment ranging between 10-20 years and fine ranging between 1-2 lakh rupees.

<sup>19</sup> Any person who knowingly allows his premises to be used for the commission of any offence under the Act shall be punished with rigorous imprisonment ranging between 10-20 years and fine ranging between 1 and 2 lakh rupees.

<sup>20</sup> *Supra* n. 7, Section 27A.

The court is empowered to send any person who is imprisoned for consumption of drugs to an appropriate medical centre for seeking necessary treatment. Agencies seizing the drugs are required to destroy them suitably in the prescribed manner. In addition, if the accused is found to have any illegal property, it shall be forfeited by the central government. The proceeds from the sale of such illegally acquired properties shall be pooled into the National Fund for Control of Drug Abuse in order to facilitate the treatment of drug addicts and to promote initiatives for drug control.<sup>21</sup>

#### *Punishment for Repeat Offences*

As drug abuse is often a habitual problem for those who engage in it, the Act imposes a far stricter punishment on repeat offenders. Sec. 31A, prior to amendment in 2014, provided for a mandatory death sentence if the quantity of drugs involved in an offence committed after the first conviction exceeded a certain threshold. The 2014 amendment made it abundantly clear that the death penalty can be imposed as a substitute for the other punishments that have been set out in the Act for a repeat offender; its application is not mandatory. Many experts have repeatedly argued for the complete removal of the death penalty from the NDPS Act. Presently, reports indicate that drug control laws in 32 countries provide for the death penalty in rare cases because the death penalty has not acted as a sufficient deterrent for preventing the surreptitious practices that these laws seek to control.<sup>22</sup>

#### *Statutory Powers of Officers*

Officers of the following departments can be empowered by the government by a general or a special order to enforce the NDPS Act: Central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military and armed forces, as well as revenue, drugs control, excise, police or any other department of the state government. Under sec 41(2) a gazetted officer can authorise any officer subordinate to him (but superior in rank to sepoy, peon or constable) to search any building, conveyance or place by day or night. Further the officer can, without warrant (from a magistrate) or authorisation (from a gazetted officer), search any building, conveyance or place between sunrise and sunset and also he can seize drugs, materials used in their manufacture, controlled substances (i.e., precursors), conveyances, evidentiary material, etc. He can also search between sunset and sunrise under certain circumstances

Under section 42 (1)(d), any officer empowered under Sections 41 and 42, can detain, search and if he thinks proper, arrest, any person whom he has reason to believe to have committed an offence punishable under the Act. Section 43 states that any officer of the departments empowered to enforce NDPS Act can search, seize and arrest in public places. Section 49 states that any officer authorised

---

<sup>21</sup> *Supra* n. 2.

<sup>22</sup> *Id.*

under Section 42 can stop, search, rummage and examine any animal or conveyance. He can compel the animal or conveyance to stop and if all lawful means of stopping it fail, he can fire upon such animal or conveyance. Section 48 states that any gazetted officer empowered under Section 42 (or a magistrate) can attach illegally cultivated opium, cannabis or coca plants and order their destruction. Section 67 states that any officer empowered under Section 42 can during enquiry in connection with any contravention of any provision of the Act- Call for information from any person; Require any person to deliver any document or thing useful for the enquiry; Examine any person acquainted with the facts and circumstances of the case. Drug traffickers can be detained to prevent their illicit traffic through an executive order issued under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. Proposals for preventive detention along with justification can be sent to Joint Secretary (NC) in the Department of Revenue or to designated detaining authorities of the state governments.

#### *Procedural Safeguards*

Sec. 55 of the NDPS Act imposes an obligation on the police officer seizing the prohibited substances to keep them in safe custody. They must contain the seal of the officer seizing them as well as the officer-in-charge of the police station. Sec. 50 of the Act gives the accused the right to be searched in the presence of the magistrate or a gazetted officer.<sup>23</sup> Finally, Sec. 58 imposes strict punishments on people making vexatious or frivolous complaints.

#### *Duties of Officers<sup>24</sup>*

- 1) Before searching any person, the officer has to explain to him that he has a right to be searched before a gazetted officer or a magistrate. If he so requires, the officer has to take him to a gazetted officer or a magistrate before whom he can be searched. (Section 50.) If the officer has reason to believe that it is not possible to take him to a gazetted officer or a magistrate without giving him a chance to part with the drug, controlled substance, etc. then the officer can move ahead with search as per Section 100 of the Cr. P. C. (Section 50(5) and 50 (6)).
- 2) To gather in writing any information given by any person before authorizing a search (Section 41). If the search is under Section 42, the officer has to also send a copy of the information taken in writing or the grounds of belief for search within 72 hours to his immediate superior officer.
- 3) Inform the arrested person, as soon as may be, the grounds of his arrest (Section 52 (1)).

---

<sup>23</sup> This right has been upheld by the Supreme Court in the case of *State of Punjab v. Balbir Singh* (1994 AIR 1872) where it was held that the police officer must, of necessity, inform the accused about this right.

<sup>24</sup> *Id.*

- 4) If a person is arrested or an article has been seized under a warrant issued by a magistrate, the officer will forward the person/seized article to that magistrate (Section 52 (2)).
- 5) If the person has been arrested or the article has been seized otherwise than under a warrant, the officer has to forward it to the nearest police station or any other officer empowered under section 53 (Section 52 (3)).
- 6) To assist officers of any other department empowered under Section 42 if notice or request is received from them (Section 56).
- 7) To prepare a full report on arrest of any person under the Act, and forward the same to superior officer within 48 hours (Section 57).

#### *Immunities in Drug Cases<sup>25</sup>*

- 1) Officers: Officers acting in discharge of their duties in good faith under the Act are immune from suits, prosecution and other legal proceedings (Section 69).
- 2) Addicts: Addicts charged with consumption of drugs (section 27) or with offences involving small quantities will be immune from prosecution if they volunteer for de-addiction. This immunity may be withdrawn if the addict does not undergo complete treatment (Section 64A). It is pertinent to note that it is not essential that the drug, if any, found with the addict in small quantity, need not be for personal use.
- 3) Offenders: Central or state governments can tender immunity to an offender in order to obtain his evidence in the case. This immunity is granted by the government and not by the court (Section 64).
- 4) Minors: All offences committed under any law by persons under the age of 18 will be covered by the Juvenile Persons (Care and protection) Act. This Act seeks to reform such juveniles rather than punish them under the respective Acts. It prevails over any other Act in respect of persons below the age of 18. Hence such persons cannot be prosecuted under the NDPS Act also.

#### ***Establishment of Specialised Courts***

Sec. 36 of the Act empowers the government to set up as many Special Courts as it deems fit for the expeditious resolution of disputes. The Special Court is empowered to take cognizance of any offence under the Act on the basis of a report submitted to it by the relevant police authority or any complaint made by officers in the central or state government who are authorized to make such complaints. Even though Special Courts have played a pivotal role in the effective implementation of the NDPS Act, they have not been able to develop

---

<sup>25</sup> *Id.*

efficacious strategies for coping with the systemic challenges that are faced by courts across the country.<sup>26</sup>

### **Other Key Features**

#### *Access to Medicinal Drugs*

Even though the Act carves out exceptions in all relevant places for allowing the use of drugs for scientific or medical purposes, it is disappointing to note that the Act has significantly undermined the ability of healthcare institutions to gain access to essential narcotic drugs for the benefit of their patients. The 2014 amendment seeks to put in place a single window clearance system in accordance with which every hospital which is in need of these drugs would be granted the status of a Recognized Medical Institution (RMI). These provisions, it is hoped, will help in streamlining conflicting provisions relating to acquisition of licenses and will go a long way in striking the right balance between 'availability' and 'control'.<sup>27</sup>

#### *Rehabilitation of Drug Addicts*

Another area in which the law has been heavily criticized pertains to the limited importance that it attaches to the health of drug users who require special care and treatment. The 2014 amendment seeks to strengthen existing provisions pertaining to the establishment and working of centres for the identification and treatment of addicts. The amendment focuses on the management of drug dependents and paves the way for accreditation of treatment centres by relevant government authorities. Treatment centres need to adopt global best practices and harm reduction techniques in order to deal with this problem in a systematic and holistic manner.<sup>28</sup>

### **Criticism of NDPS Act, 1985**

Even though the courts have clarified that people charged with offences involving small quantities of drugs have a right to get bail. Yet, neither police nor people who use drugs seem to be aware of the law, indiscriminate raids and arrests, especially of street users are not uncommon. In many cases indiscriminate raids are conducted to book offenders' especially street users. The problem has accentuated in recent years, with little attention being paid to the socio cultural context of traditional drug use. Overall, the NDPS Act led to a significant increase in the arrests of low-level drug users. Judicial proceedings in such cases have remained tardy due to the slow pace of the Indian judicial system. In some instances, those caught with small quantities of drugs were eventually acquitted

---

<sup>26</sup> *Supra* n. 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

after spending years behind bars. Beyond concerns about the obvious injustice in such cases, prolonged prison time for low level drug offenders raised the issue of recruitment by criminal groups.

Besides above, special courts have been set up for speedy trial of offences under NPDS Act in view of Section-36A of the Act. Still there is delay in disposal of these cases. Even though the law permits the use of narcotic and psychotropic substances for medical purposes, police seems to be unaware of this provision. Due to lack of awareness, the enforcement authorities sometimes exploits those who manufacture the drugs legally. The news of death of inmates continue to be reported from the jails due to lack of medical staff, limited and inadequate government facilities in jail. The poor prison policy for drug abuse cases ensures that there are no facilities for proper rehabilitation and correctional programs.

Another problem that afflicts the legislation is the continued absence of any perceptible distinction between a consumer and an addict. The existing definition of an addict is neither medical nor legal. The language used here reflects the ambiguity in the nature of treatment designed within the statute for users and addicts. The statute uses words like 'consumption', 'possession', 'use', without providing any guidance on what they mean or how they differ in indicating the guilt of the individual. In India still there is a lack of political will in creating institutions responsible for monitoring and implementing rehabilitation for the drug abusers/victims. Non-inclusion of alcohol in NDPS Act, because of prevailing social acceptance and high revenues to the government, is defeating the objectives and purposes of this health care legislation. The real problem lies with the complainants. Parents, friends, relatives, neighbours, servants do not really complain. The police too do not willingly respond to such complaints for fear of the drug user developing health problems while in custody. The approach of the Indian government is law enforcement led, with limited resources provided for treatment. This is unfortunate that efforts dominated by the law enforcement are not particularly effective. A high rate of drug incarceration as a strategy to control drug use has at best a marginal impact and does not lead to a significant undermining of the drug market.

The drug commonly known in India as "Bhang" does not come within the purview of the NDPS Act as held in *Samid v State of UP*<sup>29</sup>. Bhang is covered by the Excise Act of the different states in India and several states continue to issue licence for gathering of bhang and it's vending for general consumption. But the dividing line from cannabis is very thin because a big consignment of bhang containing a few flowering tops would come within the definition of ganja. Further, the permission for cultivation of cannabis plant for medical or scientific purposes can be given by the state governments.

---

<sup>29</sup> 1995 JIC 833 (ACC).

Under the Act there is no provision which allows for mandatory camera proceedings of search and seizures. Even the Act has not cast any mandatory obligation on the enforcement agencies that the search and seizures must be made in the presence of gazetted officer/Magistrate. Further, evidence suggests that there is no official record (of seal of investigating officer) available with the local police. Further, several times the local police do not have checking kit on the spot to decide whether the recovered substance is prohibited drug under the Act or not. Further, the Act has not cast an obligation on the local police that the complainant (in case of a police person being complainant) should not be less than Inspector in rank. Further, under the Act there is no provision which cast an obligation that all chargesheets/challans should be forwarded in court through DCP/SP concerned. There is no provision under the Act which obligates that the personal search of the police officers/team (prior to the personal search of alleged accused) must be held in camera or before the gazetted officer/magistrate. The NDPS Act still does not fulfil the necessity of fairness and transparency with regards to procedural fairness or safeguards. It is obvious that there is lack of coordination between local police and the central enforcement agencies.

India is the largest licit producer of opium in the world, which is both exported as well as used by the domestic pharmaceutical industry. The government periodically raises the official price paid to farmers to increase incentives to licit cultivators for declaring and selling to the government all legally grown opium. This has led to inducing the farmers to divest sales to drug traffickers who pay a much higher price, in spite of severe penalties for doing so.

### **Suggestions**

On the basis of aforesaid discussion and analysis of key provisions of the NDPS Act, following suggestion are formulated:

- 1) As far as procedural safeguards are concerned it is the need of the hour that the search and seizures must be done through video recording and should be made in the presence of Gazetted officer/Magistrate. Further all the chargesheets/challans under this Act must be forwarded through DCP/SP concerned. Personal search of the police officers/team (prior to the personal search of alleged accused) should be made compulsorily in camera or before the gazetted officer/magistrate.
- 2) Drug addicts need more medical facilities and not jails. Putting them behind the bars without any treatment aggravates their condition and in many cases result in suicide of the inmates. A drug addict has to be given treatment, rehabilitation and social reintegration more than punishments.
- 3) Section 27 of the NDPS Act deals with illegal possession of narcotic drugs etc. for personal consumption in small quantity. While the entire world is unsuccessfully trying to control the menace of drug trafficking and drug abuse, the Govt. of India has increased the quantity of drugs which falls in

the category of “small quantity” which is contrary to the objectives of the enactment of NDPS Act which requires reconsideration and reevaluation at the level of competent authorities or Legislature to wipe out these anomalies in order to combat the drug menace in India.

- 4) Proviso to section 36 A (4) giving so much leverage to the investigating agency is totally against the speedy trial of such cases which is a Constitutional right. Even there is no need to give such a long time for investigation and hence, Section 36 A (4) is required necessary amendment or modification for reducing the period of investigation where the accused is in custody, not exceeding 90 days in any case.
- 5) The NDPS Act is conspicuously silent regarding extension of the benefit of anticipatory bail to the accused persons. It is high time that this deficiency in the law should be cured legislatively for effective implementation of the provisions of Drug Laws in India.
- 6) Enforcement agencies need to be sensitized and people who use drugs to access evidence-based treatment services should not be slapped with imprisonment and criminal prosecution.
- 7) Government should consult psychiatrists, civil society organizations, academics and patients while issuing drug policy formulations.
- 8) There should be close interaction between Law Enforcement Agencies and Non-Governmental Organizations (NGOs) involved in the treatment, rehabilitation and Social integration of drug addicts.
- 9) It has been observed that only poor people who are using the drug for personal consumption or poor persons engaged as carriers by the drug mafia are being prosecuted by the law enforcing agencies. Efforts must be made by the state as well as central law enforcing agencies to trace out the origin of the source and real beneficiary of drug abuse money and to prosecute the real offenders of the crime in the effective manner.
- 10) A comprehensive training programme is also required to be conducted regularly for public prosecutors, investigators and the judges of the Special Courts in respect of various guidelines issued by the Hon'ble Supreme Court and various High Courts in order to enhance their skill capabilities.
- 11) A coherent policy about drug usage should be developed as it is a problem which directly affects seemingly diverse issues such as HIV/AIDS, child rights and crime (perpetrated both by users and on users).
- 12) There must be comprehensive provisioning for enforcement of NDPS Act- beginning with the police, infrastructure, courts, community awareness, social institutions and regular reviews backed by mid-course corrections-as is the case in many progressive countries.

## **Conclusion**

The problem of drug addiction has posed a serious threat to all those who want to see a healthy society. Today drug addiction may be conceptualized as crime, without victim, i.e. addict himself is the victim, who become a prey of its misuse. Government should strive to frame laws in which the civil liberties, health and justice are not ignored. On the aspect of rehabilitation, the passiveness and redundancy of the Act has been writ large. The inadequacy of accompanying institutional mechanisms has rendered the reformatory objective of the statute nugatory. This, coupled with the problematic implementation of the legislation by multiple authorities and the absence of government established rehabilitation programmes, has hindered effective implementation of the statute. Reform of the NDPS Act is a necessary step to improve the efficiency in the criminal justice system.

Drug addiction is a problem which requires a combined efforts by all concerned and society as a whole to check the problem and its adverse effect. A holistic and sustained examination of the socio-cultural causes of the drug addiction is the need of the hour. The laws should be redefined taking strict stand towards drug abusers and peddlers and drug addict should be treated as a victim, not a culprit.

Finally, the empowerment of society through sensitization and awareness is the paramount solution to support the efforts of enforcement agencies in containing the proliferation of drug trafficking and drug abuse in India and beyond.

# Uniform Civil Code & Contentious Personal Law Issues: A Re-Examination

*Vaibhav Prakash Shukla & Kaushik\**

## Introduction

The multi-dimensional debate surrounding the Uniform Civil Code (hereinafter UCC) has remained unending ever since India gained independence. The contemporary deliberations have demonstrated a UCC that faces continuous subversion from the vested interest groups in India. The Constitution of India under Article 44 categorically lays down that the state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. The Founding Fathers of the constitution meticulously adopted such a code for the whole country, and made it a part of the state's duty to usher the same in due course of time. Being a part of Directive Policies of State Policy, Article 44, nonetheless is also fundamental in the governance of the country.

The term civil code is used to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. As things stand, there are different laws governing these aspects for different communities in India. Thus, the laws governing inheritance or divorce among Hindus would be different from those pertaining to Muslims or Christians and so on.

So, technically a demand for Uniform Civil Code means, unifying all the aspects of 'Personal Law' under one common code that will apply to all citizens of India irrespective of the community they belong to. Though still we do not have mainframe of such code, sane assumptions can be made that such code will incorporate the most modern and progressive aspect of all existing personal laws.

## Constituent Assembly Debates on UCC

During the Constituent Assembly Debates, Article 35<sup>1</sup> of the Draft Constitution was hotly debated, and it remains well documented that given the religious textures of the debate, boycott from right-wingers of all the communities came to dominate the discussion.<sup>2</sup> A member while introducing an amendment to draft Article 35 vehemently argued that personal laws have to be exempted from

---

\* Author and co-author are practicing advocates at the Delhi High Court, Delhi. E-mails: shuklaclc@gmail.com; bhardwajkaushik@gmail.com .

<sup>1</sup> Art. 35 of the Draft Constitution of India, 1950 is Art 44 of the Constitution of India.

<sup>2</sup> Constituent Assembly of India Debates (Proceedings), Vol. VII, 23<sup>rd</sup> November, 1948.

Uniform Civil Code by all measures.<sup>3</sup>Mr. Ismail Sahab and Mr. Naziruddin Ahmad<sup>4</sup> strenuously argued that freedom of religion guaranteed under Article 25 of Constitution of India will be undone by the Uniform Civil Code and neither body of people nor a secular State can interfere with the personal practice and religion of the community.

K.M Munshi<sup>5</sup> while picking up the debate laid some meritorious points on religion and personal laws. He mandated for a clear distinction between personal law and religion such that there should be a divorce of religion from social relations or from rights of parties in regard of marriage and inheritance. Laying virtues of “Uniform Criminal Code” (Pre-British era criminal code were different for different religions), he emphasized that, in the past, although religious practice could cover whole personal life of an individual, it cannot continue and society will have to segregate what is not a matter of religion. This argument was very rich in its standing as this demarcation of law from religion was used by Shri Munshi to emphasize that until demarcation is made, women will never be a beneficiary of the Aristotelian idea of equality: treat like persons alike and unlike persons unlike, which we believe, still is the engine of struggle for equality and is used by all the courts to interpret Article 14 of Constitution of India.

While retorting to Ismail Sahab and Naziruddin Ahmad, Shri A.K. Aiyar<sup>6</sup> began by underscoring the point that civil code runs into every department of civil relations like property, contract, sale, succession and marriage, then why some parts have a uniform code while others have been left on ground of religion.<sup>7</sup> He further said that ancients failed on uniform code as they could not imagine a multi-cultural India in democratic order free from religious biasness and British were always in belief that personal law is connected with religion.

Hon’ble Dr. Ambedkar<sup>8</sup> while clarifying on aspect of applying uniform civil code on diverse India said that when innumerable laws are being applied with uniformity, Uniform Civil Code should not be a problem. He said resolutely that even Muslim law is uniform. But it is a misplaced notion as in North West Frontier till 1935 Muslims followed Hindu law in matter of succession and only in 1939 *Sharia* Law was introduced by Central Legislation.

---

<sup>3</sup> *Id.*, Mr. Mohammad Ismail Sahab (Madras), had proposed to add a proviso “Provided that any group, Section, Community of people shall not be obliged on giving up its own personal law”.

<sup>4</sup> Mr. Naziruddin Ahmad, Member, Constituent Assembly from West Bengal.

<sup>5</sup> K.M Munshi, Member, Constituent Assembly from Mumbai.

