BHARATI LAW REVIEW

Volume I - Issue 3
Jan.- Mar., 2013

SPECIAL ISSUE ON

"FAMILY COURT PRACTICE &
JUSTICE TO WOMEN AND CHILDREN"

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ARTICLES

Bharati Law Review

(B L R)
Quarterly Journal

Volume I - Issue 2
Jan.- Mar., 2013
Free Distribution

BHARATI VIDYAPEETH DEEMED UNIVERSITY

NEW LAW COLLEGE, PUNE
Estd. 1978

Reaccredited with 'A' Grade by NAAC

Educational Complex, Erandwane, Paud Road,
Pune - 411 038, Maharashtra, India
Tel.- (020)25444616 Fax - (020)25455854
www.bvpnlcpune.org

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Printed at

Bharati Printing Press, BVDU, More Vidyalaya, Erandwane, Paud Road,
Pune – 411 038

Editorial

Law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument for bringing about development; the development which is not confined to economic growth, but reaches out to every human being in the Country. The focus of law must be human beings. Law is not abstract; it is not a set of mechanical rules. It has a social purpose and an economic mission. Therefore, in a developing Country like India, law must be dynamic and not static. Law must not be inhibited by the past; it must look out into the future, and satisfy the hopes, aspirations of the People. As observed by Cardozo: "The inn that shelters for the night is not the journey's end, law like the travelers must be ready for tomorrow."

Inspired by these golden words we have designed Refereed Law Journal called 'Bharati Law Review'. We feel that 'Bharati Law Review' clothed and ornamented by the Speeches and Articles of the legends of the legal fraternity and learned dignitaries will definitely do justice to the students of law faculty. Law makes a man civilized and the State accountable. Justice ensures happiness and endows human dignity on each of us. 'Bharati Law Review' will surely do justice to the students and professionals by providing ideas so far as the process of Judicial Reforms in India is concerned as it is of the justice, by the justice, and for the future justices.

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GENDER JUSTICE AND WOMEN EMPOWERMENT*

Hon'ble Mr. Justice P. Sathasivam**

"You can tell the condition of a nation by looking at the status of its women." - Jawaharlal Nehru

"Where women are honoured there resides the God." - Manu, the great law-giver.

The legal profession has always been a profession of male dominance. The legal language marginalizes woman by saying that 'he' includes 'she'. Of course this marginalization of a woman in legal language was a mere reflection of her marginalization in real life. In India, historically women's disabilities have been well-known for social checks and retarding factors on the progress of the society. In Indian society women are subject to all kinds of inequalities *de jure* and *de facto.* This situation is both caused and aggravated by the existence of discrimination in the family, in the community and in the workplace. It is perpetuated by the survival of stereotypes and of traditional cultures, religious practices and beliefs detrimental to women.

Constitutional Position of Women in India

Article 14 of the Constitution of India, 1950 ensures to women the right to equality, and Article 15(1) specifically prohibits discrimination on the basis of sex. Article 16 of the Constitution provides for equality of opportunity to all, in matters relating to public employment or appointment to any office, and specifically forbids discrimination *inter alia* on the ground of sex. These articles are all justiciable, and form the basis of our legal-constitutional edifice. At the same time the Constitution of India under Article 15(3) provides for affirmative and

* Abstract of the speech delivered by Hon'ble Mr. Justice P. Sathasivam, Judge, Supreme Court of India at New Law College, Bharati Vidyapeeth Deemed University, Pune.

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positive action in favour of women by empowering the State to make special provisions for them.

The Directive Principles of State Policy of the Constitution also impose upon the State various obligations to secure equality and eliminate discrimination. These Directive Principles contained in Part IV of the Indian Constitution enjoin upon the State *inter alia* to direct its policy towards securing the rights to adequate means of livelihood for both men and women equality; equal pay for equal work for both men and women; ensuring that the health and strength of workers, men and women, are not abused, and the citizens are not forced by economic necessity to enter avocations unsuited to their age and strength. Further, a duty is imposed upon every citizen of India under Article 51A(e) to renounce practices derogatory to the dignity of women.

One of the most significant pronouncements on Article 15(3) by the Supreme Court of India is in *Government of Andhra Pradesh* v. *P.B. Vijay Kumar.*[1] The Supreme Court has ruled in the instant case that under Article 15(3) the State may fix a quota for appointment of women in Government services. Also, a Rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Article 15(3). The Supreme Court has ruled that posts can be reserved for women under Article 15(3) as it is much wider in scope and covers all State activities. The Court emphasized that an important limb of the concept of gender equality is creating job opportunities for women.

'Special Provision' referred to in Article 15(3) of the Constitution is that which the State may make to improve women's participation in all activities under the supervision and control of the State, and it can be in the form of either affirmative action or research. Talking about the provisions giving preference to women, the Court has said that this provision does not make any reservation for women. It operates at the initial stage of appointment and when men and women candidates are

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[1] AIR 1995 SC 1648.

equally meritorious. Article 15 is designed to create an equalitarian society. The Court has observed: "Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 the former being a mere general provision and the latter being a more specific provision."

Article 15(1) prohibits discrimination on the basis of sex. In *Air India* v. *Nargesh Meerza*[2] air hostesses were seeking parity with the male assistant flight pursers, the Court held that while the Rule terminating employment of an air hostess on first pregnancy was patently unconstitutional, air hostesses and assistant flight pursers could still be considered as different categories for the purpose of remuneration and other conditions of service as the word 'only' has been affirmed under Article 15. So discrimination can be made on considerations of recruitment and sex, and on not sex alone.

In *Air India Cabin Crew Association* v. *Yeshaswinee Merchant*[3] the Court justified a special retirement age of fifty for air hostesses, using the 'but for sex' test. According to Court, the 'but for sex' test was development to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex, and women will not deliberately be selected for less favourable treatment because of their sex. Accordingly, the Court held that Articles 15 and 16 prohibit discriminatory treatment but not preferential of a woman, which is a positive measure in her favour. The Constitution does not prohibit the employer from considering sex in making employment decisions where this is done personal pursuant to a properly or legally chartered affirmative action plan.

Sexual Harassment of Women at Workplaces

One of the significant cases that started this revolution was regarding the prosecution of a top police executive, who was considered a main pillar of the success in putting down terrorism in Punjab, for misbehaving with a woman officer at the Indian Administrative Services

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[2] (1981) 4 SCC 335.
[3] (2003) 6 SCC 277.

Cadre.[4] The Supreme Court in its landmark decision *Vishaka* v. *State of Rajasthan*[5] recognized that sexual harassment at the workplace is a violation of constitutionally guaranteed fundamental rights.

The most significant aspect of the *Vishaka* judgment is that it structured and systematized the ingredients of the offence. Employers are given obligation to set up appropriate complaints committee, and initiate appropriate criminal and disciplinary action which also creating awareness about rights against 'sexual harassment at the workplace' in both private and public sector. It also sought the enforcement of fundamental rights of working women under Articles 14, 19 and 21. The Court held that each incident of sexual harassment of women at the workplace resulted in the violation of the fundamental rights to gender equality and the right to life and liberty, including the right to work with dignity. Accordingly, the meaning and content of fundamental right guaranteed in the Constitution of India were found to be of sufficient amplitude to encompass all the facets of gender equality, including sexual harassment or abuse.

In the absence of domestic law occupying the field, the Court formulated measures to prevent sexual harassment, relying on the content of international conventions and norms, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). India is a signatory to CEDAW, thereby making it mandatory for the State to fulfil its obligations to women under this Convention. Article 11 of CEDAW requires the State parties to take all appropriate measures to eliminate the discrimination against women in the field of employment in order to ensure the same rights, on a basis of equality of men and women. In brief, the *Vishaka* guidelines have the following effect:

- They amend service rules and starting orders to include the prohibition of sexual harassment. Accordingly the Industrial Employment (Standing Orders) Act, 1946 and Central Civil Service Conduct

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[4] *Rupan Deol Bajaj* v. *Kanwar Pal Singh Gill*, (1995) 6 SCC 194.
[5] (1997) 6 SCC 241.

Rules, which govern the Government employment, were amended. The *Vishaka* judgment specifically provides that private employers ought to take steps towards the prohibitions contained in the standing orders;

- They create awareness of the rights of women employees;
- They allow disciplinary action to be taken, if an act of sexual harassment at the workplace amounts to misconduct;
- They allow the initiation of appropriate criminal action by making a complaint in case such conduct amounts to a specific offence;
- They set up a complaint committee which is headed by a woman, which is made up of at least 50% women and includes an NGO member;
- They permit workers to raise issues of sexual harassment at workers' meetings, and allow it to be affirmatively discussed at employer-employee meetings;
- They help an employee if a third party causes the sexual harassment.

The Court stipulated that the guidelines are binding and enforceable in law until suitable legislation is enacted to occupy the field.

Right to Privacy

In *Neera Mathur* v. *LIC*[6] the Court recognized that privacy was an important aspect of personal liberty. Neera was appointed by the Life Insurance Corporation (LIC) without the knowledge that she was pregnant. After joining her post she applied for maternity leave. On coming back, she was served with a termination notice. When she complained against such termination, the LIC pleaded that she had not supplied them with the information which had been sought through a questionnaire. In Supreme Court the Judges were astonished to learn that the questionnaire sought information about the dates of the menstrual periods and the past pregnancies. The Supreme Court said that such probes amounted to

[6] (1992) 1 SCC 286.

invasion of the privacy of a person, and therefore could not be made. The right to personal liberty guaranteed by Article 21 of the Constitution included the right to privacy, and here the women's right to privacy was recognized. Information about health could be sought where the information was relevant for the purpose. *E.g.*, information about menstrual cycles or past pregnancies might have been relevant for insurance cover by the LIC, but not for selecting a person for employment.

Paternity Test for Checking Chastity

Another case, the net effect of which was to strengthen women's right to dignity and liberty, was *Goutam Kundu* v. *State of West Bengal.*[7] In this case the respondent S filed a criminal miscellaneous application in the High Court stating that the child from his wife, the appellant A, be subjected to a blood test to determine her paternity. The High Court dismissed the petition and S came in appeal to the Supreme Court. The Court laid down the following principles in this regard:

- That courts in India cannot order a blood test as a matter of course;
- Application for subjecting a child to blood test made in order to have a routine enquiry cannot be entertained;
- There must be a strong *prima facie* case for suspecting the fatherhood of a child which can be established only by proving non-access;
- The Court must carefully examine as to what would be the consequences of ordering a blood test whether it would have the effect of branding a child as a bastard, and the mother as an unchaste woman.

The Court observed that such a demand for subjecting a child to a blood test was contrary to the right to personal liberty guaranteed by Article 21 of the Constitution.

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[7] (1993) 3 SCC 418.

Uniform Civil Code for Gender Justice

Religion has, however, proved to be a formidable barrier to reform of the laws in respect of marriage, divorce, adoption, succession, maintenance and guardianship. The personal laws of the various communities cover these matters, and the State has shown reluctance to interfere with those laws. The Constitution enjoins upon the State to take steps to provide a Uniform Civil Code. Although the Hindu law was considerably reformed, no reforms have been made in the personal laws of the Muslims and the Christians. Personal laws of Muslims as well as Christians contain some provisions, which are unjust to women. In *Shah Bano*'s case,[8] the Supreme Court held that despite the provision in section 127 of the Code of Criminal Procedure, 1973 which said that if a woman received an amount under her personal law, she would not be entitled to any maintenance under section 125 of the Code after divorce, a Muslim woman would be entitled to maintenance if the amount received by her as dower was not sufficient for her sustenance. This was a liberal interpretation of the law and was informed by the consideration of gender justice. A fierce agitation was launched against that decision by Muslim fundamentalist. The Central Government yielded to the pressure of that agitation, and passed the Muslim Women's (Protection of Rights on Divorce) Act, 1986, which denied to Muslim women the right of maintenance under section 125 of the Code of Criminal Procedure, 1973. That was doubtless a retrograde step. That also showed how women's rights have a low priority even in the secular state like India. Autonomy of a religious establishment was thus made to prevailing women's rights.

Succession Right of Hindu Women

The Hindu Succession Act, 1956 is the direct outcome of the independent struggle, and also an attempt for the practical application of constitutional ethos. Hindu women had no right of inheritance to the property of her father. There were many enactments like the Hindu Women's Right to Property Act, 1937, the Hindu Law of

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[8] *Mohd. Ahmed Khan* v. *Shah Bano Begum & Ors.*, 1985 AIR 945, 1985 SCC (2) 556.

Inheritance (Amendment) Act, 1929; but none of them ensured right to inheritance to the impartible property in equal footing with the other male.

The Hindu Succession Act, 1956 had a tremendous impact in the Hindu society. Women started to feel respectable and not subordinate to the other male members of the family. Yet, unfortunately the 1956 Act cannot be said to be free from all bias, and evenly poised with the male.

Despite the Hindu Succession Act being passed in 1956, which gave women equal inheritance rights with men, the *Mitakshara* coparcenary systems was retained, and the Government refused to abolish the system of joint family.

The Hindu Succession (Amendment) Act, 2005 is a landmark. After 50 years, the Government finally addressed some persisting gender inequalities in the the Hindu Succession Act, 1956 which itself was path-breaking. The 2005 Act covers inequalities on several fronts: agricultural land, *Mitakshara* joint family property, parental dwelling house *etc*.

The Parliament enacted Amendment Act XXXIX of 2005 substituting new section for section 6. As per the amendment dated 05.09.2005, in a joint Hindu family governed by the *Mitakshara* law, the daughter of a coparcener shall –

(a) By birth become a coparcener in her own right the same manner as the son;
(b) Have the same rights in the coparcenary property as she would have had if she had been a son;
(c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu *Mitakshara* coparcener shall be deemed to include a reference to a daughter of a coparcener.

Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the *Mitakshara* law, shall devolve by testamentary or

intestate succession under the Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and the daughter is allotted a share equal to that of a son.

However, the above provisions shall not apply to a partition which has been effected before 20th day of December, 2004.

The Hindu Succession (Amendment) Act, 2005 seeks to make two major amendments in the Hindu Succession Act, 1956. First, it is proposed to remove the gender discrimination in section 6 of the original Act. Second, it proposes to omit section 23 of the original Act, which disentitles a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares therein. Out of many significant benefits has been to make women coparcenary (right by birth) in *Mitakshara* joint family property. Earlier the female heir only had a deceased man's notional portion. With this amendment, both male and female will get equal rights.

Position of Muslim Women

Muslim community is broadly divided into two broad sects *viz.*, Shia and Sunni.

The paramount point which emerges from the personal laws is that in case of intestate succession a Muslim male is worth twice that of a female. In case of testamentary succession, a Muslim can bequeath only 1/3rd of the property. This inequality in property ownership causes simmering discontent among the women throughout the Muslim world. Muslim intellectuals are voicing their right of equality. Time has now come to remove all inequalities. Personal laws cannot be allowed to override the constitutional obligation. On the contrary, personal laws should mend to make it consistent with the constitutional ethos.

Position of Christian Women

Christians of different sects are governed by the Indian Succession Act, 1925. The native Christians and other Europeans Christians in India were governed by the English Law, and for them the first act promulgated was the Indian Succession Act, 1865 which codified both the testamentary as well as intestate succession. The rules laid down by the Act where substantially rules of English law with some modifications, additions and alterations.

Certain Provisions Enacted for the Benefits of Women

The Central and State Governments have included certain provisions in various Acts for the benefit of women. They are:

- **The Beedi & Cigar Workers (Condition of Employment) Act, 1966** - Provision of crèches for the benefit of women workers.
- **The Plantation Labour Act, 1951** - Women workers to be provided time off for feeding children.
- **The Contract Labour (Regulation & Abolition) Act, 1970** - Not to be required to work beyond 9 hours between 6 am and 7 pm with the exception of mid-wives and nurses in plantations.
- **The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979**- Separate toilets and washing facilitates to be provided.
- **The Factories Act, 1948** - In factories, women not to be engaged for cleaning, lubricating or adjusting any part of prime or transmission machinery; maternity leave up to 12 weeks with wages to be provided.
- **The Maternity Benefit Act, 1961** - Maternity benefits to be provided on completion of 80 days working, not required to work during six weeks immediately following the day of delivery or miscarriage, no work of arduous nature; long hours of standing likely to interfere with pregnancy/ normal development of foetus; or which may cause miscarriage or is likely to affect health to be given for a period of one month immediately preceding the period of six weeks before delivery. On medical

certificate, advance maternity benefit to be allowed; Rs. 250/- as medical bonus to be given when no pre-natal confinement and post natal care is provided free of charge.

- **The Equal Remuneration Act, 1976** - Payment of equal remuneration to men and women workers for same or similar nature of work protected under the Act. No discrimination permissible in recruitment and service conditions except where employment of women is prohibited or restricted by or under any law.
- **The Employees Status Insurance (General) Regulation, 1950** - Claim for maternity benefit becomes due on the date the medical certificate is issued for miscarriage, sickness arriving out of pregnancy, confinement or premature birth of child.
- **The Beedi Workers Welfare Fund Act, 1976** - Appointment of a women member in Advisory Committee and Central Advisory Committee is mandatory under the Act.

Conclusion

There should be a better and fuller understanding of the problems peculiar to women to make solutions of those problems possible. As these problems centre round the basic problem of inequality, steps should be taken to promote equality of treatment and full integration of women in the total development effort of the country. The main stress should be on equal work and elimination of discrimination in employment. One of the basic policy objectives should be universal education of women, the lack of which tends to perpetuate the unequal *status quo*. The popular UNESCO slogan should come in handy: "Educate a man and you educate an individual; educate a woman and you educate a family."

WOMEN, LAW AND MORALITY*

Hon'ble Dr. Justice Balbir Singh Chauhan**

Introduction

The revolutionary developments in re-productive technology, such as In-Vitro Fertilization (IVF), artificial insemination, and surrogate motherhood require serious consideration, as the same has posed new challenges to marital relations between spouses, and may have a serious impact on ethical and moral standard of the society. Traditional notions of morality and religion are under challenge and the law is having trouble in keeping pace with the new issues raised by these advances. The issues have to be examined in the light of the constitutional rights guaranteed to every person irrespective of his/her gender or his/her nationality. Article 21 of the Constitution of India has been given a very expensive interpretation defining the words 'life' and 'liberty' contained therein very widely.

Concepts of Law and Morality

Morality can be described as a set of values, common to society, which are normative, specifying the correct course of action in a situation, and the limits of what society considers acceptable.

Law is manifestation of the person competent to make law whether it is legislature or a king or a village *panchayat*.

It has always been a subject of debate as to whether there can be a law, which does not meet the test of morality.

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* Abstract of the speech delivered by Hon'ble Dr. Justice Balbir Singh Chauhan, Judge, Supreme Court of India at New Law College, Bharati Vidyapeeth Deemed University, Pune.

** Judge, Supreme Court of India.

The existence of unjust social practices, such as those enforcing the commission of *sati*, slavery and untouchability *etc.*, proves that morality and customs and traditions are not identical, and do not necessarily coincide with each other. Laws that serve to defend basic values, such as laws against murder, rape, malicious defamation of character, fraud, bribery, *etc.*, prove that the two can coincide.

Law is changed at the will of the Legislature. On the other hand, the moral values also consistently change with tie to reflect a change in attitudes.

There may be a case of violation of parking law that may be illegal but may not be immoral. Adultery is an offence punishable with 5 years rigorous imprisonment under section 497 Indian Penal Code, 1860 in India as well as a ground for divorce. However, the wife involved in such crime cannot be punished as an abettor. In United Kingdom, adultery is not a criminal offence though a very good ground for divorce. Therefore, law and morality can some time be seen particularly different, however, some times to be coinciding.

The morality basically describes the principles that govern our behaviour. Without these principles in place, societies cannot survive for long. Thus, morality ensure fair play and harmony between individuals and help make people good in order to have a good society and it keeps the people in a good relationship with the power that created us.

Therefore, for most of the people, morality is a set of rules that we ought to obey as the said rules tell us what is right or wrong.

There had been two schools of thoughts. One is natural law school espoused by St. Thomas Aquinas and Professor Lon Fuller. According to them, law must be in consonance with morality and one must disregard a law which is not in conformity with natural code. According to this school, the moral code comes from God, and thus is natural. Another theory is of positive law thinkers Jeremy Bentham and John Stuart Mill. According to them law must be enforced as it is even if it does not

meet the test of morality.

According to Bentham theory of utilitarianism *i.e.*, the greatest good for the greatest number of people, a person is free to act as per his own wish provided his act does not harm others. Philosopher Kant's moral system is based on rationality. Jeremy Bentham's ethical system is based on happiness of larger number of persons, *i.e.*, the greatest happiness for the greatest number of people. Thus, he developed a 'calculus of happiness' in order to calculate for any action or law what the consequences in terms of pleasure or pain would be. However, John Stuart Mill suggested that there were higher and lower pleasures and society should prefer the higher ones: "Better to be dissatisfied than a fool satisfied." By lower pleasures, he meant pleasures of flesh, and by higher pleasures, he meant pleasure of the intellect.

There may be victimless crimes which do not harm anyone, debated by Edwin Schur in *Crimes without Victims*. Criminal acts such as homosexuality, abortion and drug abuse do not harm the innocents and only those who partake of their own free will. Therefore, the Parliament and Judiciary should be very cautious and conscious about altering laws concerning morality.

Undoubtedly, morality necessarily becomes a persuasive source of law but cannot supplant the law. Morals may be created by one's society, religion or individual conscience. Morals are same as the ethics. There may be some moral principles which are universally applicable.

Difference between Law and Morality

Law would always be backed by legal sanction and if violated, a person may be punished. Morality is forced by compulsion. In such a fact-situation today both law and morality are facing challenges put forward by technology, fast urban life, secularism, equality before law, democracy and constitutionalism. Therefore, the law has the characteristics of binding whereas morality has the characteristic of being bound. Law is influenced by religion, and in a traditional society has never had a dominating character; but religion and morality had

played very dominant role. Therefore, one may say that law and morality had played very dominant role. Therefore, one may say that law and morality are two sides of the same coin. Morality seeks to influence our behaviour by way of our desires where law is the backup option and targets our desires where law is the backup option and targets our beliefs.

Issues like pornography, prostitution, and homosexuality are the areas of our own consciousness and hence it is an area of conflict between law and morality which still continues.

Live-in relationship also carries a moral ban on it in a traditional society. Law cannot be an instrument of moral standards rather law has to be independent of all sorts of moral dogmas except certain areas in which law is dominated by morality. Morality cannot play any role in legal areas like business law, company law, cyber law, tax laws, trade laws *etc*. Morality has got nothing to do with contents of law in such areas. However, it may have a vital role in laws like SITA (Suppression of Immoral Traffic in Women and Girls Act, 1956), and PITA (Immoral Traffic (Prevention) Act, 1956). Therefore, there cannot be any hard and fast rule of universal application in this regard. At the most, it can be concluded that the level of enforcement of moral standards depends upon case to case.

In *Manu Smriti*, woman had been put on the higher pedestal, as while dealing with the status of the women it says:

यत्रे : नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता I

यत्रे : तास्तु न पूज्यत्ते स्वास्तित्रा फला क्रिया : II[1]

Where women are honoured, the deities are pleased; where they are dishonoured, all their religious acts become fruitless.

However, while dealing with her contractual rights, *Manu Smriti* provides:

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[1] Manu, Ch III – 56.

पिता रक्षति कौमारे भर्ता रक्षति यौवने : I

रक्षन्ति स्थाविरे पुत्रा : न स्त्री स्वातंत्र्य मर्हति II[2]

Her father protects her in childhood; her husband protects in her young age; her sons protect her in old age; she is never fit for independence.

Both the texts have to be re-conciled giving harmonious construction and to be read in such a manner that both may co-exist. Thus, Sir Henry Maine, a great scholar of Hindu law explained that woman had been deprived of right to enter into a contract being very emotional.

Woman's character has been described in ancient text as:

दणे : तुश्टा दणे : रूश्टा, तुश्टा रूश्टा दणे : दणे II

Thus, it was explained/preached that any contract to which a woman is a party may not subsist for long.

After 1960s, Europeans massively abandoned many traditional norms rooted in Christianity and replaced them with continuously evolving relative moral rules. In this view, sexual activity has been separated from pro-creation which led to a decline in the importance of morality and to depopulation, though it gave rise to the larger controversy on many issues such as elective abortion.

In England, the *Wolfenden Report 1957*, was produced after a long debate on the relationship between law and morality recommending the legislation of prostitution and homosexuality on the basis that law should not intervene in the private lives of citizens or seek to enforce any particular pattern of behaviour further than is necessary to protect others and individuals should be allowed as much freedom and privacy as is possible without compromising any other's morality.

In *U.K. Gillick* v. *West Norfolk and Wisbech Area Health*

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[2] Ch IX – 3.

Authority,[3] the Court addressed the questions regarding the validity of a circular issued by National Health Service-Family Planning Clinics of United Kingdom containing guidelines to area health authorities to give advice regarding contraception even to girls under the age of 16. Ms. Gillick sought declaration from the Court against the health authorities on the issuance of the said circular. She argued that the health service authorities in law had no competence to give advice to a girl below 16 years of age; as such advice would adversely affect the rights of her children. Further, it would affect Ms. Gillick in her capacity as a parent and custodian of her daughters as it would be against her rights to effectively discharge her duties as parent and custodian.

Ultimately, the House of Lords by majority of 3:2 rejected her claim as the House held that having regard to the reality that a child becomes increasingly independent as it grows older and that parental authority dwindles correspondingly, the law did not recognize any rule of absolute parental authority until a fixed age. Instead, parental rights were recognized by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make its own decisions when it reached a sufficient understanding and intelligence to be capable of making up its own mind. Accordingly, it held that a doctor who in exercise of clinical judgment gave contraceptive advice and treatment to a girl under 16 years of age without her parental consent did not commit any offence under section 6(1) or section 28(1) of the Sexual Offences Act, 1956. The Court rejected the submissions made on behalf of Ms. Gilllick that if a girl was under 16 years of age, any physical examination or touching of her body without parental consent would be an assault by the examiner. The Court also rejected the submission that such provision for advice on the use of contraceptive to a girl under 16 would encourage participation in sexual activities, and this practice would offend basic principles of morality and religion which ought not to be sabotaged by the National Health Service.

However, rape within marriage is an offence in western

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[3] (1985) 3 All E R 402.

society. In *R* v. *R*,[4] the House of Lords examined the provisions of section 1(1) of Sexual Offences (Amendment) Act, 1976, in a case where the accused admitted to having forcible sexual intercourse with his wife. He was charged for rape and assault. The Court came to the conclusion that the supposed marital exemption in rape formed no part of the law of England. Therefore, there was no law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband. "Therefore, a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse."

In *Lata Singh* v. *State of U.P. & Anr.*,[5] the Supreme Court entertained a writ petition under Article 32 of the Constitution of India, and quashed the complaint under sections 366 and 368 Indian Penal Code, 1860 lodged by the brother of the petitioner therein against the petitioner and her husband as she had married inter caste observing that a major girl: "(I)s free to marry anyone she likes or to live with anyone she likes."

In *S. Khushboo* v. *Kannimmal*,[6] the Supreme Court quashed criminal prosecution against the appellant for preaching in favour of live-in relationships, holding that a live-in-relationship by two adults of different sex, by consent, does not constitute any offence, punishable under any penal law. The Court rejected numerous arguments on the morality of such relationships as being of no concern to the legal issue before it.

