For Private Circulation : Educational Purpose Only
YEAR OF PUBLICATION : 2018

Posting as a Family Court Judge is the most honoured posting. You should have these qualities which are required from Family Court Judge for conciliation and settlement and for compassion. Every family Court Judge should write down everyday that "Compassion is my passion".

Hon'ble Mr Justice Kurian Joseph
Judge, Supreme Court of India & Chairman
Supreme Court Committee for Sensitization of Family Court Matters

READING MATERIAL FOR
5 DAYS' (40 HOURS)

TRAINING MODULE
FOR
FAMILY COURT JUDGES OF INDIA

VOLUME - II

You have to be expert in dealing with dispute which are of extreme importance to the society, so, if you are posted as a Judge of the family court you should be happy that you are able to give something in return.

Hon'ble Ms Justice Indira Banerjee
Judge, Supreme Court of India & Member
Supreme Court Committee for Sensitization of Family Court Matters

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Prepared by
Hon'ble Mr. Justice D.N. Patel
Judge, High Court of Jharkhand &
Member, Supreme Court Committee for
Sensitization of Family Court Matters

DRAFT

FIVE DAYS' 40 Hours TRAINING MODULE

FOR FAMILY COURTS JUDGES OF INDIA

DAY - 1

SESSION 1

9:00 AM– 11.00 AM

Human Dignity : Concept, Constitutional and Legal perspective

- ***Universal Human Values***
- ***Human Dignity in Indian Constitution***
- ***Indian Values***

SESSION 2

11.00 AM – 1:00 AM

Basic features of Indian Civilization : Family As a Foundation

- ***Family Centric Society***
- ***Dharma or the Spiritual Doctrine of Duty***
- ***Supremacy of Traditions***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM

SESSION 3

1.45 PM – 3.45 PM

Establishment of Family Court Jurisdiction : Aims & Objectives

- ***Paradigm Shift in Conflict Resolution : Difference in approach & attitude***
- ***Reconciliation & Settlement Culture***
- ***Complimentary Roles of Duty Holders :Roles, Resources & competencies***

SESSION 4

3.45 PM - 5.45 PM

Art of Conciliation

- ***Knowledge***
- ***Skill***
- ***Aptitude***

*** Tea would be served inhouse at 4.00PM**

DAY - 2

SESSION 5

9:00 AM– 11.00AM

Art of Mediation

- ***Communication Skills***
- ***Finding epi-centre of dispute***
- ***Encouraging the parties to find solutions***

SESSION 6

11.00 AM – 1:00 PM

Practical Session

- ***Case Studies***
- ***Role Play***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM

SESSION 7

1.45 PM - 3.45 PM

Marriage : An Indian Perspective

- ***Marriage as an Institution***
- ***Rights and obligations***
- ***Generational Shift***

SESSION 8

3.45 PM – 5.45 PM

Divorce : Mend it or end it & Art of grceful separation

- ***Paradigm shift in approach***
- ***Rationalization of emotions***
- ***Mend it or end it ; keeping it in between is lawyer's paradise***

*** Tea would be served inhouse at 4.00PM**

DAY - 3

SESSION 9

9:00 AM– 11.00 AM

Custody of Child & Shared Parenting including Visitation Rights

- ***Relocation and Parental Abduction***
- ***Best interest of child***
- ***Parental Alienation***

SESSION 10

11.00 AM – 1:00 PM

Maintenance & Alimony including Interim Measures

- ***Social justice legislation***
- ***Aims and Objectives***
- ***Execution of Maintenance & Alimony Orders***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM

SESSION 11

1.45 PM – 3.45 PM

Art of Listening & Communication

- ***Listening***
- ***Understanding***
- ***Communication***

SESSION 12

3.45 PM - 5.45 PM

Guardianship & Adoption including CARA Guidelines

- ***Substantive laws***
- ***Procedure***
- ***Issues***

*** Tea would be served inhouse at 4.00PM**

DAY - 4

SESSION - 13

9:00 AM – 11:00 AM

Family Violence : Nature & Dimensions

- ***Domestic Violence***
- ***Interim Measure***
- ***Beneficial Legislation***

SESSION 14

11.00 AM – 1:00 PM

Motivational Class on Never say die : Miracle can happen in last minute

- ***Settlement can happen at any time in any stage***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM

SESSION 15 & 16

1.45 PM - 5.45 PM

Visit to Mediation and Conciliation Centre & Participation in Counselling

DAY - 5

SESSION 17

9.00 AM - 11.00 AM

Art of Being a good Family Judge

- ***Values***
- ***Ethics***
- ***Approach***

SESSION 18

11.00 AM - 1.00 PM

Personal Laws in India

- ***Personal laws***
- ***Distinctions***
- ***Forums***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM

Session 19

1.45 PM - 3.45 PM

Understanding Conflicts

- ***Nature of Coflict***
- ***Diagnosis***
- ***Solutions***

Session 20

3.45 PM - 5.45 PM

Group Dicussion

- ***Formation of participants in to four Groups***
- ***Each Group to discuss for one hour on how to perform better quantitavely as well as qualititavely***
- ***15 minutes presentation/power point presentation by each Group***

END OF FIVE DAYS' TRAINING PROGRAMME

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VOLUME - I

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MEDIATION

MEDIATION

INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code

of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business, dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.*

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbour-neighbour disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative

* Michael Mcllwrath - the host of the CPR International Dispute Negotiation (IDN)

processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with

it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

LEGAL RECOGNITION OF MEDIATION IN INDIA

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are " charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

* To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
* To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
* To frame most effective and economical schemes for the purpose.

* To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
* To undertake research in the field of legal services.
* To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
* To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
* To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberilisation policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M. Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

Evolution of Mediation in India

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was

followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52 Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha

Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation

leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

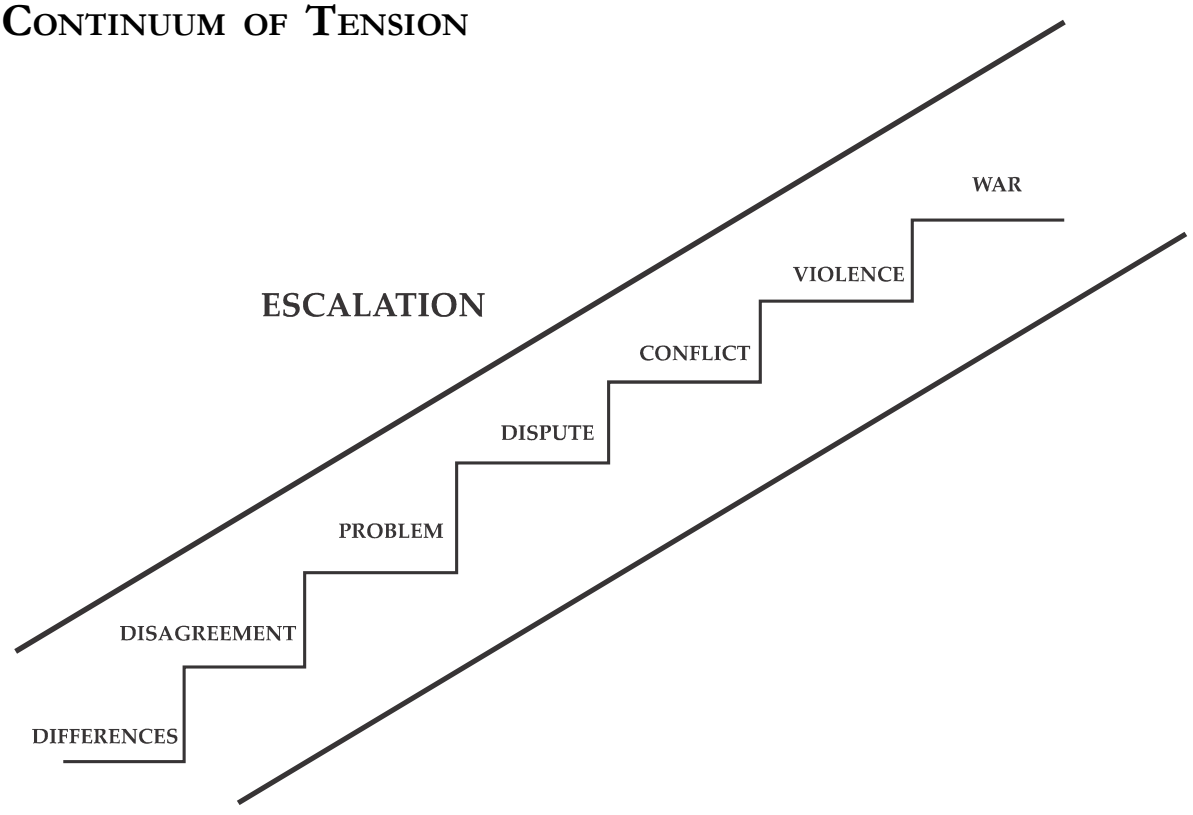
UNDERSTANDING CONFLICT

THE NATURE OF CONFLICT

It is appropriate to begin the study of mediation with an examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process. We will first attempt to understand conflict, then examine the need to manage conflict through negotiation and finally study mediation as assisted negotiation to resolve conflict effectively. This becomes necessary because how we understand conflict determines the way we will mediate.

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved become dispute. Unresolved disputes become conflicts. Unresolved conflicts can lead to violence and even war. This is called the continuum of tension and is often illustrated by the following chart:

CONTINUUM OF TENSION



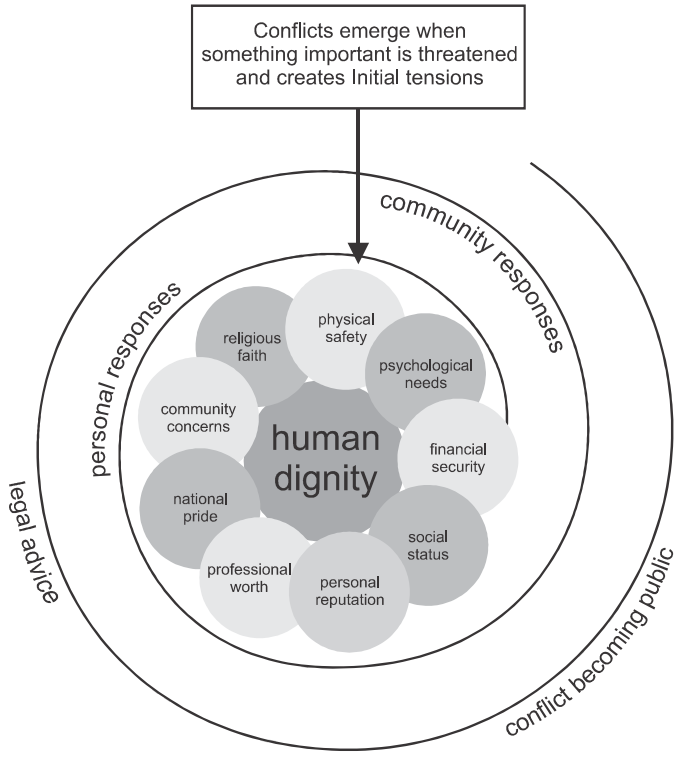
We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

THE DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

THE CONFLICT CORE AND CONFLICT SPIRAL



2) THE CONFLICT SPIRAL

When a given conflict intensifies, the initial tensions start spiralling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

Personal responses. The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in-action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

Community responses. Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

Legal advice. Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties, assisted by a neutral person, a possible solution acceptable to all can be evolved.

Conflict becoming public

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

3) THE CONFLICT TRIANGLE*

The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the

* Acknowledgement of concepts and ideas of the Conflict Core, Spiral and Triangle: 'The Mediator's Handbook' by Jennifer E. Beer with Eileen Stief developed by Friends Conflict resolution programs, revised and expanded 3rd.Edition, New Society publishers

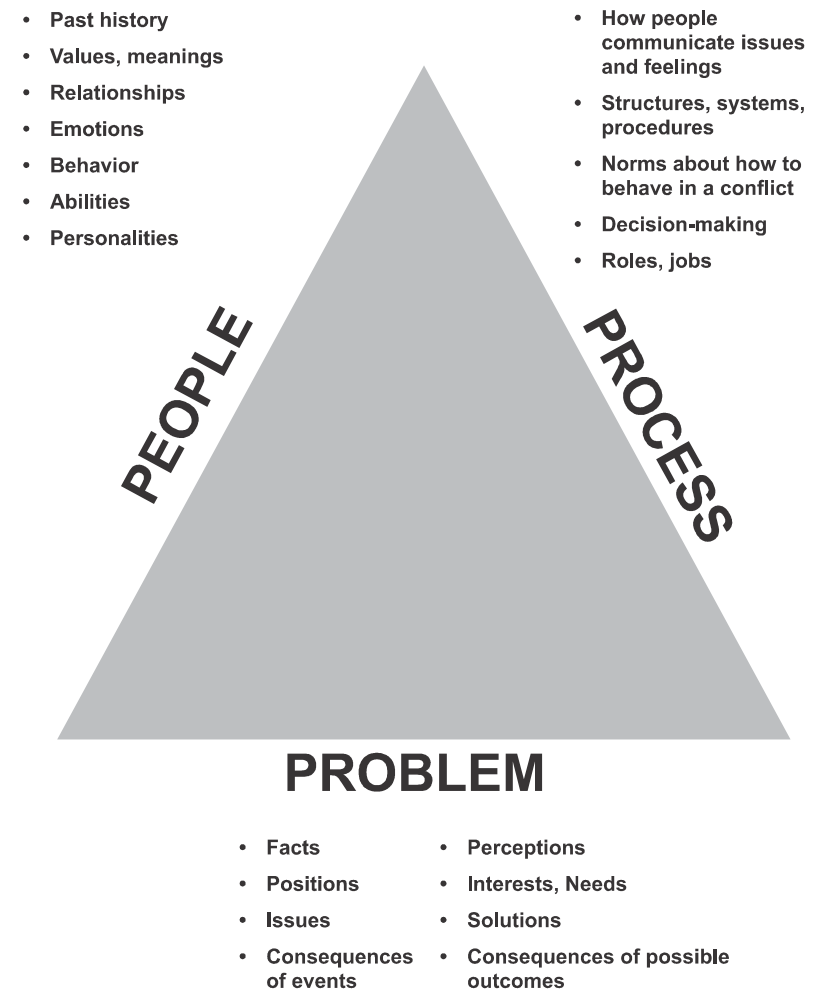
basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. **People.** Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.