<sup>6</sup> A.K Aiyar, Member, Constituent Assembly, Madras.

<sup>7</sup> Property Relations Law in India is covered by Transfer of Property Act 1882, while contract is covered by Indian Contract Act, 1872 and are uniform in application.

<sup>8</sup> Dr. Ambedkar, Chairman, Constituent Assembly of India.

In pre-1955 era, religion could be thought as one thread which connected all right-wingers against Uniform Civil Code and religious laws had one commonality in that they were all gender-biased. Amid the odds of all sorts, the Constituent Assembly debate over UCC did achieve rejection of the argument advanced by religious right for governing personal law. Thus, Assembly crystallized the idea of Article 44 on the basis that personal law will stand on the leg of modernizations and not on legs of religious dogmas. In this regard, K.M Munshirightly said that divorcing personal law from religion is starting point from where women can achieve equality in the society.

### **Progression of Framework for Uniform Civil Code**

First nascent step in direction of uniform civil code was taken by liberal Hindu leaders to remove archaic personal law and it started with Hindus for two obvious reasons. Firstly, it was to be treated as an indication to the country that majority is willing to change and rest should fall in line, and secondly, Hindu was the community whose liberals were dominant in the Parliament<sup>9</sup>. The Hindu Code Bill was introduced on 11<sup>th</sup> April 1947<sup>10</sup>, but could not be materialised as it was to be re-introduced in elected Parliament in 1951. The Bill greatly expanded rights of women, by abolishing polygamy and giving them equal share in separate property along with divorce rights.<sup>11</sup> Right wingers of all religions, however, staunchly opposed the Bill, leading to constant blocking and consequent failure in the passage of the same. This happened despite the then Government possessing a crushing majority in the Parliament. Following this debacle, the framer of the Bill-the then Law Minister, Dr Ambedkar resigned.

But since the modernist and liberal Hindus were bent on modernising the Hindu society, therefore, the Hindu Code Bill was again presented before the Parliament. This time, the debate on Hindu Code Bill, that was introduced in parts, had followed a religious tone, yet, much to the credit of then Prime

---

<sup>9</sup> In particular, K.M Munshi and A.K Aiyar were instrumental in arguing in favor of Uniform Civil Code for whole India.

<sup>10</sup> Dr. Ambedkar felt that the Government and the party in power i.e., Congress were not eager to clear the Hindu Code. He, therefore, tendered his resignation on 27th Sept. 1951. In his letter he expressed that he attached greatest importance to the Hindu Code Bill and would be prepared to undergo any strain on his health to get the Bill through. *See*, Dr. Ambedkar's Resignation dated Oct. 10, 1951 in Vasant Moon (ed.), DR. BABASAHEB AMBEDKAR: WRITINGS AND SPEECHES, 14 (Vol. 14), available at [https://www.mea.gov.in/Images/attach/amb/Volume\\_14\\_01.pdf](https://www.mea.gov.in/Images/attach/amb/Volume_14_01.pdf) (last visited May 15, 2016).

<sup>11</sup> K. N. Kadam, DR. BABASAHEB AMBEDKAR AND THE SIGNIFICANCE OF HIS MOVEMENT: A CHRONOLOGY, 121-122 (Popular Prakashan, Bombay, 1991).

Minister J.L. Nehru, the Bill, in parts, stood passed.<sup>12</sup> The post-1955 era expanded the right of women to a great extent. Debate regarding changes in personal law generated strong contestations both in the social/religious circle and inside and outside of Parliament. The period also evidenced a legislation of Bombay<sup>13</sup> aimed at banning bigamous marriages, being challenged in the High Court of Bombay on the ground that law bans polygamous marriages only among Hindus.<sup>14</sup> Justice Chagla while holding the law *intra vires* on the ground that “law can differentiate between communities since at a time one community can be ready for reforms for that community visualizes their bright future in the reformatory legislation, and other communities might not be prepared for reforms because of their religious dogmas. He was disappointed that despite the merit of Article 44, law is differentiating in introducing social reforms. In fact, in post-independence period, courts all over the country were very much keen to modernize personal law. This was evidenced in *Ram Prasad v. State of UP*<sup>15</sup>, wherein the Allahabad High Court upheld Section 5(1) of Hindu Marriage Act and Rule 27 of U.P Service Rule<sup>16</sup> which prohibited polygamy.

Indian Succession Act, 1956 expanded the right of women to acquire property. Pre-1937, a woman did not have the right to own any property at all, except what she would receive from her parents at the time of her wedding. In 1937, the Hindu Women’s Right to Property Act was introduced which gave widow of a coparcener limited right to estate which she could not alienate and the right would revert back to first heir, after death of widow. However, Indian Succession Act by virtue of Section 14 of the Act<sup>17</sup> abolished limited right of women and made the women full owner of the estate. She gained equal right in intestate

---

<sup>12</sup> The major reformatory piece of legislations passed during the early days of Independence, included: (1) Hindu Marriage Act, 1955; (2) Hindu Succession Act, 1956; (3) Hindu Minority and Guardianship Act, 1956; & (4) Hindu Adoption and Maintenance Act, 1956.

<sup>13</sup> Bombay Prevention of Hindu Bigamous Marriages, Act. XXV of 1946.

<sup>14</sup> *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 52.

<sup>15</sup> AIR 1957 ALL(411).

<sup>16</sup> The said rule inhibits (or prohibited / punishes?) polygamous husband from continuing in services.

<sup>17</sup> Section 14 of the Indian Succession Act, 1956 reads: Property of a female Hindu to be her absolute property-(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation.—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhan* immediately before the commencement of this Act.

separate property.<sup>18</sup> In addition, bias in Hindu ancestral property division was done away with by introducing the amendment<sup>19</sup> in 2005, thereby amending the definition of coparcener. This amendment bridged all the gender bias in holding the property by Hindu female. Congruently, Hindu female got equal right in adoption. Other existing wrinkles were ironed out through creative interpretation by the Apex Court.<sup>20</sup>

As it has been evidenced, the earlier reforms among Hindus, even though piecemeal, have gradually come to be accepted in the society. The process of reform in matters of women's share in ancestral property is continuous, and would take its own time in order to see the results on the ground.

Quite contrary to Hindu community, among the Muslims (constituting about 14% of the demography) there has been consistent resistance to application of UCC on pretext of religious interference by majority. It is vital that reformatory measures should be adopted to bring about legitimate and long overdue changes within the Muslim community. There have been several instances of parallel process of reformation in other Muslim countries. An insight into such legal reformatory process would lead to correct visualization of the UCC, in times when the entire debate tends to focus on the incorrect axis of religion rather than on constitutional parameters, such as gender-equality.

### **Religion vs Equality: The Turkish Experiment**

The fundamental argument against Uniform Civil Code, being majorly against changes in religious sanctioned archaic family laws, has invariably stood on the often-cited pretext of 'save the religion from onslaught of majoritarian prescriptions'. It remains fundamentally important that any genuine attempt at codification of civil law would happen only when gender parity is established. In the context of reformation within Islam, the best guiding light comes from the reformatory discussions and processes in the state of Turkey. From introduction of Civil Code in 1926 to its amendment in later years, legislative debate in Turkey has been basically existed in the back drop of impending social reforms and the resistance posed there by orthodox Islam. Nonetheless, Turkish experience has amply shown the political and legislative will to change the status of women for creating inter-gender power relationships of the family within their society<sup>21</sup>.

---

<sup>18</sup> Hindu Succession Act, 1956, ss. 8 and 15.

<sup>19</sup> The Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005).

<sup>20</sup> Hindu Adoption and Maintenance Act, 1956, ss. 7-8.

<sup>21</sup> See generally, Ebru Erdem-Akçay, *Expanding Women's Rights versus Conserving the Traditional Family in the Civil Code Amendment Debates in Turkey*, 49(1) MIDDLE EASTERN STUDIES 76-91 (2013).

In the Tanzimat period (1877) in Turkey, commercial laws were codified, however family law codification was blocked by religious groups opposed to such changes.<sup>22</sup> After the disintegration of Ottoman Empire in 1923, Turkey quickly moved to its century old movement to modernize the Turkish Society. The adoption of 1926 Civil Code was arguably the most revolutionary undertaking of the then progressive regime led by Mustafa Kemal Atatürk.<sup>23</sup> The new code abolished polygamy in Muslim society, women and men were granted equal inheritance rights, and both the parties to the marriage could seek divorce on equal terms, along with expansion in women's right in child custody matters.<sup>24</sup> The vivid effects of 1926 Civil Code showed that women related reformatory measures constituted the major item in social reform agenda.

The orthodox opponents in Turkey decried the adaptation of western code. In particular, prominent opposition parties criticized the negative impact of 1926 Code on law of land ownership.<sup>25</sup> Despite stiff resistance, the 1926 Civil Code was adopted chiefly due to the reason that Turkey as a nation was desperate to break from its Ottoman's past. It was seeking a Turkish identity, independent of Ottoman's imperialistic culture. Mahmut Esat, Minister of Justice, while defending the Code, had said that, "founding fathers aspired to build a Turkish State and become part of modern world, which could not be achieved by dogmatic religious laws."<sup>26</sup>

Though, Turkish society still needed fundamental changes to bring about gender parity and justice, progressive measures encountered several roadblocks created by the puritans of Orthodox Islam.<sup>27</sup> As late as in 1980 in Turkey, activist first time opened their voices against the existing disparities in the Code from feminist prospective highlighting the grey areas in the Code what was till then considered a revolutionary Code.<sup>28</sup> Some of the problematic areas are evident from the following biased provisions of the Code:

- i) Article 152 of Civil Code laid down that husband was head of the conjugal union and gave him power to choose the residence. The Article

---

<sup>22</sup> See, Stanford J. Shaw & Ezel Kural Shaw, *The Era of Modern Reform: Tanzimat 1839-1876* in Shaw & Shaw (eds.) *HISTORY OF OTTOMAN EMPIRE AND MODERN TURKEY* 55 (Vol 2, Cambridge, 1977).

<sup>23</sup> Nryaki Berkes, *DEVELOPMENT OF SECULARISM IN TURKEY* 418 (McGill University Press 1964).

<sup>24</sup> Y. Arat, *Women's Right and Islam in Turkish Politics: The Civil Code Amendment*, 64(2) *MIDDLE EAST JOURNAL* 237 (2010).

<sup>25</sup> *Supra* n. 23.

<sup>26</sup> *Id.*

<sup>27</sup> An amendment was sought in the Code as early as 1951.

<sup>28</sup> See, Turkish Civil Code (1926).

(Is the correct way to refer to this Code?)

moved on the assumptions that men are sole breadwinners of the family and dominant partners.

- ii) Article 154 gave the husband right to represent the union and therefore the women had absolutely no say in the matter of union.
- iii) Most draconically, Article 155 stated that wife must take permission from the husband to work outside home.
- iv) Indeed, Civil Code accepted separation of property in marriage, but since husband was sole breadwinner all property would be in his name and value of women's contribution in home was totally discredited.<sup>29</sup>

The proposal on reforming Turkish Civil code was finalized in 1984 by a national security council. However, it was finally adopted in 2001<sup>30</sup>. This was in the backdrop of long years of contestations between progressive feminists and conservatives, which culminated in the state conceding to give importance to feminist issues.

Conservatives glorified the history of Ottoman Empire, stating that there is a negative impact of Swiss-based code on inheritance of land ownership, arguing that division of land among siblings has resulted in breakdown of society.<sup>31</sup> Attacks were also made on equal right status of family. Conservative branded it as an idea that would eventually be destructive of the family structure. According to them, equality with men would unnecessarily burden the women in the family leading to eruption of fissures in fabric of family life and existence.<sup>32</sup>

Feminist women on the other side of the debate were explicit on their demand for equal status. It was quite heartening to note their resolve in securing a situation where discussions on impending changes must be informed by ideals of gender equality, instead of being driven by religious orthodoxy.

Turkey finally adopted the amendment to Civil Code in 2001 thereby allowing Turkish Muslim women to gain equal status in family life. The new Code abolished the supremacy of the husband in the marriage union; he is no longer the formal head of the family, nor solely responsible for representing the marriage union.<sup>33</sup>

The progressive discussion on Uniform Civil Code in Turkey, though not yet fully fructified, has nonetheless presented a source for long overdue changes in the personal laws of Islamic countries including the countries where Muslims

---

<sup>29</sup> *Id.*

<sup>30</sup> *Supra* n. 24, p. 6.

<sup>31</sup> *Supra* n. 21.

<sup>32</sup> *Supra* note 24, p. 6.

<sup>33</sup> Article 152 and 154 Turkish Civil Code (1926) before the Amendment.

constitute a sizeable chunk. There is no gainsaying the fact such a piece of reformatory measure based on gender equality and grounded in constitutional values and human rights (and not on dogmatic religious texts) is what is needed to be discussed and introduced in India as well.

### **UCC and Indian Muslims**

In India debate about UCC has remained tainted with dubious arguments, and has commonly perceived as destructive of secular credentials of the country. The UCC debate, ever since independence, has invariably degenerated into secular-communal tirades, thus blocking and further hindering the meaningful discourse on the whole issue.

Muslim Personal Law, originating from Holy Quran, has been followed in accordance with the scriptural mandates. In the contemporary times, the world, with an increased frequency, has witnessed spiralling frictions between modern Islam and clerics on how *Sharia* should be read and interpreted. But the fact remains that puritanical elements and their obscurantist voices are much more heard, in the ongoing talk for bringing changes within Islam. The core controversy, as said before, is due to wide acceptance of Muslim Personal Laws being inherently religious in nature.

For years, judiciary in India through their interpretations has been igniting occasional interest in the idea of UCC for the whole country, cutting across religions. The Bombay High Court in the *State of Bombay v. Narasu Appa Mali* had critically observed<sup>34</sup>:

“The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics falling under personal law in item 6 in the Concurrent List. ....all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law.”

In the above case, Gajendra gadkar J. upheld the law (Bombay Prevention of Hindu Bigamous Marriages, 1946) on the ground that it is not obligatory for the state legislature always to provide for social welfare and reform in one go. So long as the state legislature is taking the gradual steps for social welfare and reforms, and does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that equality before law is offended.

---

<sup>34</sup> AIR 1952 Bom 84, Para 10.

Quite clearly Justice Chagla pointed out that framers were sentient of personal laws and have given the state as well as the union the responsibility and jurisdiction to make laws on the same.<sup>35</sup> He went on to observe<sup>36</sup>:

“yet the expression "personal law" is not used in Article 13, because, in any opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Article 13(1) at all.”

Further, the Supreme Court, quoting Justice Gajendra gadkar from *Appamali* case, while deciding the validity of Haryana Panchayati Raj Act, 1994 in *Javed v. State of Haryana* observed<sup>37</sup>:

“Sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked on, then the religious practices must give way before the good of the people of the State as a whole”.

Recently, the Supreme Court of India in *Khursheed Ahmad Khan v. State of U.P. & Ors*<sup>38</sup>, while upholding the Rule 29(1) of the U.P. Government Servant Conduct Rules, 1956, which makes second marriage without prior permission a misconduct, again quoted *Appamali* case, and said that right of legislature to legislate on social reform cannot be disputed and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion.

It has been a consistent argument from religious communities that Articles 25 to 30 of the Indian constitution constitute the source for postulating religious freedom and that it is from these articles that minority religious communities derive their right to be governed by their own personal laws. The judiciary in

<sup>35</sup> The Constitution of India, 1950, Seventh Schedule, List III- Entry V: 'Personal Law'.

<sup>36</sup> AIR 1952 Bom 84, Para 23.

<sup>37</sup> (2003) 8 SCC 369.

<sup>38</sup> SLP No. 5097 of 2012.

India, through its creative interpretations, has demolished this line of false argument for religious freedom, by highlighting the fact that personal law is not a matter of religion.

The opposition groups conveniently oppose the reforms on often-cited argument that the Articles 25 to 30 are in contradiction to Articles 14 to 16, which seems untenable, as there is possibility of harmonised readings between Articles on religious freedom and constitutional code on equality, especially when religion is set apart from the personal laws. It remains the case that current features of personal law based on religion is manifestly discriminative between persons on basis of sex which cannot stand constitutional scrutiny.<sup>39</sup>

Indian judiciary has been also reading liberally general law affecting Muslim society. As early as in 1970 while interpreting maintenance under section 488 of old CrPC, the Kerala High Court<sup>40</sup> did not deny its benefit to the wife of a bigamous Muslim man who chose to stay away from him after his second marriage. At the outset, courts have resorted to humane construction in matters pertaining to Muslim personal law, however, this has generated great deal of resentment from the members of Muslim Personal Law Board, in particular over the humane interpretations of maintenance provisions.

In a catena of cases, judiciary endeavoured to emphasize the religion-neutral provisions. In *Bai Tahira Ali v. Ali fissanli*<sup>41</sup> the Supreme Court in a very categorical judgement held that Muslim women have a right under section 125 CrPC for maintenance. In another judgment, was held that such maintenance will continue even after *iddat* period.<sup>42</sup>

The country witnessed violent resentment from Muslim community following the Apex Court judgment in the now famous *Shah Bano* case.<sup>43</sup> In the said case, an elderly Muslim divorcee woman and mother of five filed an application for maintenance which was allowed by the magistrate and enhanced by the High Court of Calcutta. The matter then reached to the SC, which, taking into consideration the language of the statute, upheld that there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the CrPC, and that *Mahr* is not such a quantum which can *ipso facto* absolve the husband of the liability under the Code.

---

<sup>39</sup> Article 15(1) of Constitution of India prohibits discrimination only on basis of sex.

<sup>40</sup> *Shahulameedu v. Subaida Beevi* (1970) K.L.T 4.

<sup>41</sup> 1980 SC 362; see also, *Bhagwan Dutt v. Smt. Kamla Devi* (AIR 1975 SC 83) (Supreme Court declared that Section 125 of CrPC, 1973 is religion-neutral law and its application must be ensured independent of the religion by the magistrate deciding the application.).

<sup>42</sup> *Fuzlunbi v. Khader Ali* 1980 SC 1730.

<sup>43</sup> *Mohd. Ahmed Khan v. Shah Bano Begum and others*, (1985) 2 SCC 556.

After the Court delivered its judgement, the All India Personal Law Board immediately put pressure on then Rajiv Gandhi's government, following which the government on 19<sup>th</sup> May 1986 enacted the Muslim Women (Protection of Rights and Divorce) Act, 1986. Expectedly, section 5 of the Act, provides that unless explicitly requested by both parties, Muslim divorces shall not be governed by section 125 to 128 of the CrPC. The Act under section 3(1a) provides that the husband owes his divorced wife a "reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period". Constitutional validity of 1986 Act was challenged in *Danial Latifi & Another v. Union of India*, wherein SC, while upholding the law, observed<sup>44</sup>:

"In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles".

On another occasion in 2012, interpreting the *Danial Latifi* case SC in *Shamim Bano v. Ashraf Khan* further observed<sup>45</sup>:

"a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well and such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of Section 3 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined to the *iddat* period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the *iddat* period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents."

It is evident, that under section 125 of CrPC the court's jurisdiction can be invoked only when condition of section 5 of the Muslim Women (Protection of Rights and Divorce) Act, 1986 is met.<sup>46</sup> However, in *Shamima Farooqui v. Shahid Khan*<sup>47</sup>, SC held that, a magistrate can grant maintenance to a divorced Muslim woman and parameters and considerations are the same as stipulated in Section 125 of the CrPC. The creative interpretation by the Apex Court helped cure the

---

<sup>44</sup> (2001) 7 SCC 740 Para 5.

<sup>45</sup> Crl. Appeal No. 820 of 2014 [Arising out of SLP (Cr.) No. 4377 of 2012].

<sup>46</sup> *Khatoon Nisav. State of U.P. and Ors.* 2002 (6) SCALE 165.

<sup>47</sup> Crl. Appeal Nos. 564-564 of 2015 [Arising out of SLP (Cr.) Nos. 6380-6381 of 2014].

malady faced as sustained by the impugned Act of 1986. Now section 125 of CrPC has been made applicable in case of women in general without in any way linking the concerned woman to her religion.