Women's Right to Have Artificial Insemination

In *R.* v. *Human Fertilisation and Embryology Authority*, *Ex Parte Blood*,[7] the question arose regarding the interpretation of the provisions of the Human Embryology and Fertilisation Act, 1990 and provisions of the European Community Treaty. In the said case, Mr. and Mrs. Blood got married in 1991. They planned to have a family in 1994. However, before the applicant Mrs. Blood

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4 (1992) 1 AC 599.
5 AIR 2006 SC 2522.
6 AIR 2010 SC 3196.
7 (1997) 2 All ER 687.

could conceive, her husband contracted meningitis, and lapsed into a coma. On the request of Mrs. Blood sperms were collected by electro ejaculation for use by her at a later stage for artificial insemination, and were entrusted to the Infertility Research Trust for storage. The applicant wanted to use the said sperms for artificial insemination. However, the Human Fertilsation and Embryology Authority rejected her prayer for treatment in U.K. or to export the said sperm so that she may get artificial insemination in neighbouring country Belgium, on the ground that 1990 Act permitted such treatment only when donor and receiver come together, or the donor had given an effective consent in writing for using such sperms. The Court of Appeal ultimately held in favour of Mrs. Blood on the ground that there could not be a written consent by Mr. Blood but considering his wish to have a family before his death the sperm can be used by Mrs. Blood; and secondly Mrs. Blood had a right to get treatment in any country of European community. Therefore, not granting her permission would violate her right to get treatment outside U.K.; and as a special case the permission was granted. In fact it was a case where humanity could override the legal arguments. Mrs. Blood succeeded on humanitarian considerations. Such a case may give rise to various questions particularly relating to right of succession. Therefore, in such a case law must require that a donor must give an 'effective consent' in writing knowing full well the 'consequences and implications' of the same. They may be a case where a person has given the consent. He donates the sperm, but dies before the artificial insemination takes place. Therefore, it would amount to posthumous use of his sperm.

In *Re: R (Parentage)*[8] the husband and wife both went together for treatment, completed all legal formalities and after donating the sperm, they stood separated. However, the question arose as to whether the wife could have artificial insemination. The Court held that it was a case of treatment together because all the legal formalities stood completed and the treatment 'commenced together' when the sperm sample was taken. More so, the donor had subsequently not withdrawn his deemed consent.

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[8] (1996) 2 FLR 15.

Surrogacy, Law and Morals

The word 'surrogate' has been derived from the Latin word *subrogare* which means appointed to act in place of other. There are various types of surrogacy. 'Traditional surrogacy', popularly known as 'straight method surrogacy' which means that the surrogate is pregnant with her own biological child, but the child has been conceived with the intention of relinquishing the child to be raised by the other *i.e.*, by the biological father and possibly his spouse or partner. 'Gestational surrogacy' means that the surrogate becomes pregnant *via* an embryo transfer with a child of whom she is not the biological mother, and such a surrogate mother is called a 'gestational carrier'.

Surrogacy is also classified as 'altruistic' and 'commercial'. The first is when the surrogate mother does not intend to receive anything except the medical expenses, maternity, clothing, *etc.*; but commercial surrogacy is where the surrogate mother receives full consideration treating her action as a surrogate in a manner akin to a 'commercial surrogacy'. The availability of poor surrogate mothers has meant that 'commercial surrogacy' has reached industrial proportions. 'Commercial surrogacy' sometimes is referred to as 'wombs for rent', 'outsourced pregnancies' or 'baby farms'.

This may cause serious problem regarding the violation of child rights, non-implementation of laws providing for protection and development of children, and non compliance of policy decisions made on mitigating hardships and ensuring welfare for the children which can be examined by the authorities under the provisions of the Commission for Protection of Child Rights Act, 2005. In *Baby Manji Yamada's* case,[9] an identified woman donated the egg, which after fertilization with sperm of Mr. Yamada was introduced into the body of the surrogate mother. Thus, it was not a case of involvement of a 'couple' *i.e.*; Mrs. Yamada had no contribution in the birth of the child.

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[9] *Baby Manji Yamada* v. *Union of India & Anr.*, AIR 2009 SC 84.

US gay couple (Fister and Michael) rented a womb in Hyderabad. US Citizen Brad Fister (29) had come to Hyderabad in 2009 when he donated his sperm which was fused with an egg donated by an Indian egg donor. This is a first such case of two fathers.[10]

In-Vitro Fertilization (IVF) and Embryo Transfer (ET), commonly known as 'Test Tube Babies', require fertilization of an ovum outside the body, and consequently transfer of the embryo into the uterus of the woman. In-vitro is a Latin phrase meaning 'in glass', which is why it is known as 'Test Tube Baby'. India has played a great role in the development of IVF technology. Louise Brown, the world's first test tube baby, was born by this method on 25th July, 1978 in England, and India's first test tube baby, Durga was born in Kolkata on 3rd October, 1978.

In *Mahabharat*, Gandhari did not deliver a child, rather delivered a semi solid material which was divided by Maharishi Vyas into 100 pieces, and planted them in different pans/pots. Thus, 100 Kauravas were born. They may be described as the first test tube babies.

Such a technology is adopted where the woman has blocked fallopian tubes, ovulation problems, and mild degree of seminal problems for the man, or presence of seminal antibodies in the woman's body.

However, there have been very serious problems with regard to the use of IVF technology and surrogacy as fertility drugs have been stolen illegally; medical records have gone amiss; embryos have been stolen from the women and given to others or to researchers; women recruited as surrogate mothers have refused to part with the new born baby that they have conceived to assist couples to bear a child.

In fact, in the case of surrogacy, there have been many questions about enforcing a contract with the surrogate mother. Thus, the question arises as to whether such contacts may be valid in view of the provisions of public policy, particularly under section 23 of the Indian

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10 Available at: articles.timesofindia.indiatimes.com

Contract Act, 1872, and whether the child to be handed over can be considered a commodity to be sold for consideration. It gives rise to several other questions. A party may refuse to have its contract acted upon, or the child is not according to the specifications agreed upon as in ordinary law of contract, the finished goods can be rejected and damages can be claimed in such situations. Whether surrogacy contracts are the same as other contracts? It raises a very serious issue of morality and gives rise to the question of whether insemination amounts to adultery and whether a surrogacy agreement is a case of exploitation of the helplessness of poor women who are selected surrogate mothers. Surrogacy also raises complex questions of succession by a child born of a surrogate mother, as under section 26 of the Special Marriage Act, 1954 and section 16 of the Hindu Marriage Act, 1955 children of voidable and void marriages cannot inherit the coparcenary properties of any relative, they can only claim share in self acquired property of the parents.[11]

Artificial insemination gives rise to conception that may not amount to consummation of marriage. In case the husband is impotent that creates a serious problem, as even though every individual has a right in a marriage to enjoy the sexual act the wife becomes entitled for divorce on the ground of impotency of her husband. The question also arises as to whether artificial insemination amounts to adultery.

In *Oxford* v. *Oxford*,[12] a Canadian Court held that as the wife was a surrogate mother, it was a clear cut case of adultery by the wife and on this ground the divorce was granted.

'Heterologous artificial insemination' with or without the consent of the husband may be contrary to the public policy and good morals. The child so born cannot be termed to have born out of legal wedlock and, therefore, such a child will be illegitimate.

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11 *Smt PEK Kalliani Amma & Ors.* v. *K. Devi & Ors.*, AIR 1996 SC 1963; *Bharatha Matha & Anr.* v. *R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685.

12 58 O L R 251 (1921).

Questions may also arise regarding the validity of such contracts with or without the consent of the husband as under the Contract Act only a major *i.e.*, who is 18 years of age as per the provisions of Indian Majority Act, 1875, is competent to enter into a contract. In India, in spite of several statutory provisions the marriages of the children are solemnized before attaining the majority and Rajasthan is particularly known for child marriages. There is no provision declaring a child born by a girl before she attained majority as illegitimate or illegal. Therefore, the question may arise as to whether the minor girl or parents or husband on her behalf can enter into the contract of surrogacy or artificial insemination.

Section 112 of the Indian Evidence Act, 1872 provides for a presumption of a child being legitimate, and such a presumption can only be displaced by a strong preponderance of evidence and not merely by balance of probabilities as the law has to live in favour of an innocent child from being bastardized. It is settled legal proposition that proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption.[13]

So far as the Indian courts are concerned, the Supreme Court is considering the case of *Jan Balzaz*,[14] wherein a German couple got a child from a surrogate mother in India. The legal issues raised were centered on whether the surrogate mother is the legal mother of the child. The German authorities were not willing to give the citizenship to the child for the reason that surrogacy is not permitted in Germany. In such a situation, it was held that the solution for such a problem is to recognize the surrogate mother as the legal mother and take the child in adoption. However, such cases may depend on what are the terms and conditions which had been

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13 *Mohabbat Ali Khan* v. *Muhammad Ibrahim Khan* & Ors., AIR 1929 PC 135; *Chilukuri Venkateshwarlu* v. *Chilukuri Venkatanarayana*, AIR 1954 SC 176; *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*, AIR 1965 SC 364; *Perumal Nadar (Dead) by Lrs.* v. *Ponnuswami Nadar (Minor)*, AIR 1971 SC 2352; *Amarjit Kaur* v. *Harbhajan Singh & Anr.*, (2003) 10 SCC 228; *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy & Ors.*, AIR 2005 SC 800; *Shri Banarasi Dass* v. *Teeku Dutta (Mrs.) & Anr.*, (2005) 4 SCC 449.

14 Against the judgment in *Jan Balaz* v. *Anand Municipality & 6 Others*, AIR 2010 Gujarat 21.

incorporated in the surrogacy contract. Even in case of adoption of such children, inter-country adoption law is very cumbersome and time consuming.[15]

In the case of *Baby Melissa* decided by the Supreme Court of New Jersey, Baby Melissa Stern was born on 17.3.1986 by surrogacy in New Jersey and a dispute arose between the surrogate mother and biological parents as the surrogate mother refused to give up the child. In 1987, the New Jersey Supreme Court awarded the custody of the child to the Stern family *i.e.*, the biological parents considering the best interest of the child and validation of the surrogacy contract. In 1988, the Supreme Court of New Jersey held that the surrogacy contract itself was void as it was against public policy. It was the first case in American courts relating to a surrogacy contract and its validity, and it also raised questions regarding the termination of parental rights. However, when Melissa Stern turned 18 in March 2004, she formally terminated the parental rights of surrogate mother and got adoption by biological parents. The child herself has done her post-graduate in King's College in London on her own on the law of surrogacy and ethical issues of surrogacy dealing with surrogacy issues relating to new technologies.

To another case, a gay couple had contracted surrogacy, and twin girls were born to the mother in October 2006, and the law suit was filed by the surrogate mother leaving aside the right to enter into such contracts.

In *Roe* v. *Wade*,[16] the American Supreme Court had decided that every woman has a right to take a decision how her body is to be used, and therefore a woman has a right to enter into the contract of commercial surrogacy. Such an issue requires serious consideration for the reason that large percentage of population is infertile and gay, lesbian and trans-gendered members of the society do not want to lose their freedom, and want to have babies to carry on their bloodline.

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15 *L.K. Pandey* v. *Union of India*, AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232.

16 410 US 113 (1973).

In *Suchita Srivastava* v. *Chandigarh Admn.*,[17] the Supreme Court held: "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling State interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provision of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

The Westminster Parliament enacted the Human Fertilization and Embryology Act, 2008 to deal with most of the arising out of these developments. An attempt had been made to cover all the cases, as the Act had repealed all other existing laws on the issue, particularly the Human Fertilisation and Embryology Act, 1990 which was considered to be inadequate.

In Canada, commercial surrogacy arrangements were prohibited in 2004 by the Assisted Human Reproduction Act. Altruistic surrogacy remains legal.

In France since 1994 any surrogacy arrangement that is commercial or altruistic is illegal or unlawful, and sanctioned by the law.[18]

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17 (2009) 9 SCC 1 p14.
18 (*art 16-7 du code civil*).

In Georgia since 1997 ovum, sperm donation and surrogacy is legal. According to the law, a donor or surrogate mother has no parental rights over the child born.

In *Anna Johnson* v. *Mark Calvert*,[19] the genetic parents brought suit seeking a declaration that they were legal parents of child born out of surrogate mother. The Superior Court of Orange County ruled in favour of husband and wife. The surrogate mother appealed, the Court of Appeal affirmed the said judgment. However, the Supreme Court reversed the judgment of the appellate court and held that the woman was not 'natural mother' of the child for the reason that it was not her egg which stood fertilized before implanting in the womb of the natural mother.

This gives rise to the question as the whether a child is a saleable commodity. In the Roman Empire it was a right of the head of the family to treat his wife and children as saleable commodities. It is likely that such a concept would have been prevailing in our ancient society otherwise Raja Harishchandra could not sell Taramati and Raja Yudhishthira could not loose Draupadi in gambling. The origin of word *Kanyadan* in ancient times also gives an impression that there could have been a right of a father to give away the daughter as gift.

In 1810, a case was filed by Smt. Davetaya, in the Superior *Sadar Adalat* for the recovery of possession of her daughter Smt. Samkuria who had been sold away for Rs. 15/- by her husband Shri. Dayaram. The Division Bench of the said *Adalat* referred the matter to a Committee of *Pandits*, experts of Hindu law and Hindu *Dharam Shastras*. The Committee opined that it was an absolute right of the husband to alienate the wife provided she gave her consent. Accepting the opinion of the Committee, the Bench dismissed the case *vide* judgment and decree dated 26.1.1810 upholding the right of the husband to alienate the wife. Relevant Part of the judgment reads: "After consulting legal experts, it was found that the claim of the parents of the said lady is not legitimate. Her husband has the right to sell her off. In

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19 (1993) 5 Cal 4th 84-85 P 2d 776.

such a situation this sale is considered to be valid. No objections can be raised against this according to *Shastras*. The file may be consigned to the record room."

Assisted Reproductive Technologies (Regulation) Bill, 2010

So far as India is concerned the Assisted Reproductive Technologies (Regulation) Bill, 2010 is pending consideration before Parliament, wherein a very comprehensive legislation has been prepared and the salient features thereof are: Constitution of State Boards (section 12); Restriction on sex selection (section 25); Restriction on sale of gametes, zygotes and embryos (section 29); Regulation of research on embryos (Chapter VI); Determination of status of the child (section 35); Right of the child to information about donors or surrogates (section 36); and Chapter VIII which deals with offences and penalties.

The Bill, while insisting on a number of measures to be taken to ensure the anonymity of the surrogate, states that the surrogate mother should register under her own name for the purpose of medical treatment and provide the name of the couple for whom she is acting as surrogate. If the legislation makes it mandatory for the surrogate to disclose her identity, then it is unclear as to how her privacy and anonymity will be maintained.

The legal parentage of children born through surrogacy has not been adequately tackled and situations where the intended couple no longer want the child, split up, pass away or abandon the child have not been addressed. The process of handing over the child from the surrogate to the intended parents has also not been adequately addressed. The legislation also clarifies that the name on the birth certificate will be that of the genetic parents, thus equating the term with intended parents/parent. Such a clause, although protecting the anonymity of the donor, presumes that the intended parents will also be the genetic parents.

The Bill states that a woman may act as a surrogate for three successful births in her lifetime, including a maximum of three attempts at pregnancy for a particular

couple. This takes the number of times she can undergo IVF cycles to a high figure, thus jeopardizing her physical and mental health.

The Bill is still ambiguous on certain key areas like the maximum age of women who can opt for ARTs and also:

- If the child becomes paralytic or physically challenged and the foreign parents avoid their responsibility who will take care of the child and the mother?

- After reaching an agreement, if the childless parents die, what will happen to the surrogate mother?

- Who will take the responsibility, if the foreign parents never come back to get their child?

For any surrogacy agreement to be viable, it should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Right to privacy of donor as well as surrogate mother should be protected. Sex-selective surrogacy should be prohibited. Disputes concerning custody which come before the courts are to be decided according to the welfare of the child in consideration of the functions of parenthood as to who is in best position to perform.

Under this Bill of 2010, a couple has been defined under section 2(e). Persons living together and having a sexual relationship may not be legal in the country *i.e.*, section 377 IPC, thus such persons are not permitted to have the benefit of these facilities. The Bill further provides that a surrogate mother requires the consent of her husband to act as such. Therefore, single unmarried woman cannot be volunteered to be a surrogate mother. Under section 34(9), the surrogate mother shall not undergo embryo transfer more than three times for the

same couple.[20]

The 2010 Bill talks of foreign couples coming to India for surrogacy to submit documents from their home country certifying that they permit surrogacy and the child born will be granted citizenship in the country of their nationality.

In the 228th *Report* submitted by the Law Commission of India in August, 2009, titled *Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy*, it was recommended that: "The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones." The Law Commission, in its concluding note in the said *Report*, had made the following key recommendations:

- Surrogacy arrangements should continue to be governed by contract amongst parties but should not be for commercial purposes.

- Surrogacy arrangements should provide for financial support for the surrogate child in the event of death, divorce or unwillingness of the commissioning couple/individual.

- Surrogacy contract should take care of Life Insurance Cover for the surrogate mother.

- The intended parents must be a donor in a surrogacy arrangement.

- Legislation should recognize a surrogate child as the legitimate child of the commissioning parent(s).

- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

- Right of privacy of donor as well as surrogate mother

[20] This seems to be contrary to the national population policy providing a smaller family.

should be protected.

- Sex-selective surrogacy should be prohibited.

- Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only.

Thus, the Law Commission has adopted a pragmatic approach in coming to the rescue of couples who could not conceive children by natural methods as it is estimated that 15% of couples around the world are infertile.

The Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women and Child Development, Government of India. Its mandate is to find a loving and caring family for every orphan/destitute/surrendered child in the country. CARA was initially set up in 1994 under the aegis of the Ministry of Welfare in pursuance of cabinet decision dated 9.5.1990. Pursuant to a decision of the Union Cabinet dated 2nd July 1998, the then Ministry of Social Justice and Empowerment conferred the autonomous status on CARA w.e.f. 18.3.1999 by registering it as a society under the Societies Registration Act, 1860. It was designated as Central Authority by the Ministry of Social Justice and Empowerment on 17.7.2003 for the implementation of the Hague Convention on Protection of Children & Cooperation in respect of Inter-country Adoption (1993). The Ministry of Women & Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care & Protection of Children) Act, 2000' pursuant to 16th February, 2006 notification of Government of India regarding reallocation of the business.

In-country adoption of Indian children is governed by In-country Guidelines-2004 while inter-country adoption procedure is governed by a set of guidelines are a follow up of various directions given by the Supreme Court of India in *L.K. Pandey*'s case.[21] These Guidelines are amended and updated from time to time keeping in mind the welfare of such child. While CARA is engaged is

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21 *Supra* Note 16.

clearing inter-country adoption of Indian children, its principal aim is to promote in-country adoption. In fact, CARA ensures that no Indian child is given for inter-country adoption without him/her having been considered by Indian families residing in India. CARA also provides financial assistance to various NGOs and Government run homes to promote quality child care to such children and place them in domestic adoption.

In *St. Theresa's Tender Loving Care Home* v. *Government of A.P.*,[22] the Supreme Court followed the decision in *L.K. Pandey*'s case[23] and stressed the importance of regulating inter-country adoptions to avoid the sale of children as if they were commodities and held that the best interests of the child must always be considered by the courts in cases of adoption.

Section 112 of the Indian Evidence Act, 1872 is based on the well-known maxim *pateris est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is that a child born of a married woman is deemed to be legitimate. The whole burden of proving otherwise falls on the person who is interested in making out the illegitimacy, as the law in general presumes against vice and immorality. It is well established in law that courts in India cannot orders blood or DNA tests in a routine manner wherever there is a question of lineage. Application made for such prayers in order to have roving inquries cannot be entertained. There must be a strong *prima facie* case that the husband must establish non-access in order to dispel the presumption of fact regarding parentage arising under section 112 of the Evidence Act, 1872. The court must carefully examine what would be the consequence of ordering the blood test. Furthermore, it must also be recalled that no one can be compelled to give sample of blood for analysis. It may also be remembered that section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Deoxyribo Nucleic Acid (DNA) as well as Ribo Nucleic Acid (RNA) tests were not even in contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to

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22 *Ibid*.
23 (2003) 11 SCC 737.

escape from the conclusiveness of section 112 of the Evidence Act *e.g.*, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrefutable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being basterdised if his mother and her spouse were living together during the time of conception. Hence, the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.[24]

Surrogacy enables the women to provide wombs for rent business. Such a concept may have acceptability in the society but may not have respectability. It creates serious problems that the surrogate mother must be mentally stable and unlikely to withdraw midway. There is no guarantee that the child born in such a manner is of his biological parents. In case the surrogate mother suffers miscarriage and enters into the contract with other persons and becomes pregnant or has natural pregnancy through her husband, such issues may be raised and for confirmation of genetic link, biological parents may seek DNA test. Such contracts may not be included under the contract law. Newly born babies may be abandoned by his biological parents. There may be problems if the surrogate mother becomes emotionally attached to the child and develops a sense of losing the child after giving birth to him. It creates a problem of unavoidable social and ethical issues. Contracts must be turned as who will be responsible for miscarriage or defects in the baby or what will happen if the surrogate mother becomes medically ill. A woman of child bearing age if suffers from damage or missing uterus may not be able to conceive a child and go for surrogacy but a rich

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[24] *Dukhtar Jahan* v. *Mohd. Farooq*, (1987) 1 SCC 624; *Goutam Kundu* v. *State of W.B.*, (1993) 3 SCC 418; *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit & Anr.*, (1999) 7 SCC 675; *Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311; *Amarjit Kaur* v. *Harbhajan Singh*, (2003) 10 SCC 228; *Banarasi Dass* v. *Teeku Dutta*, (2005) 4 SCC 449; *Ramkanya Bai* v. *Bharatram*, (2010) 1 SCC 85.

woman may seek a surrogacy to keep her figure or avoid birth pains. This may give rise to some people to turn into making a living by bearing the children of others.

In case, surrogating is banned legally for any reason whatsoever either on the issue of ethics or morality or for any other reason, it would deprive the persons of the right to have their own children when medical means can remedy the situation. Such a case can be advanced on the ground of arbitrariness and violation of equal protection of law. Some people need the child and others need the money.

The law of surrogacy further creates a problem regarding the contract as to whether such kind of contract is permissible or against the public policy. What is the sanctity? Exception to section 375 IPC explains that the sexual intercourse with a wife below the age of 15 years may amount to rape. There is no law which declares that a child who had been given birth by a woman below the age of 15 or 16 years will be illegitimate. Illegitimacy of the child is decided only in void and voidable marriages. Law does not say that marriage with a girl of a particular age *i.e.*, 16 years is void or voidable. Therefore, the question does arise as to what would happen in a case where her parents or guardian enters into a contract with a third person for surrogacy. Whether she had a right to repudiate that contract during the period of pregnancy or she has a right to get rid of the pregnancy by terminating the same. Sections 3 and 4 of the Medical Termination of Pregnancy Act, 1971 also require the consent of the guardian if she is a minor. In such a case if she becomes pregnant by any of these means, the question would arise whether she can accuse anybody guilty for rape though neither she nor the another person indulged in any normal sexual activities.

In case the woman is not agreeable to fulfill the contract, whether the other party has a right to file a suit for specific performance of contract?

The Universal Declaration on the Human Genome & Human Rights, 1997 provides the control and regulation of human cloning. Article 11 thereof reads as under:

"Practices which are contrary to human Dignity, such as reproductive cloning of Human beings, shall not be permitted."

Thus, in case the provisions of Article 11 are not given strict adherence, we will have clones that may create a problem of enforcing the law and order as well as morality.

Conclusion

To conclude, it may be stated that law regulates life. Morality is the surviving force that supports law and eventually disciplines life. The concept of living life decently, and protecting it from man oriented invasions, has been thematically introduced through judicial pronouncements by our courts, while explaining the dimensions of life and liberty guaranteed under Article 21 of the Constitution of India.

The narration herein above demonstrates that law is striving hard for legitimacy of children who arrive in this world through their strange man made efforts. The concerned parties have to observe moral norms so as to make them acceptable by the society at large. The raw edges of immorality have to be chiseled by public education and support. Law alone would not be able to control the will of the human race. It has to be a popular movement involving social scientists, statesmen and the observance of morals by the people themselves.

DISCRIMINATION AGAINST WOMEN AND LEGAL REMEDIES*

Hon'ble Mr. K. Venkatapathy**

Though the commercial interests are always try to sell the International Women's Day as another occasion for men to express their love to women with greeting cards and token gifts, somewhat akin to St. Valentine's Day, the International Women's Day has a history of women's struggle against oppression worldwide. March 8th marks the global celebration for the economic, political and social achievements of women.

It was on this day in 1857, women from garment and textile factories staged their first protest against the poor working conditions and low wages in New York City. They were attacked and disbursed by the police. However, they formed their first Labour Union two years after and staged more protects on the same day in subsequent years. In 1908, more than 15,000 women marched through New York City demanding shorter work hours, better pay and voting rights.

It was in 1909, that the first International Women's Day was observed on the 28th of February following a declaration by the Socialist Party of America. In 1913, women across Europe held peace rallies on this day, on the eve of the First World War. It is also said that demonstrations marking the International Women's Day in Russia provided the first impetus for the Russian Revolution of 1917. Proclaiming it as a day of rebellion against the kitchen slavery, a 1932 soviet poster said: "Down with the oppression and narrow-mindedness of the household work." In the year 1975, the United Nations gave its official sanction to the International Women's Day. However, over the years the day has lost

* Abstract of the speech delivered by Hon'ble Mr. K. Venkatapathy, Former Minister of State for Law and Justice at New Law College, Bharati Vidyapeeth Deemed University, Pune.

** Former Minister of State for Law and Justice.

its political meaning and has become a day of celebration of women with an emphasis on their beauty and motherhood.

The International Women's Day holds great significance for the Indian women who are worshipped and deified on the one hand, and subjected to the worst forms of crime and violence on the other at the same time. According to a study, *Chronic Hunger and the Status of Women in India*, about 24,000 people die to chronic hunger everyday around the world. Elsewhere in the world, hunger is a social issue; but in India, it is largely due to the subjugation, marginalization and disempowerment of women. Traditionally women bear the primary responsibility for the well-being of their families. Yet they are systematically denied access to the resource to fulfill their responsibilities, which includes access to education, health care, job training and freedom to use family planning services.

According to the study there are seven major areas of discrimination against women in our country. They are:

Malnutrition: Gender disparities in nutrition are evident from infancy to adulthood. Girls are breast-fed less frequently and for shorted durations. In childhood and adulthood, while males are fed first and better, females are expected to eat last and least throughout their lives, even when they were pregnant and lactating. Malnourished women give birth to malnourished children, perpetuating the cycle.

Poor Health: Females get less health care than males. Studies on the attendance at rural primary health centers reveal that more males are treated in almost all parts of the country than females. Many women die of preventable complications during childbirth. Working conditions and environmental pollution further impair women's health. Women spend at-least three hours a day cooking, often in poorly ventilated area, which causes them eye and respiratory problems, chronic bronchitis and lung cancer.

Lack of Education: Girls are less likely to get educated than boys; and far more likely to drop out from the school

on the slightest pretext. Our society is more concerned about protecting their virginity than getting them educated.

Overwork: It is generally said that 'women like children, eat a lot and do nothing'. Their long hours of arduous work are not recognized. They are often paid less than their male counterparts for the same work. According to a study, in a one hectare of land in Himalayas, a pair of bullocks work 1,064 hours and a man works for 1,212 hours, and the woman works for 3,485 hours in a year.

Lack of Opportunity to Develop Skills: Women contribute about 60 to 65 % of total labour in overall farm production. But the extension services tend to reach only men, which perpetuates the existing division of labour, relegating women to unskilled tasks. Women are impeded from developing their skills by lack of mobility, low literacy levels and prejudices against them.

Mistreatment: In recent years, there has been an alarming rise in atrocities against women in India including rapes, assaults and dowry-related murders. Fear of violence suppresses the aspirations of women. Female infanticide and sex selective abortions are other forms of violence that reflect the devaluing of females in our society.