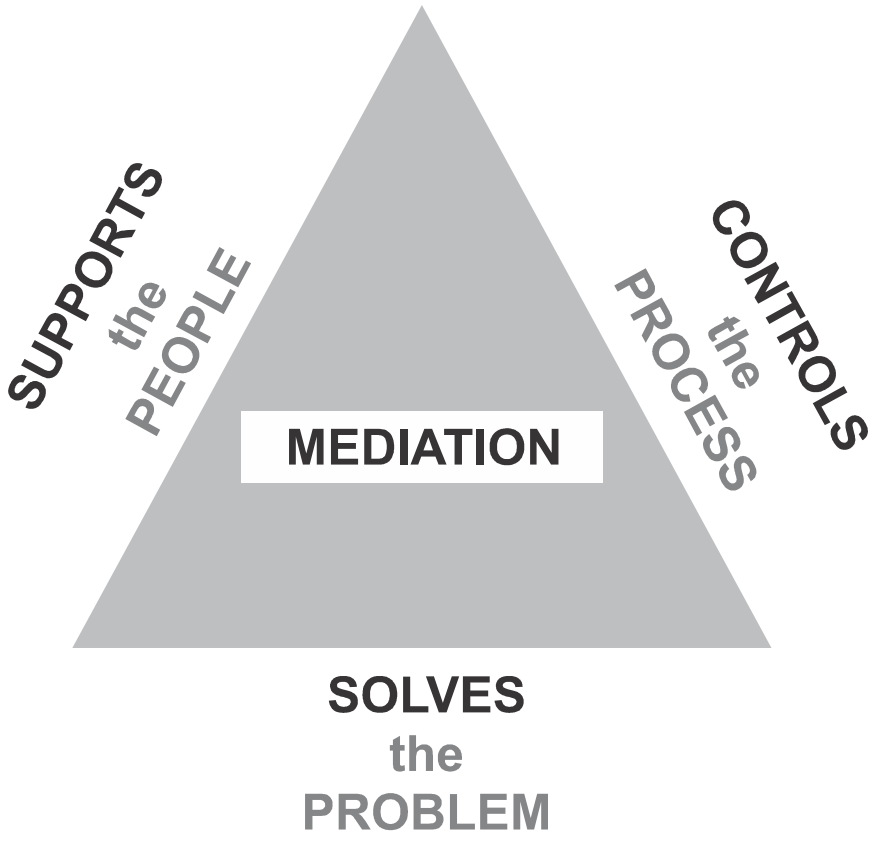
2. **Process.** Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.

3. **Problem.** Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

THE CONFLICT TRIANGLE -1



THE CONFLICT TRIANGLE -2



GOING BEYOND MERE PROBLEM-SOLVING

If the parties are able to address each side of the conflict triangle, easing their emotional state, changing their ways of interacting and addressing the problems which threatened their core interests, then the conflict is not merely resolved, but mindsets and hearts change. It is in this sense that mediation at its best goes beyond mere problem-solving or managing a conflict.

CAUSES OF CONFLICT AND ADDRESSING THEM

The first step in resolving conflict is identifying its cause. Once the cause has been identified, the next step is to evolve a strategy to address it. The following are some examples of causes of conflict and strategies to address them.

CAUSES	STRATEGY
Information	
• Lack of information • Misinformation • Different interpretations of information	• Agree on what data are important • Agree on process to collect data • Agree on considering all interpretations of information
Interests and Expectations	
• Goals, needs • Perceptions	• Shift focus from positions to interests • Expand options • Find creative solutions • Clarify perceptions
Relationships	
• Poor communication • Repetitive negative behavior • Misconceptions, stereotypes • Distrust • History of conflict	• Establish ground rules • Clarify misconceptions • Improve communication • Agree on processes and procedures • Keep your word • Focus on improving the future, not dissecting the past
Structural Conflicts	
• Resources • Power • Time constraints	• Reallocate ownership and control • Establish fair, mutually acceptable decision-making process • Clearly define, change roles
Values	
• Different criteria for evaluating ideas • Different ways of life, ideology and religion	• Search for super-ordinate goals • Allow parties to agree and to disagree • Build common loyalty

CONCEPT OF MEDIATION

1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

1.2 Mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process . The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

1.5 Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

1.6 Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.

1.7 In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator *facilitates* when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator *evaluates* when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

1.9 Mediation is a private process, which is not open to the public. Mediation is also **confidential** in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for / during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

1.12 The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

1.14 Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

TYPES OF MEDIATION

1. **COURT- REFERRED MEDIATION-** It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. **PRIVATE MEDIATION -** In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

1. The parties have **CONTROL** over the mediation in terms of 1) its *scope* (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its *outcome* (i.e., the right to decide whether to settle or not and the terms of settlement.)

1.1. Mediation is **PARTICIPATIVE.** Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

1.2. The process is **VOLUNTARY** and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

1.3. The procedure is **SPEEDY, EFFICIENT** and **ECONOMICAL.**

1.4. The procedure is **SIMPLE** and **FLEXIBLE.** It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

1.5. The process is conducted in an **INFORMAL, CORDIAL** and **CONDUCIVE** environment.

1.6. Mediation is a **FAIR PROCESS.** The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

1.7. The process is **CONFIDENTIAL.**

1.8. The process facilitates better and effective **COMMUNICATION** between the parties which is crucial for a creative and meaningful negotiation.

1.9. Mediation helps to maintain/ improve/ restore relationships between the parties.

1.10. Mediation always takes into account the **LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES** at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

1.11. In mediation the focus is on resolving the dispute in a **MUTUALLY BENEFICIAL SETTLEMENT.**

1.12. A mediation settlement often leads to the **SETTLING OF RELATED/CONNECTED CASES** between the parties.

1.13. Mediation allows **CREATIVITY** in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

1.15. Mediation **PROMOTES FINALITY.** The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

1.16. **REFUND OF COURT FEES** is permitted as per rules in the case of settlement in a court referred mediation.

COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.

7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
9.	Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

	MEDIATION	CONCILIATION	LOK ADALAT
1.	Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
6.	The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.

7. The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
8. The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
9. Not appealable.	Decree/order not appealable.	Award not appealable.
10. The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
11. Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
12. In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
13. Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A ROLE PLAY TO DEMONSTRATE THE DIFFERENCES BETWEEN ADJUDICATION AND MEDIATION

"THE FAMILY PORTRAIT"

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

EXERCISE : Resolve the dispute using **(i)** arbitration (adjudication) and **(ii)** mediation.

Exercise (i)

ARBITRATION (ADJUDICTION)

The arbitrator has to first decide upon what the **ISSUE** in dispute is : Which child fits the definition of the "favourite child"?

Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.

The arbitrator evaluates the evidence and DECIDES who fits in the definition of "favourite child" - the painting is awarded to that child.