Debates are considered medium of achieving consensus, however, lately it has become a medium of blocking any consensus. It would be apposite to mention that All India Muslim personal Law Board, a non-governmental organisation, setup in 1973, enlists its aims and objectives to implement *Sharia* law and strike down all such rulings of courts and legislations which interferes with Muslim law<sup>48</sup>. The board has had an accidental origin. When H.R. Gokhale, the then Union Law Minister, was introducing Adoption Bill in the Parliament, the Bill was vehemently protested against by Muslim organizations, calling it a 'conspiracy' and a first step towards creating a UCC. The government subsequently withdrew the Bill, and envisaged an organization which could support the cause of UCC. As originally envisaged AIMPLB, formed in 1973, was expected to support the idea of UCC, but just the opposite happened.<sup>49</sup>

Invariably arguments have been deliberately floated by vested interest groups such as AIMPLB in the media and public domain that UCC is an invasion on their religion, faith and belief, but they tend to forget that laws framed during medieval times cannot remain immune from the contemporary waves of changes. Changes have hit almost all aspects of human life, including religions. Even within Islam, changes have occurred as for instance the progressive transformation of Islamic rules in Turkish state. In India too, during pre-Independence times, in Punjab, the Muslim Personal Law (*Shariat*) Application Act, 1937 was enacted, which later saw M.A. Jinnah proposing some amendments thereto. The statement of Objects and Reasons of the said Act lays down:<sup>50</sup>

"Customary law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness, which must be characteristic of all laws. The status of Muslim women under the so called customary law is simply disgraceful."

Some enactments predating 1940s have shown that Muslim law is not static in nature. Given the problems besetting the *Sharia* law, it can be always argued that for centuries the rules therein have been interpreted by male chauvinist to suit their position, status and needs. Unfortunately, what social reformers of Muslim

---

<sup>48</sup> Organisational details about the All India Muslim Personal Law Board (AIMPLB) are available at <http://aimplboard.in/objectives.php> (last visited May 31, 2016).

<sup>49</sup> *Id.*

<sup>50</sup> *See*, The Gazette of India, 1935 (Part-V, p. 136).

community had advocated back in 1930s, and whatever little progress they made, has never been carried forward in the Independent India; rather blocked by vested-interest groups by creating a bogey of secularism.

Status of a Muslim wife has been aptly captured in a judgement of Kerala High Court, wherein the Court observed<sup>51</sup>:

“Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards their unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience, of the leaders, of the public opinion in the community will also be disturbed”.

### Conclusion

Firstly, it is widely perceived among the Muslim orthodoxy and their avid followers that adaptation of traditional *Sharia* law to changing social conditions by the wholly or predominantly Muslim legislators as has been evidenced in some Islamic countries such as Turkey would be permissible under Islamic legislative principle of consensus (IZMA), but the recourse to the said principle cannot be taken by the legislature of a predominantly non-Muslim country like India. Secondly there is a wide spread apprehension that once the Muslims agree that their personal law is not immutable; the government instead of reforming it might decide to replace it altogether by common civil code.<sup>52</sup>

Egyptian writer Ali Abdel Raziq, considered a great Islamic scholar, once famously argued that there has to be separation of religion from the civil state and representative values must be taken into consideration in enacting law, rather than seeking source of law in religious doctrines.<sup>53</sup>In this regard, an Indian Islamic scholar, Chowdhary Hyder Hussain had sounded a note of caution:<sup>54</sup>

“living under the British rule for about two centuries, we have come to consider it only natural for Hindus to be governed by Hindu law and Muslims to be governed by Muslim law; but it is wholly a medieval idea and has no place in modern world.....I would therefor strongly urge the necessity of having one single code applicable to everybody living within the territory of Indian Union, irrespective of cast, creed and religious

<sup>51</sup> *Mohammad Hannefa v. Pathummal Beevi* (1972) K.L.T 512, Para 3.

<sup>52</sup> M. Tarik, COMMON CIVIL CODE, PERSONAL LAWS AND THE RELIGIOUS COMMUNITIES IN INDIAN CIVIL CODE AND ISLAMIC LAW 30 (Institute of Constitutional and Parliamentary Studies, New Delhi and published by N.M. Tripathi Pvt. Ltd., 1976).

<sup>53</sup> Ali Abdel Raziq, ISLAM AND THE FUNDAMENTALS OF AUTHORITY (University of Chicago, 1928).

<sup>54</sup> Chowdhary Hyder Hussain, *Unified Code for India*, AIR (J) 68 (1949) p. 71.

persuasions. This is the juristic solution of the communal problem. It appears to be absolutely essential in the interest of unification of country for building up one single nation with one single set of laws in country.”

Dr. Tahir Mahmood, a noted contemporary Islamic jurist, has prescribed two ways to enforce Article 44 of the Constitution:<sup>55</sup>

1. To formulate a common civil code applicable to every citizen of India and to replace by its provisions all the heterogeneous personal laws prevailing in the country or,
2. To reform by legislations the traditional personal laws of all religious communities with a view to adapting them to modern social requirements.

Indian state has adopted the second route by introducing changes in piecemeal in the personal laws of Hindu (i.e. Hindu Code Bill). Legislative enactments in areas that are not covered by either secular or personal laws such as Domestic Violence Act of 2005 which gives right to women irrespective of their religion against any kind of domestic violence; Juvenile Justice Act of 2000 which lays down that people irrespective of their religion and faith can adopt a child legally, which was impossible for Muslims earlier, since adoption is against Islamic tenets; would go a long way in building a solid framework for uniform civil code. Further, it is high time, to bring about an amendment in the Dissolution of Muslim Marriages Act, 1939, thereby enabling the Muslim women to have same grounds of divorce as are available to woman under the Hindu Marriage Act, 1955. Additionally, there is a much needed desire on the part of society in general to establish parity between men and women by revoking irrational provisions such as oral divorce rights of Muslim man.

It is reiterated that any notion of majoritarian assessment of personal laws of minority religious groups must be discouraged and dispelled. The transformation towards creating a regime of equal laws in civil matters (UCC) must begin, and the same has to be led by the progressive social and political leadership from within the concerned community. Any externally imposed changes may backfire. In this regard, creation of organizations such as, All India Muslim Women’s Personal Law Board (AIMWPLB)<sup>56</sup> would go a long way in voicing the concerns of Muslim women, whose issues left unattended by male dominated All India Muslim Personal Law Board.

Lastly, it may be said certain archaic provisions and customary practices sanctioned under personal laws are not in keeping with the modern values. Society is constantly

---

<sup>55</sup> Tahir Mahmood, *Common Civil Code, Personal Laws and Religious Minorities* in Mohd. Imam (ed.) *MINORITIES AND THE LAW* 460 (1972).

<sup>56</sup> All India Muslim Women’s Personal Law Board, set up in 2005, has the objectives to take up issues affecting Muslim women such as marriage, divorce, maintenance and other legal issues.

changing in the wake of rapid advancements in the domain of science, technology, communication, etc. As a result, needs are strongly felt to modernise the personal laws in sync with the modern values. For this to materialise, society has to decide, how does it want to progress. Equally, it is the solemn duty cast on judiciary, statesmen and social reformers to guide the society in right direction and pave the way for modernization.

## Judicial Intervention in Sphere of Personal Laws: Instances and Justifications

*Abhishek Shukla\**

### Introduction

Validity of personal laws has been challenged before courts through various petitions since enactment of the Constitution. Whenever any petition is filed before any court challenging validity of any discriminatory provision of any personal law, its maintainability is strongly opposed mainly on two grounds. Firstly, personal laws are not included in definition of law under article 13 of Constitution; therefore personal laws are kept outside from scope of fundamental rights. This argument was formulated by Gajendra Gadkar J. in *State of Bombay v. Narasu Appa Mali*<sup>1</sup> and subsequently followed in many cases as precedent.<sup>2</sup> Secondly, it is a matter of state legislative policy and, courts should not intervene. This argument was created in *Ahmedabad Women Action Group v. Union of India*<sup>3</sup> and subsequently followed in recent judgments.<sup>4</sup> These two arguments have equally reasoned counter arguments. It is argued against exclusion of personal law from definition of law under article 13 by judicial pronouncements that there is no express provision for exclusion of personal laws from definition of law.

When custom is included in definition of law then all personal laws which are nothing else; but customary law are included in definition of law. Neither personal laws are protected under any constitutional provision like tribal customs for instance protected under article 371A-C. Argument of state legislative policy is met with proposition that discrimination caused by personal laws is violation of fundamental rights. It is an issue of violation of fundamental rights rather than a matter of state legislative policy. Provisions of law which are inconsistent to fundamental rights are liable to be struck down by judiciary in exercise of its power of judicial review. This right to constitutional remedy in itself is a fundamental right under Article 32 in Part III of Constitution.

Personal laws are gender discriminatory and gender biased from very inception; but, very recently, Supreme Court took *suo motu* cognizance of discrimination

---

\* Author is a student of Master of Laws (LL.M.) at the Faculty of Law, University of Delhi.  
E-mail: abhi.du2013@gmail.com.

<sup>1</sup> AIR 1952 Bom 84.

<sup>2</sup> *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad. 193; *Ram Prasad v. State of Uttar Pradesh*, AIR 1957 All 411; *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707.

<sup>3</sup> AIR 1997 SC 3614.

<sup>4</sup> *Khuran Sunnath Society v. Union of India*, W.P(C) No.31299 of 2008, Ker. HC.

caused by polygamy and triple talaq against Muslim women and ordered to institute a PIL (Public Interest Litigation) to examine constitutional validity of it.<sup>5</sup> Thus, in present scenario, it becomes relevant to reconsider previous precedents and their impact on status of personal laws. There are five precedents where any personal law is struck down by judiciary in exercise of its power of Judicial Review, but one precedent of *T. Sareetha v. T. Venkata Subbaiah*<sup>6</sup> has been overruled in *Smt. Saroj Rani v. Sudarshan Kumar Chadha*<sup>7</sup>. Hence, there are only four precedents which are not overruled and hold as a valid law. An analysis of the judicial process and reasoning therein can furnish insight into the state of affairs.

*Mary Sonia v. Union of India*<sup>8</sup> is the first case which treats personal laws as law *strictu sensu*, allowing for remedy to be granted by courts against injustice caused by personal laws. In this case, Constitutional validity of Section 10 of the Indian Divorce Act, 1869 was challenged by two Christian women before full bench of Kerala High Court on the ground that provisions in Section 10 are violative of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India. Both petitioners were deserted by their husbands and one of them was subjected to cruelty before desertion. Even though there was no chance of reconciliation, it was not possible for them to get a divorce since desertion and cruelty were not recognised as grounds for divorce unless adultery was also alleged and proved by them. Husband had only ground of adultery on which he could seek dissolution, but at the same time he needed to establish only adultery committed by the wife since solemnisation of the marriage. On the other hand, though wife had got a number of grounds for seeking dissolution of marriage adultery simpliciter was not a ground for divorce unlike the husband. Wife had to establish not only adultery of her husband but also that the husband was guilty of either 'incestuous adultery' or 'such cruelty as without adultery would have entitled to a divorce' or 'desertion without reasonable excuse for two years or upwards. Thus, even if a wife was able to prove that her husband is living in adultery or that he was guilty of treating her with cruelty habitually and persistently or that he has deserted her forever, she might not be entitled to get dissolution of marriage. Offending portions of the provision was severed and quashed as ultra vires. The remaining portions of the provisions were saved as

---

<sup>5</sup> *Prakash v. Phulavati*, Civil Appeal No. 7217 of 2013, Supreme Court of India. This judgment is significant as this is the first time that the court itself has shed its self-imposed restraint by *suo motu* ordering the registration of a PIL petition.

<sup>6</sup> AIR 1983 AP 356.

<sup>7</sup> AIR 1984 SC 1562.

<sup>8</sup> 1995 (1) Ker LT 644 (FB); *Ammi E. J. v. Union of India* AIR 1995 Ker 252; *See also, T. Sareetha v. T. Venkata Subbaiah* AIR 1983 AP 356 (It was the first case wherein any personal law was declared void, but this precedent is subsequently overruled in *Smt. Saroj Rani v. Sudarshan Kumar Chadha* AIR 1984 SC 1562).

valid for instance, provisions allowing dissolution of marriage on grounds of adultery simpliciter and desertion and/or cruelty independent of adultery. Prior to this judgment a Christian woman could have asked divorce when her husband was guilty of incestuous adultery, or adultery coupled with either cruelty 'or' desertion of two years. While husband could have asked divorce on adultery simpliciter. Now, after this verdict even a wife can ask divorce on ground of adultery simpliciter. Cruelty and Adultery have been made two new independent grounds for divorce available to women while husband has only one ground of adultery for seeking divorce. Initially this judgment was limited to province of Kerala only but subsequently has been followed in *Pragati Varghese v. Cyril George Varghese*<sup>9</sup> by Bombay High Court and Parliament amended this section<sup>10</sup>. It is a landmark initiative taken by court to gender sensitizes personal laws.

In *Pragati Varghese v. Cyril George Varghese*<sup>11</sup>, validity of section 10 of Indian Divorce Act was challenged along with two ancillary provisions Section 17 and 20 of the Act which provide for a requirement of confirmation of decrees for dissolution of marriage or nullity of marriage passed by District Judges by the High Court and that too normally by a Bench of not less than three Judges. These three provisions were alleged to be violative of Articles 14, 15 and 21 of

---

<sup>9</sup> AIR 1997 Bom 349.

<sup>10</sup> Indian Divorce (Amendment) Act, 2001, s. 10: Grounds for dissolution of marriage — (1) Any marriage solemnized, whether before or after the commencement\* of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent—(i) has committed adultery; or(ii) has ceased to be Christian by conversion to another religion; or(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or (iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or(vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

<sup>11</sup> AIR 1997 Bom 349.

Constitution. Bombay High Court fully endorsed the view expressed by the Kerala High Court in *Mary Sonia v. Union of India*<sup>12</sup> and held that only those portions of Section 10 that offend Articles 14, 15 and 21 of the Constitution are liable to be severed and quashed and the remainder of the provisions are liable to be retained on the statute.<sup>13</sup> It reiterates, restates and reasserts precedent laid down in *Mary Sonia's* case.

In *Preman v. Union of India*<sup>14</sup>, validity of Section 118 of Indian Succession Act was challenged for being constitutional, discriminatory, arbitrary and violative of Articles 13(1), 14, 15(1), 25 and 51A of the Constitution of India. Section 118 is not applicable to Hindus, Mohammadans, Buddhists, Sikhs or Jaina and Parsi. A Christian having a nephew or niece or nearer relative could not bequeath any property for religious or charitable use unless, (1) the Will is executed not less than 12 months before the death of the testator, (2) it is deposited within six months from the date of execution in some place provided by law and (3) it remains in deposit till the death of the testator.<sup>15</sup> Precedent of same court in *Mary Sonia's* case was cited before court and court discussed it at a great length while declaring Section 118 anachronistic and violative of Article 14, 15, 25 and 26. Thus, Court struck down Section 118 as unconstitutional.

In *John Vallamattom v. Union of India*<sup>16</sup>, unlike previous cases where validity of discriminatory provisions was challenged before high courts under Article 226 of Constitution, this time validity of section 118 of Indian Divorce Act was challenged before Supreme Court under Article 32 of Constitution. Supreme Court for first time treated any law of succession as law within definition of article 13 of the Constitution and struck down it for being inconsistent with fundamental rights under part III of the Constitution.

Above four cases, coincidentally or deliberately relates to Christian personal law. Two sections of two different Acts are severed and declared void till the extent of inconsistency. First is Section 10 of Indian Divorce act which prescribes ground of divorce to Christian spouses and Second is Section 118 of Indian Succession Act which limits power of a Christian to make will for charitable purposes. Three

---

<sup>12</sup> 1995 (1) Ker LT 644 (FB).

<sup>13</sup> Presently, section 17 has been substituted by section 12; Section 20 omitted by Act 51 of 2001, section 16.

<sup>14</sup> AIR 1999 Ker 93.

<sup>15</sup> Indian Succession Act, 1925, s. 118: Bequest to religious or charitable uses:--No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

<sup>16</sup> AIR 2003 SC 2902.

precedents come from two different high courts and one precedent comes from Supreme Court. Ratio of these precedents is given in next part of this paper.

### **Maintainability of Challenge against Personal Laws**

In all four cases, Reliance was placed on *State of Bombay v. Narasu Appa Mali*<sup>17</sup> where it has been held that personal laws are not covered in article 13 of the Constitution of India, but Courts did not find any merit in the contention and observed that present case is directly concerned with a particular provision in an enactment passed by the legislature unlike in the case which came up for consideration in *Narasu Appa Mali's* case. So long as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles.<sup>18</sup>

It is neither in doubt nor in dispute that clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall be void to the extent of such inconsistency. Keeping in view the fact that the Act is a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India.<sup>19</sup> By reason of clause 1 of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional the same having regard to the prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26th January 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. In any view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came

---

<sup>17</sup> AIR 1952 Bom 84.

<sup>18</sup> *Mary Sonia v. Union of India* 1995 (1) Ker LT 644 (FB); *Pragati Varghese v. Cyril George Varghese* AIR 1997 Bom 349.

<sup>19</sup> *See, Keshavan Madhava Menon v. The State of Bombay* 1951 SCR 228.

into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional. The world has witnessed a sea-change.<sup>20</sup>

Those portions of personal laws which offend Articles 14, 15 and 21 of the Constitution are liable to be severed and quashed and the remainders of the provisions are liable to be retained on the statute. Courts while doing so are not reenacting the provisions of personal laws by adding or subtracting words from the Section. It is also not embarking on the sphere of legislation. All that it is doing is the striking down of portions of the section which are ultra vires the provisions of the Constitution. If only such provisions, which are ultra vires Constitution, can be struck down, without striking down the entire section, it is always open to a Court to retain the rest of the Section. Court found that by striking down the offending portions the rest of the section, which does not offend the provisions of the Constitution, can legitimately be maintained. Court struck down the offending portions.<sup>21</sup>

If Personal laws are to stand the test of the constitutional mandate of equality before the law and equal protection of the laws, in the context of avoiding discrimination between the sexes, then the amendment is necessary. If Parliament does not remove the discrimination, the Courts, in exercise of their jurisdiction to remedy violations of fundamental rights, are bound, some day, to declare the Section as invalid.<sup>22</sup> A beginning has to be made if the Constitution is to have any meaning, inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."<sup>23</sup>

### **Substantive Injustice caused by Section 10 of Divorce Act**

Indian women of all religions other than Christianity were entitled to get divorce on grounds of cruelty and/or desertion which are recognised as independent grounds for divorce under the respective enactments applicable to them. For Christians who are governed by Indian Divorce Act, cruelty and desertion were not by themselves independent grounds for divorce. To be grounds for divorce, adultery should also be alleged and proved along with cruelty or desertion as far as Christians are concerned. As adultery is often committed with calculated care

---

<sup>20</sup> *John Vallamattom v. Union of India* AIR 2003 SC 2902.

<sup>21</sup> *Pragati Varghese v. Cyril George Varghese* AIR 1997 Bom 349.

<sup>22</sup> *Mary Sonia v. Union of India* 1995 (1) Ker LT 644 (FB); *Preman v. Union of India* AIR 1999 Ker 93.

<sup>23</sup> *Mohd. Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945; *Preman v. Union of India* AIR 1999 Ker 93.

and utmost secrecy, direct proof of adultery is very difficult. Under the Indian social set up it is well nigh impossible for a woman to prove adultery of her husband. This rendered the provisions for divorce virtually infructuous for a woman. Denial of divorce on the ground of cruelty or desertion without reasonable excuse for a period of two years or upwards which are grounds for divorce for all Indians of all other religions except Christians was discrimination based solely on the ground of religion.

Section 10 conferred on the husband a right to get divorce on proof of adultery simpliciter while wife was obliged to prove either cruelty or desertion along with adultery to get a divorce. This again is a discrimination based solely on sex which makes the provision constitutionally bad. In so far as it made adultery also necessary to be established along with cruelty and desertion as a ground for divorce was arbitrary, authoritarian and violative of the fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India. It incorporated the word 'incestuous' before the word 'adultery' thereby making an aggravated form of adultery alone as a ground for divorce for Christian women whereas all other Indians including Christian men are entitled to get divorce on the ground of adultery simpliciter was violative of Articles 14, 15 and 21 of the Constitution of India.