Powerlessness: While women are guaranteed equality under the Constitution of India, legal protection has little effect in the face of prevailing patriarchal traditions. Women lack the power to decide who they will marry, and are often married off as children. Legal loopholes are used to deny women inheritance rights. Powerlessness of women contribute to virtually every social malaise, including high birth rates, poverty, malnutrition, high illiteracy, infant mortality and low life expectancy, especially among rural women.

The origin of the Indian idea of appropriate female behaviour can be traced back to the rules laid down by Manu two thousand years back. He decrees that nothing must be done independently by a young girl, by a woman or even by an aged one, even within her own house. According to Manu: "In childhood a female must be

subjected to her father, in her youth to her husband, when her lord is dead to her sons; a woman must never be independent." Thus, women's suppression is rooted in the very fabric of our society – in our traditions, in our religious doctrines and practices, in our educational institutions, in our legal systems and within our families.

Some historians claim that in ancient India, women enjoyed equal status with men in all walks of life. However, historical evidence shows that at least from the medieval periods women faced various kinds of discrimination and brutalities in India. Inhuman practices like *sati*, *jauhar*, child marriages, *purdah*, *devadasis etc.* were widely prevalent in this country, which prompted social reformers like Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar, Jyotiro Phule, Mahatma Gandhi and Thanthai Periyar to fight for women's upliftment.

Thanthai Periyar exhorted men not to oppose women's rights keeping their spouses in mind; he told them to think of their sisters and daughters. He argued for complete parity between men and women in every walk of life. As far back as 1929, he passed a series of resolutions in the 1st Women's Conference held in Chergalpattu, which remains relevant to women's empowerment even today. It is said that despite such efforts, women in India still face various forms of discrimination.

After Independence, we have adopted an egalitarian Constitution which guarantees women equality in every sphere of life. Article 14 of the Constitution of India guarantees their right to equality. Article 15(1) forbids discrimination on the grounds of religion, race, caste, sex or place or birth. Article 15(3) provides for special provisions in favour of women and children. Equality of opportunity is ensured by Article 16 while the right to adequate means of livelihood is protected under Article 39(a). Article 39(b) ensures equal pay for equal work for both men and women. Article 42 directs the State to make provisions for securing just and humane conditions of work and for maternity relief. Article 51(A)(e) exhorts renouncing practices derogatory to the dignity of women.

Coming to the laws, there are ample provisions under the Indian Penal Code, 1860 to tackle all sorts of criminal actions against women, including rape, molestation, eve teasing, obscenity and other forms of violence. In addition, there are many notable pieces of legislation addressing specific issues affecting the women. The Immoral Traffic (Prevention) Act of 1956, the Medical Termination of Pregnancy Act of 1971, the *Sati* Prevention Act of 1971, the Indecent Representation of Women (Prohibition) Act of 1986, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act of 1994 are few of the post-independence legislations which come to mind in this regard.

The Protection of Women against Domestic Violence Act, 2005 is a landmark legislation enacted by the present UPA Government at the Centre. This Act recognizes, for the first time in the history, that violence against women need not be only physical or sexual; it can be psychological, verbal, emotional or economic. It has also laid down stringent rules to prosecute men who harass, beat or insult women at home. The Act recognizes live-in relationships, and aims at creating infrastructure and system to take care of the women in distress. The Act empowers the courts to pass protection orders preventing the abuser from entering places the victim frequents, communication with her or isolating any assets they share.

The impact of the 73rd and 74th Constitutional Amendment Acts which provided for reservation of one third seats in *panchayat raj* institutions for women has to be mentioned herein. The move has spearheaded an unprecedented social experiment in more than 5 lakh villages of India. It has shattered the myth that women are not fit for politics. Women leaders at grassroots levels are transforming local governance by sensitizing the State to the issues of poverty, inequality and gender issues. They are taking up issues that had gone unacknowledged previously. It has also brought about significant transformations in their lives. Empowered now, women have gained self-confidence and political awareness. They also affirm their own identity.

Even the Indian Judiciary has made several seminal contributions in protecting the interests of women. Notable among them were the guidelines for employers to prevent sexual harassment at work place laid down in *Vishaka*'s case[1] and also the guidelines in *Vishwa Jagriti Mission* v. *Union of India*[2] on ragging and the guidelines for arresting a person.

Well, we do have a plethora of laws, enactments and judicial pronouncements. Are they effective in ensuring equality for women? Has there been an improvement in the ground realities? The *Times of India* (Delhi) carried a story under the caption 'As the world gets set to celebrate womanhood, for some mothers, the girl child is a daughter too many'. The story is, under pressure for having failed to produce a son, one Seema Sai killed her daughters – four year old Riya and one and half year old Shreya – hurling them into water. The same paper carried another story from Rajkot of a mother committing suicide after giving birth to six girls. Kokila Nayka ended her life before seeing her 29th birth day delivering a baby for every year of her married life. Obviously, laws alone cannot save Kokilas, Riyas and Shreyas.

One can feel that the Indian legal system is less sensitive to the problems faced by women. The formal system of courts and the law intimidates women more than it does men. There is a dearth of lawyers willing to conduct litigation from a feminist perspective. Some lawyers hesitate to take up cases of violence against women, because their clients do not have the paying capacity. Therefore, increasing gender sensitivity amongst lawyers is very crucial. Lawyers should come forward to conduct legal awareness programmes in schools, colleges and in communities.

Most women are not aware of their rights and they often don't place great trust in what the laws can do to help them. They are so much preoccupied with their daily struggles to invest much hope in getting relief from complex new laws that would be difficult to implement and execute in practical life. They are unable to benefit

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1 *Vishaka* and Others v. *State of Rajasthan* and Others, AIR 1997 SC 3011.

2 2001 AIR 2814.

from some of the landmark judgment and significant decisions of the higher judiciary, as it takes a long time to percolate down to the district courts and the lower judiciary. Non-governmental organizations and para-legal workers can conduct legal literacy workshops, and provide legal aid and counseling to the women in distress. They can also come to their aid over seeking the process of case registration, investigation, arbitration, judgment and follow ups.

Coming to the Judiciary, it is agonizing to know that women judges constitute less than 4% of the total strength of judges in High Courts and the Supreme Court in India. The situation in the lower Judiciary cannot be any different. It took 42 long years after independence for a woman to become judge of the Supreme Court of India. Only in the year 1989 we had the first women judge of the Supreme Court of India, when Justice Ms. Fathima Beevi assumed office. One can hope that more women judges will be inducted into the higher Judiciary in the coming years.

Thus the issues relating to inequality of women have several facets; while some of them can be addressed by enacting suitable legislations, most of them require change in our attitudes towards female gender. We can hope every one of us use the occasion of the International Women's Day to introspect ourselves and make the celebrations more meaningful in the coming years. We can also hope that the International Women's Day is declared a national holiday, as it is the practice in more than twenty countries including Russia and China.

ROLE OF THE STATE AS HUSBAND, FATHER AND GUARDIAN - SOCIAL JUSTICE FOR WOMEN

Prof. Dr. Mukund Sarda*

Introduction

Justice is the first promise made under the Constitution of India. Justice – socio, economic and political is the mandate of the Constitution makers, binding on any democratic government working under the Constitution of India.

Article 38 of the Constitution emphasizes the concept of 'social justice' and imposes a duty on the State to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice - socio, economical and political, shall inform all the institutions of national life.[1]

In *Air India Statutory Corporation* v. *United Labour Union Others*[2] the Supreme Court of India has explained the concept of social justice in Article 38 of the Constitution of India as follows: "Social justice for women is a dynamic device to mitigate the sufferings of the poor, weak, *dalits*, tribals and deprived sections of the society, and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor *etc.*, from handicaps, penury, to ward off distress and to make their life livable, for greater good of the society at large. The aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation and a constitutional goal."

Article 39(f) of the Constitution says: "That children are given opportunities and facilities to develop in a

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1 Pandey, J.N., *The Constitutional Law of India*, 49th Ed., Central Law Agency, p 410.

2 AIR 1997 SC 645.

healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation and against moral and material abandonment."[3]

In the backdrop of these provisions of the Constitution of India it is very clear, even to a layman, that the State has a special role to play in case of poor, weaker and deprived sections of the society. They do enjoy right to live with dignity as enshrined under Article 21 of the Constitution of India.

Victims of Matrimonial Life

Under every personal law in India after 1955 there is a provision for divorce. The benefit of dissolving the marriage was extended to Hindus much later *i.e.*, in the year 1955, in comparison to the people professing other religions. Divorce can be taken by a married person on various grounds (on basis of the Fault Theory) or by mutual consent.

The personal law also gives right of maintenance to wife, children and parents. However, in reality the right to maintenance of these people is still a distant dream irrespective of their religions. The fight for maintenance took a constitutional debate for Muslim women. Under the Muslim law the duty of husband to pay maintenance after *talaq* was challenged in various cases like *Shah Bano*[4], *Bai Tahira's* case[5] *etc.*

The judgments of the Supreme Court in these cases forced the legislators to enact a special law for Muslim women regarding their maintenance rights called as under the Muslim Women (Protection of Rights on Divorce) Act, 1986. This Act lays down that:

- A divorced woman is entitled to have a reasonable and fair provision and maintenance from her former husband and the husband must do so within the period of *iddat* and his obligation is not confined to the period of *iddat*.

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[3] *Supra* Note 1 at p 411.
[4] *Mohd. Ahmed Khan* v. *Shah Banu Begum and others,* 1985 2 SCC 556.
[5] *Bai Tahira* v. *Ali Hussain Fissalli Chothia and Anr.*, AIR 1979 SC 362.

- If she fails to get maintenance from her husband, she can claim it from relatives failing which, from the *Waqf* Board.[6]

The validity of this Act has been upheld by the Supreme Court.[7] It is evident that this Act was enacted by the Parliament to protect a divorced woman when she fails to get protection from her former husband and relatives in terms of maintenance. The spirit of welfare State is highlighted in the relevant section of the Act in order to protect the divorcee and to refrain her from becoming destitute.

To protect any woman from domestic violence, irrespective of her religion the Protection of Women from Domestic Violence Act, 2005, was passed which guarantees a woman who is victim of domestic violence, the right of residence, monetary relief, compensation order, custody order and some special orders from the court. This is a progressive legislation protecting the women from any type of physical, sexual, economical, emotional and social abuse.

In spite of several legislations, special enactments and various Supreme Court judgments, in India the position of women, in particular of a divorcee, is very pathetic and merciful. She has to depend upon her former husband for maintenance, and has to beg and wait till the payment is made. It has been the experience of many matrimonial women victims that in spite of the court orders and the law in their favor, the respondent (former husband) has no fear of law. This is mainly because of delay in justice, cost of litigation, lack of proper implementation and sensitization of the law officers including courts towards these victims.

In these circumstances, the question arises: A woman is punished for no fault on her part (in case of divorce other than mutual consent where the husband has either cheated her or is guilty of some fault). Whether such woman has right to live with human dignity like an ordinary citizen or not? If the answer is yes, then why she

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[6] Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

[7] *Danial Latif* v. *Union of India*, AIR 2001 SC 3262.

feels helpless and has to stand in queue to get the means of livelihood *i.e.*, maintenance. Is it not the moral and legal responsibility of the State to take care of such woman who has no one to take care of? What is the role of the State as husband, father and the guardian?

Victims of Sexual Assault (Rape)

Compensation to victims of sexual assault is another grey area of concern with the rising number of rape victims. Recent gang rape of *Nirbhaya* in Delhi which shocked the whole world forced the Government of India to pass an ordinance on anti-rape laws and protection to rape victims. However, there still remains a doubt as to the rehabilitation of rape victims. The Supreme Court of India in numerous cases has laid down guidelines on providing compensation to rape victims which are still in Government cupboards. The prime recommendations given by the Supreme Court in *Delhi Domestic Working Women's Forum* v. *Union of India*[8] are:

- The complainants of sexual assault cases should be provided with legal representation.
- The advocate's role shall not be confined only to court, but to also assist her in police station, and to guide her as to how she might obtain help of a different nature from other agencies.
- The list of advocates shall be kept at the police stations that are ready to help the rape victims.
- Name of the rape victim shall not be disclosed.
- Criminal Injuries Compensation Board shall be constituted.
- Compensation for victims shall be awarded by the court on the conviction of the offender, and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as the loss of earnings due to pregnancy and child birth if it accrued as result of rape.
- The National Commission for Women must be asked to frame schemes for compensation and rehabilitation to ensure justice to victims of such crimes.

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[8] 1995 SCC (1) 14.

Further, the Supreme Court of India in a landmark judgment *Chairman, Railway Board* v. *Chandrima Das*[9] where a foreign national, a Bangladeshi women was gang raped, held that compensation can be granted under public law (Constitution) for violation of fundamental rights on the ground of domestic jurisdiction based on constitutional provisions and human right jurisprudence. The State was made liable for the act of railway employees. This judgment supports the idea that State shall act as guardian and protect the dignity and honor of every woman.

In spite of all these judgments, guidelines and clarifications, little help is extended to rape victims. There is no rehabilitation scheme or compensation paid to victims at large. Again the same question arises: what is the role of the State for such victims?

Suggestions

The State shall take pro-active role, and shall ensure social justice in reality rather than on papers. The innocent matrimonial and rape victims need special protection from the State as husband, father and guardian. Following are a few suggestions which can strengthen and reassure human dignity and respect to such victims. The State can adopt welfare measures like:

- Providing Government jobs to such victims as per their qualifications and abilities;
- Assistance in getting house accommodation under Government schemes;
- Free education for their children;
- Free medical assistance and concession in traveling;
- Benefits of ration card for purchase of food grains and necessary articles for household;
- Counseling and rehabilitation centers to be established;
- National/State Compensatory Board to be constituted for awarding compensation or maintenance to the victims.
- Tax rebate shall be given to such victims.

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[9] AIR 2000 SC 988.

The Doctrine of *Escheat* enables the Government to claim the property of a person who has died without any heir. The Government becomes the legal owner of such property. In a similar way, the responsibility lies on the Government to protect and provide means of livelihood to the innocent women victims of matrimonial offences and sexual assaults.

The Doctrine of *Parens Patriae* emphasizes that the State is the parent of all the citizens and has a role of protector, provider and entrepreneur in a democratic setup. Social justice is the golden promise made under the Constitution of India for the poor people in India. It has remained a distant dream even after 65 years of independence. Rehabilitation of victims of matrimonial and sexual assaults will be a true sign of victory of democracy and welfare of citizens.

The question remains: On planet earth, a woman has been given special protection by God, by Nature and by Law; then why not by the Government of India?

IMPORTANCE OF COUNSELING IN STRENGTHENING MARRIAGE INSTITUTION: A SOCIO LEGAL RESEARCH

Dr. Pravin N. Motiwala*

Introduction

Since working as a Marriage Counselor at Family Court, Pune, the increase in the breakdown of marriages, especially within the first year of the marriage has been observed by me. Many of the times the spouses knew each other for years together prior to their marriage. However, after marriage, either they have not resided together at all or got separated within a few days/months after their marriage. Many of them have expressed that they can be a good friends, but cannot adjust with each other to stay together as a couple. Ideas of marriage and expectations of the spouses about each other are changing in our society in modern times.

Empirical Study on Early Breakdown of Marriages

Stable marriages are essential for a healthy society. The need was felt to prevent the breakdown of marriages especially which get broken down during the first year of the marriage. The pre-marriage counseling can be of a great helps at the preventive level.

Matrimonial petitions referred at the marriage counselors in the years 2012 in Pune district were studied by the process of random sampling by me personally. All the cases where couple got separated within the first year of marriage formed a sample for the Study. Questionnaire was used for data collection. The data was analyzed and the major findings are as follows:

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- 40% cases were from "A" category *i.e.,* Restitution and Divorces, 20% cases were from "F" category *i.e.*, Mutual Consent Divorce, 9% cases were from "E" category *i.e.*, Maintenance, 31% cases are from other categories *i.e.*, Custody, Recovery, *Darkkhast*, Civil/Criminal and Other Application.

- 27% cases were filed by the husband and 37% cases were filed by wives. Rests of the petitions *i.e.*, 36% were field by either husband or wife. Analyzing the said data, it is observed that majority of the cases were filed by the wives.

- Most of the couples were from the 21 to 30 age groups. It is found that young couples filed the cases for the dissolution of their marriage.

- Most of the couples *i.e.*, 84% couples who filed the cases were from Hindu religion.

- Majority of the couples were well educated, mostly graduates. 56% couples were from the nuclear family; 44% couples were from joint family.

- Most of the marriages *i.e.*, 69% marriages were arranged marriages, and rest of the marriages were love marriages or marriages by own choice. It is observed that divorce rate in the love marriages is also increasing day by day.

- The cohabitation period of 21% couples were up to 3 months, and 26% couples were stayed together from 3 to 6 months. The cohabitation period of 34% couples was 6 to 9 months, and 19% couples were stayed together up to the 9 to 12 months. It clearly notifies that the average cohabitation period was 9 months.

- 76% couples were not having kids, and 24% couples were having kids.

Whether Parties Had Met Each Other Prior to Their Marriage?

1. It is observed that in most of the cases both husband and wife had met each other before their marriage once or twice for giving consent to their marriage. Most of the wives did not meet their partners without prior permission of their parents.
2. Further, the couples hardly met each other. During meeting, they had only formal conversations and did not discuss about their expectations about each other.
3. In most of the love marriages, couples had frequent interaction. They had discussed and spent their time regarding movies, friendship, hoteling, shopping, and romantic sexual activities.
4. In majority of the cases both the husband and wife were not aware of pre-marriage counseling services.
5. Majority of the couples did not discuss, and did not share their expectations towards their marriage. It is also observed that they did not discuss or exchange their information related to their family backgrounds, likes and dislikes, behavior, habits *etc.*, which is very much necessary for long lasting marital relationship.
6. Most of the couples have accepted that pre-marriage counseling would have been helpful for them. It is also seen that female litigants felt need and importance of pre-marriage counseling.

Marriage Counselor's Observations and Opinions about Causes of Marital Discord

Following are main factors affecting the matrimonial harmony:

- Interferences from the either parents and relatives;
- Addiction of liquor, drugs and gambling;
- Sexual incompatibility;
- Physical and mental cruelty;
- Criminal cases filed against each other;
- Behavioral problems, personality problems, and other psychological problems and psychiatric illness;
- Dowry demands;
- Differences on financial issues; and

- Extra-marital relationships.

Measures Taken to Resolve Disputes by the Parties

1. It is observed that in most of the cases, both or either of the parties had not taken any initiative to resolve their differences.
2. 96% litigants did not approach to the any expert/ professional. Only 4% parties approached to Non Governmental Organizations (NGOs) to resolve their differences. In 1% cases it is observed that husband had decided to stay separate from wife. In 4% cases, wife's partners had initiated to approach the husband's family to resolve their differences. This data indicates that majority of the litigants are reluctant to approach any professional expert.
3. It is also observed that in 5% cases parties approached their family doctors and psychologists for counseling.

Importance of Marriage Counseling

It is very important to note that in love marriages as well as in arrange marriages most of the couples stay very happy during the courtship period, but after marriage they immediately or gradually want to be separated. Why this happens? Here the pre-marriage counseling can prove very important through which they can choose right life partner.

During the marital period, if any dispute arises due to egos or a situation, sometimes the couple stops communication between them. With passage of the time due to non-communication the dispute which would have been resolved within the four walls of the home, would not get resolved, and goes out of the wall. The couple approaches the family members or non-learned counselors for their dispute, but sometimes no amicable solution comes out of it and the situation between them gets worse.

Finally, the couple approaches the family court which is the last option for the couple. The marriage counselor takes efforts and uses all his/her skill not only to resolve the matter amicably, but also strengthen relationship

between the couple and tries to save the institution of marriage.

A marriage counselor keeps every session confidential thus giving the hesitant clients space to voice their opinions. In marriage counseling it is specially seen that there is absolutely no presence of any other person than the client. At the same time care is taken that for seeking the counselor's expert advice the client is not suffered financially.

By keeping an optimistic approach and creating a positive ambition in marriage counseling an opportunity is given to the client for the betterment of their relationship.

The marriage counseling is a platform, not for confrontation, not for accusation, but for clarification of petty or serious issues between the couple, and also to help to resolve problems between them scientifically. Marriage counselor tries to understand or analyze past, and focuses on present to ensure a bright feature.

Findings and Conclusion

It is observed that most of the young couples are coming in the family court for dissolution of their marriage. Their cohabitation period is hardly up to 9 months. 7% couples have tried to resolve their difference before coming in the court through parents, family doctors and psychologists. But most of the couples don't have the knowledge and information, and availability of professional counseling services and its importance.

After analysis of the entire facts one can to state that pre-marriage counseling services are very much important in preventing the early breakdown of marriages. These services should be made available through the trained counselors, NGO's, and by the establishing counseling centers in senior colleges.

It is always said that marriages are fixed in heaven; but with better professional interventions marriages can be saved, and harmony in relationships can be maintained on the earth itself.

MARRIAGE, COUNSELING AND MARITAL RELATIONSHIPS

Ms. Smita Joshi*

Introduction

It is said that marriages are made in heaven and celebrated on earth. The popular belief is true to a certain extent, because it is a special bond shared between two souls, who tie the wedding knot after promising to be companions for lifetime. It is the physical, mental and spiritual union of two souls. But then being two distinct individuals they are different people which give rise to differences between them. When the couple faces cohabitation issues, cultural differences, and extra marital affairs, problems of forgiveness, parenting issues, sexual issues, and financial management then marriage counseling becomes a necessity. Once upon a time marriage was a 'forever' commitment. Today, however, it's a completely different story with some marriages being as short lived as just a few days or months. Divorce is no longer an alien or feared word among couples as marital problems are increasing in numbers. Separation and divorce are not the solution to marital problems. Every relationship undergoes rough patch. Almost most of us experience problems that are brought by indifference, monetary or financial problems, jealousy, 'third party' meddling, or other marital problems.

Marriage Counseling and Legal Definition

Marriage counseling seeks to identify the sources of conflict in a marriage, and provide healthy ways of resolving such conflicts. Marriage counseling is an alternative to divorce or separation for some couples. Marriage counseling may also be sought by couples who are in the process of a divorce or separation to help them deal with the changes and emotions being experienced so

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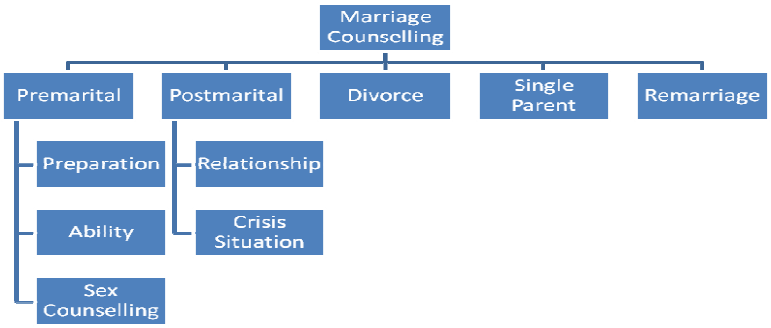
that the process is dealt with in a healthy manner. Such counseling may benefit both, the couple and any children who may be affected by negative feelings such as anger and vindictiveness. Laws vary by State, but some State laws allow a couple to obtain a marriage license for a reduced fee if they undergo premarital counseling. Marital counseling is also generally a requirement for the one who opts for a covenant marriage. Some State laws give judges the authority to order marriage counseling. In states where the judge may order counseling, the judge often delays the divorce proceeding for a month or two during the counseling period. It is an advice given by a trained person to people who are trying to find solutions to problems in their marriage.

Areas of Marriage Counseling



Procedure of Counseling in Family Courts

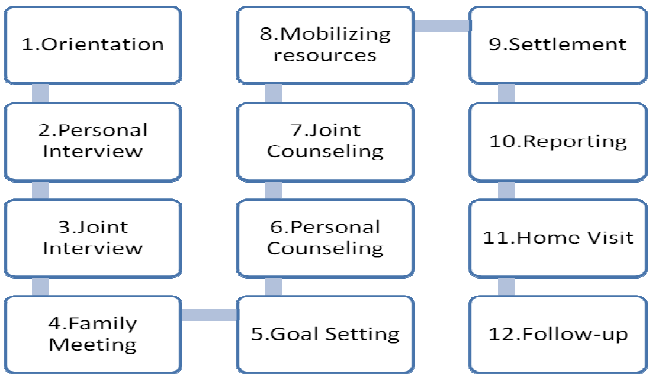
Marriage counselor performs all those tasks which in earlier days were being performed by a mediator and a family friend. The role of the marriage counselor is to see that disputes are solved amicably and that the parties unite instead of separating. Whatever they do, they do to help the parties.

As per the Family Court Rules,[1] certain time is given to the marriage counselors to work on the case and

[1] The Maharashtra Family Court Rules, 1987.

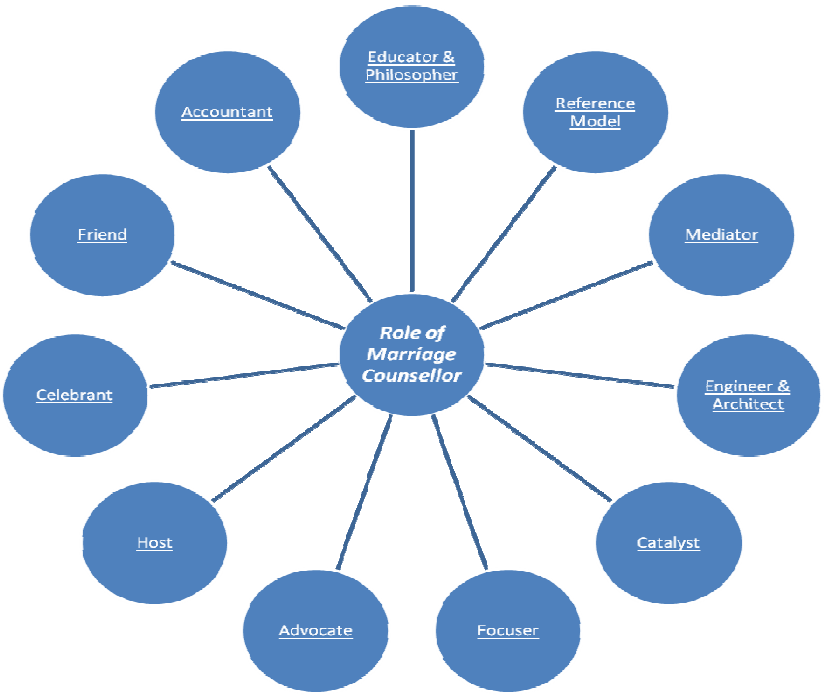
submit report to the court. When the parties step into the court, there is bitterness in their minds against each other. The counselor has to break these walls and make the parties comfortable to listen to the counselor's suggestions and think over it. Sometimes there are other legal complications involved such as filing of the cases under section 498A of Indian Penal Code, 1860, the Protection of Women from Domestic Violence Act, 2005 *etc*. In such cases the counselors availing the help of friends and relatives of the litigants could arrive at a proper settlement. The time taken by the counselor to settle a matter amicably or otherwise varies from case to case depending upon the gravity of each case and response of parties. When the counselor thinks that there is possibility of reconciliation or settlement, in such cases only the counselor requests for more time for further efforts.

Procedure of Counseling in Family Courts



Various Roles of a Counselor

Counselor acts in multiple roles while performing his duties. He is an all rounder personality and performs following roles:



Data Analysis

The samples were taken from the Family Court, Pune. The subjects were the clients who are a part of litigants in the Family Court; the clients, who have settled the matters amicably with the help of marriage counselor. Sampling was done using the random approach. Data for this research was collected from 45 couples.