No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii)

MEDIATION

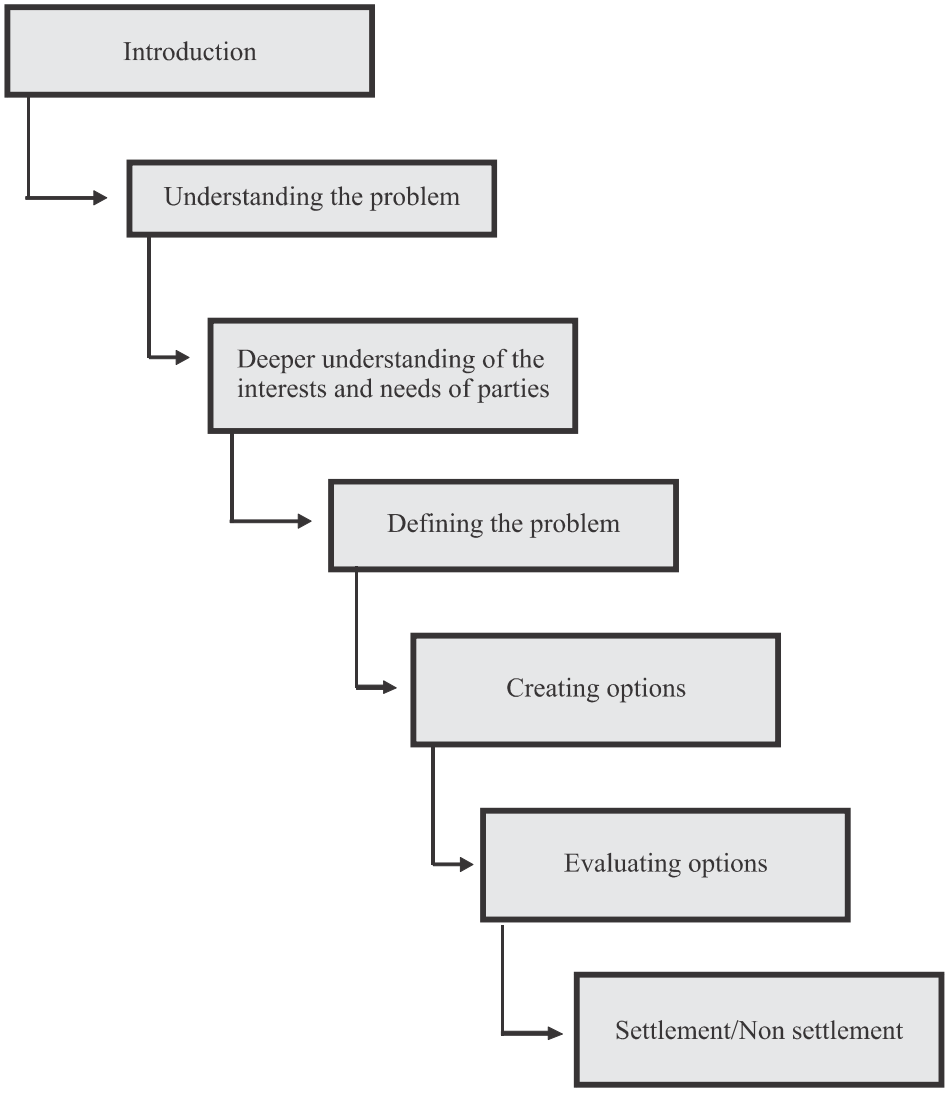
Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.

Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

THE PROCESS OF MEDIATION

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.



Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

CHAPTER-VI
STAGES OF MEDIATION

The functional stages of the mediation process are:

1) Introduction and Opening Statement

2) Joint Session

3) Separate Session(s)

4) Closing

STAGE 1: INTRODUCTION AND OPENING STATEMENT

Objectives

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present.

There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.
- Each of the parties and his counsel are seated together.
- All persons present feel at ease, safe and comfortable.

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2: JOINT SESSION

Objectives

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

Procedure

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate

session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3: SEPARATE SESSION

Objectives

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

Procedure

(i) RE - AFFIRMING CONFIDENTIALITY

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) GATHERING FURTHER INFORMATION

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties

hope to achieve);

- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) REALITY - TESTING

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA / MLATNA analysis).

(I) ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of effective questions:

- **OPEN-ENDED QUESTIONS** like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'
- **CLOSED QUESTIONS,** which are specific, concrete and which bring out specific information. For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'
- **QUESTIONS THAT BRING OUT FACTS:** 'Tell me about the background of this matter'. 'What happened next?'
- **QUESTIONS THAT BRING OUT POSITIONS:** 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'
- **QUESTIONS THAT BRING OUT INTERESTS:** 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA /MLATNA ANALYSIS).

BATNA Õ Best Alternative to Negotiated Agreement
WATNA Õ Worst Alternative to Negotiated Agreement
MLATNA Õ Most Likely Alternative to Negotiated Agreement

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/ MLATNA analysis need not be resorted to. However if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(iv) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement.

There are 2 stages to the brain storming process:

1. Creating options
2. Evaluating options

1. **Creating options:-** Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

2. **Evaluating options:-** After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties.

   Brainstorming requires lateral thinking more than linear thinking.

   Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

   Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(v) SUB- SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

- Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.
- If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(vi) EXCHANGE OF OFFERS

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

STAGE 4: CLOSING

(A) Where there is a settlement

- Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

  1. Mediator orally confirms the terms of settlement;
  2. Such terms of settlement are reduced to writing;
  3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
  4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
  5. A copy of the signed agreement is furnished to the parties;
  6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
  7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
  8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

- **THE WRITTEN AGREEMENT SHOULD:**

  - clearly specify all material terms agreed to;
  - be drafted in plain, precise and unambiguous language;
  - be concise;
  - use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);
  - use language and expression which ensure that neither of the parties feels that he or she has 'lost';
  - ensure that the terms of the agreement are executable in accordance with law;
  - be complete in its recitation of the terms;

- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

- If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting **"not settled".** The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.
- The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER-VII
ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.

- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement.

The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

(C) QUALITIES OF A MEDIATOR

It is necessary that a mediator must possess certain basic qualities which include:

i. complete, genuine and unconditional faith in the process of mediation and its efficacy.

ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

iv. highest standards of honesty and integrity in conduct and behavior.

v. neutrality, objectivity and non-judgmental.

vi. ability to be an attentive, active and patient listener.

vii. a calm, pleasant and cheerful disposition.

viii. patience, persistence and perseverance.

ix. good communication skills.

x. open mindedness and flexibility.

xi. empathy.

xii. creativity.

(D) QUALIFICATIONS OF MEDIATORS

The Supreme Court of India in **Salem Advocate Bar Association** V **Union of India,** (2005) 6 SCC 344 approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Mr. Justice M.J.Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:--

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. Awareness about competence and professional role boundaries

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience.

Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. Practice Neutrality

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. Ensure Voluntariness

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. Maintain Confidentiality

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless ;

a. the mediator is specifically given permission to do so by the party concerned; or

b. the mediator is required by law to do so.