The life of a wife who is compelled to live against her will though in name only as the wife of a man who hates her, has cruelly treated her and deserted her putting an end to the marital relationship irreversibly will be a sub human life without dignity and personal liberty. It will be a humiliating and oppressed life without the freedom to remarry and enjoy life in the normal course. It will be a life without the freedom to uphold the dignity of the individual in all respects as ensured by the Constitution in the preamble and in article 21. Such a life can never be treated as a life with dignity and liberty. It can only be treated as a depressed or oppressed life without the full liberty and freedom to enjoy life as one would desire to lead it in the way Constitution has ensured. This section had been struck down by two High Courts in two different cases and parliament has amended it to give equal right of divorce to spouses.<sup>24</sup>

### **Substantive Discrimination under Section 118 of Indian Succession Act**

Discriminatory treatment is meted out to members of Christian community under the Indian Succession Act by which they are practically prevented from

---

<sup>24</sup> Kerala High court struck it down in *Mary Sonia v. Union of India* 1995 (1) Ker LT 644 (FB); and Bombay High court in *Pragati Varghese v. Cyril George Varghese* AIR 1997 Bom 349. It is noteworthy that Parliament amended section 10 of Indian Divorce Act by Indian Divorce (Amendment) Act, 2001 to ensure gender equality.

bequeathing property for religious and charitable purposes. For Christians, faith, hope and charity are the three theological virtues. Disposition of property for the religious and charitable purposes, according to the petitioner, is an integral part of Christian religious-faith. Both the Holy Bible and the canon law speak on the obligation of a Christian to give property for religious and charitable purposes. This provision is violative of Articles 25 and 26 of the Constitution inasmuch as it is an essential and integral part of Christian religious faith to give property for religious and charitable purposes. The freedom guaranteed by Article 25 is to profess, practice and propagate religion. Christians are deprived of their right to establish and maintain institutions for religious and charitable purposes and to own and acquire property.

Bequest of property for religious and charitable use fails, if, for any reason, the testator does not suffer from the misfortune of death within 12 months of execution of the will or if it is not deposited in the place provided by law within six months, and that since as per the impugned provision a testator who lives beyond the statutory period of 12 months is not able to effectuate his wishes in relation to his property, the impugned provision defeats the object of the will and is harsh, unjust and arbitrary. In order to survive the challenge under Article 14, it must be established that the classification arising out of the impugned provision is reasonable and that it has a nexus with the object sought to be achieved, and since in the instant case the classification between bequests for religious and charitable use and bequests for other purposes is unreasonable and since it has no nexus with the object sought to be achieved, the impugned provision is hit by article 14 the Constitution of India.

Five counts of discrimination are implicit in Section 118. Firstly, it discriminates the Christian against non-Christians. Secondly, it discriminates testamentary disposition by a Christian against non-testamentary disposition. Thirdly, it discriminates religious and charitable use of property against all other uses. Fourthly, it discriminates the Christian who has a nephew, niece or nearest relative against a Christian who has no relative at all. Fifthly, it discriminates a Christian who dies within 12 months of which he has no control. This Section is declared unconstitutional in by Kerala High Court and Supreme Court in two different cases.<sup>25</sup>

Courts in these four cases not only upheld validity of challenges to personal laws but also granted reliefs as prayed. These four cases are a sharp deviation from judiciary's policy approach not to interfere in personal laws. In these cases, judiciary has adopted legalistic approach and granted constitutional remedy, but these precedents are not followed as an authority. There are many judicial

---

<sup>25</sup> Kerala High Court struck down this section in *Preman v. Union of India* AIR 1999 Ker 93; and Supreme Court in *John Vallamattom v. Union of India* AIR 2003 SC 2902.

precedents previous and subsequent to these cases where courts again adopted policy approach; and declared that personal laws are outside scope of fundamental rights.<sup>26</sup> Judiciary lacks consistency over issue of personal laws. Even same High Court which struck down Section 10 of Divorce in *Sonia Mary's* case<sup>27</sup>, subsequently in *P E Mathew v. Union of India*<sup>28</sup> gave wholly adverse finding that personal law, lay outside the scope of fundamental rights. Inconsistency in two judicial pronouncements is a bad for any legal system. Now, Judiciary has two ways either overrules these four precedents where legalistic approach is adopted and adopt complete policy approach, or adopt legalistic approach and follow these precedents as authority. It is better for judiciary to adopt legalistic approach rather than adopting policy approach. Justifications of judicial intervention are discussed in next part.

### **Personal Law as Law under Article 13 of the Constitution**

Article 13 does not define law. It gives an illustrative definition of law. This definition is inclusive. It includes legislation as well as delegated legislation. Moving a step ahead from our ordinary sense of law, it includes custom and usage as law. Inclusion of custom and usage in definition of law shows clear intention of our Constitution makers that definition of law is more social than legal. Customs are not made by state. Definition of law given here is not limited to state actions only. These fundamental rights check society as well as state actions. Customs are usages which are not compatible with fundamental rights are void.<sup>29</sup> This definition of law is more inclusive than formal definition of law. This definition of law is closer to Hartian concept of law in comparison to Austin's command theory of law. Under article 13 definition of law sociological instead of formal.

Customary laws are not creation of state. Customs are practices accepted as law. They evolve from uniform and continuous practice of society. All customs don't enjoy status of law, only those customs are binding as law which are recognized by law. If there is a custom which has been recognized by law that must yield to a fundamental rights. In *Madhu Kishwar v. State of Bihar*<sup>30</sup> when constitutional validity of a tribal custom which does not allow woman to succeed estate of their male relation was challenged, Ramswami J. adopted an activist attitude and ruled that tribal woman would succeed to the estate of their male member. Majority of Judges took conservative view and desisted from declaring a discriminatory personal law void. They argued that if they would do so it will 'bring chaos in the

---

<sup>26</sup> *P E Mathew v. Union of India* AIR 1999 Ker345.

<sup>27</sup> 1995 (1) Ker LT 644 (FB).

<sup>28</sup> AIR 1999 Ker 345.

<sup>29</sup> *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* AIR 1961 SC 564.

<sup>30</sup> AIR 1996 SC 1864.

existing state of law'. Judiciary's approach in this case can't be appreciated in legalistic or juristic sense. Supreme Court has adopted correct approach in cases of custom, but in case of personal laws it has adopted policy approach rather than legalistic approach.<sup>31</sup>

Pre-Constitutional laws are laws in force prior to commencement of the Constitution. These laws are saved by article 372 of Constitution. This article gives continuity to all pre constitutional laws in so far they are consistent with constitutional provisions. Article 13(1) of the Constitution declares all existing laws void till the extent of their inconsistency with fundamental rights, but they become void only after courts declare them void until they will continue to remain in force. Article 13(2) (b) gives an inclusive definition of laws in force or pre-constitutional law. Law in force includes laws made by legislature or other competent authority prior to commencement of the Constitution and not repealed subsequently. This definition includes laws made by legislature as well as delegated legislation. All laws made by executive prior to enactment of the Constitution are covered in definition of law in force. Custom or usages is not mentioned in definition of law in force because they are not created under legislative or executive authority; and its validity does not depend on competency or continuity of state. Article 13(2) (b) refers only to pre-constitutional legislations. There is no reason for excluding pre-constitutional acts governing personal laws should be kept outside the scope of fundamental rights, for instance, Indian Divorce Act, Indian Succession Act etc.

State is prohibited from making any law which takes away or abridges any fundamental right incorporated in Part III of the Constitution. A law made in contravention of fundamental rights shall be void to the extent of contravention. Definition of law under article 13(3) (a) is given widest possible amplitude. It includes all state actions along with usage and custom. Now, it is not possible to comprehend that any state action is outside definition of law under article 13(3) (a), but there are few express exclusions for instance, article 13(4) excludes Constitutional amendments from definition of law; but there is no provision to exclude personal laws from purview of article 13(3) (a). Any law which is passed by parliament or state legislature by the virtue of power conferred by articles 245-46 is subject to article 13<sup>32</sup>. All statutory laws covering personal laws are made in exercise of power conferred by articles 245-46. Personal law is a subject matter of concurrent list in which both parliament and state legislature have legislative power. There seems no reason to conclude that post constitutional laws made

---

<sup>31</sup> M P Jain, INDIAN CONSTITUTIONAL LAW 920 (Lexis Nexis Butterworths Wadhwa, Nagpur, 6<sup>th</sup>edn).

<sup>32</sup> *Hari Krishna Bhargava v. Union of India* AIR 1966 SC 619.

under power conferred by constitution are excluded from application of fundamental rights.

### **Discriminatory Nature of Personal Laws**

Discriminatory provisions of personal laws cause two level of discrimination against women; firstly it discriminate them against men within their own community and secondly it discriminate them against women of other community. A woman is given less share in succession or her husband has more liberty to divorce, but her liberty is narrow on very limited ground; this discriminates a woman against a man. This discrimination is based on sex only and violates article 15 which prohibits discrimination on ground of sex only. A woman has less grounds of divorce than her counterpart women of other religions, for instance a Muslim women has less grounds of divorce in comparison to a Hindu women; this discrimination is based on religion only and violates article 15 which prohibits discrimination on ground of religion only. Discrimination against women intra community or inter community is derogatory to the status of women. All personal laws treat women as less human being, this inhumane treatment meted out to women is against their dignity and violates right to life with dignity u/a 21.

Personal laws allow for discriminatory treatment being incompatible with fundamental rights. Provisions of polygamy and triple talaq under Muslim personal law is most seriously and frequently contested.<sup>33</sup> Muslim personal law allows a male to have four wives at a time and female can have only one husband at a time. A Muslim male can divorce her wife at will, but she can seek divorce from court on limited grounds. Shia and Sunni, both sects of Muslim personal law give half share woman in comparison of a male in inheritance. Muslim women (Protection of rights on divorce act, 1986) takes away Muslim women's right to divorce under secular law of section 125, CrP.C. Polygamy, Triple talaq, Inheritance and Maintenance are four major provisions of Muslim personal law which are severely challenged. Indian Divorce (Amendment) Act, 2001 was passed by parliament to bring substantive gender equality in Christian personal law. Impugned provisions either have been repealed or amended, for instance section 10 has been amended and section 20 has been repealed.<sup>34</sup> The Amending Act removes gross gender inequality existent in the said Act.

---

<sup>33</sup> Supreme Court took *suo motu* cognizance of discrimination caused by polygamy and triple talaq. *See also, Prakash v. Phulavati*, SC, Civil Appeal No. 7217 of 2013.

<sup>34</sup> Indian Divorce (Amendment) Act, 2001 had sought to bring about gender equality by amending Section 10 and Sections 17 and 20 to do away with confirmation by High Courts of decrees of divorce or nullity of marriage. Section 34 which provides that the husband may claim damages for adultery in a petition in dissolution of marriage or for judicial separation, or in a petition limited to that object, on the ground of his wife having

Hindu Personal law has gone through a drastic change through the Hindu Succession (Amendment) Act, 2005. It made daughter coparcener in joint Hindu family and allotted those equal shares. Except Guardianship rights of a child, all other laws provisions of Hindu personal law give equal treatment to men and women. Hindu personal law is the most gender sensitive personal law in throughout India. This discriminatory provision<sup>35</sup> of guardianship was challenged before Supreme Court in *Geitha Hariharan v. Reserve Bank of India*<sup>36</sup> instead of declaring void Supreme Court moderated it by judicial construction. Father is the first guardian of child and in his absence mother can act as guardian. Both parents should be made guardian jointly and severally to secure equal guardianship rights to women. All above discriminatory provisions of all major laws were challenged before Supreme Court in *Ahmedabad Women Action Group v. Union of India*<sup>37</sup>, but Supreme Court refused to go into the merit of this case and suggested petitioners to approach legislature. It observed that it is a matter of state legislative policy and remedy lies somewhere else.

---

committed adultery has been deleted. Section 35 provides that where in a petition by the husband, the alleged adulterer was made a co-respondent and the adultery is established, the court may order the respondent (adulterer) to pay the cost of the proceedings. This provision has also been deleted. Provision to Section 36 which provides that alimony *pendent lite* shall not exceed one fifth of the husband's average net income for three years, the next preceding date of the order has been deleted. As also Section 39 which empowers the court to order settlement of the wife's property for the husband's benefit and children.

<sup>35</sup> Hindu Minority and Guardianship Act 1956, s. 6: Natural guardians of a Hindu Minor- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-(a) in the case of a boy or an unmarried girl- the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;(b) in the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father; (c) in the case of a married girl- the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-(a) if he has ceased to be a Hindu, or(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.- In this section, the expressions 'father' and 'mother' do not include a step- father and a step- mother.

<sup>36</sup> AIR 1999 SC 1149.

<sup>37</sup> AIR 1997 SC 3614. It is noteworthy that the petition was filed to declare following laws void- (a) Muslim Personal Law which allows polygamy as void as offending Articles 14 and 15 of the Constitution; (b) Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts; (c) The provisions of Sunni and Shia laws of inheritance which discriminate against females in their share as compared to the share of males of the same status; (d) Sections 6 of Hindu minority and Guardianship Act read with Sections 6 of Guardians and wards Act void;(e) Sections 10 of India Divorce Act void and also to declare Sections 43 to 48 of Indian Succession Act void.

### Right to Constitutional Remedies

Right to constitutional remedies is a fundamental right under part III of the Constitution. It can be claimed as a matter of fundamental right. Article 32(1) guarantees the right to move the Supreme Court for the enforcement of the fundamental rights enumerated in part III of the Constitution.<sup>38</sup> Right of access to the Supreme Court under article 32 is a fundamental right itself.<sup>39</sup> The petitioner has fundamental right u/a 32(1) to move the court by appropriate proceedings for enforcement of any of his fundamental rights guaranteed under part III and the court is bound under article 32(2) to issue appropriate directions.<sup>40</sup> Powers to issue writs u/a 32(2) is a power coupled with duty to issue appropriate writs. Once violation of fundamental right is proven, Supreme Court cannot refuse to issue writs.<sup>41</sup> Refusal to issue writs to protect fundamental rights would be an 'abdication of the duty laid upon Supreme Court'.<sup>42</sup>

A wholly erroneous approach has been adopted in *Madhu kishwar v. State of Bihar*<sup>43</sup>, where Supreme Court refrained from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. Even in *Pragati Varghese v. Cyril George Varghese*<sup>44</sup> where Bombay High Court struck down Section 10 of Indian Divorce Act, but refrained from striking down Section 17 and 20 of the same Act. These sections provided for confirmation by High Court of decrees for dissolution of marriages and decrees for nullity of marriages passed by District Judges. Such confirmation was required to be made by a Bench of the High Court consisting of not less than three Judges. It found Section 17 and 20 as unreasonable and arbitrary is liable to be struck down by suitable amendments.<sup>45</sup> It suggested the legislature should intervene and carry out suitable amendments. There are several judicial pronouncements which have held that Section 17 amounts to a procedural unreasonableness.<sup>46</sup> The Calcutta High Court has observed that Section 17 of the

---

<sup>38</sup> Constitution of India, 1950, Article 32: Remedies for enforcement of rights conferred by this Part- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

<sup>39</sup> *Bodhisattwa Gautam v. Subhra Chakraborty* AIR1996 SC 922; *Common Cause, a Registered Society v. Union of India* AIR 1999 SC 3020.

<sup>40</sup> *Kanu Sanyal v. District Magistrate, Darjeeling* AIR 1973 SC 2684.

<sup>41</sup> See generally, Upendra Baxi, Laches and the Right to Constitutional Remedies, available at <http://upendrabaxi.in/documents%5CLaches%20and%20the%20right%20to%20constitutional%20remedies.pdf> (last visited May, 2015).

<sup>42</sup> H M Seervai, CONSTITUTIONAL LAW OF INDIA, 625 (1968).

<sup>43</sup> AIR 1996 SC 1864.

<sup>44</sup> AIR 1997 Bom 349.

<sup>45</sup> Section 17 has been amended and section is repealed by Indian Divorce (Amendment) Act, 2001.

<sup>46</sup> *Mrs. Neena v. John Pormer* AIR 1985 MP 85; *Swapna Ghosh v. Sadananda Ghosh* AIR 1989 Cal 1.

Indian Divorce Act requires confirmation of a divorce decree passed by a District Judge by a Bench of High Court of not less than three Judges. This needs to be amended as it is violative of article 15 and of procedural due process for denying procedural reasonableness to Christians.<sup>47</sup> In spite of several adverse findings against Section 17 and 20 courts failed to discharge their duty.<sup>48</sup> They have shown reluctance in performing their obligation to declare an arbitrary and unreasonable law void. Reluctance shown by judiciary in guarantying right to constitutional remedy against discriminatory personal laws derogates its status from right to discretion of court. The way in which it has been exercised makes all fundamental rights a sweet will of Judiciary.

### Conclusion

The foregoing discussion demonstrates that legalistic approach manifested in the judicial intervention in matter of personal laws is reasonable. Arguments against judicial intervention that personal laws are not covered in definition of law under Art. 13 of Constitution stands negated when Constitutional Bench of Supreme Court examined validity of The Muslim Women (Protection of Rights on Divorce) Act, 1986.<sup>49</sup> There are many more instances in Indian legal history when judiciary has reviewed provisions of personal laws,<sup>50</sup> but there are only two provisions of personal laws which have been declared void.<sup>51</sup> As a matter of policy Courts have ruled out scope of judicial intervention on discrimination or injustice caused by personal laws, and threw this delicate issue in exclusive domain of legislature to repeal discriminatory or unjust provisions of personal laws by amendment. In true legal sense Courts are not helpless when constitutionality of any provision of personal law is challenged; it can declare all discriminatory personal laws void in a single blow. While declaring void any provision unconstitutional judiciary does not rewrite or amend law, but simply strikes down what is unconstitutional. If any law is found violative of fundamental rights then aggrieved person has a fundamental right to get it declared void from Supreme Court.<sup>52</sup>

There can be an argument whether particular provision of personal law is discriminatory or not. We can argue what we mean by equality, but making an argument that personal laws can't be questioned on ground of equality is nonsense. Protection of Article 14 is even available to anon-citizen. It shows

---

<sup>47</sup> *Ramish Francis Toppo v. Violet Francis Toppo* AIR 1989 Cal 128.

<sup>48</sup> Presently, section 17 has been substituted by section 12; Section 20 is omitted.

<sup>49</sup> *Danial Latifi & Anr. v. Union of India* (2001) 7 SCC 740.

<sup>50</sup> *Anil Kumar Mhasi v. Union of India* (1994 5 SCC 704); *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125; *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

<sup>51</sup> Indian Divorce Act, 1869, s. 10 and Indian Succession Act 1925, s. 118.

<sup>52</sup> The Constitution of India, 1950, Art. 32.

importance of equality that nobody even a non-citizen can't be denied of right to equality. Right to equality is a basic feature of Constitution and even parliament in its constituent power can't take it away.<sup>53</sup> Opponents of judicial intervention in personal laws argue mainly on technical grounds they try to avoid substantive question of equality. It is well settled law that substantive rights can't be denied on technical grounds. Article 44 of Constitution obliges state to secure uniform civil code throughout India.<sup>54</sup> The word state has been used in this Article which covers all organs of state. This obligation is not limited to legislature only. In a sense this equally obliges judiciary too. Judiciary simply can't escape from its obligation merely saying it as a matter of legislative policy. Judiciary along with legislature has failed to furnish constitutional promise of gender equality in personal laws. 'Judicial reluctance', not 'judicial restraints' refrain it from declaring discriminatory personal laws void. If it gives up judicial reluctance and adopts a juristic approach, it can declare all discriminatory laws void in a single blow at any time.

---

<sup>53</sup> *Minerva Mills v. Union of India* 1980 AIR 1789, 1981 SCR (1) 206.

<sup>54</sup> The Constitution of India, 1950, Article 44: Uniform civil code for the citizens- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

**Ms. Ganga and Ms. Yamuna are Juristic Entities  
and have a Right to Flow? : An Examination of  
*Mohd. Salim v. State of Uttarakhand*  
Sunanda Bharti\***

**Preface to Judgement**

A home work was given to the State of Uttarakhand (UK) by the High Court of the State via a judgment dated 5.12.2016 to carry out the following:

1. Illegal encroachments were to be removed from the river bed of River Yamuna;
2. Encroachers were to be evicted from the Government land within a period of twelve weeks from the mentioned date. The Central Government was directed to take the final decision on the basis of settlement arrived at between State of Uttar Pradesh and State of Uttarakhand, regarding the division of assets/properties on 02.02.2016, within a period of three months from the date; &
3. The Central Government was also directed to constitute a Ganga Management Board and make it functional within a period of three months.<sup>1</sup> Mining in river bed of Ganga was banned and a legal responsibility was created on the District Magistrate and Sub-Divisional Magistrate to be personally responsible to implement the direction.

Lack of inter State cooperation resulted in nothing but additional assurances from the govt. authorities. Consequently, the Court was compelled to get strict. The High Court displayed its serious displeasure about the manner in which the State of U.P. and the State of UK acted (rather omitted to act) in the matter. It was taken as a sign of non-governance.

The Court remarked that “[an] extraordinary situation has arisen since Rivers Ganga and Yamuna are losing their very existence. This situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna.”<sup>2</sup>

---

\* Assistant Professor in Law, Law Centre-I, Faculty of Law, University of Delhi. E-mail: sunanda.bharti@gmail.com.

<sup>1</sup> According to Section 80(2)(b) of the U.P. Reorganization Act, 2000 (*hereinafter* ‘the Act’), two full time members, one from each of the successor States, are to be nominated by the respective State Government as Members of the Ganga Management Board. As per Section 80(4)(c) of the Act, four part-time members, two from each of the successor States are to be nominated by the respective State Government. The Chairman is to be appointed by the Central Government in consultation with the successor States along with two representatives.