A questionnaire was formulated which was tailor-made especially for the subjects; and the areas focused at were:

Confidence	Self-Esteem/Image	Focus
Responsibility	Decision Taking ability	Competitiveness
Initiative	Self-Reliance	Awareness

There were 21 objective questions with 5 point rating scale which was ranging from 'yes', 'mostly', 'sometimes', 'rarely', and 'no'. A subjective questionnaire was also made which the subjects had to fill in. The questions were basically mostly related to counseling, and how the clients have changed post-counseling also; why the clients settled the matter amicably; and the main reason how counseling is helpful to them. The case studies for each client were also taken while the data was being collected.

Discussion and Conclusion

The questionnaire was given to the clients and the data was collected. After the scoring the interpretation was done and it was noticed that the clients scored very high on areas such as 'confidence', 'self esteem/image', 'focus', 'responsibility', 'competitiveness', 'ambition', and 'awareness'. This means that the counseling is working on the clients in the personal areas which enhance their entire psycho-social rehabilitation.

Marriage counseling therapy refers to the use of meaningful occupations to assist people who have difficulty in achieving occupationally balanced lives. A marriage counselor works with a variety of individuals who for whatever reason have difficulty in accessing or performing meaningful marital Life. The subjects have really scored a high on confidence, focus, self esteem, *etc*. This shows that the clients are on a road to recover in terms that they are slowly but steadily learning to do things on their own. They are still not very confident about the decisions that are taking but at the same time they are growing to be confident about themselves. The self-esteem shows that they also have improved from the time they caught on the 'disease'. They feel good about themselves and have also started believing in spouse capacities and the capabilities that they possess. They also take responsibility for their own actions and whatever little/major decisions they are taking. According to the responses they still need a bit of help while working alone.

Counseling alone is not a treatment; but it will help in following all other parts of our care path. It is

recommended to complement your counseling with psychosocial support. Even when you feel relief of psychotic symptoms, you could experience difficulties with social contacts, motivations or daily care. It is also very likely that you find it difficult to find or hold on to a marital life, on improving social functioning; be it in the community, at home or at work.

Disposal of Cases through Marriage Counseling

The table given below shows the year wise data 2001 to 2011, the cases referred to the marriage counselors of the Family Court, Pune. As per the Family Court Rules when the parties institute the case in the Family Court and both the parties appear in the court on that date they should have referred to a marriage counselor.

After the data analysis, the researcher found that the referral number is increased year after year. The year 2001 shows the number of cases referred to counselor was 2318, and in the year 2011 shows the number of cases referred to the counselor was 4689. The *net resultant* of this analysis means society needs counseling very much.

Disposal of Cases in 11 Years by Marriage Counselors

Year	Total	Disposal	Reconciliation
2001	2318	846	179
2002	1750	775	155
2003	1656	708	125
2004	1968	767	122
2005	2401	1034	172
2006	2659	1251	192
2007	2521	1266	196
2008	3256	1351	165
2009	4038	1400	175
2010	4689	1464	167
2011	4790	1520	182

Views of Hon'ble Judges

- **Hon'ble J. Mrs. Mrudula Bhatkar[2]**

Hon'ble Ladyship Mrudula Bhatkar in her telephonic conversation with researcher has very specifically mentioned that the counselor's work is not different than the work of a judge as both the parties come with their disputes before the counselor as well as the judge. The counselor has to solve the problems by understanding the problems of the parties; the dispute can be solved in a very simple manner, but it all depends on what kind of counselor the parties have approached. The counselor can increase the dispute or it can solve the disputes easily. Thus, a counselor plays very important role in judiciary. Hon'ble Ladyship Mrudula Bhatkar says that the impartial counseling and non-judgmental attitude should be the first criteria of becoming a successful counselor. The parties must show confidence for the counselor as for better understanding between the parties, and the counselor there has to be trusted between both of them.

Hon'ble Ladyship Mrudula Bhatkar has considered a job of a counselor parallel to the smartness and cleverness of Lord Krishna as they both have to work on the serious grounds of counseling with a shark brain. The skill to understand the problem between the parties can only be done by a smart counselor and thus the counseling can be successful only by an intelligent counselor. The counselor should not force his own point of view on the parties as the parties already have suffered with emotional imbalance. Thus a smart counselor not only understands the emotional point of view of the parties but make them comfortable to solve the problem. Hon'ble Ladyship had admired the role of the counselor in solving the marriage disputes as due to correct counseling the marriages have been saved. The first aim of a counselor should be to save the marriage institution, and if not possible then to try to save the emotional and physical as well as the financial time of the parties by settling the matter amicably. Today's world is a very fast changing world and the marriage counselor can play a

[2] Judge, Bombay High Court, Mumbai.

very important role in very part of life as most of the matters filed in the family court are based on anger, pride, feeling of taking revenge against each other, thus a true counselor can solve the problem with his/her smartness. In today's world engineers, doctors, information technologists and highly qualified people normally file matters for maintenance as well as for other problems. This problems are increasing day by day in today's world, thus a true counselor can make them understand their self-respect and can provide them confidence regarding themselves. Thus a marriage counselor plays a role of a torch to people who because of their ego have lost in the darkness of problems of their marriage. If a marriage counselor makes understand every individual that he/she has his/her own self-confidence and self-respect then the matters which are filed in court without any base will get disposed off very easily. Thus Hon'ble Ladyship Mrudula Bhatkar speaks about the importance of the counselors as an important pillar in Indian judiciary.

- **Hon'ble Dr. Mrs. Shalini Phansalkar - Joshi[3]**

The unique feature of the Family Courts Act, 1984 is the recognition of the institution of marriage counselors by creating for them a key and important role. As per the mandate of the Act, immediately after the institution of the proceedings and appearance of the parties on the first date the court has to refer them to the counselor for reconciliation and amicable settlement of matrimonial dispute. Thereafter also as and when there are chances of reconciliation between the parties, the court can and does refer the parties to a counselor to resolve the dispute amicably and finally. The Rules framed under the Family Courts Act, 1984 also confer wide powers on the counselors including to interview the parties, to pay home visits, to ascertain the wishes of the parties, to know their standard of living and nature of relationship with the children, to seek information from employer of the spouses to know their income, *etc*. Counselor is thus expected to assist the court in arriving at an amicable settlement between the parties and if it is not possible, then in arriving at just decision of the case. In that sense,

[3] Joint Director, Maharashtra Judicial Academy.

the counselor acts as a bridge or link between the court and the litigating spouses. His role in custody matters of the children of the warring spouses is irreplaceable. One may say that, having regards to the object of the Family Courts Act, 1984 the counselor may be called as 'the backbone of the system'. The counselor does play such vital and effective role in settling, resolving and in narrowing down the dispute in matrimonial litigation.

- **Hon'ble Dr. Mrs. Sunanda Joshi**[4]

Family Courts deal only with matrimonial disputes. The provisions of the Family Courts Act, 1984, are in keeping with the objective of the Act of bringing about reconciliation and speedy settlement of disputes in matrimonial matters. The institution of marriage counselors is one of the most important and unique provisions of the enactment. Marriage counselors are the backbone of the functioning of the Family Courts.

Marriage counselors are professionally qualified and are having expertise in dealing with matrimonial disputes. Marriage counselor brings about dialogue between the parties and tries to remove misunderstanding between them. In most of the cases parties come face to face only in the chamber of the counselor after their separation. Marriage counselor puts different options before the parties to choose best suitable for them. A marriage counselor is not taking decision for the parties but helps them in taking decision. Thus counselor helps the parties in helping themselves. The role of a counselor is that of a friend, philosopher and guide for the parties. Counselor talks to their friends, relatives and family members to bring about some workable solution. It is very difficult to bring about reconciliation between the parties as people come to the court as a last resort when all their efforts fail. However, almost 50% of the disputes are settled at the level of marriage counselor with 'minimum bitterness' and 'maximum fairness' which is no less an achievement since it puts end to further litigation between the parties. Reconciliation is also brought about in 8% to 10% of the cases. By thinking that sometimes it is better than to

[4] Judge, Family Court, Thane.

keep on fighting with each other throughout their life which has tremendous adverse effect on the children of the couple. The speedy settlement of disputes gives the parties relief at early stage, and saves precious years of their life and a chance to resettle. Thus the role of a marriage counselor is very vital to bring stability in family and social life. Continuous training and upgrading their skills is very important in achieving the objective of early settlement.

During some counseling sessions women were given reality orientation about limitations of the counseling office *e.g.*, it was not compulsory for the person (against whom complaints were made) to attend counseling sessions and even if he/she attends counseling sessions and arrives at a settlement, the counselor was not in a position to execute them as he had no such power.

By understanding all these things, women still use to prefer efforts at our office to try out resolving their problems.

Many of them were satisfied with the problem solving at the level of our office. But at the same time in some cases other persons would not respond to the call letters sent by own office, or they would meet their lawyers after signing agreements, and would not implement it as we were not in a position to take any action against them for non- implementation of the agreements.

- **Hon'ble Ms. Aruna G. Faraswani**[5]

With westernization in our society increasing, the relationships between the spouses are getting strained. Most relationships get strained on some point or other for misunderstanding, communication gap, leading to ego problem between the couples. Expectations from a spouse have increased to such an extent that loss of expectations has resulted in ripples in their relationship. Different mental setup is also one of the grounds of discord of marital relationship. It is a time of going to specialist and getting oneself treated from a specialist for any medical health problem. So also the need has arisen

[5] Judge, Family Court, Pune.

to go to a specialist or a therapist for a discord in a marital relationship. Marriage counselors are specialized people who are working either voluntarily or through social institutions or through the Family Courts. The role of a marriage counselor is to work as therapist for couples, whose relationships are strained. The counselors are trained to be active listeners and act as catalyst to defuse the aggravated emotionally charged spouses. Their role is confidential which helps individual to confine in them which facilitate to identify the problem, understand the source of reactive reaction and to reorganize the key emotional responses in the relationship. With stress each spouse goes through, a special form of a therapy is required which a specialist, a trained marriage counselor can help in saving the marital relationship. If required they can refer the couple to psychologist, psychiatrist, for various therapies. The marriage counselors are professionals to help the couple in their need to save the marital relationship. As a specialist in medicine field is required for any disturbance in the function of the physical body, so also the marriage counselor is important in emotional disturbance of a spouse in a marital relationship. The marriage counselors have become the need of the hour as each individual is going through a lot of stress due to various factors like economical, financial, emotional, health, *etc*. Reconciling a couple strengthens the fabric of the society and the marriage institution.

Suggestions and Conclusion

Marriage counseling is in its essence 'a helping in a relationship'. All of us seek to satisfy our personal needs. More often than not, in trying to gratify our needs, we find ourselves in conflicting situations in which our interests clash with those of others. But through the process of socialization in childhood, and later through education, we learn to moderate our desires such that there is no open clash. We may learn to suppress a few desires and inhibit other needs so long as our happiness is not endangered. In addition to human suffering caused by physical handicaps and clash of interests, a major source of suffering is to be found in one's own personality. Often a sense of personal inadequacy and inferiority leads to lack of self-confidence, withdrawal and

lack of desire for achievement. Even if the individual has the desire or motivation, he is hindered by subjective and environmental factors. A marriage counselor and client relationship is a helping relationship is characterized by certain essential features and is meaningful because it is personal and intimate as follows:[6]

- Is affective in nature involving mild to strong emotional relationships.
- Involves the integrity and is sustained voluntarily.
- Involves the mutual consent of the counselor and the counselee either explicitly stated or implicitly to be inferred.
- Takes place because the individual in need of help is aware of his own limitations and inadequacies.
- Involves confidence reposed in the counselor.
- Is often achieved and maintained through communication and interaction; it involves, gives and takes, *i.e.*, it is not a one way process.
- Involves a certain amount of 'structure'. The situation is either vaguely or clearly defined.
- Is marked by the desire for change in the existing condition of the client, that is, it is concerned with the improvement of the client.

In short, the marriage counselor's profession involves specialized knowledge, trained skills and the desire to provide comfort to others.

Summary

Law is not for a law's sake. Law is an instrument of social control. It originates and functions in a society, and for a society. The need for a new law, a change in existing law and the difficulties that surround its implementation

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[6] Shertzer, Bruce, Stone, Shelley C., *Fundamentals of Counseling*, Houghon Mifflin, 1968.

cannot be studies in a better manner. Without sociological enquiry, law and society are not divisible as water tight compartment. They are interlinked. The Alternative Disputes Resolution, Arbitration and Conciliation Act, 1996 was enacted for the speedy disposal, and for proper and permanent solution which is convenient for both the parties. It means that law is needed for the society.

The Family Courts Act, 1984 enacted for the settlement of family disputes, where emphasis should have been laid on conciliation and achieving societal desirable results, and adherence to rigid rules of procedure and evidence should have been eliminated. The Law Commission in its 59th Report in 1974 had also stressed that in dealing with disputes concerning the family the court ought to adopt and approach radically different approach than that adopted in ordinary civil proceedings, and that it should make reasonable efforts at settlement before the commencement of trial. The need was, therefore, felt in the public interest to establish family court for speedy settlement of family disputes. As per section 6 of the Family Courts Act, 1984 and the Maharashtra Family Court Rules (1987) No. 12 and 13, a marriage counselor attached to the counseling center shall be appointed by the High Court. The role of marriage counselor is to give the disputed parties a scope to resolve their disputes by way of reconciliation or an amicably settlement.

This non-doctrinal or empirical research was carried out by collective and gathering data by using methods/interviews, questionnaire, and counseling experts' views/opinions. The researcher concludes that marriage counseling is important in a judicial set up. The researcher also critical analyze the Alternative Dispute Resolution system (ADR), mediation and conciliation in judicial set up, and also suggest that marriage counseling is necessary not only Family Courts but in every marital disputes in court litigation and out of the court also. A pre-marriage counseling is also important. The views and opinions suggest that a marriage counselor plays various pivotal roles by using scientific technique as it is very important to save the matrimonial relationship, and it is most possible when a counselor tries to discuss various

options lying before the parties and to find out a proper and permanent solution. The parties can try to recognize or settle the matter permanently and amicably. The institution of marriage counselors is one of the most important and unique provisions of the Enactment. Marriage counselor is the back-bone of the functioning of the Family Courts.

Hence, it can be rightly said that the marriage counseling is a perfect mean to end unending marital disputes.

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AGGRIEVED WOMEN AND LIVE-IN RELATIONSHIPS: JUDICIAL DISCOURSE

Mr. Rajendra Anbhule*

Introduction

Lon L. Fuller contributed more than any other individual to the revival of Natural Law in the postwar years. He emphasized the theory of inner morality of law which he means that moral values are written into the very idea of law.[1] Law to be enforced must have minimum content of morality and in absence of it, law is incapable of execution. In India judiciary has interpreted the term, 'law' and 'morality' as contemplated by Fuller while adjudicating the cases relating to relationships in the nature of marriage. Pre-marital sex and live-in relationships are recognized to the extent of granting maintenance, residence and protection under statutory laws. While dealing with these types of cases all live-in relationships have not been protected under the garb of relationships in the nature of marriage. Judiciary is adumbrating law relating to live-in relationship in India on case to case basis approach. The present article deals with the issue of live-in relationship in the light of judicial approach towards it and subsequent statutory developments in India.

Meaning of Live-In Relationship

There is no legal definition of the term live-in relationship. Live-in relationship is: "An arrangement of living under which the couples which are unmarried live together to conduct a long-going relationship similarly as in marriage."[2] It is an arrangement whereby two people decide to live together on a long term or permanent basis

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1 Fuller, *The Morality of Law*, 192 (1969).

2 Available at: http://legalservices.co.in/blogs/entry/Live-In-Relationship, visited on 27/01/2013.

in an emotionally and/or sexually intimate relationship. The term is applied more frequently to those couples who are not married. In fact it has been emerged as a declaration of independence, keeping away from the 'shackles' of institutionalized marriages. It's a willful rejection of the institution of marriage, of the stereotypes it engenders, and of the restrictions and inequalities it has come to stand for.

Live-in relationships in India have still not received the consent of the majority of people. They are still considered a taboo to the Indian society. The majority of the people consider it as an immoral and an improper relationship.

Legal Status of Live-In Relationship

There is no legislative provision in India recognizing live-in relationship except the provision given under the Protection of Women from Domestic Violence Act, 2005[3] wherein female living in a relationship in the nature of marriage is termed as an aggrieved person. Before that the issue was that, whether a man and woman living together for a long time even without a valid marriage as per personal law entitle her to claim reliefs against male partner. In *A. Dinohamy* v. *W.L. Balahamy*,[4] the Privy Council for the first time laid down the preposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in consequence of a valid marriage, and in a state of concubinage. The Privy Council again reiterated the same principle, and made significant addition to the ruling of 1927 in *Mohabbat Ali Khan* v. *Muhammad Ibrahim Khan and Others*,[5] laying down that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years. For a live-in couple to be considered validly married, the Court wanted evidence of

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[3] According to provision to section 2(q) of the Act, a female living in a relationship in the nature of marriage may also file a complaint against male partner and his relatives.

[4] AIR 1927 PC 135.

[5] AIR 1929 PC 185.

cohabitation for a number of years, without specifying the minimum number of years.[6]

After 1950 the Supreme Court of India in *Gokal Chand* v. *Parvin Kumari,*[7] followed the principle laid down by the Privy Council in *Mohhabat Ali Khan* case, but added further that a continuous cohabitation of a man and a woman as husband and wife, and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the court cannot ignore them. Further in the case of *Badri Prasad* v. *Dy. Director of Consolidation and Others*,[8] the Court held that a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy.

The judgments given by Supreme Court in *Gokal Chand and Badri Prasad* case was again revisited by the Court while interpreting sections 50[9] and 114[10] of the Indian Evidence Act, 1872 in *Tulsa* v. *Durghatiya*[11] wherein the Supreme Court held that, in case of relationship of marriage between two persons there is a rebuttable presumption regarding marriage. The presumption can be drawn from natural events and

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[6] Available at: http://www.indiatogether.org/2008/aug/soc-livein.htm, visited on 27/01/2013.

[7] AIR 1952 SC 231.

[8] AIR 1978 SC 1557. For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. The Court observed that, in such cases a strong presumption arises in favour of wedlock. Proof as to *factum* of marriage by examining the priest and other witnesses are not necessary.

[9] It states that: "When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

[10] It states that: "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

[11] (2008) 4 SCC 520.

conduct of the parties. Long cohabitation as husband and wife raises such presumption. Law favours legitimacy of marriage and burden lies on the person who seeks to deprive such relationship to prove that no marriage took place. Thus in those cases where a man lived with a woman for a long time without formal proof of marriage, the woman has been accorded legal status with a view to protect her rights. Reading the provisions of sections 50 and 114 of the Evidence Act together, it is clear that that act of marriage can be presumed from the common course of natural events and the conduct of the parties as they are borne out by the facts of a particular case.[12] It is clear that the view taken by the Privy Council in *A. Dinohamy*[13] and *Mohabbat Ali Khan* case[14] has been consistently followed by the Supreme Court after 1950 granting a woman status of wife and favouring legitimacy of marriage.

Live-In Relationship and Issue of Maintenance

In case of woman who is in live-in relationship with the male partner, the question was without a valid marriage as per personal law whether raises a presumption of a valid marriage entitling such a woman to maintenance. In *Jagit Kaur* v. *Jaswant Singh*,[15] the Court observed with respect to Chapter XXXVI of the Code of Criminal Procedure, 1898 (Cr P C) that provisions for maintenance wives and children intend to serve a social purpose. Section 488 prescribes forum for a proceeding to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief. Again in *Nanak Chand* v. *Chandra Kishore Aggarwal*,[16] the Supreme Court while discussing section 488 of Cr P C, virtually came to the same conclusion that section 488 provides for a summary remedy, and is applicable to all persons belonging to any religion, and has no relationship with the personal laws of the parties.

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12 *Ibid.*, para 11.
13 *Supra* Note 4.
14 *Supra* Note 5.
15 AIR 1963 SC 1521.
16 AIR 1970 SC 446.

After the enactment of consolidated Cr P C, 1973 in *Captain Ramesh Kaushal* v. *Veena Kaushal,*[17] the Supreme Court held that section 125 is a re-incarnation of section 488 of Cr P C, 1898. It observed that this provision is a measure of social justice specially enacted to protect, and inhibit neglect of women, children and falls within the sweep of Article 15(3) reinforced by Article 39 of the Constitution. Speaking for the Bench Justice Iyer observed that: "We have no doubt those sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to the selective in picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts."

It may be noted that section 125, Cr P C provides for giving maintenance to the wife and some other relatives. The word 'wife' has been defined in Explanation (b) to section 125(1) of Cr P C as: "Wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

Despite the observation made by Supreme Court in *Captain Ramesh Kaushals* case the Court in future gave restricted meaning to the provision under section 125 in *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav and Another,*[18] wherein a two-judge Bench of Supreme Court held that, an attempt to exclude altogether personal law of the parties in proceedings under section 125 is improper. The Court also held that the expression 'wife' in section 125 should be interpreted to mean only a legally wedded wife. This case made an impact on subsequent judicial decisions.[19] However in *Vimala* v. *Veeraswamy,*[20] a three-judge Bench of Supreme Court gave wider meaning to the provision under section 125 and held that, section 125 of Cr P C, 1973 is meant to achieve a social purpose and the object is to prevent vagrancy and destitution. Explaining the meaning of the

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17 AIR 1978 SC 1807.
18 AIR 1988 SC 644.
19 *Infra* Note 22.
20 1991 AIR SCW 754.

word 'wife' the Court held: "..the object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term 'wife' in section 125 of Cr P C, includes a woman who has been divorced by a husband, or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective. However, under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife, and is, therefore, not entitled to maintenance under this provision."

The Apex Court again reiterated the law laid down *Vimala* case in 1991 by protecting those women who were not having legal status of marriage. In *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit and Anr*,[21] the Supreme Court held that, the standard of proof of marriage in a section 125 proceeding is not as strict as is required in a trial for an offence under section 494 of the Indian Penal Code, 1860. The Court explained the reason for the aforesaid finding by holding that an order passed in an application under section 125 does not really determine the rights and obligations of parties as the section is enacted with a view to provide a summary remedy to neglected wives to obtain maintenance. The Court held that maintenance cannot be denied where there was some evidence on which conclusions of living together could be reached.

The law laid down by Supreme Court in *Yamunabai* case giving restricted meaning to the provision under section 125 of Cr P C, 1973 was again relied by the Supreme Court in a subsequent decision in *Savitaben Somabhat Bhatiya* v. *State of Gujarat and Others,*[22] wherein the Court held that however desirable it may be to take note of plight of an unfortunate woman, who unwittingly enters into wedlock with a married man,

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21 1999 AIR SCW 3844.
22 AIR 2005 SC 1809.

there is no scope to include a woman not lawfully married within the expression of 'wife'. The Bench held that this inadequacy in law can be amended only by the Legislature. From the above it is clear that there was a divergence of opinion on the interpretation of the word 'wife' in section 125 of Cr P C, 1973.

Constitutional Protection to Live-In Relationship

It is to be noted that the acceptance of pre-marital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective, and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy.[23] Morality and criminality are not coextensive.

Whenever restriction is imposed on pre-marital sex and live-in relationship it violates Article 21 of the Constitution of India which provides for right to life and personal liberty, and more particularly right to privacy recognized under the canopy of Article 21.

In *Payal Sharma* v. *Supdt., Nari Niketan Kalindri Vihar, Agra*,[24] while interpreting the right of petitioner in the light of Article 19 and 21 of the Constitution, the Court held that the petitioner, a lady about 21 years of age, being a major, has right to go anywhere and to live with anyone. Man and woman even without getting married can live together if they wish. This may be regarded immoral by society, but not illegal. There is a difference between law and morality. In *Lata Singh* v. *State of U.P.*,[25] the Supreme Court held that, a live-in relationship

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[23] *Infra* Note 26.
[24] AIR 2001 All 254.
[25] AIR 2006 SC 2522.

between two consenting adults of heterogenic sex does not amount to any offence even though it may be perceived as immoral. A major girl is free to marry anyone she likes, or live with anyone she likes.

The further constitutional sanction to live-in relationship has been given by Supreme Court in *S. Khushboo* v. *Kanniammal,*[26] wherein the Court observed that, while it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting. Though an *obiter dictum* this case has provided a positive impetus to live-in relationship in India.

Live-In Relationship and the Domestic Violence Act, 2005

By enacting the Protection of Women from Domestic Violence Act, 2005 (hereafter referred as 'the Act') Parliament of India has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship, still rare in our country, sometimes is found in big urban cities. In India, in the wake of changed social context, judiciary has also taken cognizance of the live-in relationship while interpreting the term, 'relationship in the nature of marriage' as used in section 2 of the Act.

For detailed scrutiny of the term, 'relationship in the nature of marriage' some key provisions which are there in the Act are important to be taken into consideration.

Section 2(a) of the Act states: 'aggrieved person' means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

Section 2(f) states: 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when

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[26] 2010 Cri L J 2828.

they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

Section 2(s) states: 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

Section 3(a) states that an act will constitute domestic violence in case: it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.

It is to be noted that section 2 (f) of the Act has used the term, 'lived together in a share household' while defining domestic relationship. The definition is silent about the period of residence of the parties. In *M. Palani* v. *Meenakshi*,[27] the Madras High Court held that, the Act does not contemplate that the petitioner and respondent should live or have lived together for a particular period or for few days. A fact that they shared household at least at the time they had voluntary sexual intercourse is sufficient to enable woman to maintain application for maintenance. In this case there was consensual sex between petitioner and respondent, but there was no promise to marry her.

Though the term, 'relationship in the nature of marriage', has been used in different definitions given in section 2 of the Act it has not been defined. In *D. Velusamy* v. *D. Patchaiammal*,[28] the Supreme Court laid

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27 2008 (5) ALL MR (Journal) 38.
28 2011 Cri L J 320.

down following requirements to be fulfilled for determining the term 'relationship in the nature of marriage':

1. The couple must hold themselves out to society as being akin to spouses.

2. They must be of legal age to marry.

3. They must be otherwise qualified to enter into a legal marriage, including being unmarried.

4. They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

The Court held that a 'relationship in the nature of marriage' under the Act of 2005 must fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. Thus a relationship with married person cannot be considered as relationship in the nature of marriage.

The Court also said that all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the four conditions mentioned above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' that he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, be a 'relationship in the nature of marriage'.[29] The Supreme Court has thus impliedly rejected the judgment given by the Madras High Court in *M. Palani* case where parties lived together at the time of having sex was held by the Court as domestic relationship entitling a woman to claim maintenance.

In *D. Velusamy* case[30] the Court also observed that the judgment would exclude many women who have had a live-in relationship from the benefit of the Act of 2005,

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[29] *Ibid.*, para 34.
[30] *Ibid.*, para 35.

but then it is not for the court to legislate or amend the law. Parliament has used the expression 'relationship in the nature of marriage' and not 'live in relationship'. The court in the garb of interpretation cannot change the language of the statute.

Conclusion

The law relating to live-in relationship in India is not clear, and there are many questions that need to be answered. Right of the child born out of such relationships ought to be secured. There is a need of urgent legislation which will clearly dictate the ambit of live-in relationship, and the rights and obligations of the partners in such relationship. Despite this due to the willingness of judiciary to provide immediate solution to the existing problems, following propositions laid down by the Apex Court are to be taken into consideration while interpreting the term live-in relationship:

1. A woman who is in live-in relationship with a male partner can be treated as an 'aggrieved person', as contemplated by section 2 (a) of the Protection of Women from Domestic Violence Act, 2005.