6. Do no harm

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. Promote Self-determination

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of :

a. his qualifications and prior experience;

b. direct or indirect interest if any, in the outcome of the dispute;

c. any fees that the parties will be charged for the mediation; and

d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party 'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

TRAINING OF MEDIATORS

A system, even if perfectly structured, may not yield desired result if the persons operating it do not have requisite operational skills. A person who is selected to perform a particular job may commit errors if he is not properly trained for it. Training is indispensable before a person starts performing. Training, seeks to identify the gaps in the expertise of a person and to fill such gaps to equip him to perform efficiently. Training should be focused, specialized, result oriented and structured according to the task. It should improve skills, knowledge and attitude of a trainee.

Mediation is a developing concept in India. Efforts are being made to make mediation a fully developed tool for resolution of disputes. Training is necessary for a mediator to learn the fundamentals of mediation. Training is required for a mediator irrespective of his background, whether he is a judicial officer or advocate or person belonging to any other category.

It is necessary to follow uniform mediation process and programme all over India. Uniformity is required also in the matter of duration, nature and curriculum of the training for mediators.

DURATION OF TRAINING

In the light of International standards and indigenous requirements, the duration of training should be a minimum of 40 hours.

NATURE OF TRAINING

Training consists of :-

(i) Theory

(ii) Exercises like role play and demonstration.

(iii) Practical training of mediating a few actual disputes under the guidance of a trainer or a trained mediator.

CURRICULUM

The curriculum for training shall include :-

1. Concept and process of Mediation.
2. Evolution and Legislative History of mediation in India.
3. Conflict management and resolution.
4. Concept of Mediation.
5. Types of Mediation.
6. Advantages of Mediation.
7. Difference between Mediation and other modes of Dispute Resolution.
8. Stages of Mediation.
9. Negotiation.
10. Communication.
11. Impasse management.
12. Role of Mediator.
13. Ethics and code of Conduct for Mediator.
14. Role of Referral Judges.
15. Role of Parties and their Advocates.
16. Enforceability of settlement agreement.
17. The Mediation Rules.

COMMUNICATION IN MEDIATION

1.1 Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following :

- To express our feelings/thoughts/ideas/emotions/desires to others.
- To make others understand what and how we feel/think.
- To derive a benefit or advantage.
- To express an unmet need or demand.

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.

1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.

1.8 Consequently, a communication would involve :-

A Sender - person who sends a message.

A Receiver - person who receives the message.

Channel - the medium through which a message is transmitted which could be words or gestures or expressions.

Message - thoughts/feelings/ideas/emotions/knowledge/

information that is sought to be communicated.

Encoding - transforming message/information into a form that can be sent to the receiver to be decoded correctly.

Decoding - understanding the message or information.

Response - answer/reply to a communicated message.

A deficiency in any of these components would render a communication incomplete or defective.

1.9 Communication may be unintentional e.g., in an emotional state, the feelings could be conveyed involuntarily through body language, gestures, words etc. A Mediator should be alert to observe such expressions.

1.10 Communication may be verbal or non-verbal. Communication could be through words - spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the communication, and 7% is transmitted through words.

VERBAL AND NON-VERBAL COMMUNICATION

Verbal Communication is transmission of information or message through spoken words.

Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanor, attitude and other modes of non-verbal expression. It is often more spontaneous than verbal communication and takes place under less conscious control. Therefore, it can provide more accurate information.

It is important for a mediator to pay adequate attention to non verbal communications that take place throughout the mediation. It is also important for a mediator to analyze the message sent by the parties through such non verbal communication.

1.11 REQUIREMENTS FOR EFFECTIVE COMMUNICATION :

i) Use simple and clear language.

ii) Avoid difficult words and phrases.

iii) Avoid unnecessary repetition.

iv) Be precise and logical.

v) Have clarity of thought and expression.

vi) Respond with empathy, warmth and interest.

vii) Ensure proper eye contact.

viii) Be patient, attentive and courteous.

ix) Avoid unnecessary interruptions.

x) Have good listening abilities and skills.

xi) Avoid making statements and comments or responses that could cause a negative effect.

1.12 CAUSES OF INEFFECTIVE COMMUNICATION :

i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.

ii) Misinterpretation and distortion of the message by the Receiver.

iii) Differences in language and expression.

iv) Poor listening abilities and skills.

v) Lack of patience.

vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

1.13 BARRIERS TO COMMUNICATION :

PHYSICAL BARRIERS :

i) lack of congenial atmosphere.

ii) lack of proper seating arrangements.

iii) presence of third parties.

iv) lack of sufficient time.

EMOTIONAL BARRIERS :

i) temperaments of the parties and their emotional quotient.

ii) feelings of inferiority, superiority, guilt or arrogance.

iii) fear, suspicion, ego, mistrust or bias.

iv) hidden agenda.

v) conflict of personalities.

1.14 COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

	ADVERSARIAL SYSTEM	MEDIATION
GOAL	To win.	To reach mutually acceptable solutions.
STYLE	Argumentative.	Collaborative.
SPEAK	To establish and convince.	To explain.
LISTEN	To find flaws and develop counter arguments.	To understand.

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

(A) Active Listening.

(B) Listening with Empathy.

(C) Body Language.

(D) Asking the Right Questions.

(A) ACTIVE LISTENING :

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the dispute.

In active listening the listener pays attention to the speaker's words, body language, and the context of the communication.

An active listener listens for both what is said and what is not said.

An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis-statement or other limitations of the speaker's communication.

An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message.

Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

Following are the commonly used techniques of active listening by the mediator:

1. **Summarising:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.

2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.

3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from *Positions* to *Interests* and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:

    1. Converts the statement from negative to positive.
    2. Converts the statement from the past to the future.
    3. Converts the statement from positions to interests.
    4. Shifts the focus from the targeted person to the speaker.
    5. Reduces intensity of emotions.

Example:

Party: "My boss is cruel and indifferent. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn't make any time for me and always ignores me."

Mediator Re-frames: "You want regular access and communication with your boss and you want him to be considerate, is that right?" This re-frame has converted the employee's complaint from negative to positive, past to future, position to interest and shifted the focus back to the employee's needs/interests.

NOTE :

Position: A position is a perception ("my boss is cruel and indifferent") or a claim or demand or desired outcome ("I should be able to meet him at least once a day").

Interest: An interest is what lies beneath and drives a person's demands or claims. It is a person's real need, concern, priority, goal etc. It can be tangible (e.g. property, money, shares etc.) and/or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.).

4. **Acknowledging:** In acknowledgment the mediator verbally recognizes what the speaker has

said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.

5. **Deferring :** A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. **Encouraging :** The mediator can encourage parties when they need reassurance, support or help in communicating. Example : " what you said makes things clear" or "this is useful information"

7. **Bridging :** A technique used by a mediator to help a party to continue communication. Example: "And--------", "And then-----", The word "And" encourages communication whereas the word "But " could discourage communication.

8. **Restating :** In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

9. **Paraphrasing:** Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.

10. **Silence:** A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

11. **Apology:** It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologise.

    Example: "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"

12. **Setting an agenda:** In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

    For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision making.