<sup>2</sup> *Mohd. Salim v. State of Uttarakhand*, High Court of Uttarakhand, Writ Petition (PIL) No.126 of 2014, Para 10.

In order to justify the strict action that was to ensue, the religious significance of the two rivers Ganga and Yamuna was highlighted. The Court stated, "Rivers Ganga and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganga & Yamuna."<sup>3</sup> And, on that basis, it declared the two rivers to be legal persons.

### Judicial Precedents Relied upon

A few cases of the Supreme Court were relied upon by the Nainital High Court. For instance, the apex court in *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*<sup>4</sup> held that a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebait who are entrusted with the possession and management of its property.<sup>5</sup> The Shebait is entrusted with the custody of the idol and is responsible for preservation of the property of the idol-he being the human agent.

Again, in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass*<sup>6</sup> held that the concept 'juristic person' arose out of necessities in the human development and that recognition of an entity as juristic person was for subserving the needs and faith of society. After profusely quoting from Salmond to Paton and several other authorities, the court concluded that there was nothing that could stop the law from declaring a non-human entity as a legal person. It was however, quick to clarify that the entity would act like a natural person only through a designated person, whose acts are processed within the ambit of law.

"All the Hindus have deep *Astha* (devotion) in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well-being. The rivers have provided both physical and spiritual sustenance to all of us from times immemorial. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea."<sup>7</sup>

Emphasizing the aforementioned, the Court declared that there was utmost expediency to give legal status as a living person/juristic or legal entity to Rivers Ganga and Yamuna read with Articles 48-A<sup>8</sup> and 51A(g)<sup>9</sup> of the Constitution of India.<sup>10</sup>

---

<sup>3</sup> *Id.*, para 11.

<sup>4</sup> 1969 (1) SCC 555.

<sup>5</sup> *Supra* n. 2, para 12.

<sup>6</sup> AIR 2000 SC 1421.

<sup>7</sup> *Supra* n. 2, para 17.

<sup>8</sup> Constitution of India, 1950, Article 48-A reads: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

It is noteworthy that while exercising the *parens patrie* jurisdiction, not only the Rivers Ganga and Yamuna, but all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, were declared as juristic and living entities having the status of a legal person with all corresponding rights, duties and liabilities.<sup>11</sup>

As for the trustee/guardian, the Director Namami Gange<sup>12</sup>, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand were declared persons in *loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. As the human voice of the two rivers, these officers are bound to uphold the status of Rivers Ganga and Yamuna and also to promote the health and well-being of these rivers. The Advocate General is supposed to represent at all legal proceedings to protect the interest of Rivers Ganga and Yamuna.<sup>13</sup>

### **Living Entity versus Legal Entity**

It is important to clarify that the expressions used by the Court viz. living entity and legal person are not synonymous, as have been erroneously used.

Every living entity is not a legal person. The former expression is the proper domain of science while the latter remains purely a legal fiction. An unborn, in the mothers' womb is 'life' per medical sciences but cannot 'die' in the legal sense because it is yet to be born. Hence for law, it is not a legal person. Transposing the understanding onto River Ganga and Yamuna, the fact that they are both alive and now legal persons is just coincidental.

Conferment of legal personality onto the rivers Ganga and Yamuna is being compared widely with the similar case of river Whanganui of New Zealand which was best owed juristic personality in 2017 along with legal rights as a human being. However, there is a subtle difference to be noted. The legal status of river Whanganui is the result of the incessant fight of the local Māori tribe who, since the 1870s, struggled for the recognition of their river as an ancestor for more

---

<sup>9</sup> *Id.*, Article 51A(g) reads: It shall be the duty of every citizen of India- to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

<sup>10</sup> *Supra* n. 2, para 18.

<sup>11</sup> *Id.*, para 19.

<sup>12</sup> 'Namami Gange Programme' is an Integrated Conservation Mission, approved as 'Flagship Programme' by the Union Government in June 2014 with budget outlay of Rs.20,000 Crore to accomplish the twin objectives of effective abatement of pollution, conservation and rejuvenation of National River Ganga. More details about the National Mission for Clean Ganga (NMCG) are available at <http://nmcg.nic.in/NamamiGanga.aspx> (last visited July 05, 2017)

<sup>13</sup> *Supra* n. 2, para 20.

than 140 years.<sup>14</sup> Further, the legal status has been granted not by judiciary but by parliament of New Zealand.<sup>15</sup> By and large, the implications of such conferment of juristic personality on rivers are likely to be the same. However, it is to be noted, in the case of Indian rivers (Ganga and Yamuna), the conferment has been made by the judiciary and not by the legislature. In view of it, the Parliament of India needs to seize with the matter and deliberate all the nuances of such conferment before legislating on the issue. A legislative recognition of legal personality of rivers, against the wide and long held views, is equally required for such a weighty issue carrying legal as well as social and political implications.

### **Rights and Duties of Rivers Post Legal Personality**

One way to define legal personality is to concentrate on the abstract form of legal person where legal personality is nothing more than the formal capacity to bear legal rights and discharge legal duties. It is the most inclusive definition of person and can be regarded as 'potentially all encompassing'. All that the Legislature needs to do in this context is to decide what entity should be treated as a subject of rights or other legal relations. From this perspective, animals too can be legal persons, if law decides so or the Judiciary so stipulates. Hence an idol is a legal person in India and the same has been done for River Ganga and Yamuna by the judiciary. As Lawson puts, 'we are dealing with pure abstractions, something which exists only in contemplation of law.'<sup>16</sup>

Sometimes this personality is understood to exist in the entity (such as human beings) while at other times the term is used in the restricted sense, that is, only for those entities to which law attributes personality. This restricted definition was elaborated upon by the Supreme Court of India in the year 2000 in *Shriomani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass*<sup>17</sup> as mentioned above.

### **Implications of Conferring Personality on Rivers**

If Ganga and Yamuna are legal persons now, it would be interesting to explore what rights and duties they might have. This, unfortunately, the Nainital HC did not have the occasion to elaborate upon.

Geologically speaking, one of the most important function of rivers is to transport water by gravity, from headwaters to ocean. Translated in the language of rights and duties, this would mean that the two holy rivers have the duty to flow.

---

<sup>14</sup> See, Eleanor Angie Roy, *New Zealand River Granted same Legal Rights as Human Being*, The Guardian (March 16, 2017), available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> (last visited July 05, 2017)

<sup>15</sup> *Id.*

<sup>16</sup> FH Lawson, *The Creative Use of Legal Concepts*, 32 NEW YORK UNIVERSITY LAW REVIEW 914 (1952).

<sup>17</sup> 2000(2) S.C.R. 705.

Whether this duty is to flow only along the traditionally designated path or not is not clear. Whether the three guardians (the Director Namami Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand) would be legally responsible to pay compensation to the displaced if the rivers change course? Would 'flowing' include only a regular/consistent flow with the result that underflow or overflow would be considered as a breach of duty on the rivers' part? Would they be legally liable in cases of drought and flooding?

Articulated in the language of rights, one may maintain, from the perspective of the rivers, that they have a right to flow. Does that mean that they can, acting through their human agents, refuse to be bound by dams and other such mechanisms? Would that amount to placing fetters on their liberty? These are clearly some of the critical questions that granting legal personality to Ganga and Yamuna would entail. Presently, answers to these questions remain unclear.

Ever since the start of civilizations, rivers have been used as sources of fresh water, satisfying the ever increasing thirst of societies, both ancient and contemporary, for the life giving elixir. If we read a duty into this, it would mean that rivers would have a duty to allow human beings to use their waters for consumption and carry man-made and other debris to the oceans upto a limit. As a right, it would mean, the rivers have a right not to get polluted beyond a limit. That in-turn would mean that the appointed guardians of the rivers can act against any individual or industry that is adding to the pollution beyond permissible limits.

An irony here is that it is the myriad state sponsored hydroelectric projects, dams, channelization of river waters into numerous canals and industry waste etc., which has brought the two rivers Ganga and Yamuna to the present appalling situation. It is a paradox that the polluter (state) is being allowed to play the role of the protector. It certainly raises more questions than answers.

### **Concluding Remarks**

It would have been a well thought out judgement, had the court considered the implications in advance. Just branding some natural resources as a legal person, might not serve any purpose, unless one knows what rights and duties would enable the rivers to move against the perpetrators of pollution and other life threatening activities for the rivers. Also, it would be better, if instead of the present set of multiple authorities, a single neutral authority was created to carry out the responsibilities of 'parents' of the rivers in an effective and impartial manner.

## **Mediation in the Consumer Protection Bill, 2015: An Introduction**

*Alok Sharma\**

### **Introduction**

The Central Government has approved a new Consumer Protection Bill 2015 (hereinafter 'the Bill') that seeks to replace the 30-year-old law. The Government has proposed several amendments to the Consumer Protection Act, 1986 (hereinafter 'the Act') that was already amended thrice in 1991, 1993 and 2002 to serve consumers better. The proposals admit that implementation of the Act has been sluggish. In India, the courts suffer under the pressure of large number of pending cases. In consumer protection area also, consumer awareness and their will to go to court to fight for their rights are directly proportional.

Justice delayed is justice denied. An effective judicial system requires not only to reach just results but also to reach them swiftly. But, in India, the currently available infrastructure of courts is inadequate to settle the growing litigation within a reasonable time. The considerable delay in attainment of the conclusion in any litigation adds to the expenses and makes absence of an efficient mechanism for their recovery even more problematic. Therefore, there is an imminent need for mediation to be put in place properly and implement it religiously to get the real justice for the people of our country.

The present paper is divided into two parts. The first part deals with the concept of consumers, their rights, the Act, need for the new Bill, the Bill and its salient features. The second part deals with the Alternative Dispute Redressal mechanism, specifically mediation, as the best option to reduce the burden of cases on the formal judiciary.

### **PART A**

#### **Consumers and their Rights**

Mahatma Gandhi once said, "A Consumer is the most important visitor on our premises. He is not dependent on us we are on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity. He is doing us a favour by giving an opportunity to serve him." US President John F. Kennedy delivered a historic address to the US Congress on 15th March, 1962 in which he outlined his vision of consumers' rights. This was for the first time when any politician had formerly set out such principles. He said, "Consumers by definition include us all. They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard."<sup>1</sup>

---

\* Assistant Professor, Law Centre-I, Faculty of Law, University of Delhi, Delhi.  
E-mail : alokasharma001@yahoo.com

<sup>1</sup> Consumers International, Consumer Rights,

Gradually, the consumer movement has developed this idea into a set of eight basic consumer rights viz., “right to satisfaction of basic needs; right to safety; right to choose; right to be heard; right to redress; right to consumer education; right to a healthy environment; and right to sustainable development.”<sup>2</sup>

### Need for New Bill

The most important initiative taken by Indian Government regarding consumer protection has been the enactment of the Act to protect the consumers from the unfair trade practices and to redress their disputes. It is so because the well-organized sectors of service providers, manufacturers, and traders with the acquaintance of market and their controlling skills frequently try to cheat the consumers.<sup>3</sup> However, there have been challenges in the implementation of the Act as majority of consumers were unaware of their rights and also disposal of cases has not been fast due to various constraints resulting in high pendency.<sup>4</sup> Further, it neither provides for any remedy to the web consumers nor address contracts between consumers and manufacturers that contain unfair terms. In this context, the Law Commission of India had recommended for a separate law to be enacted and presented a draft Bill in this regard.<sup>5</sup>

Consumer markets for goods and services have undergone drastic transformation since the enactment of the Act. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce and online shopping in India have led to new delivery systems for goods and services and have provided new options and opportunities for consumers but rendered them vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e-tailing pose new challenges to consumer protection and will require appropriate and swift executive interventions to prevent consumer detriment.<sup>6</sup> There is, therefore, a need to modernise the Act to address the myriad and constantly emerging vulnerabilities of the consumer in the market economy extant.<sup>7</sup>

### Consumer Protection Bill, 2015

A Working Group was established in 2004 to inspect the provision of the Act and to consider relevant modification to make it more effective and functional. Many proposed amendments were circulated in July 2006 to concerned Central Ministries, all State Governments and NCDRC. Further revised proposed amendments were distributed in 2009. With the feedback received, the Department of Consumer Affairs in consultation with the Ministry of Law and Justice drafted ‘Consumer Protection (Amendment) Bill, 2010’. In the meantime, some additional remarks of the Department of Financial Services were received

---

available at <http://www.consumersinternational.org/who-we-are/consumer-rights/> (last visited May 26, 2016).

<sup>2</sup> *Supra* n. 1.

<sup>3</sup> *Supra* n. 3.

<sup>4</sup> *Supra* n. 5, Statement No. 1.

<sup>5</sup> Law Commission of India, *199<sup>th</sup> Report on Unfair (Procedural and Substantive) Terms in Contract* (Law Com, 2006).

<sup>6</sup> *Supra* n. 5, Statement No. 2.

<sup>7</sup> *Supra*, n. 9.

on the proposed sections about unfair trade practice and unfair contract which were approved by the Ministry of Law and Justice and resulted in 'Consumer Protection (Amendment) Bill, 2011'. This Bill was introduced in Lok Sabha on 16.12.11 and referred to the Standing Committee on Food, Consumer Affairs and Public Distribution on 26.12.11 whose Report was presented in Lok Sabha on 19.12.12 but it lapsed with the dissolution of the 15<sup>th</sup> Lok Sabha.<sup>8</sup>

Then the Consumer Protection Bill, 2015,<sup>9</sup> was introduced in Lok Sabha on August 10, 2015 which was referred to the Standing Committee on 26th August, 2015 which submitted its report on 26th April, 2016. Presently the Bill is pending in Parliament. The Statement of Objects and Reasons of the Bill states, "With a view to widen the ambit and amplify the scope of the said Act and to modernise the legislation on consumer protection to keep pace with the changes in markets; ensure fair, equitable and consistent outcomes for consumers; enable swift executive intervention in the nature of class action both to prevent consumer detriment and to provide redress to consumers, it has been felt necessary to replace the existing Act by way of introducing a fresh Bill by repealing the Act."<sup>10</sup> The Bill provides for a comprehensive framework to take care of the interests of the consumers.

### **Salient Features of the Bill**

The Bill aims to fill the gaps by broadening the scope and ambit of the Act and bringing about radical changes to ensure speedy, easy and inexpensive justice to aggrieved consumers. One of the significant features of the Bill is to bring the online consumers under the scope of the Act as there is no Act for the same (e-commerce). Further, the Bill is proposed on the lines of institutions in the USA and the European countries that provide that Consumer Protection Laws should derive their basis from the Law of Contract and of Sale of Goods otherwise it tends to be confusing and conflicting. Some of the salient features of the Bill are as follows:

**Definition of Consumer:** A consumer is defined as any person who buys a good or hires a service for a consideration as the user but not the seller of them. It covers transactions through all modes including offline, online through electronic means, teleshopping, or multi level marketing.<sup>11</sup>

**Rights of Consumers:** The rights of consumers include the right to: (i) be protected against marketing of goods and services which are hazardous to life and property, (ii) be informed of the quality, quantity, potency, purity, standard and price of goods or services, (iii) be assured of access to a variety of goods or services at competitive prices, and (iv) to seek redressal against unfair or restrictive trade practices.<sup>12</sup>

---

<sup>8</sup> Available at <http://www.civilserviceindia.com/subject/Management/notes/consumer-protection.html>. (last visited May 24, 2016).

<sup>9</sup> Consumer Protection Bill, 2015.

<sup>10</sup> Consumer Protection Bill, 2015, Statement No. 3, Statement of Objects and Reasons, 30th July, 2015.

<sup>11</sup> The Consumer Protection Bill 2015, available at <http://www.prsindia.org/billtrack/the-consumer-protection-bill-2015-3965/> (last visited May 26, 2016).

<sup>12</sup> *Supra* n. 11.

**Central Consumer Protection Authority (CCPA):** The central government will set up the CCPA, an independent executive agency, to promote, protect and enforce the rights of consumers. The CCPA will serve as a regulatory body and carry out various functions.<sup>13</sup>

**Product Liability:** If defects in the manufacture, construction, design, testing, service marketing etc. of a product/services results in any personal injury, death or property damage to a consumer, the defaulting manufacturers or service providers shall be liable in a product liability action. In certain cases, the seller could also be held liable for the same. The Bill limits the ability to claim damages on account of mental agony only to cases where personal injury is actually caused.

**Consumer Disputes Redressal Commissions:** Consumer Grievance Redressal Commissions are to be set up at the district, state and national levels. The District Commission may issue these orders regarding a consumer's complaint remove the defect, replace the good, return the price amount, stop the sale or manufacture of hazardous products, discontinue unfair trade practices or pay compensation for any loss suffered by the consumer. Appeals from its decisions will be heard by the State Commission then by the National Commission, and then by the Supreme Court.<sup>14</sup>

**Consumer Mediation Cell:** The Bill introduces mediation as a mode of consumer dispute resolution to ensure speedy and inexpensive justice except in cases of grave threats to life, physical or mental injuries. Consumer Mediation Cells will be established and attached to the redressal commissions at the District, State and National levels as prescribed by respective governments.<sup>15</sup>

**Penalties:** The Bill provides for punishment up to life imprisonment in certain cases of food poisoning and stringent punishment against the incidents of fraud, cheating and noncompliance of order of the Commissions.

**Provision of Cooling off:** The Bill gives the right of cooling off in consumer contracts which means a consumer can return the goods purchased by him within the specified time period and get the payment back if the goods are not in conformity. Similarly the interest of the seller is also protected.

**Miscellaneous Provisions:** The Bill has many provisions simplifying the consumer dispute resolution process in the consumer forum including enhancing the pecuniary jurisdiction of the Consumer Grievance Redress Agencies and power to review their own records by the District and State commissions. It also provides for setting up of a circuit bench to facilitate quicker disposal of cases and it envisages that consumer complaints to be resolved expeditiously within a period of three to five months. Consumers can file complaints electronically and in consumer courts that have jurisdiction over their place of residence. The complaint shall be deemed as admissible if the question of its admissibility is not decided within 21 days.<sup>16</sup>

---

<sup>13</sup> *Supra* n. 11.

<sup>14</sup> *Supra* n. 11.

<sup>15</sup> *Supra* n. 11.

<sup>16</sup> *Supra* n. 11.

## PART B

### Alternative Dispute Resolution

In all developed countries, methods are sought for to lift the pressure from the courts and to find ways to resolve cases at a pre-trial stage before they go to court.<sup>17</sup> When some procedures are used as alternative to resolving disputes before the courts they are called as Alternative Dispute Resolution (hereinafter ADR) and when carried out online, they are termed as Online Dispute Resolution. The modern ADR movement began from United States of America. Chief Justice *Warren Burger* of the U.S. Supreme Court once observed on noticing the increase of cases in the US Supreme Court and said, “*We are moving towards a time when it will be impossible for the courts to cope up with the dockets. If something is not done, the result will be a production of line of justice that none of us would want to see.*” The Centre for Public Resources, New York was a leader in the movement towards ADR.<sup>18</sup> ADR was introduced in the 1980s for the resolution of commercial disputes.

It was implicit that the high cost of litigation and long duration were misuse of public resources so numbers of ADR techniques including mini trials were evolved as techniques for resolution of disputes by the consenting parties.<sup>19</sup> Therefore, resolving disputes through ADR is easier, faster and inexpensive than resolving disputes before courts. Mediation, arbitration, and conciliation are the three main types of ADR. Mediation can be easily differentiated from others due to its characteristic features, i.e., its voluntary and flexible nature; the mediator’s lack of adjudicatory competence; and the self-determination of the parties.<sup>20</sup> In arbitration, the third party, an arbitrator has the competence to issue (at least partly) binding decisions. Conciliation is similar to arbitration and a conciliator has greater influence on the outcome than a mediator by announcing a (non-binding) conciliation decision.<sup>21</sup>

### Mediation

***The Planning Commission of India on Mediation:*** The Planning Commission had constituted the working group on “Consumer Protection” in the context of preparation of the 12<sup>th</sup> Five Year Plan.<sup>22</sup> The Sub Group on ‘Consumer Protection

---

<sup>17</sup> FICCI Short-term Consultancy Report, with Heike Hummelmeier & Maj Zscherpe *Strengthening Consumer Protection in India* (Manual on ‘Mediation & Complaint Handling, 2008), available at [http://www.mediationadvisory.in/html/The\\_Manual\\_\\_FICCI.pdf](http://www.mediationadvisory.in/html/The_Manual__FICCI.pdf), (last visited May 27, 2016).