2. A woman and her male partner must hold themselves out to society as being akin to spouses; must be of legal age to marry; must be otherwise qualified to enter into a legal marriage, including being unmarried; and must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

3. They must have resided together in a share household as contemplated by section 2(s) of the Protection of Women from Domestic Violence Act, 2005.

CHILD CUSTODY AND EFFECT OF NONCOMPLIANCE OF ORDER OF ACCESS

Ms. Aruna G. Faraswani*

Priscila Comino, conducted a study as part of her doctoral thesis in psychology at the University of the Basque Country (UPB/EHU) Spain, by using some of the yardsticks as syndromes like introversion, depression, attention problems or delinquent behaviour. She has stated that the poor handling of divorce by parents, rather than the act itself, causes additional behavioural problems for the children. It is not the divorce in itself that can lead to problems and children. It is the divorce linked to interparental conflict, a lack of co-parenting and an unsuitable family climate, inadequate co-parenting, changes in the child's daily routine or psychological problems of the parents themselves.

The worst affected victims of divorce are probably the children. The most traumatizing situation for a child is perhaps seeing one's parents getting separated. Being the constant witness to fights and an emotional turmoil among his or her parents is certainly an unfortunate circumstance for a child. As for a child, both of the parents are dear to him or her, being away from one of them can hamper his emotional state of mind severely. Hence, child custody and child support is an important affair in divorce that should be dealt with care to ensure a bright future for the child.

Child supported visitation rights also have a positive effect on the child. Due to frequent meetings with non-custodian parent will make him believe that he is still close to his parent. On receiving both the emotional and financial support from non custodian parents will certainly lead to a feeling that his parent still loves and cares for him.

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In matrimonial disputes there are several misconceptions on the issue of custody and visitation rights and guardianship. Custody implies the living of the child with one parent. Guardianship implies the proprietal rights over the child's person and property. In a traditional family it is the father who is favoured to be responsible with regard to the issues of proprietal rights of the minor whereas the mother is favoured with the issue of being a caretaker of the minor, but when there is a custody battle neither the father nor the mother are automatically given the custody.

Section 6 of the Hindu Minority and Guardianship Act, 1956 states that the natural guardian of a Hindu minor is the father and after him, the mother provided the minor has not completed the age of five years then the custody would be with the mother. Under section 6(b) in case of an illegitimate minor child it is the mother and after her, the father.

Section 26 of the Hindu Marriage Act, 1955 is the provision whereby a direction can be given for the custody of the child whilst passing a decree in any proceeding under the Act. The expression 'child' under section 26 of the Hindu Marriage Act covers both legitimate and illegitimate child.

The court can consider to whom the custody of the child should be given, but the court is not competent to appoint a guardian of the minor child whilst granting a decree of dissolution of the marriage.

Section 17 of the Guardians and Wards Act, 1890 describes about the guidelines to be considered consistently with law to which the minor is subject in appointing of the guardian, for welfare of the minor.

The Hon'ble Supreme Court in *Rosy Jacop* v. *Chakranukhal*[1] has held that the children neither are not mere chattel nor are they play things for their parents. The controlling consideration is the welfare of the child, and not the rights or sentiments of the party.

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[1] AIR 1973 SC 2090.

The Hon'ble Supreme Court in the case of *Jai Prakash Khadria* v. *Shyam Sunder Agarwal*[2] has observed that the orders relating to custody of children are the very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody, but such change in custody must be proved to be in the paramount interest of the child.

A child always wants an ideal situation. It is not good for the child to live in a broken home. Hence, on the doctrine of best interest of the child in changed circumstances the issue of custody of the child can be modified from time to time.

As regards custody of the minor child there are bitter battles not only between parents but also between grandparents and/or father and grandparents. In *Jai Prakash Khadria*[3], the paternal and maternal grandparents of the minor grandson played a tug of war for the custody of minor grandson, having utmost love and affection for him, and not with any oblique motive. The Hon'ble Supreme Court directed the maternal and paternal grandparents to invest Rs. 10 lacks in the name of minor grandchild, and allowed the custody to remain with paternal grandfather.

In the case of *Dinesh @ Syed Mohamed Sheik Sikandar and Ors.* v. *Jareena Begum*[4] the battle was between father along with his father, and the maternal grandmother. The Hon'ble Madras High Court after interviewing the child, inquired about whether the father was having regular employment or not. In fact, child was put in a school and she was in healthy condition and proper medical care was also given and there was no allegation of any ill treatment to the child. Hence, the Court awarded custody to the father.

In the case of *Anjali Kapoor* v. *Rajiv Baijal*[5] the facts were: A female child was born on 20.5.2001 and the mother of the child died at the time of delivery. The child

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2 AIR 2001 SC 1056.
3 *Ibid.*
4 II (2011) DMC 550.
5 II (2010) DMC 595(SC).

was taken from the hospital by the material grandmother. Questioning the same, the father sought custody of the child being the natural guardian, in the Family Court. The Family Court rejected the application of the father on the ground that the father was not in a good financial position, and he was taking loans from several persons including the maternal grandparents of the child. The same was reversed by the Madhya Pradesh High Court. The matter was taken to the Hon'ble Apex Court. Ultimately, the Hon'ble Apex Court allowed the appeal, and vested the custody in favour of the maternal grandmother observing that: "Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute, and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the Appellant grandmother for a long time, and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the Appellant to retain the custody of the child."

The issue of custody gets complicated when parents are living in a foreign country. Disputes arise, and one of the parent with the child returns to India. The issue then arises which court has got jurisdiction, and if there are orders passed by the foreign court then, what are its implications.

As regards territorial jurisdiction, the Apex Court in the case of *Pooja Bahadur* v. *Uday Bahadur*[6] has observed about where the child ordinarily resides. It is very important to understand the meaning and definition of the word and phrase 'ordinarily reside'. The said meaning and definition has been discussed by the Hon'ble Supreme Court in the case of *Ruchi Manjoo* v. *Sanjv Manjoo*.[7] It was held that the expression 'ordinary resides' would imply something more than a flying or a casual visit to a particular place. A person resides in a place by choice makes it his abode permanently or even temporarily depends upon the facts of each case. The intention to make that place where the person resides

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[6] AIR 1999 SC 1741.
[7] II (2011) DMC 317(SC).

once ordinary abode can be considered ordinarily resides at a particular place.

The Principle of Comity Court was also considered in the said case by the Apex Court 1 reproduce the paragraph from the judgment as follows: "Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of section 13 of the Code of Civil Procedure, 1908 as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity, and not object surrender, is the *mantra* in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive, and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plenitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case."

Further it has been held that: "This principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is the entire more so where the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Case of *Dhanwanti*

Joshi and *Sarita Sharma*[8] respectively also supported the said proposition".

The Hon'ble Delhi High Court in the case of *Deepti Mandlaus* v. *State (Govt of NCT) and Anr.*,[9] wherein facts briefly were that a petition was filed on behalf of the mother for the issuance of a writ of *habeas corpus* directing the father to produce the minor child before the Court and to handover the custody to her, the mother. Both the parents were working as software professionals in Canada since 4.4.2009. Father and child both are Indian citizens. With the consent of mother, child along with his father came to India on a visit. Father decided not to go back to Canada and got the child admitted in a school in Noida. He also filed a petition under section 7 of Guardians and Wards Act, and section 6 of the Hindu Minority and Guardianship Act before the Patiala House Court, New Delhi to appoint him as a sole guardian of the minor child. Notice was issued to the petitioner mother regarding the custody of minor son, and as a term of the custody order the father shall bring back the minor son to the jurisdiction of the said Court forthwith. On 14.8.2010 respondent father received copy of petition as well as copy of the said Order dated 11.8.2010. On 6.9.2010 the mother/petitioner filed the present writ petition. The Hon'ble High Court observed that the principles of Comity of Courts did not help the mother as the child was born in India; no courts in Canada were already in session of the custody case. The issue of child must always be addressed from the standpoint of the child, and much attention to the right of the parents to custody should not be given. A paragraph is reproduced: "An issue of custody of a minor is actually a facet of the minor's right to life guaranteed under Article 21 of the Constitution of India. Irrespective of anything, the courts have to look after the interests of the minor, and not let themselves to be sucked into the ugly battles of the minor's parents. It is not so much a question as which parent deserves to gain custody of the child as it is a question of which parent's care is best for the child."

Considering all the judgments, there is one principle *i.e.*, the first and paramount consideration is the welfare

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[8] 1998(1) SCC 112 and 1(2000) DMC 413.
[9] II (2011) DMC 176 (DB).

of the child. While considering the same, the custody can be handed over to either of the parent, or even the grandparents depending upon the facts and circumstances of each case.

The Hon'ble Supreme Court in the case of *Kirtikumar Maheshankar Joshi* v. *Pradipkumar Karunashankar Joshi*[10] has observed that: "In our judgment, the law relating to custody of a child is fairly well settled and it is this: In deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statues and the rights flowing interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases is neither bound by statutes nor by strict rules of evidence or procedure, nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction, ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comfort, moral and ethical values cannot be ignored. They are equally, or we may say even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

In the case of *Anjali Kapoor* v. *Rajiv Baijal*[11] it has also been observed that welfare of child prevails over legal rights of parties while deciding custody.

In the case of *Lakha* v. *P. Anilkumar*[12] the Hon'ble Court has observed that remarriage of father cannot be a ground for not granting custody.

It is normally considered that the girls require guidance of their mother and hence merely because the mother is working lady she should not be refused custody of the female child. This is observed in the case

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10 1992(3) SCC 573.
11 2010(1) Mah L J 2(SC).
12 2007(1) DMC 57(SC).

of *Thirty Hoshiae Dolikuka* v. *Hosiam.*[13] Inhere the Hon'ble Supreme Court has recognized mother being the equal natural guardian on par with father, and in absence of father can act validly on behalf of the minor as her guardian. For the court to consider refusal of custody, the grounds could be cruelty or immorality or renouncing the world, or ascetic.[14]

As stated in foregoing para father is the natural guardian of a Hindu minor. But there being changes in social and economical environment in the society, the women have progressed and are in equality with men in all aspects.

The new emergent trend between the couples is that they are agreeing to joint custody of children despite their own differences. This is a favourable approach in the western country to handle the issue, and is also emerging and being considered in the metro cities. Joint legal custody of a minor child enables both the parents to take all major decisions jointly including decisions of the child's education, religion, medicine, discipline, upbringing, and all plans for the future with both the parents considering the best interest of the child. As the child needs to grow in a healthy environment with the involvement of both the parents, sharing parenting time is important more so for the child, rather than the couple. Giving the custody of the child to one parent, and making the other just a visitor, creates distances in a healthy relationship, and not fair to the child; the exceptional cases where one parent is abusive or alcoholic then the custody to one parent is justified.

Maintenance of successful families and communities, are entitled to legal recognition and protection.

Visitation or access rights are granted to non custodial parents or other relatives allowing them to visit and spend time with their child or grandchild. Visitation and custody governed by the same principle, and are closely interlinked.

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13 (1982) 2 SCC 54.
14 *Geeta Hariharan* v. *R.B.I.,* AIR 1999 SC 1149.

Order should be specific, and then it becomes easier for the parties and the court to know the rights of the parents with visitations.

A copy of the order of visitation rights to be sent to the school by the court for the non-custodial parents to participate in the various functions and programmes of the school concerning the child and learn the progress of the child.

If either parent violets or access order then the Bombay High Court in the case of *Vinodchandra* v. *Anupama*[15] has observed that: "When the husband fails to pay maintenance as per orders of the court, even if interim order, the application of husband for custody or access to child can be stayed till such time arrears are paid."

Can the right of the child to enjoy the company of his father be equated to the maintenance amount not being paid? No doubt this is one of the measures to discipline the father, and punish him that if he cares for his child he must pay maintenance. On the other hand in spite of the father paying the maintenance the custodian parent mother does not bring the child for access to the father. Due to vengeance against each other the couple uses the child, and he becomes the victim. Can competent court be a silent spectator? Measures have to be evolved to protect the rights of the child to enjoy his parenthood irrespective of the respective indifference between his parents. In USA, they draw up a parenting plan or custody agreement if either parent violates a visitation order, the parent in violation can be held in contempt of court, and fined and jailed until he/she agrees to comply with the order. If the non-custodial parent fails to return the child to the custodial parent and keeps the child for long period of time even after the custodial parent has demanded the child, the non-custodial parent can face criminal charges.

In our State, we have access/visitation rights given to the non-custodial parent to the Children Complex situated in the court complex, or with the consent of both

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15 AIR 1993 Bom 23.

parties suiting the convenience of the child at the nearest N.G.O. Office, where such facility is available, and where the rapport between the child and the parent is very cordial, the non-custodial parent take the child with his at a specified time and place, and returns the child at the specified time and place to the custodian parent.

The wife held that children did not want to meet the father hence she was not liable and had not willfully defaulted the order. After considering all the facts on record the Court observed that the wife had willfully breached the order of access and had consistently defaulted in bringing the children as directed to Children Complex.

In Para 22 the Court held that the report of the Child Counselor is must, as the facility is provided in Family Court. In Para 23 it has been observed that in the normal course it is a correct order to struck off the defense of the wife. The Court in Para 26 held that in an order of access of a child to his father which would require to be effectuated not to grant father any 'rights' he may claim, but to grant the child the invaluable right of having his father's care and affection, the wife deserves to be given one more opportunity to mend her ways to allow the child access to the father by herself, not interfering therewith directly or indirectly. The Court gave direction to the wife to attend the Child Counselor to decide the venue, so also the husband and the wife to get the children for access at the said venue, and leave the premises of the mentioned date and time. Thirdly, if she did not follow the direction then her defense to be struck off.

This judgment gives stimulation for a deep thought process. It, therefore, needs to be considered that though technically one need to pass an order, but whether the interest and welfare of the child will be protected.

In the event of noncompliance by the party directed to act, custody orders are enforceable by the remedies generally associated with equitable, injunctive or coercive court orders.

The selection of remedy and imposition of sanctions by the court in each is depended on the circumstances of

the family, the nature of the parenting plan violations, and the remedial goals set by the court. The first test is whether the custodian parent had willfully disobeyed/violated the order of the court if not was there a good cause for withholding the child.

Margaret M. Mahoney[16], in her article, *The Enforcement of Child Custody Orders by Contempt Remedies,* has stated various remedies for violation of a court order. They are as follows:

- The custodian parent should be sent for a day of two, to a community centre like hospital, orphanage, old age home, municipal school, juvenile centre, *etc*.
- A working parent can be punished by suffering simple imprisonment on weekends/holidays.
- There can be an order of court arrest for a day/days depending upon the period of disobedience.
- Temporary shift of custody.
- Compensation of access for the loss of time to be spent with the child.

Lastly, one would also like to mention about the case of two minor children, Aishwarya, then five months old, and Abhigyan, then two years old, which had been handed over to different foster houses, by the Norwegian court. The natural parents were allowed to meet their children only once in a year for one hour, on considering the facts that the mother over-fed the children, she fed with her hand, and that the son slept with his father, which are perfect normal acts in an Indian family life. It reflects the Indian culture. This culture and behavior is alien to the Norwegian Government, and they have their own moral yardstick.

On learning the facts of this case there does not appear to be any abuse or mal-treatment of the children.

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[16] Professor of Law, University of Pittsburgh, Pennsylvania, United States.

By keeping the children in different foster homes at that tender age, away from their natural parents till the age of 18 years, would traumatize them. It is incredible that a State can infringe on the personal affair of a family to such an extent that the relations between the children and their natural parents are broken down, and between the siblings snapped. The children, being separated from their natural parents, are not beneficial as it is not in their interest and welfare. It could amount to gross violation of human rights and the rights of the child to enjoy his parenthood with the natural and be rooted to the culture of his family.

To conclude there is one principle of paramount consideration, *i.e.*, the welfare and interest of the child is of prime importance irrespectively wherever he resides. The same is supported by child welfare laws. The issue of custody and access are dependent upon the facts and circumstance of each case. The court order is to be specific so that the rights of the parent as regard visitation are clear. If the same is disobeyed then the court has to select a remedy and impose the same in order to reinforce the credibility of the courts, and a general attitude of public deference to judicial authority.

RIGHTS OF UNBORN CHILD: ISSUES AND CHALLENGES

Dr. Archana Ranka*

Introduction

There have been several critical issues which underlie the problem of right of unborn child. These issues need to be addressed carefully so as to evolve a strategy to combat the problem. Further, there is a complexity embedded in the host of issues that constitute the terrain within which sex determination and sex-selective abortion takes place in India. Thus, there is a need for a multi-pronged policy and programmatic approach within which legal and other strategies have important roles to play. The holistic approach to adopt strictest measures is the critical and most radical call of the time.

Right to life is a well established right and is recognized by various national and international instruments; but a serious question is that does a foetus enjoy this right? And if so which are such rights we do not have definitive answer for. Globally, the various Constitutions recognize the sanctity of life; but they have failed adequately to protect the life of a foetus. Judicial pronouncements are also not conclusive, and vary in different jurisdictions.

In India, the right to life is guaranteed to every person under the Constitution. If we say that a foetus enjoys right to life, then will it affects the right of a pregnant woman to abort? Is a foetus to be recognized as a separate entity or a part of its mother? These questions are baffling the courts worldwide. There is a desperate need for the courts to arrive to a definite decision on these vital issues and recognize the right of a foetus.[1]

Critical Issues

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1 Prashanth, S.J., Right to Life of Foetus, *Criminal Law Journal*, AIR 2005.

I. Strict Laws and Political Will

It is easy but unrealistic to suggest that the Government must frame laws which have sharp nails and teeth, and then vigorously implement them to curb the problem. The reality seems to be that the Government, whatever its political complexion might be, relies on the prominent castes for votes and support.[2] Further, it is difficult to take action against doctors in India as they have a powerful lobby and have close links with politicians. The Government apathy is another major hurdle. Above all, the problem of giving birth to a foetus (unborn child) essentially is at prey of the doctor, the pregnant woman and/or her husband.

II. Role of Education

The impact of modernity and modern education is known to be complex. In States having a long history of female infanticide (now foeticide), the education may not enlighten the communities like *Khaps* in Haryana state, and the castes which have been getting rid of their female offspring for generations to generations. On the contrary, a college or university education may enhance the groom's market price. Degree and job-oriented education, which our educational system provides, may not create the awareness of discrimination against females and other social evils.

This of course at all costs does not mean that we should not have education. Literacy has surely very positive aspects and must be encouraged, at all costs. The point is that the potential of our formal educational system to remove gender bias and eradicate social evils is sometimes overstated. *E.g.*, high dowries are endemic among the Syrian Christians of Kerala though this State is often projected as a model which other States should try to emulate.[3] It is absolutely necessary to bring about an attitudinal change among castes and communities which resort to female foeticide and infanticide, through a different kind of formal or informal education in rural areas. This is a tall order as it calls for a radical

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[2] Vishwanath, L.S., Female Foeticide and Infanticide, *Economic and Political Weekly*, 1st Sept 2001. Available at: www.epw.org.in

[3] *Ibid.*

restructuring of our educational system.[4] It is also clear that unfortunately people don't understand that both the genders are essential to create stability as well harmony, and predetermination of sex has serious effects which prove disastrous to the overall growth and wellbeing of the society.

III. Reduction in Dependence on Agricultural Land

As noted earlier, dominant castes at rural areas have derived their socio-economic status from the extent of agricultural land they owned, and have tried to avoid high dowries and land alienation through female infanticide. Since India has embarked on the capitalist path, a significant reduction on agricultural land as a resource could be a distant possibility.[5] Communities actively involved in female infanticide need to be persuaded towards trade and commerce as aid to agriculture, or as substitute of agriculture.

IV. Criminalization of Female Foeticide

Recently, the Chinese Government criminalized abortions and ultrasounds obtained for sex-selection purposes, in the hope that criminalization will prove more successful in curbing these practices. A new Chinese law calls for prison terms up to three years and fines for doctors and other health workers who assist in telling the gender of unborn babies, leading to abortions.[6]

To kill someone because of his or her sex (gender) is, in some sense, a heinous hate crime. It needs to be punished by the same 'deterrent logic' as in the case of an ordinary murder, whatever punishment to be given, it should be effective, coercive and terrifying one.

The problem with investigating a woman's reasons for abortion is, however, not that simple. Consider the enforcement of such a law. If police suspects a woman of having had a sex-selection abortion, they can subject her to the sort of interrogation that might ordinarily

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[4] *Ibid.*
[5] *Ibid.*
[6] Anonymous, *Times of India*, New Delhi, 27th Dec 2005.

accompany a homicide investigation. Even if a woman accused of wrongful abortion is found 'innocent' after this investigation, the fact of her abortion would may become a public knowledge, and she would may suffer the stigma that attaches to this procedures (even when the procedures are done for medically sound reasons). Also, because it may often be difficult for a person to establish her reasons for terminating a pregnancy, the prospect of a criminal accusation could place a serious chill on the exercise of the right to choice, even for women who have no preference for male or female offspring.[7]

V. Ethics and Morals

Morally, the decision to terminate a pregnancy on the basis of a baby's sex shall by all means to be an ugly decision that deserves no protection. But the reality is that the reproductive rights of women who would never abort on the basis of sex depend on the Government's staying out of the decision altogether. Here we must hope, instead, that women will prove worthy of the trust and responsibility that is placed in their hands, even as we refrain from finding out whether that trust is warranted.[8]

According to some writers, criminalization of female foeticide works as a catalyst in the fire of social stagnation. What we need to realize is that female foeticide is not a result of criminal intent but that of compulsion caused by circumstances caused by rapid victimization of the females in the society. An evil practice can be curbed not by cutting the stems growing on the trunk above the ground, but by eliminating the roots standing beneath. Social awakening, vigorous campaigning against female foeticide, honest and full enforcement of dowry prohibition, and sexual harassment laws are the steps towards uprooting the practice of female foeticide.[9]

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[7] Colb, S.F., Criminalization of Sex Selective Abortion in China, *Find Law*. Available at: http://www.indiafemalefoeticide.org

[8] *Ibid.*

[9] Agrawal, M., *Female Foeticide: Law and Its Effectiveness*. Available at: http://www.indiafemalefoeticide.org

The above view is correct. However, not all crimes are committed with *mens rea i.e.*, a criminal intent. *E.g.*, the cases of violations of environmental and traffic regulations. The deterrent measures need to be used to 'discipline' the erring public and medical fraternity, along with social awakening measures.

"We may have to, for some time at least, revives the guilt of foetal murder. It would be calling a spade a spade"...an excerpt from the *Hippocratic Oath*, written 2,300 years ago, reads like an accurate prophecy of doom: "Our mistakes are not discovered by the patient (or their kin in case of the deceased)...and even if they are...they may whimper but rarely scream...and the worst penalty a doctor has to pay for his sins is disgrace...and it is surprising how little it (disgrace) bothers those who are used to it."[10]

Families that seek 'Female Foeticide Services', but more importantly doctors and medical practitioners (and all categories of employees in establishments with ultrasound sonography or other diagnostic, or fertility treatment facilities) who use these facilities to either commit or aid in the commission of female foeticide, or, to use Satish Agnihotri's phrase 'Female Foeticide Service Providers' will be liable for punishment for perpetrating crimes against humanity under the provisions of the Rome Statute (International Criminal Court)[11] in far more serious ways than contemplated by the current legislation, which imposes extremely mild punishment for the first offence and then steps it up gradually. Thus, the penalty structure itself defeats the purpose. Clearly, therefore the question of criminal responsibility and liability must be structured on the basic of an understanding of the gravity of the offence and not a response to a 'social evil'.

VI. Sex Determination: A Social or a Woman's Issue

Though sex determination has to be understood in the context of increasing violence against women, it has to

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[10] Sridhar, L., *Female Foeticide: The Collusion of the Medical Establishment*. Available at: http://www.indiafemalefoeticide.org

[11] Article 25 of the Rome Statue addresses the crucial question of individual criminal responsibility.

be viewed as a social issue. The term 'sex-selective abortion' is in use in recent years and various United Nations publications also use this expression. But if one's objective is to fight foeticide, one must know how best to convey the message of condemning foeticide to the masses.

Findings and Inferences

Laws cannot be enforced in the absence of a favorable consensus. In pluralistic society like India such consensus is a function of democratic constitutionalism and social development. A change in material conditions of life needs to be accompanied by a change in cultural preferences in favor of unborn child. The most vital important right of an unborn child is its right to take birth. Procuring abortion is condemned as an offence except for preserving the life of the mother. At what stage of pregnancy does the unborn child get a right to birth?

Indian Perspective

In India, since times immemorial, abortion has not been considered as an offence. The Hindus as well as Muslims considered it to be a forbidden act only and simply in the Indian Penal Code, 1860, in view of the religious, moral, social and criminal offence under sections 312-318, but where the abortion is on medical grounds in order to protect the life of the mother or child, it does not amount to an offence. These strict legal provisions on abortion have led to a large number of illegal abortions. In order to eliminate the high incidence of illegal abortions, the Medical Termination of Pregnancy Act, 1971, was enacted which permitted abortions on three grounds:

1. Health Ground: When there is danger to the life or risk to physical or mental health of the woman.

2. Humanitarian Ground: When pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman *etc.*, and

3. Eugenic Ground: When there is a substantial risk that the child, if born, would suffer from deformities and disease.

Thus right to birth is conferred on the unborn child who can be restricted in the interest of the mother or the child itself.[12]

Conclusion

In addition to the right to birth, again it is reiterated that simultaneously the unborn child has the right to healthy growth in unpolluted environment. Regarding the unborn child's rights in the realm of torts, the Congenital Disabilities (Civil Liability) Act, 1976, was passed by the British Parliament providing for action that may lie against a person or authority.

Moreover, we now have time at our disposal. Instead of blaming each other, we should take quick initiatives without loss of time. The change should start within each one of us. Let bygones be bygones. Mistakes committed by our forefathers should not be repeated by the present generation. Most of us and we are the future parents, and with us lies the responsibility of maintaining the balance in our society. At last, this research would like to be concluded with a saying which was aptly remarked by *Manusmriti*, the great sacred, the very first *Smriti* writer of Hindus[13]: *Yatra Naryaste Pujante, Ramante Tatra Devta*, which denotes that where ever women are worshipped and woman hood is honoured, respected and revered, *devta i.e.*, the God resides, settles and makes His abode perpetually; and where the women are insulted, dishonoured, degraded, battered and beaten cruelly, or harassed God does not come, and saintly moves away.

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12 Dr. Kameshwar, G., Basic Right of a Child – Born and Unborn, *Criminal Law Journal*, AIR 2002, p 144.

13 *Manusmriti*, VII 4-7.

RIGHTS OF DISABLED CHILDREN: NEED FOR PRACTICAL IMPLEMENTATION OF LEGISLATIVE PROVISIONS IN INDIA

Dr. Jayashree Palande*

Introduction

All school going children, whether they are disabled or not, has a right to education as they are the future citizens of the country.

Some children with special needs may not benefit from regular classroom education due to various reasons including disability. In such a case, it is only appropriate that they be provided with education in some other meaningful way. This entails changes in curricular decisions and classroom arrangements, provision of aids and appliances, arrangements for finances and above all, appropriate teacher preparation. The most important aspect of this situation is the economics of developing such a large task-force of personnel to meet the needs of persons with disabilities, whose prevalence is usually quoted as 'one in ten'. According to the *National Policy on Education, 1992* the number of school going children with disabilities in India is reported to be about 12.59 million. It is in this context that this paper critically analyses children with disabilities, and their education and law.