BARRIERS TO ACTIVE LISTENING :

(i) Distractions :-- They may be external or internal. The sources of external distractions are

noise, discomfort, interruptions etc. The sources of internal distractions are tiredness, boredom, preoccupation, anxiety, impatience etc.

(ii) Inadequate time :- There should be sufficient time to facilitate attentive and patient listening.

(iii) Pre-judging :-- A mediator should not prejudge the parties and their attitude, motive or intention.

(iv) Blaming :-- A mediator should not assign responsibility to any party for what has happened.

(v) Absent Mindedness :- The mediator should not be half-listening or inattentive.

(vi) Role Confusion :-- The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

(vii) Arguing / imposing own views:-- The mediator should not argue with the parties or try to impose his own views on them.

(viii) Criticising

(ix) Counseling

(x) Moralising

(xi) Analysing

(B) LISTENING WITH EMPATHY

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them.

Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy. In empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Example:

Wife: "I had such a hard day at work"

Husband :"I am so sorry you had a hard day at work"
(focus is on listener/ husband) - Sympathy

Husband :"You had a hard day at work, mine was worse" - Sympathy
(focus on listener/husband)

Husband: " You feel it was hard for you at work today.
Would you like to talk about it?"
(focus on speaker/wife) - Empathy

Reflecting' is a good communication technique used to express empathy.

(C) BODY LANGUAGE :

The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

In the case of mediators the following can demonstrate an appropriate body language :-

(i) Symmetry of posture - It reflects mediator's confidence and interest.

(ii) Comfortable look - It increases the confidence of the parties.

(iii) Smiling face - It puts the parties at ease.

(iv) Leaning gently towards the speaker - It is a sign of attentive listening.

(v) Proper eye contact with the speaker - It ensures continuing attention.

(D) ASKING THE RIGHT QUESTIONS

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing and context of the questioning are important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

TYPES OF QUESTIONS :

(a) Open Questions: These are questions which will give a further opportunity to the party to provide more information or to clarify his own position, retaining control of the direction of discussion and maintaining his own perspective. They are broad and general in scope.

Examples: "Can you tell me more about the subject ?"
"What happened next?"
"What is your claim?"
" What do you really want to achieve?"

(b) Closed Questions: These questions are limited in scope, specific, direct and focused.

They are fact-based in content and tend to elicit factual information. The response to these questions may be 'Yes' or 'No' or a very short response and may close the discussion on the particular issue.

Examples: "What colour shirt was the man wearing?"
"On which date was the contract signed?"

"What is the total amount of your medical bills?"
"Were you present in the market when the event occurred?"

(c) Hypothetical Questions: Hypothetical questions are Questions which allow parties to explore new ideas and options.

Examples: "What if the disputed property is acquired by Government?"
"What if your husband offers to move out of the parental house and live separately?"

Other types of questions like Leading Questions and Complex Questions are not ordinarily asked in mediation, as they may not help the mediation process.

CHAPTER-X

NEGOTIATION AND BARGAINING IN MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called 'Shuttle Diplomacy'. Any negotiation that is based on merits and the interest of both parties is **Principled Negotiation** and can result in a fair agreement, preserving and enhancing the relationship between the parties. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

a. To put across one's view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

NEGOTIATION STYLES

1) Avoiding Style — **Unassertive and Uncooperative:** The participant does not confront the problem or address the issues.

2) Accommodating Style	**Unassertive and Cooperative:** He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.
3) Compromising Style	**Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.
4) Competing Style	**Assertive and Uncooperative:** The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.
5) Collaborating Style	**Assertive, Cooperative and Constructive:** He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is Bargaining?

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

TYPES OF BARGAINING USED IN NEGOTIATION

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining.

(iii) Integrative Bargaining.

(i) Distributive Bargaining: is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party. The two forms of distributive bargaining are:

Positional Bargaining: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

Example: Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut. They continue to argue about how much to leave open - a crack, halfway, three quarter way.

Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation.) Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

Negative consequences of Distributive Bargaining are:

(a) By taking rigid stands the relationship is often lost.

(b) Creative solutions are not explored and the interests of both parties are not fully met.

(c) Time consuming.

(d) Both parties take extreme positions often resulting in impasse.

(ii) Interest-Based Bargaining: A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in half and share it, although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy.

Three steps in interest-based bargaining

There are three essential steps in interest-based bargaining.

(a) Identifying the interests of parties.

(b) Prioritizing the parties' interests.

(c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

(iii) Integrative Bargaining: Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel. Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window of the adjoining room and keeps the connecting door open. Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution.

Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agree to help the customer to sell his old car at a good price.

The fancy leather seats and the offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

NOTE :

Position: A position is a perception ('my boss is cruel and indifferent') or a desired outcome ('My boss should meet with me once a day to talk'). The claim or demand, itself, is a position.

Interest: An interest is a person's true need, concern, priority, goal etc.. It can even be intangible (not easily perceivable) e.g. respect, loyalty, dependability, timing, etc. An interest is what lies beneath and drives a person's demands or claims.

BARRIERS TO NEGOTIATION

1) Strategic Barriers.

2) Principal and Agent Barriers.

3) Cognitive Barriers (Perception Barriers).

1) Strategic Barriers:

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence under Section 498 A of the Indian Penal Code.

A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

2) Principal and Agent Barriers:

The behaviour of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

3) Cognitive Barriers (Perception Barriers).

Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perceptional limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptional limitations are called cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

Example of Cognitive Barriers

Risk Aversion: People tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. They are ready to bear risk with regard to loss. They would avoid a certain loss and take a risk of greater loss. For example, some parties would rather postpone a certain loss through settlement at mediation for an uncertain outcome of the trial in the future. A good mediator will assist the parties in addressing these realities.

Assimilation bias: The tendency of negotiators to ignore any unfavorable information. For example, a court decision which could prejudice the case. To counter this, repeat the important information, provide documentary and other tangible evidence and reduce information to writing.

Inattentional blindness: Negotiators sometimes fail to focus on the entire picture and instead focus only on specific details. To counter this, the mediator may frequently shift focus from the specific to the larger picture.

Reactive devaluation: People in conflict have a tendency to minimize the value of offers from the other side. To counter this, mediator can change the focus from the source of the offer to the terms of the offer. For example, instead of saying "the plaintiff offers 5 lakhs" the mediator may say " will you be satisfied with something like 5 lakhs".

Endowment effect: The tendency for people with property or interests in something to over value it. (their house, their land, a lawyer's evaluation of their case etc.) . To counter this, the mediator may enquire about the actual value, use objective criteria like the Sub-registrar's valuation, ask for the latest Court judgment supporting the submission etc.

Psychological impediments:

People make unwarranted assumptions about the motives and intentions of the other parties.

Anchor Price, Aspiration Price and Reservation Price

To facilitate meaningful and successful negotiation the mediator should be aware of the Anchor Price, the Aspiration Price and the Reservation Price.

Anchor Price is a base number or a set of terms or an opening offer that has to be assessed by the mediator from the information given by the parties. This will serve as a parameter in the negotiation. If the anchor price is defined appropriately, parties tend to treat it as a real and valid bench mark against which subsequent adjustments are made. It must be based on complete information and if not it can be misleading. Mistaken or misguided anchor prices can increase the chance of impasse and can have unintended consequences in a negotiation.