<sup>18</sup> Alternative Dispute Resolution in India, available at <https://www.astrealegal.com/alternative-dispute-resolution-in-india/> (last visited May 27, 2016).

<sup>19</sup> *Supra* n. 18.

<sup>20</sup> Dr Felix Steffek, *Mediation in the European Union: An Introduction*, June 2012, available at <https://e-justice.europa.eu>, (last visited May 22, 2016).

<sup>21</sup> *Supra* n. 20.

<sup>22</sup> The Planning Commission, *Report of The Working Group on Consumer Protection, Twelfth Plan (2012-17), Vol II, Report of Subgroup on Consumer Protection & Redressal, ADR and Consumer Counseling*, Department of Consumer Affairs,

& Redressal, ADR and Consumer Counselling' had been constituted to look at the policies of the State and Central Governments regarding Consumer Protection and to evaluate the activities undertaken for Consumer Protection and Redressal Mechanism during the 11<sup>th</sup> Five Year Plan and to come up with comprehensive set of policies, programmes and action plan to strengthen the Redressal Mechanism and to provide better Protection for Consumer.<sup>23</sup>

One of the objectives of the Sub Group was 'to create avenues for Consumers for settlement of Consumer related cases through Mediation process involving Voluntary Organisations and settlement of Grievances.'<sup>24</sup> One of the priorities of the 12<sup>th</sup> Plan was 'setting up of State Consumer Helplines and Consumer Advice Centers and linking them to a Mediation Centre in all States/UTs and networking across the country as a major Counselling cum Mediation Mechanism.'<sup>25</sup> The recommendations for 12<sup>th</sup> Plan period included 'strengthening of the existing Redressal mechanism to make it more efficient for delivering speedier justice'<sup>26</sup> and 'supplement the existing redressal system with ADR Mechanism.'<sup>27</sup>

The primary object of ADR movement was avoidance of vexation, expense and delay and promotion of the ideal of "access of justice" for all.<sup>28</sup> The Sub Group listed the advantages of ADR system as, "Reliable information is an indispensable tool for adjudication. Judicial proceedings make halting progress because of reluctance of parties to part with inconvenient information. ADR removes this drawback in the judicial system. Information can be gathered more efficiently by an informal exchange across the table. It further observed the relevance of ADR to India as, "Out of the methods of ADR, mediation is the most suited method for a country like India, because by and large people in India at least in the rural areas would like to settle their disputes amicably."<sup>29</sup>

The advantages of ADR techniques have been widely recognized. The emphasis in ADR, which is informal and flexible, is on helping the parties to help themselves. Mediation is the most common form of ADR which broadly refers to instances in which a third party helps others reach accord. It offers the opportunity for a fresh approach to negotiations with concrete effects as it has a structure, timetable and dynamics that ordinary negotiation lacks. Flexibility, confidentiality and voluntary participation are important features. Mediation is an attempt to help disputants to hear one another, to minimise the harm suffered, to maximize areas of agreement, and to find ways of preventing disputes with the process of seeking compromises or mutually agreed conclusion.

During mediation, both sides involved in the dispute meet with a neutral third party, a mediator, to create their own agreement jointly<sup>30</sup> and the mediator cannot

---

Ministry of Consumer Affairs, Food and Public Distribution, Government of India,

available at [http://planningcommission.gov.in/aboutus/committee/wrkgrp12/pp/wg\\_cp2.pdf](http://planningcommission.gov.in/aboutus/committee/wrkgrp12/pp/wg_cp2.pdf) (last visited May 22, 2016).

<sup>23</sup> *Id.*, p. 14.

<sup>24</sup> *Supra* n. 34.

<sup>25</sup> *Supra* n. 34.

<sup>26</sup> *Id.*, p. 32.

<sup>27</sup> *Supra* n. 37.

<sup>28</sup> *Id.*, p. 33.

<sup>29</sup> *Emphasis supplied.*

<sup>30</sup> Dispute Resolution Programs

decide whether and how to solve the conflict. The mediator, instead, tries to empower the parties themselves to solve their conflict by persuading them to re-evaluate their own positions. He allows the parties to find a resolution on their very own, by giving them the opportunity to work out the underlying problems of the dispute. The mediator will assist the parties in exploring options and measuring the strengths and weaknesses of their respective cases. Much depends on the mediator's skill and training as he uses various techniques to open and improve the dialogue and empathy between disputants, aiming to help them reach an agreement.

**Mediation in India:** The techniques of ADR are not alien to the justice dispensing system of India. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well known to ancient India. Long before the king came to adjudicate on disputes between persons, such disputes were quite peacefully decided by the intervention of the *Kulas* (family or clan assemblies), *Srenis* (guilds of men following the same occupation), *Perishads* (assemblies of learned men who knew law) and such other autonomous bodies like *Nyaya Panchayats* at grass root level.<sup>31</sup>

The Preamble to the Indian Constitution promises to secure socio-economic and political justice and equality of status and of opportunity to all the citizens. Art. 39-A holds that "the state will ensure that the legal system operates in a manner so as to promote justice to all and to ensure that no citizen is denied the opportunities of securing justice by reason of economic or any other disability." But the ground reality is just the opposite as the law hardly reaches the vulnerable sections of the society where majority of the people are illiterate, rural, rustic and unaware of their legal rights and remedies. Moreover, those who are aware of their legal right, find it very difficult to get them translated into reality due to the legal and procedural ordeals they have to undergo in the process of litigation.<sup>32</sup> The efforts towards ADR mechanism have met with considerable success and good results in the world, especially in the litigation-heavy United States therefore, the provisions pertaining to mediation in the Bill must be immediately implemented.

**Law Commission of India on Mediation:** The Law Commission in its 124<sup>th</sup> Report<sup>33</sup> emphasized the desirability of the Courts being empowered to compel parties to a private litigation to resort to arbitration or mediation. The other related reports are 126<sup>th</sup> Report,<sup>34</sup> 129<sup>th</sup> Report,<sup>35</sup> 222<sup>nd</sup> Report,<sup>36</sup> and 238<sup>th</sup> Report.<sup>37</sup>

---

available at <https://www.usa.gov/consumer-complaints> (last visited May 26, 2016).

<sup>31</sup> Dr. S.K. Dixit, *Arbitration and Conciliation*, available at [www.icsi.edu](http://www.icsi.edu) (last visited May 26, 2016).

<sup>32</sup> *Supra* n. 18.

<sup>33</sup> Law Commission of India, 124<sup>th</sup> Report on the High Court Arrears: A Fresh Look (1988).

<sup>34</sup> Law Commission of India, 126<sup>th</sup> Report on Government and Public Sector Undertaking Litigation Policy and Strategies (1988).

<sup>35</sup> Law Commission of India, 129<sup>th</sup> Report on Urban Litigation: Mediation as Alternative to Adjudication (1988).

<sup>36</sup> Law Commission of India, 222<sup>nd</sup> Report on Need for Justice – dispensation through ADR etc. (2009).

**Justice Malimath Committee on Mediation:** In 1989, the Government of India, on the advice of the Chief Justice of India, constituted a Committee<sup>38</sup> under the Chairmanship of Justice V.S. Malimath having other two members, viz., Mr. Justice P.D. Desai and Dr. Justice A.S. Anand. The terms of reference of the Committee were, inter alia, to suggest ways and means, “to reduce and control arrears in the High Courts and subordinate Courts.” This Committee, also known as the Arrears Committee, undertook a comprehensive review of the working of the court system, particularly all aspects of arrears and law’s delay and made various useful recommendations for reducing litigation and making justice readily accessible to the people at the minimum cost of time and money.<sup>39</sup> It submitted its comprehensive Report in August, 1990. It endorsed the recommendations made in the 124<sup>th</sup> and 129<sup>th</sup> Reports of the Law Commission to confer power on the Courts to compel the parties to resort to arbitration or mediation<sup>40</sup>

### **Mediation in the Consumer Protection Laws**

**United Nations on Mediation:** The General Assembly adopted guidelines for consumer protection by consensus on 9<sup>th</sup> April 1985.<sup>41</sup> The guidelines provide a framework for Governments, particularly those of developing countries, to use in elaborating consumer protection policies and legislation. They are also intended to encourage international co-operation in this field.<sup>42</sup> Initially, the UN Guidelines are articulated around seven main objectives.<sup>43</sup> The Guidelines were revised in 1999 to include a new section on sustainable consumption and production (Section G).<sup>44</sup> The UN Guidelines complement the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.<sup>45</sup> The UN Guidelines provide a framework of principles and are intended to meet seven (initially six) key legitimate needs for consumers including availability of Effective Consumer Redress. The guidelines should apply both to home-produced goods and services and to imports.

The measures enabling consumers to obtain redress have been specifically mentioned under Part E of the 1985 guidelines which expressly includes informal

---

<sup>37</sup> Law Commission of India, 238<sup>th</sup> Report on Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions (2011).

<sup>38</sup> The Justice Malimath Committee on Alternative Modes and Forums of Dispute Resolution, 1989-90.

<sup>39</sup> *Supra* n. 18.

<sup>40</sup> *Supra* n. 3.

<sup>41</sup> UN Department of International Economic and Social Affairs, *Guidelines for Consumer Protection* (A/RES/39/248, 1986), available at <https://www1.umn.edu/humanrts/links/consumerprotection.html> (last visited May 21, 2016).

<sup>42</sup> *Supra* n. 41.

<sup>43</sup> *Supra* n. 42.

<sup>44</sup> See, Economic and Social Council, Resolution E/1999/INF/2/Add.2 of 26 July 1999.

<sup>45</sup> *United Nations Guidelines on Consumer Protection: Role of UNCTAD*, available at [http://www.icpen.org/files/icpenDownloads/UNCTAD\\_Flyer\\_consumer\\_guidelines\\_en.pdf](http://www.icpen.org/files/icpenDownloads/UNCTAD_Flyer_consumer_guidelines_en.pdf) (last visited May 21, 2016).

mechanism (ADR mechanisms) for the same.<sup>46</sup> In 1999, after the revision of the Guidelines, these Guidelines were renumbered as 32, 33, and 34 under same Part E.<sup>47</sup> United Nations Conference on Trade and Development (UNCTAD) is undertaking a consultation on the revision of the United Nations Guidelines on Consumer Protection. This task was mandated initially by the First Ad Hoc Expert Meeting on Consumer Protection.<sup>48</sup> It recommended that "UNCTAD should...undertake discussions regarding the possibility of updating the United Nations Guidelines for Consumer Protection" and "undertake to collaborate on the content of potential revisions". Later on it was developed in the Second Ad Hoc Expert Meeting on Consumer Protection.<sup>49</sup>

The Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which was held in Geneva from 6 to 10 July 2015, adopted by unanimity the Draft Resolution on consumer protection and the revised UNGCP and invited "the General Assembly of the United Nations, at its seventieth Session in 2015, to consider the adoption of the Draft Resolution on Consumer Protection and the revised United Nations Guidelines on Consumer Protection as annexed to this resolution." The General Assembly adopted the resolution on consumer protection and the annexed UNGCP on 22 December 2015.<sup>50</sup> The previous section E, on Measures enabling consumers to obtain redress, is renamed Dispute resolution & redress, now section F. The Intergovernmental group of experts on consumer protection law and policy has been established to monitor the implementation of the guidelines, provide a forum for consultations, produce research and studies, provide technical assistance, undertake voluntary peer reviews, and periodically update the UNGCP. Its first meeting will take place on 17 and 18 October 2016 in Geneva under the auspices of the UNCTAD.

**Mediation in the USA:** Federal and state consumer protection laws exist to give protection against many forms of fraud and unfair business practices. The Federal Trade Commission is the main federal agency enforcing consumer protection laws. All states have common law (judge-made law) giving protection against fraudulent business practices.<sup>51</sup> If any consumer experiences any problems then he has the right to complain by these steps - Gather supporting documents;

---

<sup>46</sup> E. Measures enabling consumers to obtain redress. (A/RES/39/248, 1986) available at <https://www1.umn.edu/humanrts/links/consumerprotection.html> (last visited on May 21, 2016).

<sup>47</sup> Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection* (as expanded in 1999), available at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) (last visited May 23, 2016).

<sup>48</sup> UNCTAD, *Implementation Report on the UNGCP* (TD/B/C.I/CLP/23), available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx> (last visited May 21, 2016).

<sup>49</sup> UNCTAD, *Review of UNCTAD's Implementation Report, UNGCP*, available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx> (last visited May 21, 2016).

<sup>50</sup> The General Assembly, Resolution (70/186 of 22 Dec 2015).

<sup>51</sup> *Consumer Protection Laws*, available at [www.consumer-law.lawyers.com/consumer-fraud/consumer-protection-laws.html](http://www.consumer-law.lawyers.com/consumer-fraud/consumer-protection-laws.html) (last visited May 29, 2016).

Contact the seller; Contact third parties i.e. local consumer protection offices or state regulatory agency or licensing board that has jurisdiction over the seller. He can also notify the Better Business Bureau (BBB) in his area about his problem which tries to resolve his complaints against companies. He can also contact an appropriate federal agency.

If none of these options work, he may seek to resolve his problem through the legal system or through an alternative dispute program which are ways to solve disagreements between buyers and sellers, without going to court. Some companies and industries offer programs to solve disputes. One can also contact one's state's attorney general or consumer protection office, law school clinics, or the BBB to find a dispute resolution program.<sup>52</sup>

**Mediation in the European Union:** In the European Union, when consumers have problems, they can settle their disputes out-of-courts through ADR or ODR procedure e.g. arbitration, mediation, ombudsmen, and complaints boards. On 21st May 2013, the European Union adopted legislation on 'ADR and ODR as Directive on consumer ADR and Regulation on consumer ODR' complemented in 2015 by an 'Implementing Regulation on consumer ODR'. This legislation allows consumers and traders to resolve their disputes without going to courts in an easy, fast and inexpensive way.<sup>53</sup>

The ADR Directive ensures that all consumers have access to the ADR for resolving their contractual disputes with traders no matter what products or services they availed except health and higher education, whether online or offline and whether the trader belongs to the consumer's Member State or another Member State. The Member States shall prepare national lists of bodies offering ADR procedures and comply with binding quality requirements. Further, to facilitate the transposition of the ADR Directive, the European Commission has established an Expert Group comprising of national ADR experts which submitted its "Activity Reports."<sup>54</sup>

**Mediation in India:** The Consumer Protection Bill, 2015 proposes completely new provisions for Mediation for speedy disposal of court cases as an ADR mechanism. A whole new chapter has been devoted to mediation, appointment of mediators and the system of mediation to settle disputes.<sup>55</sup> "This is aimed at giving legislative basis to resolution of consumer disputes through mediation, thus making the process less cumbersome, simple and faster. This will be done under the aegis of the consumer courts."<sup>56</sup> The Bill defines "mediation" as "the process by which a mediator is appointed by the National Commission or a State Commission or a District Commission, as the case may be, mediates the dispute between the parties to the complaint or appeal by the application of the provisions of Chapter V of the Act, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings,

---

<sup>52</sup> Consumer-Complaints, available at [www.usa.gov/consumer-complaints](http://www.usa.gov/consumer-complaints) (last visited May 29, 2016).

<sup>53</sup> *Alternative and Online Dispute Resolution*, available at [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm) (last visited May 25, 2016).

<sup>54</sup> *Supra* n. 53.

<sup>55</sup> Consumer Protection Bill, 2015, Ch V.

<sup>56</sup> Consumer Protection Bill, 2015, Statement No. 5.

clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasising that it is the parties' own responsibility for making decisions which affect them."<sup>57</sup>

The Bill defines "mediator" as "a person who is appointed by the District Commission or State Commission or National Commission as a mediator to help the parties to find their own solution to the dispute."<sup>58</sup> Therefore, the Bill provides for a mediation option to ensure speedy and inexpensive justice. For this purpose, the National, the State or district forum will be entitled to mediate disputes between the disputants. The Bill provides for establishment of a District Consumer Mediation Cell attached to the District Commission in each district of the State and a Consumer Mediation Cell attached to the State Commission by the State Government and a National Consumer Mediation Cell attached to the National Commission by the Central Government.<sup>59</sup> It also empowers the State Government and the Central Government to decide the composition of Mediation Cell and its maintaining a list of empanelled trained Mediators and data on a daily basis and submit report on a monthly basis to the concerned Government.<sup>60</sup>

The Bill provides for the procedure of empanelment of Mediators, tenure of mediators for a period of five years from the date of empanelment or up to the age of seventy years and for further extension for another term of five years or up to the age of seventy years of age.<sup>61</sup> It further provides for preference for nominating mediators from the panel, considering their suitability for resolving the consumer disputes involved and preference shall be given to those who have proven record of successful mediation or who have special qualification or experience in the mediation.<sup>62</sup> It imposes a duty on mediator to disclose in writing certain facts which may likely to give rise to a justifiable doubt as to his independence or impartiality<sup>63</sup> and in this situation, after conducting such inquiry as it deems fit and giving a hearing to the mediator it dictates for revocation of appointment of such mediator by a reasoned order and replace him by another mediator.<sup>64</sup>

The Bill also provides for removal of the name of a Mediator, after hearing him and passing a reasoned order, from the panel under certain circumstances viz., if he resigns or withdraws his name from the panel for any reason, declared insolvent by any court, declared to be of unsound mind, exhibits or displays such conduct which is unbecoming of a mediator, or it is not possible or desirable to continue his name in the panel.<sup>65</sup> The mediator has to follow a procedure of Mediation which shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by principles of natural justice, having regard to the rights and obligations of the parties, usages of trade, and the circumstances of the dispute.<sup>66</sup> The mediator has to send the outcome of the

---

<sup>57</sup> Consumer Protection Bill, 2015, s 2(22)

<sup>58</sup> Consumer Protection Bill, 2015 s 2(23)

<sup>59</sup> Consumer Protection Bill, 2015 s 63(1)(2).

<sup>60</sup> Consumer Protection Bill, 2015 s 63(3)(4).

<sup>61</sup> Consumer Protection Bill, 2015 s 64.

<sup>62</sup> Consumer Protection Bill, 2015 s 65.

<sup>63</sup> Consumer Protection Bill, 2015 s 66.

<sup>64</sup> Consumer Protection Bill, 2015 s 67.

<sup>65</sup> Consumer Protection Bill, 2015 s 68.

<sup>66</sup> *Supra* n. 66.

mediation proceedings to the concerned Consumer Dispute Redressal Commission in writing and signing it.<sup>67</sup> It empowers any party to the suit to offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.<sup>68</sup> In the last relevant provision, it provides that within seven days of the receipt of any settlement, the District Commission, State Commission or National Commission shall pass an order recording that a settlement has been reached between the parties and dispose of the matter.<sup>69</sup>

Therefore, the Bill provides for a comprehensive Chapter on mediation for speedier disposal of consumer cases. While there can be no disagreement on the importance of these provisions, the notion of mediation has failed repeatedly over the decades in India even in consumer protection area. The main reason being the producers and service providers, who land in tiffs with consumers, are averse to solve problems across the table for various reasons. Another problem is that mediation is not compulsory but optional. With this leniency, it is highly improbable that defaulting companies will opt for mediation.

Further, the concerned authorities must be extra vigilant while implementing these provisions as putting mediation as part of the judicial process can also have adverse impact on consumer litigant because most of them are unaware about their right to refuse such mediation offers. It can also frustrate the ends of justice and harass the consumer litigants due to further delaying the process of settlement. Moreover, provisions pertaining to appointment of mediators could also act as a breeding ground for corruption leaving the consumers helpless. Hence, the proposed mediation under the Bill needs to be carefully implemented.

## Conclusion

India is expected to emerge as the world's largest middle class consumer market so she needs provisions ensuring fair, equitable, speedy and consistent outcomes for the consumers. The proposed Bill addresses various issues which are unaddressed under the present consumer protection regime, i.e., the Act. India is experiencing a robust growth in her e-commerce sector therefore; the Bill recognises the growing complexity of the business in this area. It is expected to enhance the quality and safety of products and services. Upon implementation of the Bill, our consumer law will not only get stronger but also help India to outshine in the global world with a stronger consumer economy.

As far as mediation is concerned, its main purpose is to allow the disputants to find solutions to their conflicts in a sustainable and self-determined way. This procedure is constructive having the chance for personal development and social growth for the disputants. The principle of voluntariness and reaching the solution by the disputants themselves have the expectation of substantive justice as the solution reached will benefit both the parties or, at least, avoid the worse off for anyone after the mediation. In addition, mediation aims to lighten the heavy case loads of the courts and to reduce the expenses for their infrastructure through privatisation of dispute resolution.

While proceedings in court are authoritative, formal and claim-oriented, mediation offers a flexible and self-determined approach in which all aspects of conflict irrespective of their legal relevance may be considered. It has the

---

<sup>67</sup> Consumer Protection Bill, 2015 s 69.