Concept of Disability[1]

Since antiquity, society has detected disabilities arising out of obvious deficits in anatomical structures, sensory functions and intellectual developments amongst its members. These disabilities debarred the affected persons from participating in the mainstream of social

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1 Singh, Aditi S., Nizamie, Haque, *Disability: The Concept and Related Indian Legislations.*

life. The concept of disability has become an important issue for re-examination and re-classification.[2]

In the past two and a half decades, as the disability rights movement has emerged, the concept of disability has shifted from individual impairment to a more social phenomenon. In this social view, persons with disabilities are seen as being restricted in performing daily activities because of a complex set of interrelating factors, some pertaining to the person and some pertaining to the person's immediate environment and social/political arrangements. The social concept of disability introduces the notion that society has erected barriers, physical or attitudinal, that affect persons with disabilities. Consequently, Governmental programs and policies have evolved to include fixing the environment (*e.g.*, making buildings barrier-free) and providing income assistance or work-related supports to help persons with disabilities participate more fully in the community and the workplace.

In November 2001, the World Health Organization[3] (WHO) released a new framework, *the International Classification of Functioning, Disability and Health (ICF).* The ICF was a seven-year effort involving some 65 countries. The ICF has since been accepted by 191 countries. This new framework goes beyond a medical approach to take a much broader view of disability. The ICF looks at the body, individual activities, social participation and social environments. Instead of a negative description of disability, impairment and handicap, the ICF provides a neutral description of body structure, function, activities, and participation. It also recognizes the role of environmental factors in either facilitating functioning (body functions, activities and participation) or raising barriers. Under the framework, the term 'disability' refers to externally imposed

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[2] Banerjee, G., The Concept of Disability and Mental Illness, *Mental Health Review*, 2001.

[3] World Health Organization (WHO) is a specialized agency of the United Nations (UN) that acts as a coordinating authority on international public health. Established on 7th April 1948, and headquartered in Geneva, Switzerland, the agency inherited the mandate and resources of its predecessor, the Health Organization, which had been an agency of the League of Nations.

impairments, activity limitations or participation restrictions.[4]

Disability in India

- **Historical Perspectives**

Until the recent past there was no comprehensive law for persons with disabilities. The first attempt was made in July 1980, when a Working Group was set up. A draft legislation known as the Disabled Persons (Security & Rehabilitation) Bill was prepared in 1981, which was also the International Year of Disabled Persons. In the year 1987-88 a Committee was constituted under the Chairmanship of Member of Parliament Shri Bahrul Islam who was the former Judge of Supreme Court. The Committee submitted its report in June 1988 with wide-ranging recommendations concerning the various aspects of rehabilitation, *e.g.*, prevention, early intervention, education, training, employment *etc.* These recommendations, however, could not be enacted into a law. Since welfare of the disabled is a State subject, Indian Parliament lacked jurisdiction in passing a comprehensive legislation at the national level.

In December 1992, a conference was held in Beijing under the aegis of 'Economic and Social Commission for Asia-Pacific'[5] (ESCAP) which launched the Asia-Pacific

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[4] Human Resource Development, 2003.

[5] The Economic and Social Commission for Asia and the Pacific (UNESCAP or ESCAP), located in Bangkok, Thailand, is the regional arm of the United Nations Secretariat for the Asian and Pacific region. It was established in 1947 (then as the UN Economic Commission for Asia and the Far East) to encourage economic cooperation among its member States. The name was changed to the current in 1974. It is one of five regional commissions under the administrative direction of United Nations headquarters. The ESCAP has 52 member States and nine Associate members, and reports to the UN Economic and Social Council (ECOSOC). As well as countries in Asia and the Pacific, it includes France, the Netherlands, the United Kingdom and the United States. The ESCAP is headed by Executive Secretary Noeleen Heyzer of Singapore. Ms. Heyzer is the first woman to head ESCAP, which is the biggest of the UN's five regional commissions, both in terms of population served and area covered. Fifty-two countries are members of ESCAP, and there are nine countries which are associate members. ESCAP's regional focus is managing globalization through programs in environmentally sustainable development, trade, and human rights.

Decade of Disabled Persons, 1992-2002. It laid emphasis on enactment of legislation aimed at equal opportunities for people with disabilities, protection of their rights and prohibition of abuse and neglect of these persons and discrimination against them. Under Article 253 of the Constitution of India, Parliament can enact a law even in respect of a subject of State List in order to give effect to international commitment. This made it possible for Indian Parliament to enact a comprehensive law for persons with disabilities.

As a result of the Government of India's commitment at ESCAP Conference, recommendation of the previous Committees and strong NGO movements in the country, the process of discussion and consultation for drafting a comprehensive law was started in right earnest towards the end of 1993. Initially a draft was prepared and it was circulated to all the State Governments, eminent NGOs of the country, professionals and the other concerned Ministries of the Government of India. Finally, a comprehensive Act known as the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) was unanimously passed by both the Houses of Parliament on 22nd December 1995, which got the assent of the President on 1st January 1996. The Government notified the Act on January 5, 1996 and it has been in effect from 7th February, 1996.[6]

- **Need for Legislative Provisions in India[7]**

In spite of being one of the most detailed and voluminous constitutions of the world, Indian Constitution did not incorporate specific provisions for education and rehabilitation of disabled persons. The Constitution mentions the disabled at one place only. It happens while it delineates the legislative power of the Union and State Legislatures.[8] Entry IX List II in the VIIth Schedule read

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[6] Mohit, A. (2000) Governance and Legislation: Initiative of the Government of India to advance Asia and Pacific Decades of Disabled persons.

[7] Singh, Aditi S., Nizamie, Haque, *Disability: The Concept and Related Indian Legislations.11*

[8] The Union and State Legislatures in India are comparable to the Federal and State Legislatures in the United States.

as *Relief of Disabled and Unemployables*. Combining the 'disabled' with the 'unemployables' and 'relief' reveals the prevailing social attitude towards people with disabilities. In spite of the great intellectuals and social reformers among the Constitution framers and their best intention, one does not find any reason to put them at higher pedestal from the common people so far as their attitude towards the disabled are concerned.

However, members of the Constituent Assembly of India were eager to make the country as a modern welfare State. This spirit of the Constitution combined with positive social traditions of India did help people with disabilities find a rightful place in the society to a large extent.

Disability Related Legislations in India

At present there are following laws in our country to safeguard the rights of disabled persons:

1. **The Mental Health Act, 1987**: This is an Act to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs, and for matters connected therewith or incidental thereto.

2. **The Rehabilitation Council Act of India (RCI, 1992)**: The Act was created to provide for the constitution of the Rehabilitation Council of India for regulating training of the rehabilitation professionals, and maintaining of a Central Rehabilitation Register and related issues.

3. **The Persons with Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995**: The Act stipulates to set up a Central Coordination Committee and a Central Executive Committee at the national level. The former is a comparatively larger body while the later is smaller in its size and will translate the decisions of the Central Coordination Committee into actions among other functions. The Act further provides setting up State Coordination and State Executive

Committee for different States of the country. The Act further stipulates the appointments of a Chief Commissioner at the National Level and Commissioners for Persons with Disabilities in each State, who will ensure the implementation of its provisions.

The Act makes it clear that it is in addition to all other existing laws and executive orders meant to serve different groups of persons with disabilities. It is a comprehensive Act and therefore the author plans to deal only with its provisions on education and employment in some depth.

4. **Educational Provisions**: stipulates that the Government and appropriate local authorities shall "ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of 18." It is certainly a laudable provision and will go a long way in promoting the educational facilities for them. The Act talks of different modes of the service delivery to attain this goal. Moreover, it stipulates provisions of aids and appliances as well as researches in this sector. However, it does not set any deadline to achieve the goal of universalization of education for children with disabilities. Consequently, the goal set out in the Act gets defeated to a large extent.

The Act makes some provisions for preferential allotment of land to the disabled for the following purposes:

The Act goes on to stipulate non-discrimination with the disabled persons by taking the following measures:

- Adapting rail compartments, buses, vessels and aircrafts in such a way to permit easy access to disabled persons.

- Adapting toilets in rail compartments, vessels, aircrafts and waiting rooms.

- Installing auditory signals at red lights in the public roads for the visually handicapped.

- Engraving on the surface of the zebra crossing for the visually handicapped.

Education is the key to the advancement of children with disabilities as it provides access to information, enables them to communicate their needs, interests and experiences, brings them into contact with other students, increases their confidence and encourages them to assert their rights. Without a basic education, their chances for employment are almost nil. Hence, there is an urgent need to consider policies and programmes that will place greater emphasis on the participation of children with disabilities in the mainstream education system. Certainly the challenges are great.[9]

5. **The National Trust (For Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act, 1999**: The Trust aims to provide total care to persons with mental retardation and cerebral palsy and also manage the properties bequeathed to the Trust. The Trust also supports programmes that promotes independence and address the concerns of those special persons who do not have family support. The Trust will be empowered to receive grants, donations, benefactions, requests and transfers.[10]

Suggestions

1. The Rehabilitation Council of India Act, 1992 and the Persons with Disabilities Act, 1995 as well as the National Handicapped Finance and Development Corporation registered under section 25 of the Companies Act, 1956 need to be amended appropriately to make them mandatory for including the persons with disabilities themselves on various committees.

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9 *Hidden Sisters*, 1995, Women and Girls with Disabilities in the Asian and Pacific Region (ST/ESCAP/1548), United Nations.

10 Disability India Network, 2001.

2. There must be a deadline for each goal to be achieved.

3. The phrase 'within economic capacity and development' must be removed at the earliest from important clauses in the Disabled Persons Act, 1995.

4. Teachers should celebrate date of 3rd December as the International Day of Disabled Persons in school.

5. To implement the current concept of inclusive education, pre-school teachers should have in-service training on disabilities, and future training courses should include education of children with disabilities.

6. In-service training programmes of two to three weeks' duration for general educators and special educators in all the disabilities and in specific areas of disability are essential to effectively teach children with disabilities.

7. Pre-service programmes at degree and post-graduate levels are necessary to improve the quality of teacher training and to promote research and development activities in the field of special education.

8. All universities should have a department of special education to promote education of children with disabilities.

9. There should be separate training programmes for staff working in Community Based Rehabilitation (CBR) programmes. The preparation of teachers for rural special education programmes should be planned differently, as the aim of these programmes would be to integrate disabled persons in their own environment and community.

10. Periodic evaluation of the training programmes and constant updating to meet the challenges of changing trends in special education should be part of the planning of teacher preparation.

11. The curriculum for each of the above programmes should be carefully developed by an expert group which includes practicing special teachers. The

feedback from the teachers is imperative in making the correct decisions about the content.

12. Parents need to be given more support so that they are able to enhance the capabilities of their exceptional children. Special courses, programs should be organized for these parents so that they can help their children in overcoming their disability. Professionals can help parents to learn about and understand their child's exceptionality; provide needed social emotional support; and serve as a resource for keeping in view the diverse needs of children with disabilities and the different models of service delivery systems. There is a need for reorienting the existing pre-service programmes in general education from pre-school to university levels and to plan in-service and pre-service programmes in special education at all levels.

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GROWING MENACE OF FEMALE FETICIDE IN MODERN SOCIETY AND JUDICIAL RESPONSE

Dr. Mukesh Kumar Malviya*

Introduction

Women in ancient India were held in high esteem. The position of a woman in the *Vedas* and the *Upanishads* was that of a mother (*maata*) or goddess (*devi*). In *Manusmriti*, a woman was considered as a precious being to be protected first by her father, then by her brother and husband, and finally by her son. With the passage of time, the status of woman was lowered. Muscle power and money power dominated the societies. Since men fought the wars and ran the enterprises of industrial production, they considered themselves superior to women.

In the early Vedic age, girls were looked after with care. They were given the facilities of education. Remarriage of widows was permitted. But in the later Vedic period, daughters were regarded as a source of misery. The practice of polygamy deteriorated the status of women. Women in the later civilizations were not allowed to go to schools. In the Gupta period, they were allowed to listen to the scriptures. In the medieval period, the practices of *purdha* system, dowry and *sati* came into being. *Sati* and polygamy were glorified. It was thought that the right place for woman was in the home. Her main duty was to cook and attend to all other menial jobs. They were considered fit for producing and bringing up children. Thus, women had been deprived of their rightful place in society. This was and has been going on for centuries.

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The inhuman practice of *sati* where the wife burns herself alive in the funeral pyre of husband existed through the centuries. Raja Ram Mohan Roy fought against this evil practice and it was finally abolished by Lard William Bentinck in 1829. After the development of science and technology, female foeticide is being practiced on a large scale.

Female feticide is violation of a basic human right and guarantee under the Constitution. In case of female feticide, the female children in the wombs of expecting mothers, are not only denied the right to live but are robbed to their right to be born. The selection of male child over female is enough proof for denial of right to birth of a girl child. Social, cultural, financial and psychological reasons are responsible for the prevalence of this evil female feticide in our society.

Female feticide is the termination of the life of a fetus within the womb on the grounds that its sex is female. Female feticide is thus the conjunction of two ethical evils: abortion and gender bias. A fetus' right to life outweighs the parents' rights to wealth, pride, or convenience, whether the fetus is male or female. The term 'sex selective abortion' is preferable to the term 'feticide' since it points to both of the ethical evils inherent in this practice.

Female feticide has replaced female infanticide as a means to reduce or eliminate female offspring. In certain societies where women's status is very low, many female fetuses are aborted. Thus, at least 100 million of the total numbers of aborted female fetuses have been victims of female feticide. This number is based on a predicted ratio of boy-to-girl births and does not take into account the male and female fetuses that are aborted for non-gender-based reasons.

Many societies, both eastern and western, have a history of infanticide. For thousands of years, parents have exterminated baby girls by poisoning, strangling, or burying them alive. This practice decreased in the Greco-Roman world as Christianity flourished, and is nearly non-existent in the West today.

In countries such as China and India, the practice of infanticide continued into the 20th century. However, the 1970s saw a dramatic drop in the girl-to-boy ratio in India, when abortion was legalized and ultrasound technology enabled families to determine the sex of their child in the fourth month of pregnancy. By 2005 the ratio slipped to 814 girls for every 1,000 boys, as opposed to the natural rate of 952 girls for every 1,000 boys.

According to the British Medical Journal *Lancet*, approximately 50 million girl fetuses have been victims of feticide in China. In India the number is estimated at 43 million. Approximately 7 million more are credited to Afghanistan, Pakistan, Nepal, and South Korea. Because China and India account for 40% of the world's population, an imbalance in these two countries alone has a profound impact on global population statistics. According to the December, 2007 UNICEF *Report*, India is 'missing' 7,000 girls per day or 2.5 million each year.

Girls in parts of Southeast Asia (primarily India and China) are being killed even before they have a chance to be born. The numbers of females are dwindling. Sex ratio (female to male) is getting worse every year as these areas are becoming more affluent and have easy access to modern-day technology to get abortions done without any serious medical consequences. Current sex ratio in the worst affected regions stands at 50 girls: 100 boys in the age group of 0-6 years. There are also cases where girls are not aborted, but they usually die within the first year or two from lack of care by parents, or they are murdered. Studies have shown that the number of girls reported for vaccinations is less than the number at the time of birth. Further yet, this number drops drastically for school admissions. In short, girls continue to be treated as a liability, a burden that is best removed right when it is born.

Main Causes

1. Dowry system where parents of the bride have to pay the groom's family to marry off their daughter. Higher the dowry, better the chances of a girl getting married. Of course, an unmarried girl is a blot on a family's honor. Since we are a still developing country

and poverty been the top reason which is followed by illiteracy, people think that a girl's birth brings a lot of misfortune.

2. The social, cultural and religious fiber of India is predominantly patriarchal contributing extensively to the secondary status of women. The patrilineal social structure based on the foundation that the family runs through a male, and makes male a precious commodity that needs to be protected and given special status.

3. Girls don't propagate family name, and neither does the family property stay in the same family.

Consequences

1. **Women's Health**: There are women who have to undergo numerous abortions in hopes of getting a son at the risk of not being able to conceive again. They have even higher chances of being abused and abandoned by their husbands and families once they cannot conceive and haven't even produced a son. Some women don't have the financial means to consult qualified physicians, so they settle for quacks that are available in plenty, and thus endanger their health immensely. There are reports of these quacks prescribing testosterone to women who want a male child resulting in increase in cases of cancer among women and the birth of eunuchs. In addition to that, emotional and mental strain that a woman goes through is not considered important at all. She is left alone to suffer.

2. **Women Being Trafficked**: Stories of women being bought from the poor regions of the country for men who can't find themselves brides in the affluent parts affected by adverse sex-ratio are already making news. There is also news of women being bought and abandoned or sent to other men once they have produced a son. Long distance brides are being bought from a completely different culture and are forced to adjust to their new homes with new culture, new language, and far away from their original families.

3. **Women Being Abused and Sexually Exploited**: Although it is invariably happening already, incidences of young girls (children) as well as older women being raped and forced into polygamy are to see a leap in numbers if the current trend of mass extinction of the female gender continues at the same pace.

4. **Suicide Rates**: Suicide rates in women are in increase. Their psychological health and physical health is suffering. In short, the female gender is doomed if we don't do anything about fixing the problem we have at hand.

5. **Violence amongst Men**: With a lack of proper family institution at home, men are bound to resort to aggressive means to expend their energy when they are not busy making money or beating women they bought because they couldn't give them sons in the first go.

Female feticide has adversely affected Indian society. 36% of men between the ages of 15 and 45 in the wealthy State of Haryana are unmarried. This prevalence of unmarried men has a destabilizing effect that counteracts stabilizing and enriching effects of families in a society. The poorer of these unmarried men seek brides from India's economically challenged eastern States, and wives obtained in this way tend to be exploited and in some cases passed on from one husband to the next.

Who is Responsible?

This ethical problem goes along with economic growth in many cases. It is the wealthy families that can afford ultrasounds and abortions. If unchecked, the problem will grow in proportion to the Indian economy.

The parties responsible in this genocide include parents, Indian society, Indian Government and religious leaders, worldwide consumers, trade partners and allies of India, and corporations such as GE who supply many ultrasound machines that are used primarily for purposes of feticide.

Global Effects of Female Feticide

All countries where female feticide is practiced are at risk for being caught in a vicious circle. Female feticide leads to low female-to-male ratios, which in turn perpetuates low status of women. Conversely, low status of women leads to more female feticide.

Rodney Stark, in *The Rise of Christianity*, points out that one of the ways Christianity revolutionized the status of women in Greco-Roman society was by opposing all infanticide. Stark cites the social scientific work of Guttentag and Secord: "Linking cross-cultural variations in the status of women to cross-cultural variations in sex ratios. … To the extent that males outnumber females, women will be enclosed in repressive sex roles as men treat them as 'scarce goods'. Conversely, to the extent that females outnumber males … women will enjoy relatively greater power and freedom." As the ratio of women to men is on increase, women have come to enjoy higher status in the society as a whole, not only amongst the growing proportion of Greco-Romans who are Christians.

If an increase in ratio of women to men brings higher status to women, a decrease in this ratio risks the opposite effect. Thus, the decrease in the boy-to-girl birth ratio, itself the result of the low status of women in Indian society, risks a sharp further decrease in the status of women from bad to worse. The danger is a vicious circle bringing continually greater female feticide and lowering of the status of women in Indian society.

All countries where female feticide is practiced are at risk for falling into this vicious circle. Therefore, it is especially urgent for Orthodox Christians to respond to female feticide.

Legal Aspects Related to Feticide

The Indian Penal Code, 1860

Sections 312-316 of the Indian Penal Code, 1860 (IPC) deals with miscarriage and death of an unborn child and depending on the severity and intention with which the

crime is committed, the penalties range from seven years to life imprisonment for fourteen years, and fine.

- **Section 312: Causing miscarriage**

  Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

  Explanation: A woman who causes herself to miscarry, is within the meaning of this section.

- **Section 313: Causing miscarriage without woman's consent**

  Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life] or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

- **Section 314: Death caused by act done with intent to cause miscarriage**

  Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine.

  If act done without woman's consent

  If the act is done without the consent of the woman, the person shall be punished either with [imprisonment for life] or with the punishment above mentioned.

Explanation: It is not essential to this offence that the offender should know that the act is likely to cause death.

- **Section 315: Act done with intent to prevent child being born alive or to cause it to die after birth**

  Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

- **Section 316: Causing death of quick unborn child by act amounting to culpable homicide**

  Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act because the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

  Illustration: A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Until 1970 the provisions contained in IPC governed the law on abortion. IPC permitted 'legal abortions' did without criminal intent and in good faith for the express purpose of saving the life of the mother. Liberalization of abortion laws was also advocated as one of the measures of population control.

The Medical Termination of Pregnancy Act, 1971

The Medical Termination of Pregnancy Act was passed in July 1971, which came into force in April 1972. This law was conceived as a tool to let the pregnant women decide on the number and frequency of children. It further gave them the right to decide on having or not having the child. However, this good intentioned step was being used to force women to abort the female child.

Thus both these laws were meant to protect the childbearing function of the woman and legitimize the purpose for which pre-natal tests and abortions could be carried out. However, in practice we find that these provisions have been misused and are proving against the interest of the females.

The Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

In order to do away with lacunae inherent in previous legislation, the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act had to be passed in 1994, which came into force in January 1996. The Act prohibited determination of sex of the fetus and stated punishment for the violation of the provisions. It also provided for mandatory registration of genetic counseling centers, clinics, hospitals, nursing homes, *etc*. The main aim to enact this Act was to combat the practice of female feticide in the country through misuse of technology, done surreptitiously with the active connivance of the service providers and the persons seeking such service.

The Act was amended in 2003 to improve regulation of technology capable of sex selection and to arrest the decline in the child sex ratio as revealed by the Census 2001 and with effect from 14.02.2003, due to the amendments, the Act is known as the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

The main purpose of enacting the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 has been to:

1. Ban the use of sex selection techniques before or after conception;

2. Prevent the misuse of pre-natal diagnostic techniques for sex selective abortions;

3. Regulate such techniques stringent punishments have been prescribed under the Act for using pre-conception and pre-natal diagnostic techniques to illegally determine the sex of the fetus.

The authorities empowered and pertinent as well as important provisions of the Act are as follows:

1. The appropriate Authorities at the District and State levels are empowered to search, seize and seal the machines, equipments and records of the violators.

2. The sale of certain diagnostic equipment is restricted only to the Bodies registered under the Act.

3. The Government has also taken various steps to support implementation of the legislation, including through constitution of a National Inspection & Monitoring Committee (NIMC), Central and State Supervisory Boards, capacity building of implementing agencies, including the judiciary and public prosecutors and community awareness generation through PRIs and community health workers such as Auxiliary Nursing Midwives (ANMs) and Accredited Social Health Activists (ASHAs).

4. The Act has a Central and State levels Supervisory Board, an Appropriate Authority, and supporting Advisory Committee. The function of the Supervisory Board is to oversee, monitor, and make amendments to the provisions of the Act. Appropriate Authority provides registration, and conducts the administrative work involved in inspection, investigation, and the penalizing of defaulters. The

Advisory Committee provides expert and technical support to the Appropriate Authority.

5. Sec. 6 of the said Act clearly says that determination of sex is prohibited.

6. Sec. 22 prohibits advertisements relating to pre-natal determination of sex and punishment for contravention.

7. Sec. 23(3) of the said Act, lays down that any person who seeks the aid of a genetic counseling centre, a genetic laboratory or a genetic clinic, or of a medical geneticist, gynecologist or registered medical practitioner, for applying pre-natal diagnostic techniques on any pregnant women (unless there is evidence she was compelled to undergo such diagnostic techniques) for purposes other than those specified, shall be punishable with imprisonment for a term that may extend to 3 years and with a fine which may extend to Rs. 10,000 and any subsequent conviction may involve imprisonment which may extend to 5 years and a fine of up to Rs. 50,000.

8. Before conducting any prenatal diagnostic procedure, the medical practitioner must obtain a written consent from the pregnant woman in a local language that she understands.

9. Prenatal tests may be performed in various specified circumstances, including risk of chromosomal abnormalities in the case of women over 35, and genetic diseases evident in the family history of the couple.

The Constitution of India, 1950

Section 312 of IPC read with the Medical Termination of Pregnancy Act, 1971 where all the restrictions imposed therein, including the time limit of 20 weeks, other than the ones to ensure good medical conditions, infringe the right to abortion and the right to health, which emanate from right to life as guaranteed by Article 21 of the Constitution. Freedom from interference in one's privacy and family life is protected by Article 12 of the Universal

Declaration of Human Rights, Article 17 of the Civil and Political Rights Covenant, Article 11 of the American Convention, and Article 8(1) of the European Convention. Right to abortion is a species of right to privacy, which is again proclaimed a continuance of the right to life under Article 21 of the Constitution of India.

Judicial Activism and Response

Our honorable judiciary in India had observed 2007 as the Awareness Year of Female Feticide and dealt in a strict manner with those responsible for this crime. The former Chief Justice Y.K. Sabharwal had declared while delivering his presidential address at a State-level seminar on 'Eradication of Female Feticide', jointly organized by the Punjab Department of Health and Family Welfare, and Punjab Legal Services Authority that law can play an important role in checking this menace of female feticide.

1. ***Cehat* v. *Union of India***[1]: In the landmark case of *Cehat*, *Masum* and *Dr Saba George* v. *Union of India and Others* - in light of the alarming decline in sex ratios in the country to the disadvantage of women, this petition was filed seeking directions from the Supreme Court for the implementation of the Pre-Natal Diagnostic Techniques Act which regulates the provision of prenatal diagnostic technology. In this case the Court took on the unique role of actually monitoring the implementation of the law and issuing several beneficial directives over the course of 3 years during which the case was proceeding in the Court. This petition put the issue of sex selection and sex selective abortion on the national agenda and as a consequence there have been heightened activities on this issue by government and non-governmental agencies alike.

   In the words of the Supreme Court of India, it is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has

[1] (2003) 8 SCC 412.

soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents compelled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide where by female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques.

Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence; fetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States. The Supreme Court of India also directed all the State Governments/Union Territory administrations to create public awareness against the practice of pre-natal determination of sex and female feticide through advertisements in the print and electronic media by hoardings and other appropriate means. The Governments are supposed to furnish quarterly returns to the Central Supervisory Board giving a report on the implementation of the Prenatal Diagnostic Techniques Act, 1994.

2. ***Kharak Singh* v. *State of U.P. and Others***[2]: Inhere the Supreme Court has certainly recognized that a person has complete rights of control over his body organs and his 'person' under Article 21. It also said to be including the complete right of a woman over her reproductive organs. In the United States of America, the Supreme Court upheld the right to privacy and ended the ban on birth control back in 1965 in the case of *Griswold* v. *Connecticut*. Eight years later, the Supreme Court ruled the right to privacy included abortions in the landmark case of *Roe* v. *Wade*. In 1976, *Planned Parenthood of Central Missouri* v. *Dan Forth*, ruled that requiring consent by the husband and the consent from a parent if a

[2] 1963 AIR 1295.

person was fewer than 18 was unconstitutional. This case supported a woman's control over her own body and reproductive system. William Brennan, J stated: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."

3. ***Vijay Sharma and Other* v. *Union of India***[3]: The couple, Vijay and Kati Sharma, based in the commercial metropolis Mumbai, challenged the validity of the Pre-conception and Pre-natal Diagnostic Tests Act (PCPNDT) Act, a 2001 Indian legislation which bans sex determination. But the judges said in a verdict that sex selection would be as good as female feticide.

4. ***Qualified Private Medical Practitioners and Hospitals Association* v. *State of Kerala***[4]: It was declared that laboratories and clinics which do not conduct pre-natal diagnostic, test using ultrasonography will not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and a direction to the respondents not to insist for registration of all ultrasound scanning centers irrespective of the fact as to whether they are conducting ultrasonography, under the Act. A similar view was taken in the case of *Malpani Infertility Clinic Pvt. Ltd. and Others* v. *Appropriate Authority, PNDT Act and Others*.