Aspiration Price is the price that a party aspires to obtain from the negotiation.

Reservation Price is the lowest a party may be open to receive.

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

A mediator should help the parties to separate themselves from the problem.

For example, if Aparna has been consistently late to work for the past 2 weeks, a perception may develop that "The problem is Aparna." Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people

In being hard on the issues, the Mediator will request documentation on damages, verify the

accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests

In negotiation, focus must be on interests rather than on positions. Hence the mediator should help the parties to shift the focus from their positions to their interests.

(d) Create variety of options

The Mediator is required to facilitate generation of various options and selection of the option most acceptable to the parties.

(e) Rely on objective criteria

When perceptions of the parties differ, in appropriate cases objective criteria like expert's opinion, scientific data, valuation report, assessor's report etc. can be relied on by the parties to examine the options and arrive at a settlement.

AN EXERCISE TO IDENTIFYING UNDERLYING INTERESTS
Mohan Industries V/s All India Express

Facts for Mohan Industries

The owner of a small plastic supply company called Mohan Industries is a party at mediation. He is the defendant in a contract dispute with a large manufacturer called All India Express ("All India"). The dispute centers around his company's shipments of supplies to All India, which have been 7-10 days late for the past 3 months. All India's shipments to its customers consequently have been late and its customers have started to complain. Until 3 months ago, Mohan Industries had delivered timely shipments to All India.

All India's attorney demanded that Mohan Industries make its shipments on time and pay for the damages resulting from the 3 months of delayed shipments. If the case continues in Court, All India probably will win a suit for breach of contract.

Mohan Industries has had a profitable business relationship with All India having a supply contract for 10 years. It would be profitable for Mohan Industries to work with All India in the future.

The reason the shipments have been late for the past 3 months is that Mohan Industries is in the process of upgrading its computers for better service. This is a temporary problem that probably will be cleared up in 3 more months. A good deal of their operating expenses is going towards this

computer upgrade and they generally operate on a thin profit margin. Hence they do not want to spend a large amount of money on litigation.

Mohan Industries is also in the process of bidding on a supply contract with another large manufacturer. They would like to use All India as a good reference in submitting their bid.

The President of Mohan Industries is 84-years-old and he is not in good health. He has planned to turn over the company to his eldest son this year, but that is doubtful now that this legal dispute has come up. He does not want the final phase of his career in business to be tied up in litigation.

Facts for All India Express

The party at mediation is All India Express (All India). The counsel for All India has advised them that they have a right to sue Mohan Industries for breach of contract and that it will probably prevail in court.

All India has stated that it has had a good and profitable working relationship with Mohan Industries for the past 10 years. There are no other suppliers available that makes the plastic product as well as Mohan Industries. The price charged by Mohan Industries is reasonable.

All India is in the process of introducing its products on an international level. It is very important to All India that there be no interruption in plastic supplies for the next few years.

All India is operated by a young man (37-years-old) who recently suffered a severe setback in his health (diabetes). He would like to focus his time and energy on the international expansion and getting better physically.

This is the right time for All India to expand internationally because its main competitor, another Indian company, is not yet ready for such as expansion (though it will be ready soon).

All India has explained that it values its customers and it is worried that it will lose them if plastic supply shipments continue to be late.

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IMPASSE

During mediation sometimes parties reach an impasse. In mediation, impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties. It may also be due to resistance to workable solutions, lack of creativity, exhaustion of creativity etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the impasse.

TYPES OF IMPASSE

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse

(ii) Substantive impasse

(iii) Procedural impasse

Emotional impasse can be caused by factors like :

- ã Personal animosity
- ã Mistrust
- ã False pride
- ã Arrogance
- ã Ego
- ã Fear of losing face
- ã Vengeance

• Substantive impasse can be caused by factors like:

- ã Lack of knowledge of facts and/or law
- ã Limited resources, despite willingness to settle
- ã Incompetence (including legal disability) of the parties
- ã Interference by third parties who instigate the parties not to settle dispute or obstruct the

- ã settlement for extraneous reasons.
- ã Standing on principles, ignoring the realities
- ã adamant attitude of the parties

• Procedural impasse can be caused by factors like :

- ã Lack of authority to negotiate or to settle
- ã Power imbalance between the parties
- ã Mistrust of the mediator

STAGES WHEN IMPASSE MAY ARISE

Impasse can arise at any stage of the mediation process namely introduction and opening statement, joint session, separate session and closing.

TECHNIQUES TO BREAK IMPASSE

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques which may include following techniques:

(a) Reality Testing

(b) Brainstorming

(c) Changing the focus from the source of the offer to the terms of the offer.

(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.

(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.

(f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.

(g) Careful use of good humour.

(h) Acknowledging and complementing the parties for the efforts they have already made.

(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

(j) Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.

(k) Allowing the parties to vent their feelings and emotions.

(l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.

(m) Focusing on the underlying interest of the parties.

(n) Starting all over again.

(o) Revisiting the options.

(p) Changing the topic to come back later.

(q) Observing silence.

(r) Holding hope

(s) Changing the sitting arrangement.

(t) Using hypothetical situations or questions to help parties to explore new idea and options.

CHAPTER-XII
ROLE OF REFERRAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

Reference to ADR and statutory requirement

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

Stage of Reference

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/ or their authorized representatives.

Consent

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all the

parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not effect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

Avoiding delay of trial

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

Choice of Cases for reference

As held by the Supreme Court of India in **Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.,** (2010) 8 Supreme Court Cases 24, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

i. (i) Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.

ii. Disputes relating to election to public offices.

iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

i) All cases relating to trade, commerce and contracts, including

-disputes arising out of contracts(including all money suits);

-disputes relating to specific performance;

- disputes between suppliers and customers;

- disputes between bankers and customers;

-disputes between developers/builders and customers;

- disputes between landlords and tenants/licensor and licensees;

- disputes between insurer and insured

ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/coparceners/co-owners; and

- disputes relating to partnership among partners.

iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);

- disputes between employers and employees;

- disputes among members of societies/associations/apartment owners' associations;

iv) All cases relating to tortious liability, including

- claims for compensation in motor accidents/other accidents; and

v) All consumer disputes, including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

Motivating and preparing the parties for Mediation

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

Referral Order

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

Role after conclusion of mediation

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. Though the role of the lawyer in mediation is functionally different from his role in litigation, the service rendered by the lawyer to the party during the mediation process is a professional service. Since lawyers have a proactive role to play in the mediation process, they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not. Awareness programmes are necessary to make the lawyers aware of the concept and process of mediation, the advantages and benefits of mediation and the role of lawyers in the mediation process.

The role of lawyers in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(i) Pre-Mediation

When faced with a dispute and the prospect of approaching an adjudicatory forum for relief, a party first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation for mediation. The lawyer is best placed to assist his client to understand the role of the mediator as a facilitator. He helps the client to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative. The party must be informed that in a dispute involving the break down of relationship, whether personal, contractual or commercial, mediation helps to strengthen/restore the relationship. While helping the party to understand the legal position and to assess the strength and weakness of his case and possible outcome of litigation, the lawyer makes him realize his real needs and underlying interest which can be better satisfied through mediation.