<sup>68</sup> Consumer Protection Bill, 2015 s 70.

<sup>69</sup> Consumer Protection Bill, 2015 s 71.

procedural flexibility that allows the disputants and the mediator to tailor its procedure as per the needs of the individual conflict. Mediation can be used to resolve disputes of any magnitude. It can save time and reduce the cost of resolving a dispute, both financial and emotional. It can also assist the disputants to re-establish trust, respect and maintain their ongoing relationships.<sup>70</sup>

Therefore, the need of the hour is that the Bill must be passed so that the consumers must have a low-cost and quick grievance redressal method, i.e., mediation to guarantee that manufacturers and service providers shall be accountable for the price and quality that the consumers are entitled to. The law must be more successful in reducing the accumulation of cases by introducing mediation as a redressal mechanism and thereby begins a new era in this area.

---

<sup>70</sup> *Supra* n. 17.

## Recognition of Third Gender: A New Dimension to Make Human Rights Mechanism more Humane

*Srishty Banerjee\**

### Introduction

Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transsexual.<sup>1</sup> People in the world over are subject to continuous abuse of human rights because of their actual or perceived sexual orientation and gender identity. These abuses may take many forms, from denials of the rights to life, freedom from torture, and security of the person, to inequity and prejudices in accessing economic, social and cultural rights such as health, housing, education and the right to work, from non-recognition of personal and family relationships to pervasive interferences with personal dignity, suppression of diverse sexual identities, attempts to impose heterosexual norms, and pressure to remain silent and invisible.<sup>2</sup>

### Meaning of Transgender

Transgender is an umbrella term. It includes persons whose own sense of gender does not match with the gender assigned to them at birth. They include transmen and transwomen (whether or not they have undergone sex reassignment surgery or hormonal treatment or laser therapy), genderqueers and a number of other socio, cultural identities, such as kinnars, hijras, aravanis, jogtas, and other local

---

\* Assistant Professor in Law, School of Law, Northcap University, Gurgaon, Haryana.

<sup>1</sup> J. Venkatesan, *Supreme Court Recognises Transgenders as Third Gender*, *The Hindu* (April 15 2014), available at <http://www.thehindu.com/news/national/supreme-court-recognises-transgenders-as-third-gender/article5914572.ece> (last visited Feb. 10, 2016)

<sup>2</sup> Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* HUMAN RIGHTS LAW REVIEW (2008), available at <https://globalfop.files.wordpress.com/2012/11/sexual-orientation-gender-identity-and-international-human-rights-law-contextualising-the-yogyakarta-principles.pdf> (last visited Feb. 14, 2016).

names given to the community.<sup>3</sup> In *NALSA v. Union of India*<sup>4</sup> the apex court of India has given a vast description of ‘transgender’.

### ***Hijra: Third Gender Persons***

In India, the *hijra* (pronounced HIJ-ra) community has existed for more than four thousand years<sup>11</sup> and currently is believed to number half a million. The word “*hijra*” designates an alternative gender to the male-female binary; the term translates as eunuch or hermaphrodite. The *hijra* include both ceremonially emasculated males and inter-sexed people whose genitals are “ambiguously male like at birth. The *hijra* identity is “deeply rooted” in Indian culture, which she believes has religious underpinnings in the Hindu belief that all people contain male and female attributes. The *hijra* also seems to play a sanctioned role in Hindu society through the practice of *badhai*—a contradictory ritual where infertile *hijras* bless births and marriages. However, *hijras* “neither man nor woman call into question the basic social categories of gender on which Indian society is built. This makes *hijras* objects of fear, abuse, ridicule, and sometimes pity.” Attitudes toward the *hijra* are also coloured by the fact that many work as prostitutes because they find it difficult to find appropriate employment because of societal discrimination. This category has been the subject of discrimination, humiliation and abuse of their basic human rights. British colonization of India in the mid-1850s, began an era of systemic state-sanctioned discrimination for the *hijra*. The primary instruments of this discrimination were laws, including (1) the Criminal Tribes Act of 1871: An Act for the Registration of Criminal Tribes and Eunuch and (2) Section 377 of the Penal Code, which criminalized non-procreative sexual acts.<sup>5</sup>

### **International Human Rights Law and Gender Identity**

Human rights are rights inherent to all human beings. We are all equally entitled to our human rights without discrimination, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, such as age, disability, health status, sexual orientation or gender identity. The equality and non-discrimination guarantee provided by international human rights law applies to all people, regardless of sex, sexual orientation and gender identity or “other status.”<sup>6</sup>In June 2011, the Human Rights Council adopted

---

<sup>3</sup> *Supra* n. 1.

<sup>4</sup> AIR 2014 SC 438.

<sup>5</sup> Jennifer Rellis, *Please Write ‘E’ in this Box - Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICHIGAN JOURNAL OF GENDER AND LAW 223, 233 (2007).

<sup>6</sup> Free and Equal: UN for LGBT Equality, *International Human Rights Law and Sexual Orientation & Gender Identity*, available at <https://www.unfe.org/system/unfe-6->

resolution 17/19 – the first United Nations resolution on human rights, sexual orientation and gender identity. The resolution was approved by a narrow margin, but, significantly, received support from Council members from all regions. Its adoption paved the way for the first official United Nations report on the same subject, prepared by the Office of the High Commissioner for Human Rights.<sup>7</sup>

The legal obligations of States to safeguard the human rights of LGBT and intersex people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. United Nations Secretary-General Ban Ki-moon described violence and discrimination against LGBT people as a “monumental tragedy for those concerned and a stain on our collective conscience”. It is also, he noted, a violation of existing international human rights law. At the discussion of LGBT equality at United Nations Headquarters, New York, 10 December 2010, following recommendations were given to the parties to take steps for the rights of LGBT and transgenders:

- Protect people from homophobic and transphobic violence. Include sexual orientation and gender identity as protected characteristics in hate crime laws.
- Prevent the torture and cruel, inhuman and degrading treatment of LGBT persons in detention by prohibiting and punishing such acts and ensuring that victims are provided with redress.
- Repeal laws criminalizing homosexuality, including all laws that prohibit private sexual conduct between consenting adults of the same sex. Ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity, and are not subjected to baseless and degrading physical examinations intended to determine their sexual orientation.
- Prohibit discrimination on the basis of sexual orientation and gender identity. Enact comprehensive laws that include sexual orientation and gender identity as prohibited grounds of discrimination.
- Safeguard freedom of expression, association and peaceful assembly for LGBT and intersex people. Any limitations on these rights must be compatible with international law and must not be discriminatory. Protect individuals who

---

un\_fact\_sheets\_v6\_\_international\_human\_rights\_law\_\_and\_sexual\_orientation\_\_gender\_identity.pdf (last visited Feb. 17, 2016).

<sup>7</sup> UN HR, Office of the High Commissioner, *Born Free and Equal* (2012) 9, available at <http://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf> (last visited Feb. 18, 2016).

exercise their rights to freedom of expression, association and freedom of assembly from acts of violence and intimidation by private parties.<sup>8</sup>

### *Yogyakarta Principles*

The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birth right. These principles were developed in 2006 during a meeting of the International Commission of Jurists (an international human rights non-governmental organization) by human rights experts, judges, academics, UN rapporteurs and representatives of NGO's.

The meeting happened in Indonesia, on Java Island, at Gadjah Mada University, from 6<sup>th</sup> to 9<sup>th</sup> November 2006, it aimed to resolve the issues of discrimination and stereotype based on sexual identity or orientation. Principle 3 of the 'Yogyakarta Principles', "everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom". Principle 3 talks about 'self-determination' of one individual, meaning the right of an individual to choose his own destiny, no matter if is motivated by external or internal reasons. Thus, it is safe to say that self-determination also stands for self-perception or self-identity. In the case *Daniel M. Maffei v. Kolaeton Industries, Inc. Et al*<sup>9</sup> decided in March 1995, the New York Court felt that relevant to the issue of transgender people was the fact that gender or sex can be determined by "seven factors: chromosomes (XX female, XY male), gonads (ovaries or testes), hormonal secretions (androgen for men and estrogen for women), internal reproductive organs (uterus or prostate), external genitalia, secondary sexual characteristics and self-identity"(how a person sees itself as a man or a woman).

By protecting the right to self-determination, Principle 3 of the 'Yogyakarta Principles' protects the universal right of non-discrimination, as all humans can choose their own identity without facing any negative repercussions.<sup>10</sup> In India,

<sup>8</sup> *Id.*

<sup>9</sup> 626 N.Y.S.2d 391 (March 14, 1995), available at <http://www.transgenderlaw.org/cases/maffei.htm> (last visited Feb. 10, 2016).

<sup>10</sup> Alexandra Pisa, *How Could the Yogyakarta Principles Help Improve the Situation of Transgender People, When Examined in the Framework of Existing Bodies of International Non-Discrimination Norms?*, available at <http://arno.uvt.nl/show.cgi?fid=127432> (last visited Feb. 10, 2016).

the Supreme Court in the landmark case of *NALSA v. Union of India*<sup>11</sup> stated that the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' should be applied as a part of Indian law. 'Equality and non-discrimination on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, should be applied in India as well,' the Court said.

### **NALSA v. Union of India**

In 2012, the National Legal Services Authority, which provides pro-bono legal services to marginalized communities, filed a writ petition in the Supreme Court of India on behalf of country's transgender community. The petition sought a legal declaration of their gender identity than the one assigned to them and that they are entitled to equal recognition of their constitutional rights.

In April 2014, the Supreme Court allowed the petition and held that the right to express one's identity in a non-binary gender was an essential part of freedom of expression, and individuals must have the right to express their self-identified gender. It directed the government to give legal recognition to the third gender, such that individuals would be able to identify themselves as male, female or third gender. It also ordered the government to take necessary steps to remove the social stigma, promote transgender-specific health programs, and grant them equal legal protection.<sup>12</sup>

The Supreme Court judgment recognising the rights of transgendered persons is a landmark ruling and restores faith in the Court's ability to recognise gross injustice. While the decision is largely based on the protection of fundamental rights, the Court also relied on a host of UN human rights provision as well as the 2006 Yogyakarta Principles, which specifically recognise the human rights of sexual minorities, and which were adopted to counter discrimination on the basis of gender identity and sexual orientation. The Bench listened with approval a host of foreign judgments relating to the rights of transgendered persons, without throwing a nationalist anti-western hissy fit. An outstanding feature of the decision is that the judges accepted the broad definition of 'transgendered' as they accepted a vast array of identities and experiences that constitute the category of transgendered persons, culturally and socially, and also accepted the fact that gender identity was not necessarily biologically determined. They referred to each person's experience of gender, which may involve a freely

---

<sup>11</sup> *Supra* n. 4

<sup>12</sup> See the case analysis of *National Legal Services Authority v. Union of India* by Global Freedom of Expression, Columbia University, New York, available at <https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india> (last visited Feb. 13, 2016).

chosen modification of bodily appearance or functions by medical or other means.<sup>13</sup>

### ***Guidelines for Elevation of Third Gender***

Supreme Court in the case of *NALSA v. Union of India*<sup>14</sup> has given following directions to the executive branch of the government for elevation of transgender to make their life dignified:

-Transgender person's right to decide their self-identified gender is upheld and the Centre and State governments are directed to grant legal recognition of their gender identity such as male, female or third gender.

-The Centre and State governments should seriously address the problem faced by them such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence on Sex Reassignment Surgery (SRS) for declaring one's gender is immoral and illegal.

-The Centre and State governments should provide medical care to transgender in hospitals and also provide separate public toilets.

-The government should operate separate HIV Sero-surveillance Centres as transgenders faced several sexual health issues.<sup>15</sup>

-The Bench directed the Centre and States to take steps treat them as socially and educationally backward classes and extend reservation for admission in educational institutions and for public appointments.

### ***Problems Faced by Transgenders***

The transgender people, as a whole, face multiple forms of oppression in this country and the world over. Discrimination is so large and pronounced 'especially in healthcare, employment and education, leave aside social exclusion.<sup>16</sup> Expressing its anguish at the plight of transgenders, the Apex court said: "Seldom, our society realises or cares to realise the trauma, agony and pain which members of the transgender community undergo." Nor did it appreciate their innate feelings, especially of those whose mind and body disowned their biological sex. Our society often ridicules and abuses the transgender community and in public place like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the

---

<sup>13</sup> Ratna Kapur, *Beyond Male and Female, The Right to Humanity*, The Hindu (19<sup>th</sup> April, 2014).

<sup>14</sup> *NALSA v. Union of India*, AIR SCC 438 (2014).

<sup>15</sup> *Supra* n. 1.

<sup>16</sup> *Id.*

fact that the moral failures lies in the society's unwillingness to contain or embrace different gender identities. When families and governments fail to provide them security nets against all these repressions, they drive their children into conventional *hijra* (aravani) communities that adopt them, but the apathy is that they perpetuate them in begging and sex work as a way of life.<sup>17</sup>

Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.<sup>18</sup>

#### ***Recognition to Transgender as Third Gender***

India has been championing the human rights movement since the days of Mahatma Gandhi and has always looked at it from a broader angle. The human rights movement has been carried forward Dr. Martin Luther in the U.S.A., and by Julius Nayerere in Tanzania and many other personalities in Asian, African and Latin American countries of the world. But these human rights promises are like a fairy tale for the sexual minorities if they are not even permitted to basic human needs of life. The Supreme Court of India held that "recognition of transgenders as a third gender is not a social or medical issue but a human rights issue. Transgenders are also citizens of India. The spirit of the Constitution is to provide equal opportunity for every citizen to grow and attain their potential, irrespective of caste, religion or gender." The Bench said that gender identification is essential. It is only with this recognition that many rights such as the right to vote, own property, the right to marry, the right to claim a formal identity through a passport or ration card, a driver license, the right to education, employment, health and so on will be meaningful.<sup>19</sup>

The Court further held that sex- discrimination in Indian constitutional law includes discrimination on the grounds of gender identity, and rejected the view that it was limited to biological sex. It held that a binary understanding of gender

---

<sup>17</sup> Vaishna Roy, *The Road Looks Long for Third Gender*, *The Hindu* (May 2, 2015), available at <http://www.thehindu.com/opinion/op-ed/the-road-looks-long-for-third-gender/article7162258.ece> (last visited Feb. 15, 2016).

<sup>18</sup> The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (The Yogyakarta Principles, 2006), available at <http://www.yogyakartaprinciples.org/principles-en/> (last visited Feb.15, 2016).

<sup>19</sup> *Supra* n. 14.

denied *hijras* and transgendered person's equal protection of law and constituted the basis for widespread discrimination. The Court has clearly articulated that transgendered persons should no longer be treated with cruelty, pity or charity. There needs to be a paradigm shift towards a rights based approach where they accepted as fully human.

**Articles 14, 19 and 21**

The Supreme Court interpreted the Constitution of India in the light of human rights conventions and principles. Under Article 14, "the State shall not deny to 'any person' equality before the law or the equal protection of the laws within the territory of India." The Court held the article affords protection to 'any person,' "transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country." [para. 54] It also held that Articles 15 and 16's prohibition of discrimination against any citizen, inter alia, on the ground of sex equally apply to transsexual persons. According to the Court, the use of word 'sex' in the articles "is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female." [para. 59]

As to the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution, the Supreme Court ruled that it "includes one's right to expression of his self-identified gender," and notwithstanding legitimate exceptions pursuant to Article 19(2) of the Constitution, "no restriction can be placed on one's personal appearance or choice of dressing." It concluded that a transgender personality "could be expressed by the transgender behaviour and presentation [and the government] cannot prohibit, restrict or interfere with a transgender expression of such personality, which reflects that inherent personality."<sup>20</sup>

The concept of right to life and liberty as enshrined under Article 21 of the Constitution of India, being a guaranteed fundamental right undoubtedly is very wide in its scope and applicability and with the modern strides of jurisprudence, with revolutionary pronouncements by the Apex Court in judgement over past two decades, or so has assumed wider connotations and amplifications. Under this noble concept, everyone in this country has been guaranteed the right to life and liberty.<sup>21</sup> The Court referred to Article 21 of the Constitution, which says "no person shall be deprived of his life or personal liberty except according to procedure established by law." It interpreted that this provision broadly protects "those aspects of life, which go to make a person's life meaningful," including

---

<sup>20</sup> *Supra* n. 12.

<sup>21</sup> Amartya Sen, *The Global Reach of Human Rights*, 29(2) JOURNAL OF APPLIED PHILOSOPHY 91-100 (May, 2012)

one's right of self-determination of the gender to which a person belongs. Accordingly, the Court held that "*Hijras/Eunuchs*, therefore, have to be considered as third Gender, over and above binary genders under our Constitution and the laws."<sup>22</sup>

### **Conclusion**

As all human beings have the right to live with dignity at all times, regardless of their legal, social or political status so do transgenders. There are numerous reports that have documented persons killed or sentenced to death because of their sexual orientation or gender identity (Amnesty International, 'Crimes of Hate, Conspiracy of Silence. Torture and Ill-Treatment Based on Sexual Identity, 2001) and this is really inhumane in this era of human rights.

The NALSA judgement is an immensely significant and potentially transformative decision. It affirms that there is no place in the Constitution for a hierarchy of super- humans, lesser humans and non-humans because of sexual orientation or gender identity.

---

<sup>22</sup> *Supra* n. 12.

## **Cement Cartelization Case: (Re)Defining Moment for Competition Jurisprudence in India**

*Mausam\**

### **Introduction**

When the Competition Commission of India (CCI) passed its Order to impose Rs 6307 Crores as fine on eleven leading cement manufacturers of India, the Order gave a big jolt to the business community in India. After this order, it appeared as if the CCI has emerged possibly as the mightiest regulator. It gave signal that business must be conducted according to the rules of fair play. But commentators very soon realized that a wrong cannot be corrected by committing another wrong. The Competition Appellate Tribunal (COMPAT) quashed the CCI order of penalty and directed the CCI to hear the matter a fresh. However, it must be noted that the COMPAT did not say anything against the merit of the case. The Order was quashed on the ground of violation of principles of natural justice. This is a huge setback for the CCI and its repercussion will be seen in future cases.

### **Background**

In re *Cement Cartelization Case*<sup>1</sup> which relates to the complaint of cartel in cement industry in India, the Builders Association of India (BAI) filed information on July 26, 2010 with CCI under Section 19(1) (a) of the Competition Act, 2002 against the Cement Manufacturer's Association (CMA) and 11 cement manufacturers. The BAI alleged that these cement manufacturers and CMA has formed a cartel in cement industry which is resulting in exorbitant price increase of the cement. After finding prima facie case against these manufacturers and CMA, the CCI directed, Director General (DG) to investigate the matter. After thoroughly considering the information and subsequent investigation, DG found that there were clear prior consultations among parties, capacity under-utilisation, production and supply parallelism and similar pattern of price increase. On the report of DG, the CCI established that top cement manufacturers were controlling the supply of cement in the market by way of some tacit agreement and noticed that the conduct and activities of CMA was found to be in violation of section 3(1), 3(3)(a), 3(3)(b) of the Competition Act, 2002. The CCI imposed more than 6307 Crore rupees' penalty on eleven leading cement manufacturers.

---

\* Research Scholar, Faculty of Law, University of Delhi. E-mail: mausam8280@gmail.com.

<sup>1</sup> *In re Cement Cartelization*, COMPAT Final Order, Dec. 11, 2015.

The aggrieved parties approached to the Competition Appellate Tribunal against the order of the CCI on ground of violation of rule of 'fair hearing', which is an important aspect of principle of natural justice. The COMPAT in its final order set aside the penalty imposed by the CCI and directed the CCI to hear the matter afresh.

### *Legal Issues*

There are three issues that were the main focus:

1. Observance of principles of natural justice by tribunal like Competition Commission of India.
2. Confidentiality of document versus fair opportunity to defend.
3. Violation of principle of 'One who hears must decide'.

### *Analysis*

So far as the first issue is concerned, it is established that administrative authorities in India are not bound by the technical rules of procedure of law courts; this presses the need to follow the minimum procedure of fair hearing. The reason is obvious that under globalisation processes, countries adopted policy of liberalisation. This policy of liberalisation and technological developments in the fields of science, agriculture, communication has given birth to issues and disputes, which were hitherto unknown to the judicial system. To deal with such issues and disputes it became necessary to create bodies comprising of expert and persons possessing special knowledge in the fields of economics, technology, science etc. For smooth functioning of such kind of bodies, technical rules of procedure of law courts are relaxed. But it does mean that these bodies or authorities can function arbitrarily. They have to follow minimum procedure of fair hearing as per the principles of natural justice.