5. ***Dr. Varsha Gautam w/o Dr. Rajesh Gautam* v. *State of U.P.***[5]: A pregnant woman wanted to get her abortion done because there was a girl child in her womb. She approached the petitioner Dr. Varsha Gautam at her hospital, who agreed to perform the abortion although it was an offence to perform such an operation and even determination of the sex by doctors using ultrasound technique was illegal. The petitioner was said to have engaged in getting abortions done in her hospital in collusion with

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[3] AIR 2008 BOM 29.
[4] 2006 (4) Kar L J 81.
[5] AIR 2005 BOM 26.

doctors, who determined the sex of the fetus by conducting ultrasound tests. Her clinic was not even registered under the Act and she was not entitled to conduct pre-natal diagnostic procedures therein.

6. ***Vinod Soni and Another* v. *Union of India***[6]: By this petition, the petitioners who are married couple seek to challenge the constitutional validity of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (referred to the Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. It was held that right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. Reliance is placed on a Supreme Court judgment and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception thus, not unconstitutional.

In order to strengthen the monitoring of female feticide and girl child survival, the Registrar General of India, has made it mandatory for all the Chief Registrars of Births and Deaths to closely monitor the sex ratio at birth every month.

Conclusion

In India, the available legislation for prevention of sex determination needs strict implementation, alongside the launching of programmers aimed at altering attitudes, including those prevalent in the medical profession. More generally, demographers warn that in the next twenty years there will be a shortage of brides in the marriage market mainly because of the adverse juvenile sex ratio, combined with an overall decline in fertility. While fertility

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[6] 2005 Cri L J 3408.

is declining more rapidly in urban and educated families, nevertheless the preference for male children remains strong. For these families, modern medical technologies are within easy reach. Thus selective abortion and sex selection are becoming more common.

The National Plan of Action for the South Asian Association for Regional Cooperation (SAARC) and Decade of the Girl Child (1991-2000) seek to ensure the equality of status for the girl child by laying down specific goals for her dignified survival and development without discrimination. The codified law worldwide considers human life as sacred, and specific legal provisions have been devised to protect the life of the born and the un-born.

However, the objective of the law gets defeated due to lacunae in the law and lack of proper implementation. Even though the law is a powerful instrument of change yet law alone cannot root out this social problem. The girls are devalued not only because of the economic considerations but also because of socio-cultural factors, such as, the belief that son extends the lineage, enlarges the family tree, provides protection safety and security to the family and is necessary for salvation as he alone can light the funeral pyre and perform other death related rites and rituals. Evidence indicates that the problem of female feticide is more prevalent in orthodox families. It is, therefore, essential that these socio-cultural factors be tackled by changing the thought process through awareness generation, mass appeal and social action. In addition to this all concerned *i.e.*, the religious and social leaders, voluntary organizations, women's groups, socially responsible media, the doctors, the Medical Council/Association (by enforcing medical ethics and penalties on deviant doctors), and the law enforcement personnel should work in a coordinated way.

To conclude one would like to say that awareness amongst people from all walks of life and enlightening them with education are two foolproof tools of combating this ever pervading menace which has plagued our country and rendered the sex ratio to fall drastically. 'Female feticide' is also depicted in a serial named *Na Aana Is Desh Meri Lado* aired on Colors Channel over the

week days to which a notice has been issued by the National Commission of Women of being vocative of the Indecent Representation of Women (Prohibition) Act, 1986 as well as Cable T.V. Networks (Regulation) Act, 1995.

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PROTECTION OF CHILDREN FROM CHILD ABUSE: AN INTERNATIONAL PERSPECTIVE

Ms. Smita Pande*

Introduction

Child abuse is the physical, sexual or emotional mistreatment or neglect of a child. Child abuse can occur at home or in an organization, school, or community the child interacts with. The definition of child abuse is: "Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation, an act or failure to act, which presents an imminent risk of serious harm."[1] In the United States of America (US) a report of child abuse is made every 10 seconds. According to US Department of Health and Human Sciences Administration for Children and Families, Children's Bureau (2010), Child Malnutrition 2010, approximately 80% of children that die from abuse are under the age of 4.[2]

Factors Responsible for Child Abuse

Children are innocent, and need guidance and protection in the present–day society where they are exposed to multi–faceted turmoil, violence and complexities, and the resultant dangers to their innocence. This situation has arisen because of various changing factors in our human society as follows:

1. Breakdown of joint family system: Earlier people lived together so someone or the other was available to

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1 The Federal Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C.A. and 51069) as amended by the CAPTA Reauthorization Act of 2010.

2 www.childhelp.org

tend to the child and family; values were incorporated voluntary; and responsible contribution was done in all aspects; care and grooming of generally any and every growing–up child was taken care of. To raise a child was a delight, and not a problem. *E.g.*, someone bathed the child; someone fed it; somebody took the pram and the child had an outing too. Today, it's a nuclear family, and parents are busy earning and managing careers. It then comes to who will do what and when, and the child is circumstantially left to hired and impersonal supervision, or worse still left to fend for itself sans care or guidance.

2. In modern and present era, women have a dual role to play. Earlier they only looked after children and home but now they have to earn and further their own careers. They contribute to the family earnings, but simultaneously by absenting themselves at this crucial stage of the child's growth they deny the child the parental personalized attention and guidance which had been the hallmark of our traditional society. *E.g.*, leaving their child at home on the mercy of baby sitters or day care centre's where strangers are dealing with its needs, emotions, moods *etc.*, which is not desirable. The child may not be able to confide and tell its problems and feelings to the baby sitter. Baby sitters work not because they like to, but because they need to earn, hence sometimes they are frustrated and may commit atrocities on the child. When the grandparents look after the grandchild, in some cases, it works out well, but considering their old age they cannot do a lot. A child requires a lot of looking after, and hence there is a helper who may not have clean, hygienic habits or good character; he/she may be violent, and beat the child who is helpless and dependent.

3. Degradation in moral values: As the greed of man is growing by the day, you cannot trust anyone. A neighbour, a close family friend, a servant, or anyone who may is likely to attack an innocent child; hence a child today needs to be protected even from their own relations and friends. The person, who is in a fiduciary capacity like a guardian, father, uncle, and neighbor *etc.*, may commit assault, exploitation and

even rape. This is a global phenomenon, and all have to concentrate in bringing an end to the ill treatment meted out to children today.

4. Unnecessary exposure to violence and sex depicted in films, advertisements and television creates curiosity and confusion, and therefore should not be seen by children unattended. They need to know the truth and explained about the scenes, the themes and hence, proper censoring is must. Crimes occur as no one explains or supervises these children.

Child Abuse in United Kingdom

The murder of Victoria Climbie by her own guardians is barbaric and inhuman.[3] The facts show that Climbie was tied up for long hours sometimes 24 hrs by her great aunt Marie Therese Konao. She was even hit by chain, hammer and wire. She was in constant contact with the police, social service department of 4 local authorities – the National Health Service, the National Society for the Prevention of Cruelty to Children, and local churches; and all noted signs of abuse, yet none could protect her life.

In the inquiry held after her death by Lord Laming, it was discovered that there were times when Climbie could have been saved.[4] It was found that many organizations were badly run. The report by Lord Laming made recommendations related to child protection in England. Climbie's death resulted in the 'Every Child Matters' initiative, and the introduction of the Children Act, 2004. A very dynamic scheme introduced the creation of the contact point project, a government data base, designed to hold data, information on all children in England and the creation of the Office of the Children's Commissioner chaired by the Children's Commissioner for England. On 13th July 1999 Marie Konao requested her neighbour, Cameron, who would often look after Climbie, to take her up permanently as Manning, her boyfriend, with whom

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[3] enwikipedia.org/wiki/murderofvictoriaclimbie

[4] Victoria Climbie Inquiry Report, House of Common, Health Committee, 6th Report of Session. Available at: http://www.publications.parliament.uk/pa/cm20203/cm/select/cmhealth/5702002.03.pdf, retrived on 21/2/2013

she was staying did not want the child. Cameron's son Patrick and her daughter Avril observed that the child had numerous injuries – a burn on her face, a loose piece of skin hanging from her right eyelid – which Marie Konao said was self-inflicted; but Carl Manning's account was different. He said that he hit Climbie because of frequent bed wetting or incontinence. When Cameron's daughter took Climbie to a French teacher, she advised that Climbie to be taken to a hospital. In the hospital, the pediatrician was suspicious that the injuries were not accidental, and she was then placed under police protection. Ruby Schwartz consultant pediatrician diagnosed scabies, and her level of care was downgraded by Michelle Hine, a Child Protection Officer and Rachel Dewar - a police officer decided to lift police protection allowing Climbie to go home. On the 24th July 1999, she again was taken to the hospital with severe burns on her head plus other injuries; there was no evidence of scabies. Mary Rossiter felt that Climbie was being abused, but still wrote 'able to discharge' on her notes. On 5th August 1999 Barry Almeida, a social worker took Climbie to NSPCC centre in Tottenham at Haringey Social Services Department where Marie Konao said that Climbie had poured boiling water over herself to stop the itching caused by scabies, and had used utensils to cause other injuries. The police officer and social worker believed her, and she was sent home. On the 7th August 1999, Marie Konao took her to church and told the pastors that she was the mother, and that devils were inside Climbie. No one suspected her or doubted her even in the church. During October 1999 to January 2000, Manning forced Climbie to sleep in a bin liner in the bathroom in her own excrement due to frequent bed wetting. During the months of December and January social worker Arthur Worrey made 3 visits to the Marie Konao's residence, but received no answer. She speculated to the supervisor that Marie Konao had returned to France, although there was no evidence of such. The supervisor wrote on Climbie's file that they had left the area. On February 18th they wrote to Marie Konao that if they did not receive any reply from her, they would close the file. A week later on 25th February they closed the file; on the same day Climbie died. On 24th February she was taken in semi-conscious state, suffering from hypothermia, multiple organ failure, and malnutrition to

North Middlesex Hospital where she died. Manning pleaded guilty to charges of manslaughter and cruelty; Marie Konao denied all charges. Manning described Climbie as a Satan saying no matter how hard he hit her, she did not cry. On 12th January both Marie Konao and Manning were found guilty and sentenced to life imprisonment. The Judge said: "What Victoria Climbie endured was truly unimaginable; she died at both of your hands - a lonely drawn out death."[5]

Child abuse exists all over the world in rich countries as well as poor countries. Since time immemorial mothers would guard their children, and protected and advised them. With education things should have improved but the statistics show an increase in child related crimes. On June 29th 2012, Justice Secretary Kenneth Clarke said: "All the people with an interest in protecting vulnerable people will agree that we have closed the gap in the law and from now on if you fail to take steps to stop a child being killed, you are equally responsible."[6] The new law, the Domestic Violence Crime and Victims Amendment Act, 2012 was due to come into force. According to it, anyone, who deliberately causes or allows physical harm to a child or vulnerable adult, faces up to 10 years in prison. It is effective in England and in Wales, it also enables prosecution of people who stay silent, or blame someone else. This move allows a number of cases where prosecutions could not be brought, because it was impossible to identify the individual responsible for the abuse. In a case, there was a 5 month old baby who suffered a brain hemorrhage, fractured skull, and a 2 week old baby with a broken collar bone, ribs and leg. In 2007, death of Baby Peter in North London was shocking. During the 8 months of abuse, the child suffered more than 50 injuries; had 60 visits from social workers, police and health workers. In 2009 his mother, her boyfriend, and a lodger were jailed for causing or allowing Peter's death. This little boy 17 month old died of abuse, despite being on the Council's Child Protection Register.

Children's Secretary Mr. Ed Balls observed reasons for these inhumane murders:

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5 enwikipedia.org/wiki/murderofvictoriaclimbie
6 wwwbbc.co.uk/news/1863734

1. Poor child protection plans;

2. Failure to implement the recommendations of the Victoria Climbie Inquiry;

3. Agencies acting in isolation without coordination;

4. Insufficient supervision by senior management; and

5. Over dependence on performance date which was not always accurate.

Thus, stern actions were taken by Ed Balls:

1. Sharon Shoesmith was removed as Head of Children's Services;

2. The education and children's services OFSTED to carry out unannounced annual inspection of services across the country.

Child abuse is thus now at the centre of legal attention in England.

Child Abuse in China

Legal and education experts in China are calling for criminal law to be revised to include the offence of child abuse in China after number of incidents in which minors were physically or sexually abused has come to light. Yan Yanhong, a teacher in a privately owned kindergarten in Zhejian province, posted a photo on line of her picking a boy by his ears. The child appeared to be shouting in the photo, and seemed to be in great pain. The police found 700 photos in Yan's e-album of children being abused in different manners including throwing into garbage cans, or having their mouths sealed with plastic tape. Yan was detained by the police. Cai Lining, Director of Judicial Department of Public Security in Wen Ling said that Yan could not be charged of committing a crime because:

1. Abuse pertains to someone who abuses a family member, but KG teacher is not a family member to the children;

2. Crimes with intentional injury deals with cases in which someone is physically injured. Inhere the child was not injured to a degree that would justify that charge;
3. An insult charge requires that the offended person sues the offender; the child cannot sue because he was not an adult.

Here, the interpretation that abuse pertains to family member is very narrow, and should include abuse by any one, and should be treated as a human right violation.

Yao Jian Long, a legal expert says that many laws forbid child abuse; but there is no clear definition of child abuse in Chinese law. According to Hou Juanzha, Vice President of Yu Chang Pre - School Education College in Shanxi province: "Memories of abuse will have a negative effect on child's development. Lots of criminals were abused as children."[7] It seems a correct observation.

Los Angeles Times reports a grim tale of child abuse in China. A woman is to undergo surgery to remove some 26 needles stuck in her body when she was an infant. Doctors believe the needles were driven into her body when she was very small, the one in the top of her skull could only have been stuck when the bones in her head were still soft. "They wanted her dead," said Qu Rei, a spokesman at Richland International Hospital in Yunnan province, which agreed to remove the first needles in her body. Luo does not remember ever being stabbed. Relatives suspect her grandparents. They wanted a grandson instead of two granddaughters. Female infanticide is a common practice in cultures that prize boys. China's strict one child policy has exacerbated the age old prejudice by making the male heir even a more precious commodity. China's family planning restrictions have also led to a surge in child trafficking. In one incidence, Chinese police rescued 40 kidnapped infants purchased in relatively impoverished south western China, and bound for potential buyers on the country's more prosperous east coast. Thousands of baby girls are

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[7] Tougher Laws Against Child Abuse Urged, *China Daily*, Oct 30, 2012. Available at: www.china.org.ch

abandoned every year; some are left on streets, and some even in the trash.[8]

Child Abuse in United States of America

In United States of America (US) also child abuse is a major issue of concern. On October 9, 2012, a college coach Jerry Sandusky was jailed for life for child sex. Judge John Cleland warned 68 yrs old Sandusky that he was imposing a prison term that had the unmistakable impact of being for the rest of his life. Mr. Jerry Sandusky was convicted of 45 counts of child sexual abuse in June, after a trial in which he was found guilty of molesting 10 children over a 15 yrs period, meeting them through a charity he founded for troubled youth. Prosecutors said that Mr. Sandusky had advantages which should have led to a productive life; instead he spent his time setting up a charity that he used as a vehicle for child sex abuse. Assistant Attorney General Joseph Mc Gettiger told the Court: "Instead of being a productive citizen he worked diligently to construct a mechanism to acquire victims."[9]

In another incidence, a four year old girl, who was allegedly locked in the attic of her home in Hill Street when she would not sleep, had her face rubbed in vomit, her head flushed in toilet. The abuse came to light when rescue workers were called to the house after investigators said she was forced-fed food, and choked. Gaston Police Sgt William Lucas was called to Halifax Regional Medical Centre. After nurses saw what they thought were signs of child abuse so bad, even the nurses were crying. The girl's father Daniel Gibbs 32, his girl friend Phylis Evans 49, the girl's uncle Douglas Gibbs 23, and her grandmother Mary Gibbs 59 were charged with felony of child abuse. The child's biological mother Susan Harrison said the last time her daughter visited her; the little girl did not want to go back to her father's family.[10]

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[8] *Child Abuse*. Available at: china.article.latimes.com/2007/sept/11worldfgneedles–sep11,2007chingchingni/timesstaffwriter

[9] wwwndtv.com/article/world/us/277589

[10] www.wral.com/news/local/story/109101o Aug 8 2005

In a booklet written for the National Center for the Prevention and Treatment of Child Abuse and Neglect, Dr. Brandt Steele revealed that child abusers had themselves been abused as children. A pattern of violence was established early in their lives and passed it along to their offspring.[11]

John Ruskin an English writer (1819-1900) said: "Give a little to love a child and you get a great deal back." Children make this world a happy place, but somehow all across the globe the children are abused. Homes are built for children and orphanages, but there too, they are subjected to indignity and abuse.

Child Abuse in India

In India, today our children are unsafe. There are innumerable cases which high light child abuse. A series of sex abuse scandals at orphanages and shelter in India has sounded alarms over the management of children's homes many of which operate with little or no public oversight. In *Arya Anathalaya* many children are orphans, and some are from families where the father is absent, mother has to work and cannot provide adequate care. Once an 11 year old child died in the *Anathalaya.* She was placed there by her mother after her father had walked out. Krishna Shah, a social worker says that the system has broken down: "There is no effort to protect the children. If something goes wrong, option is to displace the kid further; instead the management should be removed." It is a correct opinion: why should the kid move out and readjust when he/she is not to blame? The child requires protection, and security; efforts should be made to check abuse by changing the management, which should make inspections and weekly interaction, should be done with the students to know how secure they are there.[12]

In Indore, a 15 yrs old girl from Dewas called up *Childline Indore* and lodged a complaint against her cousin who abused her; the cousin was a minor too, and was molesting her. The victim was hesitant to inform her

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11 www.violence.de/prescotthustler-newarticle.html

12 wwwndtv.com/article/india/children homes under abuse–spotlight-242203

family about the incident. In Mhow, a school girl was molested by a family friend; incident took place 2 yrs ago, but was reported after the telecast of *Satyamev Jayate,* a serial hosted by Aamir Khan.[13]

Urgently Needed Measures to Protect Children from Abuse

1. **Need for Teachers and Parents to be Counseled Periodically**: Teachers should love teaching, and be tolerant; and should never inflict pain for correcting a student. China has no law concerning child abuse. In a case a KG teacher burnt 7 children with a hot iron on the face because they had been naughty. In one incident, a father was not talking to his child because he needed glasses. The father shouted: "How could you have been so careless? You should have protected your eyesight."[14] The examples indicate that the parents need counseling today, and some check is required to be kept on them so that they are more mature and understanding towards their children.

2. **Need for Redefining Child Abuse**: There is need to give a precise and clear definition of 'child abuse' and make laws strict, punishment deterrent and only then we can secure the future safety of the children worldwide.

3. **Need to Protect and Give Personalized Care to Children**: In India, we believe in 'doing our duty' - *kartavya ka palan*. When we do our duties sincerely, the rights will automatically come for all. If this policy is rigidly followed and duties are performed sincerely, the children will be safe.

4. **Need to Report Cases of Abuse to the Authorities**: A Chinese proverb says: "There is only one pretty child in this world and every mother has it." Thus, a mother must report a human right violation, assault or any other crime happening to her child to the police immediately. The mother or the other family members of the child must understand the gravity of the crime, and report the matter to the police so that

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13 *Times News Network* June 30, 2012.
14 *Abuse in Rural China*. Available at: ingredinchin.com/2011/1/1

it is not repeated again. But it has been found that many parents keep silent, and this encourages the criminal to get away. According to *Times of India*, Bangalore[15] in the past 6 months Ms. Ramaiah Hospital reported 9 cases of child sex abuse of which 7 victims were under 15 years of age; many such cases have gone unreported. "Most families of victims of child abuse live in a culture of denial and the conspiracy of silence. But such disturbing experiences can impact the child adversely; affect their personal function, and the type of person they grow up into."[16] There is no need to be afraid to discuss the matters, in fact if the facts and circumstance of the relating to the crime are known to others precautions will be taken. It will help in crime prevention.

5. **Need to Have Friendly Relationship with the Child**: According to a recent survey by *Prayas* and UNICEF, more than 53% of children in India face one or more form of sexual abuse. The *Report* says that 2 out of every 3 children are physically abused, and 54.68% are boys. "Most children report to their elders when they are physically abused, but elders keep to themselves when sexually abused. Families should break the barriers between them and their younger ones, so that children can speak freely about such traumatic experiences."[17] Every person should be gentle towards a child but it seems the grownups have no time or patience to look, listen or understand the problems of the child. As per the existing laws, it is not mandatory to report a case of child abuse.

   However a Bill 'Protection of Children Against Sexual Offences Bill, 2011' was passed in the *Rajya Sabha* and the *Lok Sabha* in May 2012; but is awaiting approval of Cabinet Committee and President's consent. The Bill seeks to protect children from sexual offences and pin the burden of proof on the accused. Bills such as these help children who

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15 Times of India, Banglore, 27th June 2012.

16 Dr. Shekhar Seshadri, Professor, Department of Adolescent and Child Psychology, Nimhans.

17 Dr. Saldanha, S. of *Enfold Trust* which organizes sessions on Human Sexuality and Life Skills.

face sexual abuse greatly. "The government should not waste time to make this bill a law."[18]

Sometimes the father, mother or family members are perpetrating child abuse. In India, in March, a severely battered toddler, Baby Falak, died in a hospital in the Indian Capital Delhi. She was brought in with serious injuries, including human bite marks all over her body in January 2012. In Bangalore, in April 2012 there was the case of a three month old baby Afreen who was battered by her father who allegedly wanted a son. She died after attempts to revive her failed.[19] Sometimes there is child abuse in shelter homes. Child abuse in Haryana in Rohtak Shelter Home on June 13, 2012 has been reported by Saurabh Malik/TNS. At *Bal Kunj*, Chhachroli, in Yamuna Nagar, 12 children shifted from shelter *Apna Ghar* in Rohtak. Narrated tales are published about the children being physically abused, brutally beaten, often kept naked, and made to consume liquor, and regularly work as farm labourers by Jaswanti who ran *Apna Ghar*. Things were hardly better at *Nari Niketan* in Karnal. Five girls residing over there alleged that they were sexually molested, and made to suffer abortion by giving tablets and inserting foreign objects into private parts. The stories narrated by the inmates at Mother Teressa's Missionaries of Charity were appalling. The Investigating team found 'frozen blank expressions, presumably due to addiction to white powder'.[20]

6. **Need for Moral and Value Based Education**: There has to be a socio-legal and moral perspective and approach to stop child abuse. Children must be taught to respect humanity in their tender age only. Imparting education about sex at right time through scientific education will save a lot of children from becoming victims of sex related crimes. There is also a need to protect childhood; teach them about morality and fitness, to exercise; good and friendly personal relations with parents or grand-parents; importance

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18 *Ibid.* articles.timesofindia.indiatimes.com/2012-06-27/Bangalore/324404061

19 www.bbc.co.uk/news/world-asia-india18328061

20 www.tribuneindia.com/2012/20120614/main4.hr.m

of brothers and sisters; to share their fears and thoughts with them and other cousins and relations, *etc*. It is said that the people today don't talk much with each other, and there is a fall in human and moral values. We must strengthen the bonds of love in the family. Princess Diana, Princess of Wales said: "Hugs can do a great amount of good, especially for children."

The world overall is suffering when children are not be given proper upbringing and care. No society where children are neglected can achieve peace or prosperity. Children are the future policy makers, parents, leaders and philosophers. To educate them properly is the principal duty of the society. Barbara Bush, the former First Lady of US said: "You have to love your children unselfishly. That is hard, but that is the only way." Child abuse must end immediately. The human rights of the children must be respected.

7. **Need for Special Courts to Deal with Matters Related to Children**: Special courts should be established to deal with child abuse, and if required the courts should take *suo moto* action to help these innocent victims. Human Rights Education will be a great asset to achieve this goal.

Children are used in warfare. Millions of children are victims of armed conflict. Millions are used as cheap labour. Do we care for our children; do we make any budgetary allocations for children, their protection, welfare, health and development? Is the implementation of laws proper? Are we following the Directive Principles of State Policy? Are we aware of Art. 15 of the Constitution of India which says that special provisions can be made for women and children? If lack of governance harms children, its dangerous and quick action is urgently required to be taken.

Conclusion

The future of any society rests on the children, as only they bring new energy, new ideas, new vision, and rejuvenate the environment. Any society which ignores,

neglects and fails to look after the interests of the child, will suffer. Every person must raise a child, or sponsor a child, or help in educating the child. The destiny of a nation will be determined by what kind of education is imparted to the young ones. Education should be wholesome, meaning it must include - moral, ethical, cultural, religious, technical, and research; then and then only our progress will be meaningful. They need protection, love and care, and the society must invest in the welfare of the children for future security. A dysfunctional home environment, families facing uncertain times, marital discord, exposure to violence, makes children a vulnerable group. The institution of marriage and joint family system must be strengthened to make childhood of the children healthy, happy and secure.

LEGAL STATUS AND JUSTICE TO ILLEGITIMATE CHILDREN

Ms. Anisa Shaikh*

"A child born in illegitimate relationship or in a void marriage is innocent, and is entitled to all rights which are given to other children born in valid marriage."[1]

Concepts of Legitimate and Illegitimate Child

The importance of the concept of legitimacy in the law probably stem historically from a concern to protect the family as the unit of society. Brenda Hoggett expressed following view: "The institution of marriage may well have been devised in early societies in order to establish a relationship between father and child.....A man may derive spiritual, emotional and material advantages from having children; but whereas motherhood may easily be proved, fatherhood may not. A formal ceremony between man and woman, after which it is assumed that any children she may have are his, is the simplest method of establishing a link. It also enables him to limit his relationships to the offspring of a suitable selected mate. A legal system which wishes to facilitate the orderly devolution of property and status within patrilineal families will therefore place great emphasis on the concept of legitimacy. But a legal system which is no longer so concerned about material provision for future generations of the few, and is far more concerned about the welfare of all young children, is likely to find the concept more and more distasteful."[2]

For any society, childhood is an opportunity through which it attempts to realize its vision. In every religion child is considered as the incarnation of divinity and its

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1 Ashok Kumar Ganguly, J. in *Revanasiddappa* v. *Mallikarjun*, (2011)11 SCC 1.

2 *Brenda Hoggett, Parents and Children*, 2nd Ed., p 119.

bringing up is a religious perception and a moral duty. The child is basic *grundnorm* of the universe.

But sometimes some acts of human beings, prohibited or considered undesirable, do takes place, and the consequences of such acts are borne by those who are innocent. A man and a woman commit a sin, and the child so born becomes sinful and is clothed with the taint of illegitimacy because he is not born in wedlock. The reason is that there is legally unrecognized relationship between the child so born and the persons who begot it. Such illegitimate child suffers from social stigma in every legal order. Its sufferings or deprivations are based on the maxim, *pater est quem nuptiae demonstrant.*[3]

Hindu Law Relating to Legitimacy of a Child

Manu says: "Immediately on the birth of his first born, a man is (called) the father of a son, and is freed from the debt of the manes…"; "That son alone on whom he throws his debts and through whom he obtains immortality, is begotten for (the fulfillment of) the law…… "[4]

These two *slokas* of Manu speak of the sacredness and sanctity of a son because through the son he conquers the worlds; through son's son he obtains immortality; and through his son's grandson he gains the world of the son.[5] So to have a son is *dharma*; failing to have a son one cannot discharge his sacred duties. This is why Manu has spoken of twelve types of sons[6]; six are kinsmen and heirs, and six others not heirs but kinsmen.[7]

Under Hindu law an illegitimate child has never been considered as *nullius filius*.[8] In some cases he has been considered to be a member of the family. It can be said that in Hindu law the illegitimate child, and putative father and natural mother have never been considered

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3 The marriage indicates who the father is/marriage indicates paternity.
4 Manu IX-106,107
5 Manu IX-137.
6 Manu IX-165-179.
7 Manu IX-158.
8 A child of no one.

strangers to each other. The illegitimate son under *Sastrik* law is put in two categories:

1. The child born to a regenerate class by a permanent and exclusively kept concubine;

2. The child born to a *sudra* by a permanent and exclusively kept concubine.

In the former case[9] the child is a member of his father's family, though not a coparcener had full rights of maintenance throughout life. In the latter case[10], the child enjoyed a much higher place having status of a son and a member of his father's family.