Section 36 of the Competition Act explicitly directs the Commission to follow the principles of natural justice. It says, 'in discharge of its functions, the Commission shall be guided by the principles of natural justice...'<sup>2</sup>. The term 'principles of natural justice' has not been explained under the Competition Act, 2002. But the scheme of the Act and the regulation made under the Act, expressly envisage some of the principles of natural justice mainly notice and opportunity of fair hearing. For instance, under Section 26(2) of the Act, if the Commission has not taken decision to close the case, then the Commission is expected to forward the copy of the report of DG, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authority or the parties concerned. Further it also requires providing an opportunity of hearing to the parties concerned before arriving at any final conclusion under Section 26(7) or 26(8) of the Act. Apart from this, there are several regulations which deal with notice and opportunity of hearing<sup>3</sup>. So far as the other principles of natural justice are

---

<sup>2</sup> Competition Act, 2002, s 36(1).

<sup>3</sup> See, Competition Commission of India (General) Regulation, 2009, Regulations 14, 17(2), 21(8), 22, 25, 29, 41, 44, 46, 48, and 50.

concerned, it is left to the CCI to decide that which aspects of principles of natural justice will be followed. Since under the Act, the Commission is vested with inquisitorial, investigative, regulatory, and adjudicatory and to a limited extent even advisory jurisdiction, it cannot ignore unwritten principles of natural justice.

Further, the word 'shall', used in Section 36 of the Act, is generally used as imperative or mandatory (i.e., has a duty to or more broadly, is required to), but sometimes it may be used in permissive or directory sense, such as 'may' or 'should'<sup>4</sup>. It's imperative or permissive interpretation depends upon the situation. In cases where any right or benefit to anyone depends on its being taken in the imperative sense, it must be interpreted as mandatory. On the other hand, where no public or private right is impaired by its interpretation in the other sense, it is treated as permissive. In present case, parties are found guilty of forming cartel in cement industry and made liable to pay a huge amount as penalty. Therefore, under the scheme of the Act the CCI is required to treat the word 'shall' as mandatory. It is duty of the CCI to follow the principles of natural justice to provide fair hearing to the parties, whose rights are going to be adversely affected.

The sole purpose of the rule of fair hearing is to avoid failure of justice. It is this purpose which should be a guide in applying the rule of fair hearing to varying situations that may arise<sup>5</sup>. In *Keshav Mills Co. Ltd v. Union of India*<sup>6</sup>, the Supreme Court of India observed that: "The only essential point that has to be kept in mind in all cases...that the administrative authority concerned should act fairly, impartially and reasonably"<sup>7</sup>.

In a number of decisions, the High Courts and Supreme Court have repeatedly ruled that the Commissions, Tribunals and other administrative bodies clothed with the power to adjudicate upon the rights of the parties or pass orders adversely affecting a person or a body of persons or imposing penalty for contravention of any statutory provision or otherwise are bound to act justly, fairly and in consonance with the principles of natural justice. One of the earliest judgements on the subject is *State of Orissa v. Dr. (Miss) Binapani Dei and others*<sup>8</sup>. In that case, the Supreme Court unequivocally recognised that:

The rule is that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed: it need not be shown to be super added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the

<sup>4</sup> See, BLACK'S LAW DICTIONARY, 1499 (9<sup>th</sup> edn., 2009).

<sup>5</sup> I.P. Massey, ADMINISTRATIVE LAW, 219 (Eastern Book Company, 7<sup>th</sup> edn., 2008).

<sup>6</sup> (1973) 1 SCC 380.

<sup>7</sup> *Id.*, p.381.

<sup>8</sup> AIR 1967 SC 1269.

essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case<sup>9</sup>.

Again in *Maneka Gandhi v. Union of India*<sup>10</sup>, the seven-Judge Bench of the Supreme Court observed:

[N]atural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action..... The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected?<sup>11</sup>

The Court further held:

[A] tribunal or a person to whom judicial or quasi judicial functions are entrusted is thus presumed to have an obligation to act with fairness, that is not only the obligation to observe the principles of natural justice but, on the contrary, to observe a higher standard of behaviour than that required by natural justice<sup>12</sup>.

Accepting the above established principles in our country, the COMPAT in present appeal also observed that:

Before parting with this order, we consider it necessary to mention that we have referred to various provisions of the Act (un-amended and amended) and Regulations and analysed the same to emphasis the proceedings held under the Act and Regulations should be just and fair and in consonance with the principles of natural justice as engrafted in the Act and the Regulations...

We also feel the time has come for the Commission to evolve a comprehensive protocol and lay down guidelines for conducting investigation/inquiry in consonance with the rules of natural justice...

...It should be realised that much of the appellate litigation would be obviated if a just and fair procedure is adopted for conducting investigation and inquiry and passing of orders under Section 27, 28 and the provisions contained in Chapter VI of the Act.<sup>13</sup>

Thus, the above mentioned observation of the COMPAT reaffirmed that the administrative authorities in India are bound to follow the Principles of natural justice. These specialized expert authorities are established to provide speedy and effective justice. Therefore, procedural rules are little bit relaxed for them. But it does not mean that they can adjudicate matters in an arbitrary manner. Where decision of any administrative authority affects the right of

---

<sup>9</sup> *Supra* n. 2, pp. 129-130.

<sup>10</sup> (1978) 1 SCC 248.

<sup>11</sup> *Supra* n. 2, p. 137.

<sup>12</sup> *Supra* n. 2, p. 150.

<sup>13</sup> *Supra* n. 2, pp. 209-210.

any person or imposes any kind civil consequences, such authority is under obligation to follow just and fair procedure. In this present case, the CCI inflicted fine of Rs. 6307 Crores on the parties, which is one of the highest amount in history of Indian market regulation. Therefore, it is very reasonable expectation from the CCI to adopt just and fair procedure for adjudication and to provide fair opportunity to present their case to all interested parties.

Second issue in this case relates to the conflict between confidentiality of document collected by the official for the case and other parties' right to defend them. The Competition Act recognizes that information obtained from either of the parties could be commercially sensitive and its disclosure could result in harm to an enterprise.<sup>14</sup> In this case, some parties sought confidentiality of their document (cement pricing data) which was granted by the DG according to the Act<sup>15</sup>. One of the opposite party also supplied similar kind of documents, which were not granted confidentiality by the DG. Further, DG refused to share cement pricing data of some parties with the other opposite parties. Therefore, the issue was whether not sharing confidential documents (cement pricing data) with opposite parties violates the right of fair opportunity to defend.<sup>16</sup>

Fair opportunity to defend themselves is an important facet of natural justice. A person cannot defend himself properly, unless he has knowledge that what evidences can be used against him. Every person before an administrative authority or tribunal exercising adjudicating powers has right to know the evidence to be used against him. This principle was firmly established in *Dhakeshwari Cotton Mills Ltd. v. CIT*<sup>17</sup>. In this case the Appellate Tribunal did not disclose the information supplied to it by the department. The Supreme Court held that the assessee was not given a fair hearing. However, the supply of adverse material, unless the law otherwise provides, in original form is not necessary. It is sufficient if the summary of the contents of the material is supplied provided it is not misleading. A person may be allowed to inspect the files and take notes. Whatever mode is used, the fundamental remains the same that nothing should be used against the person which has not been brought to his notice.<sup>18</sup>

It is established from the fact of the present case that that the data collected by DG even otherwise is not for public consumption and remains confidential vis-a-vis public domain and can be used by DG & CCI only for the purposes of the Act, and not otherwise<sup>19</sup>. Further such data cannot be revealed to the public by any official of the CCI irrespective of confidentiality is granted or not. On the other hand, the Commission cannot treat cement pricing data as confidential vis-à-vis other opposite parties<sup>20</sup>. Since this is a case of cartel, conspiracy can only be proved by parallel behaviour. Therefore, the CCI

---

<sup>14</sup> See Competition Act, 2002, s. 57.

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* n. 2, para 14.

<sup>17</sup> AIR 1955 SC 65.

<sup>18</sup> *Supra* n. 6, p.227.

<sup>19</sup> *Supra* n. 2, para 14.

<sup>20</sup> *Id.*

cannot ask the opposite parties to argue their case without knowing and referring to pricing data of each other. While directing DG to provide non-confidential part of the data to opposite parties<sup>21</sup> the COMPAT observed that:

The present enquiry is being done by the commission into issue of cartelization in industry for the purpose of increasing prices, non-utilization of capacities and thereby killing competition and keeping high profit margins. Cartelization, if proved, invites heavy penalties on the parties involved. It is mandatory for the Commission to give an opportunity to all the parties facing allegation of cartelization to discredit the allegation and argue that the same were not established. The Commission cannot tell the opposite parties that they should argue their case without knowing and referring to pricing data of each other. In the issue of cartelization pricing data, the profit margin, cost of per unit of the material are the relevant factors which would reflect whether there was a cartelization or not. As in a conspiracy the direct evidence of meeting of minds is not available, so is the case in cartelization, direct evidence of agreement between different parties to a cartel is normally not available and it is to be inferred from price parallelism and other factors.<sup>22</sup>

Third issue of this case relates to the violation of principles of natural justice namely, 'one who hears must decide'. The CCI Chairperson was not present at the time of the final hearings of the matter on the three dates (February 21, 22, and 23 of 2012) on which arguments were placed by the counsel of each party. Further, each page of orders passed on these days was initialled by the Chairperson and the last page was signed by other six members and the Chairperson himself without putting the date on which they had signed the order. This is against the mandate of the General Regulation, 2009.<sup>23</sup>

The COMPAT found that the signature of the CCI Chairperson indicates that he authored the order, not any of the six Members. These six Members had heard the arguments on the above mentioned dates, but they did not write the order. Further, the Chairperson did not know the nature and content of the arguments of the counsels placed before the Commission. Most important fact is revealed by the recording of the minutes. The minutes of the meeting recorded on those dates do not show that the remaining six Members had recorded the arguments advanced by the learned advocates.<sup>24</sup> In absence of recorded arguments advanced on those dates, how come the Chairman knows about the nature and content of the arguments? And when he does not know the nature and content of the arguments, how can he form an opinion and come to any conclusion? It indicates that the Chairman's participation in the decision-making process has a salutary effect on the final verdict and his views must have influenced the other six members. Therefore, the COMPAT found it a denial of fair hearing and violation of principle of natural justice. The COMPAT observed that:

---

<sup>21</sup> *Supra* n. 2, para 18.

<sup>22</sup> *Supra* n. 2, p. 42.

<sup>23</sup> *See*, General Regulation, 2009, Regulation 32(1).

<sup>24</sup> *Supra* n. 2, para 96, p. 208.

[T]he law on the issue can be summarized to the effect that the very person/officer, who accords the hearing to the objector must also submit the report/take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice<sup>25</sup>.

The expression 'one who decides must hear' which is popular in common law jurisdiction is known by the term 'institutional or anonymous decision' in American law.<sup>26</sup> Unlike law courts, the decision in many administrative proceedings is not the decision of one man from start to finish. Under administrative proceeding often one person hears and other decides. The divided responsibility may work contrary to the concept of fair hearing.

In the USA the concept of 'one who decides must hear' was discussed by the Supreme Court in *Morgan v. United States*<sup>27</sup>. In this case, the statute authorised the Secretary of Agriculture to make an order fixing the maximum rates for dealings in stockyards of Kansas City. The hearing in this case was given by a subordinate officer and the final decision regarding rates came from the Secretary. It may be noted that there was evidence on the file showing that the Secretary did not personally consider the case and appraise the evidence. Under these circumstances, the Supreme Court of the USA, quashing the order of the Secretary, observed that when an official is vested by law with the power to decide, he has the duty to exercise real deciding function in which evidence is received and weighed by the Trier of facts. That duty cannot be performed by one who has not considered the evidence or arguments. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decide must hear<sup>28</sup>.

In India, the courts have followed the approach of the Supreme Court of USA. In *Gullapalli Nageswara Rao v. APSRTC*<sup>29</sup>, an administrative action was challenged on the ground that the one who decided did not hear. In this case, the petitioners challenged the order of the government confirming the scheme of road nationalisation. The Secretary of the Transport Department gave the hearing but the final decision came from the Chief Minister. The Supreme Court held that this divided responsibility was against the concept of fair hearing because if one who decides does not hear party; he gets no opportunity of clearing doubts in his mind by reasoned arguments. The Supreme Court observed that:

[I]n the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interest in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is one the principle that justice should not only be done, but should manifestly and undoubtedly be seen to

---

<sup>25</sup> *Supra* n. 2, p.156.

<sup>26</sup> *Supra* n. 6, p. 254.

<sup>27</sup> 298 US 468 (1936).

<sup>28</sup> *Local Govt. Board v. Arlidge* 1915 AC 120, 481.

<sup>29</sup> AIR 1959 SC 308.

be done... This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argued to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold the said procedure followed in this case also offends another basic principle of judicial procedure<sup>30</sup>.

In *Rasid Javed v. State of U.P.*<sup>31</sup>, the Supreme Court relied upon the judgment of Gullapalli Nageswara Rao and observed that a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted. Similar observation was made by three judges' bench of the Supreme Court in *Union of India v. Shiv Raj*<sup>32</sup>.

It is hard fact that a literal application of this rule in modern complex administrative system is very difficult. Its literal application will create major hurdle in smooth functioning of administrative process. Again, this is also not correct lesson of *Morgan* case. The real thrust of *Morgan* case is that the person or authority charged with the responsibility of taking decision may take help from subordinate, but he must personally consider and appraise the evidences and independently come to a decision. Demanding something more than this would amount to breaking a quixotic lance against something deeply ingrained in the administrative process.

In present case, if the CCI's Chairperson had instructed other six Members to record the arguments of the all counsel advanced on those dates and then situation might have been different. Recording of the arguments would have provided an opportunity to Chairman to personally consider and appraise the arguments. The conduct of the CCI Chairperson shows clear cut violation of principles of fair hearing and natural justice.

## Conclusion

This order of the COMPAT is very important, as it will lead the direction of competition enforcement regime in India. This order is also important because it was not given against the merit of the case. Whether there was cartelization in cement industry or not, it was not decided by the COMPAT, that still remains *res Integra*. The COMPAT set aside the CCI order for procedural violation. Thus, it establishes that procedural fairness is an implied mandatory requirement to protect arbitrary action. This order also affirms that, "if the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of

---

<sup>30</sup> *Supra* n. 2, p. 160.

<sup>31</sup> (2010) 7 SCC 781.

<sup>32</sup> (2014) 6 SCC 564.

justice. The decision must be declared to be no decision". This order is a lesson for the Competition Commission of India to correct its course of action.

Since, the COMPAT has ordered the CCI to hear the matter afresh; therefore all party of cement cartelization case will also be entitled to argue afresh. This will definitely increase the burden of work and will slow down the speed of functioning of the CCI. Therefore, it will remind the importance of procedural issues in cartel enforcement. In coming days, this case will pave wave for the establishment of a well-defined and fairer procedural regulatory structure in CCI.

## Book Review

### TEXT BOOK ON THE TRANSFER OF PROPERTY ACT

*Avtar Singh*

Universal Law Publishing Co., 4<sup>th</sup> Edn., 2014

Pages: Lxxv + 424, Price Rs 425/-

*Sarbjit Kaur\**

The Transfer of Property Act came into existence in 1882 for regulating transactions of transfer of property between parties by their own act and also incidentally to provide for some other matters. Before the enactment of this Act, the transfer of property in India was governed by the English Common Law principles of justice, equality and good conscience. Also, there were many regulations and enactments to deal with it. The Act has been amended from time to time to make it suitable to the changing needs of the society. Property transactions are now increasing because of expanding scope of use of property both- urban and rural. As a result, property disputes are also increasing. As the subject is gaining more importance, it becomes necessary to understand the basic principles of property law, to know the object and scope of the Transfer of Property Act and interpretation of the courts on various issues relating to the subject.

The book under review is an authoritative source to provide full knowledge of the subject. Text book on the Transfer of Property Act by Avtar Singh, first published in 2005, has been thoroughly revised and updated in the present Fourth Edition in 2014. The book is one of the best treatises on the subject and this edition has further taken it towards the goal of excellence.

The book has been divided into VIII chapters. Each chapter is preceded by a well-structured synopsis of the contents contained therein. In each chapter, there are headings and sub-headings to make the topic commented upon easy to understand and remember by the students. Section-wise commentary is presented for easy and quick reference. The book explains the provisions of the Act in an analytical and illustrative manner. The basic principles affecting the property transactions have been traced with copious reference to judicial pronouncements. A narration of the amendments that have been made in the Transfer of Property Act from time to time is also given in the beginning of the book.

Chapter I is a primer which discusses what physical objects or things are included under the term "immovable property". The Transfer of Property Act has not defined the term "immovable property". It only says that

---

\* Associate Professor, Faculty of Law, Delhi.

“immovable property” does not include standing timber, growing crops or grass. As the definition given by the Act is neither comprehensive nor exhaustive the author has tried to explore other Acts which have defined the term “immovable property”. The term “movable property” as defined in General Clauses Act is also explained in this Chapter.

Chapter II of the book focuses on transfer of property by act of parties. The Chapter has been divided into two parts. Part A deals with rules regarding transfer of property in general, whether movable or immovable. Definition of property what may be transferred, competency of persons, operation of transfers, oral transfers, restriction on transfers along with vested interest, contingent interest, conditional transfers, transfers for benefit of unborn persons are dealt with skillfully and concisely under this Chapter. Part B provides for rules regarding transfer of immovable property.

Sale, under the Transfer of Property Act, is a transfer of ownership in exchange for a price paid or promised or part-paid or part-promised. Chapter III dealing with sales of immovable property, is divided into two groups. Group A deals with sale. It covers definition and essentials of sale, cancellation of sale deed, rights and liabilities of buyer and seller, difference between sale and content of sale, etc. Group B covers discharge on encumbrances on sale.

Chapter IV has been devoted to discuss another very important aspect of property law, i.e., mortgage of immovable property. The Chapter is divided into twelve parts. It covers definition of mortgage, rights and liabilities of the mortgagor and mortgagee, redemption, charges, etc. It is a comprehensive coverage of statutory provisions and relevant case law by the author.

Under Chapter V, an attempt has been made to sail the readers through various provisions of the Transfer of Property Act relating to lease of immovable property. The essential elements of a transaction of lease are- (1) The parties to lease- lessor and lessee (2) The subject matter of lease- immovable property (3) There must be transfer of a right (4) Duration of lease (5) Consideration of lease- premium (6) Acceptance of transfer by the lessee (7) Lease must be made in the mode under section 107. The author has given a fair treatment to all these essentials ingredients of a lease. Sections 105 to 117 are explained in an analytical and illustrative manner in this Chapter. Chapter VI deals with exchange of properties. It includes definition of exchange, distinction between sale and exchange and exchange and partition.

A gift is a gratuitous transfer i.e., without consideration. Definition of gift under the Act, its essential elements and construction of gift deed are fairly dealt with in Chapter VII. Gift to several persons of whom one does

not accept it, onerous gift to disqualified person and suspension and revocation of gifts are also commented upon in this Chapter. In Chapter VIII dealing with transfer of actionable claims, an analysis of definition of actionable claim is done. The book ends with short notes, frequently asked questions and solutions of those questions, which will be of great help for the students.

The book provides detailed analysis and insights in the field of property law which shows authors' long experience, vast knowledge and enough maturity about the subject. The book is very well written in a lucid manner. It deals with a very vast area in a very effective manner. An exhaustive Subject Index has enhanced the usefulness of the book. The book indeed is a valuable asset not only for legal professionals, teachers, students and scholars but people from all walks of life who want to understand property law in its right perspective. Considering the amount of information contained therein, the book is very reasonably priced. It would be a valuable addition to any library.

**Statement of Ownership  
and other particulars about the journal**

<i>Place of Publication</i>	New Delhi Law Centre-I, Umang Bhawan, University of Delhi Delhi – 110 007
<i>Language</i>	English
<i>Periodicity</i>	Annual
<i>Printer's Name, Nationality and Address</i>	O S D Delhi University Press University of Delhi Delhi – 110 007
<i>Publisher's Name, Nationality and Address</i>	Prof Ved Kumari Professor-in-Charge Law Centre-I, Umang Bhawan University of Delhi Delhi – 110 007
<i>Editor's Name, Nationality and Address</i>	Prof Ved Kumari Professor-in-charge Law Centre-I, Umang Bhawan University of Delhi Delhi – 110 007
<i>Owner's Name</i>	Law Centre-I Umang Bhawan University of Delhi Delhi – 110 007

I, Prof Ved Kumari, Chief Editor, hereby declare that the particulars given above are true to the best of my knowledge and belief.

*Dated:* 2017

*Sd/-*  
Prof Ved Kumari