With this concept in mind even an illegitimate child has been recognized in Hindu law and was called *dasiputra*. So the acknowledgement in Hindu Law is inherently present, and such a separate acknowledgement is not required at all and all his rights are governed by Hindu Law.[11]

In *Kattari Nagaya Kamarajendra Ramasami Pandiya Naicker* v. *T.B.K. Visvanathaswami Naicker (deceased) and Ors.*,[12] the Privy Council held when a *sudra* had died leaving behind an illegitimate son, a daughter, his wife and certain collateral agnates, both the illegitimate son and his wife would be entitled to an equal share in his property. The illegitimate son would be entitled to one-half of what he would be entitled had he been a legitimate issue. An illegitimate child of a *sudra* born from a slave or a permanently kept concubine is entitled to share in his father's property, along with the legitimate children.

In *P.M.A.M. Vellaiyappa Chetty and Ors.* v. *Natarajan and Anr.*,[13] it was held that the illegitimate son of a *sudra* from a permanent concubine has the status of a son and a member of the family, and share of inheritance given to

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9 Mitakshara I.12.3.

10 Manu IX-179; Yajnavalkya II 133-134; Mitakshara I.12; Dayabhaga IX-28.

11 *Rahi* v. *Govind,* 1 Bom 97; *Chamaya* v. *Irya*, AIR 1931 Bom 492; *Ratnaraja Kumar* v. *Narayana Rao*, AIR 1953 SC 433; *Amini Reddy* v. *Ammireddy*, AIR 1961 AP 131.

12 (AIR 1923 PC 8); MANU/PR/0029/1922.

13 (AIR 1931 PC 294); MANU/PR/0062/1931.

him is not merely in lieu of maintenance, but as a recognition of his status as a son; that where the father had left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son was not entitled to demand a partition of the joint family property, but was entitled to maintenance out of that property. Sir Dinshaw Mulla, speaking for the Bench, observed that though such illegitimate son was a member of the family, yet he had limited rights compared to a son born in wedlock, and he had no right by birth. During the lifetime of the father, he could take only such share as his father may give him, but after his death he could claim his father's self-acquired property along with the legitimate sons.

In *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh and Anr.*,[14] the facts were that Raja was a *sudra*, and died leaving behind a legitimate son, an illegitimate son, a legitimate daughter and three widows. The legitimate son had died and the issue was whether the illegitimate son could succeed to the property of Raja. The Privy Council held that the illegitimate son was entitled to succeed to Raja by virtue of survivorship.

In *Gur Narain Das and Anr.* v. *Gur Tahal Das and Ors.*,[15] a Bench comprising Justice Fazl Ali and Justice Bose agreed with the principle laid down in the case of *Vellaiyappa Chetty*[16] and supplemented the same by stating certain well settled principles to the effect that: "Firstly, that the illegitimate son does not acquire by birth any interest in his father's estate, and he cannot therefore demand partition against his father during the latter's lifetime. But on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship, and is entitled to enforce partition against the legitimate son(s); and that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son."

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14 (1890 L R 17 I A 128
15 (AIR 1952 SC 225); MANU/SC/0078/1952.
16 AIR 1931 PC 294.

In case of *Singhai Ajit Kumar and Anr.* v. *Ujayar Singh and Ors.*[17] the main question was whether an illegitimate son of a *sudra vis-à-vis* his self-acquired property, after having succeeded to half-share of his putative father's estate, would be entitled to succeed to the other half share got by the widow. The Bench referred to Chapter 1, section 12 of the Yajnavalkya and the cases of *Raja Jogendra Bhupati*[18] and *Vellaiyappa Chetty*,[19] and concluded that: "Once it is established that for the purpose of succession an illegitimate son of a *sudra* has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son, and to share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death."

Modern Hindu law has divided sons into four categories:

1. **Son born in lawful wedlock** (it includes adopted son also): He is a legitimate child and class I heir as per section 8 and Schedule I of the Hindu Succession Act, 1956.

2. **Son born in void or voidable marriages**: Son born in void marriage is covered and the amended section 16 of the Hindu Marriage Act, 1955 which has completely superseded the common law doctrine that 'the offspring of a marriage which is null and void *ipso jure* is illegitimate.' Firstly, it has declared that the status of such a child is legitimate. Secondly, it recognizes his right in the property of the parents and not others.

3. **Son born in invalid marriages**: Children born in a wedlock, which is invalid, are not covered by a statutory provision. If there is a violation of section 5(iii) or section 7 or section 15 of the Hindu Marriage Act, 1955. The marriage is neither void nor voidable, and as such is not covered by

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17 (AIR 1961 SC 1334); MANU/SC/0229/1961.
18 *Supra* Note 14.
19 AIR 1931 PC 294.

sections 11 or 12 and consequently not covered by section 16 of the Hindu Marriage Act, 1955. However judicial pronouncements had made the task easy. Section 7 of the Hindu Marriage Act, 1955 shall not turn the children born as illegitimate, and as such shall have a legal shelter under section 16 of the Act.[20]

4. **Son born out of wedlock**: In this category the rights of illegitimate children to succeed to their mother's property has been preserved and recognized, but not to the father's property. On the other hand, the illegitimate son of a person by a continuously kept concubine who had a right to inherit his father's property is now denied that right. This is covered by section 3(1)(j) of the Hindu Succession Act, 1956 wherein it is stated that illegitimate children shall be deemed to be related to their mother and to one another ... and in *Gurbachan Singh* v. *Khichar Singh*[21] it is said that though ordinarily illegitimate children are not considered as children, yet in so far as relationship with one's own mother is concerned, even illegitimate children are considered as her children by virtue of the proviso to section 3(1)(j).

In modern law two legal instances do give an inference of legitimation by subsequent marriage though indirectly:

- Firstly, section 112 of Evidence Act, 1872 speaks about presumption of legitimacy. It says: "Any person was born during the continuance of a valid marriage between his mother and any man...." This provision speaks of birth, and not conception during lawful wedlock which over rules the Hindu and Muslim law, and this view judicially[22] and burden of proof is put on the father to show 'no access'.

- Second instance can be gathered from section 12(1)(d) of the Hindu Marriage Act, 1955. Section 12 speaks of

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20 AIR 1996 SC 1963.
21 AIR 1971 P & H 240.
22 *Karapaya Servai* v. *Mayandi*, AIR 1934 PC 49; *Bhagwathi* v.*Aiyappan*, AIR 1953 TC 470; *Palani* v. *Sethu*, AIR 1924 Mad 677; *Kahan Singh* v. *Natha Singh*, AIR 1925 Lah 414.

> voidable marriage and provides four grounds to declare the marriage null and void. Section 12(1) stipulates that: "That respondent was at the time of the marriage pregnant by some person other than petitioner." The expression 'other than petitioner' is legally significant. So if the petitioner had pre-marital intercourse with a woman and then latter on marries the same woman, such a marriage is valid and not voidable and the child so born shall be legitimate child under the doctrine of *legitimatio per subsequence matrimonium.*[23]

In India, it is very unfortunate that though the illegitimate child has been granted the status of legitimacy, the amended Hindu Succession Act, 1956 and the Hindu Marriage Act, 1955 have failed to protect the interests of innocent children who have no control over their birth. Though a child born out of wedlock is not considered illegitimate any more in the eyes of the law, the same child is not entitled to a share in the property that is inherited by his parents. Vikramjit Sen, Judge, Delhi High Court, known for his progressive rulings, says that a provision of the amended section 16 of the Hindu Marriage Act: "bestows the same legitimacy rights on the offspring of a voidable marriage provided the conception had not occurred after the voidable marriage was declared to be a nullity."

The amendments to the Criminal Procedure Code, 1973 that allow illegitimate children to force their biological parents to pay for their upkeep has had more teeth added to it by an Andhra Pradesh Bill proposed last year that suggests simplified prosecution and enforcement. The Bill says that illegitimate children now have the right to take shelter in the homes of either of their biological parents. Illegitimate children now enjoy all the rights of legitimate children and can claim them from their official parents. If these children file a police case with the help of friends and relatives or NGOs, an alleged biological father can be forced to undergo a DNA test to establish paternity. This new provision gives additional protection to the illegitimate children of rich and philandering persons.

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[23] Legitimation by subsequent marriage.

However section 125 of Criminal Procedure Code, 1973 has taken care that no legitimate or illegitimate child is left unattended by the biological father. It says that a man must maintain his legitimate or illegitimate child, and casts an obligation on the biological father if his offspring is without any means of sustenance.

A Bench of Justices G.S. Singhvi and A.K. Ganguly said in a judgement[24] that such children cannot be deprived of their property rights as what was considered illegitimate in the past, may not be so in the present changing society. The Apex Court ruled: "The court has to remember that relationship between the parents may not be sanctioned by law; but the birth of a child in such a relationship has to be viewed independently of the relationship of the parents." "A child born in such a relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. Right to property is no longer fundamental but it is a Constitutional right and Article 300A[25] contains a guarantee against deprivation of property right save by authority of law," the Bench said.

The Bench disagreed with a plethora of earlier decisions taken by the Apex Court in *Jinia Keotin* v. *Kumar Sitaram Manjhi*[26] and several other cases that illegitimate children were entitled only to a share in the self-acquired property of the parents and nothing beyond that. It also ruled: "In our view, in the case of joint family property, such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. The only limitation even after the amendment seems to be that during the life time of their parents, such children cannot ask for partition (of property) but they can exercise this right only after the death of their parents."

The Supreme Court in *Jinia Keotin* v. *Kumar Sitaram Manjhi*[27] held as under: "...Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of

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24 *Revanasiddappa* v. *Mallikarjun*, (2011)11 SCC1.
25 Persons not to be deprived of property save by authority of law.
26 2003 (1) SCC 730.
27 *Ibid.*

contravention of the statutory prescriptions, any child born of such marriage would have the effect, *per se*, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the Legislature in enacting section 16 put an end to a great social evil. At the same time, section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only."[28]

Same position was again reiterated in a recent decision of this Court in *Bharatha Matha* v. *R. Vijaya Renganathan*[29] wherein this Court held that a child born in a void or voidable marriage was not entitled to claim inheritance in ancestral coparcenary property but was entitled to claim only share in self-acquired properties.

In *Rameshwari Devi* v. *State of Bihar and Ors.*,[30] the Court dealt with a case wherein after death of a government employee, children born illegitimately by the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retiral benefits along with children born out of a legal wedlock. This Court held that under section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were

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28 *Neelamma and Ors.* v. *Sarojamma and Ors.*, (2006) 9 SCC 612.
29 AIR 2010 SC 2685.
30 (AIR 2000 SC 735); MANU/SC/0043/2000.

entitled to share in the family pension, death-cum-retiral benefits and gratuity.

What happens to children born from live-in relationships, where no marriage has taken place? The Supreme Court had presumed a man and woman to be married despite them only having a live-in relationship if they lived for a very long time under one roof and were known in society as husband and wife.

In *Madan Mohan Singh* v. *Rajni Kant*[31] a live-in relationship if continued for a longtime, cannot be termed as 'walk in and walkout' relationship and there is presumption of marriage under section 114 of the Evidence Act and children born to them will not be illegitimate.[32]

In *Bharatha Matha* v. *R. Vijaya Renganathan*[33] wherein the Court held that a child born in a void or voidable marriage was not entitled to claim inheritance in ancestral coparcenary property, but was entitled to claim only share in self-acquired properties.

In *Smt. P.E.K. Kalliani Amma and Ors.* v. *K. Devi and Ors*.,[34] this Court held that section 16 of the Act is not *ultra vires* of the Constitution of India. In view of the legal fiction contained in section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

In *S.P.S. Balasubramanyam* v. *Sruttayan*,[35] the Supreme Court had said: "If a man and woman are living under the same roof and cohabiting for a number of years, there will be presumption under section 114 of the

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31 AIR 2010 SC 2933.
32 *Chanmuniya* v. *Chanmuniya Virendra Kumar Singh Kushwaha and Anr.*, (2011) 1 SCC 141.
33 AIR 2010 SC 2685.
34 (AIR 1996 SC 1963); MANU/SC/0487/1996.
35 AIR 1992 SC 756.

Evidence Act that they live as husband and wife and the children born to them will not be illegitimate."

Conclusion

Dr. Har Dev Kohli, author of *Law and Illegitimate Child - From Sastrik Law to Statutory Law*, suggests a society where the illegitimate child will not be victimized for the sins of his parents. A possible remedy, he points out, lies in the vigorous implementation of the most sacred ideals of human rights and social justice. Some statutory provisions are present in Hindu law. But they remain at best, half-baked provisions, which keep the distinction alive. He suggests legislation in India on the pattern of English Legitimacy Act. But in the largest democracy of the world, where no school readily admits a child who cannot fill the blank asking for the father's name, what legitimacy are we talking about?

With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. If one looks at the history of development of Hindu Law it will be clear that it was never static, and has changed from time to time to meet the challenges of the changing social pattern in different time.

The common law view that the offspring's of marriage which is void and voidable are illegitimate *ipso jure* has to change completely. The child remains innocent.

CONSTITUTIONAL PROVISIONS FOR LEGAL AID IN INDIA

Ms. Silky Mukherjee*

Introduction

'The concept of seeking justice cannot be equated with value of dollars.'[1]

India is a country with poor and illiterate masses. Majority of the Indians are not aware of their legal and constitutional rights. Even if they come to know of their rights, they are in a helpless position because they cannot afford to engage the services of a legal counsel, which has become a costly affair. With a view to provide free legal aid to the deserving sections of the society, the Parliament of India has incorporated a specific Directive Principle *viz.*, Article 39-A by the 42nd Amendment of the Constitution in 1976.

Legal aid is a constitutional right supported by Articles 21 and 39-A of the Constitution of India. Article 21 of the Indian Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

Further, Article 39-A directs the State to ensure that the operation of the legal system promotes justice on a basis of equal opportunities, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The right to get justice starts from the point when a person is either victimized by some unlawful act or is alleged accused of some unlawful commissions or

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1 Blackmun, J. in *Jackson* v. *Bishop,* 404 F 2d 571 (8th Cir 1968).

omissions. We stay in a society governed by rule of law where in the basic canons of natural justice are given supreme value. The most important aspect of the concept of natural justice is, giving a person the right to be heard in fair trial. Fair trial within its very wide ambit incorporates many things which are very widely discussed and deliberated upon by the authors in the later sections of the article. But the most important of all these is right to be represented by someone having knowledge of law. A country like India, where poverty and illiteracy have permanent abode, we cannot think of a situation wherein a person who is a party to a suit or a criminal matter can represent him or can be part of hearing which is the most essential segment of natural justice, unless he is represented by someone knowing law, that is an advocate or a lawyer. As mentioned earlier in a country which is badly struck by poverty and destitution, very few of the grand citizenry can actually think of appointing a practicing lawyer paying hefty sum of money to represent his case. Though the advocates by virtue of professional ethics are supposed to take up the matter of anyone seeking their assistance, without considering how much they are going to be paid and what is the merit involved in the matter, yet in this era of dissolution of all ethics and virtue no one can demand the professionals of advocacy are any exception; and thus in recent times generally, the main motto of advocacy like any other profession is to earn money.

But we have the germ of free legal aid enshrined in our law of the land from very long time. Section 304 of Code of Criminal Procedure in India[2] and Article 39-A[3] coupled

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[2] Legal aid to accused at State expense in certain areas:
(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.
(2) The High Court may, with the previous approval of the State Government make rule providing for-
(a) The mode of selecting pleaders for defence under sub-section (2);
(b) The facilities to be allowed to such pleaders by the courts;
(c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).
(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials

with Articles 14[4] and 21[5] of Indian Constitution have place it a very important place altogether. Contribution of Justice V.R. Krishna Iyar and Justice Bhagwati working under the novel notion of Judicial Activism has actually expanded the dimension of free legal aid to a far greater horizon.

The contribution of Justice V.R. Krishna Iyer towards the development and incorporation of the concept of legal aid in the Indian legal system has been tremendous. His report titled *Processionals Justice to Poor* has gone a step further in enabling the recognition of the poor for the purpose of giving legal aid. In a report on free legal aid in 1971, Justice Bhagwati observed that: "Even while retaining the adversary system, some changes may be effected whereby the judge is given greater participatory role in the trail so as to place poor, as far as possible, on a footing of equality with the rich in the administration of justice."

The Apex Court of India while upholding the constitutional mandate has given some epoch breaking judgments like *M.H. Hoskot* v. *State of Maharashtra*,[6] *Hussainara Khatoon* v. *State of Bihar*[7] and *Khatri (II)* v. *State of Bihar*[8] thereby strengthening the notion of free legal aid in India. In the various parts of the article the authors will try to see that how the free legal aid has developed in India during last few decades and emerged out as one of the most important facet of various other concomitants of right to life.

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before other courts in the State as they apply in relation to trials before the Courts of Session.

3 Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

4 Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

5 Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

6 AIR 1978 SC 1548.

7 AIR 1979 SC 1377.

8 AIR 1981 SC 928.

Right to Fair Trial and Free Legal Aid as a Fundamental Concomitant

In order to have an idea regarding the right to have fair trial, we can have a look on various human right conventions and charters at global level. The authors have in brief mentioned few important provisions on the concept of fair trial from some of the very important human right conventions like Universal Declaration on Human Right, United Nations Convention on Civil and Political Right, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Universal Declaration of Human Rights, 1948[9]

Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defense.

International Covenant on Civil and Political Rights, 1966[10]

Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 14(3): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

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[9] Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10th December 1948.

[10] The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976.

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay it;

(e) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have free assistance of an interpreter if he cannot understand or speak the language used in court.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950[11]

Article 6: Right to Fair Trial. It reads:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) To be informed promptly, in a language which he understands in detail, of the nature and cause of the accusation against him;

(b) To have adequate time and facilities for the preparation of his defense;

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[11] The Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe.

(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

All the conventions and charters mentioned above talks about a criminal justice system which does not incriminate a person unless his crime is proved beyond all doubt. The accused should be given all opportunity to represent his case in proper way in public trial, and then only a person may be held guilty.

All these rights mentioned in all this supremely important international documents related to fair trial will be of no use if a person is not given proper scope to represent himself. In a world where though the ignorance of law is no excuse, yet very few are actually aware about the law in truest sense of term, no one can represent himself or herself properly unless that person is assisted by someone acquainted with the terms and jargons of law. Thus to prevent the notion of fair trial from becoming dead letter the alleged accused or retractor of law is required to be represented by someone who knows and can practice law that is an advocate or a lawyer.

Free Legal Aid in India

The right to legal aid is a basic concomitant of right to get fair trial, one of the fundamental human rights. Now as the authors have strived to write a paper on Indian scenario, this right becomes the right of significant importance.

India is a country unfrequented with illiteracy, poverty and innocuousness of wide range of people who know nothing about the nitty-gritty's of legal world. They come

to know about the proceedings and requirements of law only when they are faced with any charge; it may be criminal or civil, or whenever they are the victims themselves. Lack of awareness has even prevented the literate people from knowing the requisites of legal world. It was very well depicted by Nilam Katara, the courageous mother of slained Nitish Katara, the victim of one of India's most celebrated murder, wherein a politician's daughter was in love with Nitish Katara, a man from modest background, and it did not go well with her unduly powerful and notorious politician father and the gruesome murder of that man took place. Just after the incident Ms. Nilam Katara, mother of deceased Nitish Katara whose husband was suffering from paralytic attack had to tryst with her destiny all alone in search of justice. She was not from law background and she had to suffer a lot because of these, as every now and then her efforts used to get hindered due to the stringent and formalistic legal proceedings in India. Though coming from a very educated upper-middle class background and herself being quite educated, she had to face inexplicable agony while she was fighting for justice of her deceased son. Later on in an interview she depicted her anguishes and pains to attain the justice and urged to include certain basic aspects of law as a part of primary and secondary education so that people would know a little about the law by which they are governed, and do not become exposed to a hitherto before unknown world once when they are going through most taxing time-frame of their life.

Hence, the above motioned incident can make one thing clear that is, Indian population baring a particular section of people knows very little about the vast legal system by which they are governed and where ignorance of any of those law from that magnanimous repository of laws, cannot be put forth as an excuse.

Under such circumstance the need of those who know the law becomes really important and when we think about the illiterate and poverty stricken mass which actually covers the lion share of the great Indian population, the need of such people increases by leaps and bounds that to at a free of cost. This is why the Apex Court of the country, that is Supreme Court of India by

realizing the need of the free legal assistance has played very vital role in making the same as one of the basic right.

Here the authors wish to clarify one thing, that the law of the land has already has within its edifice the concept of *amicus curie*, the literal meaning of the same says an adviser to the court on some matter of law who is not a party to the case. If it is explained taking into consideration the practical contexts than it will refer to a person appointed by court to look into the matter of a party before a court who is not represented by any lawyer.

In India, the provision relating to the same is given in section 304 of the Code of Criminal Procedure, 1973:

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defense at the expense of the State.

(2) The High Court may, with the previous approval of the State Government make rule providing for-

(a) The mode of selecting pleaders for defense under sub-section (2);

(b) The facilities to be allowed to such pleaders by the courts;

(c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before the Courts of Session.

Article 39-A of the Constitution of India also speaks about free legal assistance. The above stated article

depicts that, the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, the noble thought of free legal aid is there in the basic laws of the land for long. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. All this constitutional obligations are actually furthering the goal enshrined in section 304 of the Criminal Procedure Code, 1973 where in constitutional duty to provide legal aid arises from the time the accused is produced before the Magistrate for the first time and continues whenever he is produced for remand.[12]

Since 1952, the Government of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Government for legal aid schemes. In different States legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati, the then Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of *Lok Adalats* added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987, Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally

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12 Pathak, Varun, *A Brief History of Legal Aid*, http://www.legalserviceindia.com/articles/laid.htm. Accessed on February 27, 2012.

enforced on 9th of November 1995 after certain amendments were introduced therein by the Amendment Act of 1994.[13]

Justice V.R. Krishna Iyer and Justice P.N. Bhagwati have also contributed to the development of Legal Aid through Reports called *Processionals Justice to Poor* in 1971 and *National Judicature: Equal Justice - Social Justice, Ministry of Law and Justice and Company Affairs* in 1977.

Keeping in mind the need of Indian population, the Legislature has also formulated the Legal Services Authorities Act, 1987 which also initiated the concept of *Lok Adalat* in India. In 1987, the Legal Services Authorities Act was enacted to give a statutory base to the legal aid programmes throughout the country on a uniform pattern. The Act was finally enforced on 9th November 1995 after certain amendments were introduced in the Amendment Act of 1994.[14]

Landmark Cases Generating Legal Aid Movement in India

In *M.H. Hoskot* v. *State of Maharashtra,*[15] the Supreme Court laid down some banning prescription for free legal aid to prisoners which are to be followed by all courts in India, such as furnishing of free transcript of judgment in time, to the sentences; where the prisoner seeks to file an appeal or revision, every facility for exercising such right shall be made available by jail administration, and if a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Article 142,[16] read with Articles 21[17] and 39-A of

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13 *Supra* Note 7.

14 *Supra* Note 12.

15 (1978) 3 SCC 544.

16 Article 142: Enforcement of decrees and orders of Supreme Court and unless as to discovery, *etc.* (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court.

In *Khatri (II)* v. *State of Bihar,*[18] the Court ruled that: "The Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty and indigence, he is entitled to obtain free legal aid at the cost of the State. We deplored that, in that case, where the accused were blinded prisoners the Judicial Magistrate failed to discharge his obligation and contended himself by merely observing that no legal representation had been asked for by the blinded prisoners and hence was provided. We accordingly directed the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty and indigence that he is entitled to free legal services at the cost of the State unless he is not willing to take advantage of the free legal aid provided by the State. We also give a general direction to every State in the country .....to make the provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations, the only qualification being that the offence charge against an accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representations."[19]

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(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

17 Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

18 (1981) 1 SCC 635.

19 Mamta Rao, *Public Interest Litigation: Legal Aid and Lok Adalats*, Second Edition, Eastern Book Company, Lucknow, 2004, p 352.

Bhagwati, J has observed in *Hussainara Khatoon* v. *State of Bihar*[20] that: "Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just."[21]

In *Sheela Barse* v. *State of Maharashtra*,[22] the Supreme Court while deciding an issue on protection to women prisoners and other detenues in police lock-ups *inter alia* observed the following regarding Legal Aid and Advice:

"(1) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in every case of arrest it must be immediately be made known to the arrested person that he is entitled to apply for the bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra, also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock-up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.[23]

(2) Whenever a person is arrested by the police and taken to the police lock-up the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee. Such Committee of Legal Aid will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the

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20 AIR 1979 SC 1369.

21 Jain, M.P., *Indian Constitutional Law*, LexisNexis Butterworths Wadhwa, Nagpur, 2010, p 1205.

22 (1983) 2 SCC 96.

23 Rao, Mamta, *Public Interest Litigation: Legal Aid and Lok Adalats*, Second Edition, Eastern Book Company, Lucknow, 2004, p 353.

concerned Legal Aid Committee for carrying out this direction."[24]

In *State of Maharashtra* v. *M.P. Vashi,*[25] while interpreting Article 39-A held that in a fit case the court can direct the ruling politicians to carry out the Directive Principles of State Policy even though these are stated to be non justiciable in a court of law. Further, there is inaction or slow action by the politicians and administrative officers, the judiciary must intervene. The Apex Court clubbed legal aid with legal education and directed the State to revamp and restructure the deteriorating standards in legal education. The Supreme Court, in this case, directed the State to provide grant-in-aid to recognized law colleges so as to enable them to function effectively and in a meaningful manner and turn out sufficient number of well trained or properly equipped law graduates. That in turn will enable the State to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. These aspects necessarily flow from Articles 21 and 39-A of the Constitution.

Conclusion

Our judicial system is standing on the premises of one single most important canon of natural justice, that is no one can be punished unheard. That requirement of hearing can never be justified unless the person seeking justice has represented his case properly. Here our criminal jurisprudence follows a very interesting anecdote, *i.e.*, let thousands of criminal to get liberated but don't punish a single innocent. So according our very magnanimous judicial scheme no alleged accused shall be considered as guilty unless his guilt is proved beyond all doubt. Keeping in mind all the above aspects which actually make our judicial system so unique, it can be said with certainty that an party to a suit or criminal case should be represented properly in the public hearing and he should be definitely assisted by a lawyer or an advocate as the author has already described, the dimensions of law is so complex and manifold. In a country like India that legal assistance should be a

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[24] *Ibid.*
[25] (1955) 5 SCC 730.

fundamental requirement and hence should be available at free of cost to needy masses in search of justice. Our Apex Court has in times and again made very apt attempts to implement this philosophy which is already prevailing in our legal system from the beginning. Legislature has done their bit by creating Legal Services Authorities Act, 1987. Jurist has contributed in this respect by submitting their valued suggestions in various report in given subjects.

In brief, it can be said that a lot has done in this regard to satisfy the basic need of a just society. Yet a lot of things are required to be done to make the notion of free legal aid a reality to the greater portion of the population. The most important requirement in this respect is creation of legal awareness amongst the people from all walks of life. The legal jargons are required to be made legible to the greater masses. Most importantly public spirited lawyers are the need of the hour to carry forward the very noble mission of providing justice to people belonging to all segments of society. Then only the very noble and idealistic end of this notion called legal aid will be fully attained.