(ii) During Mediation

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The lawyer must himself observe the ground rules of mediation explained by the mediator and advise the party also to observe them. The lawyer must be prepared on the facts, the law and the precedents. At the same time, he must enable and encourage the party to present his case before the mediator. Considering that the party may not always be able to state the complete and correct facts or refer to the relevant documents, the lawyer must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA/ MLATNA analysis, the lawyer must constantly evaluate the case of the parties and the progress of mediation and must be prepared to advise the party to change position, approach, demands and the extent of concessions. When it is felt necessary to have a sub-session with the lawyer(s) the mediator may hold such sub-session with the lawyer(s) and the lawyer(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the lawyer(s) can be held by the mediator also at the request of the party or the lawyer. The lawyer participates in finalizing and drafting the settlement between the parties. He must ensure that the settlement recorded is complete, clear and executable. He must also explain to his client and make him understand every term of the settlement.

iii) Post-Mediation

After conclusion of mediation also, the lawyer plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism.

If a settlement between the parties has been reached before the mediator, the lawyer has the responsibility to reassure his client about the appropriateness of the client's decision and to advise against any second thoughts. To maintain and uphold the spirit of the settlement, the lawyer must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

ROLE OF PARTIES IN MEDIATION

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute.

Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. As far as the parties are concerned, the whole process of mediation is voluntary. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. Neither the mediator nor the lawyers can take the decision for the parties and they must recognize and respect the right of self-determination of the parties.

During the process of mediation, parties should focus on their interests rather than their entitlement or legal technicalities.

The parties are free to avail of the services of lawyers in connection with mediation.

Mediation is about communicating, persuading and being persuaded for a settlement. Hence, each party needs to communicate its view to the other party and should be open to receive such communication in return. Both speaking and listening are equally important. The attempt must not be to argue and defeat but to know and inform. Parties may have to change their position and align it with their best interest.

In mediation, trust in the mediator is essential. Hence, the mediator must be a person who continues to enjoy the trust of the parties.

A settlement duly arrived at between the parties in mediation is binding on the parties and the parties are bound to cooperate in the execution of the order/decree passed in terms of the settlement.

MARRIAGE AS AN INSTITUTION

MARRIAGE AS AN INSTITUTION

There is no definition which adequately covers all types of human marriage. It has given a number of definitions and explanations. Some of them are as follows:

Edward Westermarck in his "History of Human Marriage" defines marriage as "the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring."[1]

Malinowski says that marriage is a "contract for the production and maintenance of children."[2]

According to *Robert H.Lowie*, "Marriage is a relatively permanent bond between permissible mates."[3]

According to *Lundberg*, Marriage consists of the "rules and regulations which define the rights, duties and privileges of husband and wife, with respect to each other."[4]

According to *Horton and Hunt,* "Marriage is the approved social pattern whereby two or more persons establish a family."[5]

According to *Anderson and Parker*, "Marriage is the sanctioning by a society of a durable bond between one or more males and one or more females established to permit sexual intercourse for the implied purpose of the parenthood."[6]

Legal Perspective

The right to marry is a component of Right to Life under art. 21 of the constitution of India which says, 'No person shall be deprived of his life or personal liberty except according to the procedure established by law'. This right has been recognised under the Universal Declaration of Human Rights 1948. Art. 16 of the same states:

1. Men and Women of full age without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.[7]

Types of Marriage

Polygyny

Polygyny is a form of marriage in which one man marries more than one woman at a given time. It was in practice in most of the ancient civilisations. It prevailed among the ancient Herbrews, Assyrians, Babylonians, Indians and others. At present, it is widespread among primitive tribes but usually it is confined to the wealthier class. It is in practice among the Eskimo tribes, Crow Indians, African Negroes, the Nagas, Gonds and Baigas of India. However, it is permitted in the Muslim community.[8]

Types of Polygyny

It is of two types namely:

1. *Sororal Polygyny:* It is a type in which the wives are invariably the sisters. It is often called 'sororate'. The Latin word 'Soror' stands for sister. When several sisters are simultaneously or potentially the spouses of the same man, the practice is called the sororate.[9]
2. *Non- Sororal Polygyny:* As the term suggests, it is a type of marriage in which the spouses are not related as sisters.

For social, economic, political and other reasons, both the types are practised by some people. [10]

Causes of Polygyny

Sociologists and anthropologists have made several studies to find out the causes of Polygyny. Some of the factors mentioned by them are:

- *Enforced Celibacy:* Men do not approach the women during the period of pregnancy and while the child is being breastfed. Due to this long period of celibacy, a second marriage was contracted.
- *Earlier aging of the female:* In the uncivilised tribes men remarried a number of times because the women aged earlier.[11]
- *Women as badges of distinction:* Among some tribal's, a man's social status is often measured in the terms of number of wives. Greater the number greater he prestige.
- *Taste of variety:* Men go after several women for they have a taste for variety.
- *Constancy of sex urge in man:* Unlike the woman, man is susceptible to sex stimulation throughout the year. Polygyny provides him an opportunity to enjoy sex life throughout the year.[12]

On account of the greater harmful effects of polygyny on family life, polygyny has been declared illegal in the civilised societies. The Indian government has declared polygyny an offence under Hindu Marriage Act, 1955.[13]

Polyandry

Polyandry is the form of marriage in which a woman marries more than one man at a given time. It is practised among the Tibetans, Marquesan Islanders of Polynesia, the Bahama of Africa, the tribal's of Samoa and others. In India, the tribe's such as Tiyan, the Toda, the kota, the Khasa and Ladhaki Bota also practice polyandry. The Nairs of Kerala were polyandrous previously. [14]It is however relatively a rare type of marriage and is generally an improvised adjustment to certain peculiar and extreme conditions.[15]

Types of polyandry

Polyandry may take two forms namely:

1. *Fraternal Polyandry:* In this form one wife is regarded as the wife of brothers who have sexual relations with her. It is also known as alelphic polyandry. The children are treated as the offspring of the elder brother.[16] This practice of being mate, actual or potential, to one's husband's brother is called "levirate." It is prevalent among the Todas.[17]
2. *Non-fraternal polyandry:* In this type, the husbands need not have any close relationship prior to marriage. The wife goes to spend some time with each husband. So long as a

woman lives with one of her husbands, the others have no claims over her. Nair polyandry was one of these types[18]. If a child I born out of such relationship, then any husband is chosen its social parent by a special ritual.[19]

Causes of Polyandry

No universal generalisations can be made with regards to the causes of polyandry. Still factors which cause polyandry are:

- *Lesser number of Women:* According to Westermark, when the number of women is lesser than the number of males in a society, polyandry is found, for example among the Todas of Nilgiri that was the reason for this form of marriage.
- *Poverty:* Polyandry has developed in areas where there was scarcity of natural resources so that many men may support one woman and her children.
- *Bride Price:* When in a society, bride price is high on account of the lesser number of women, polyandry develops.
- *Backwardness:* Generally, polyandry is found in such areas as are situate far away from the centres of culture and progress.
- *Joint family:* the spirit of joint family gets strengthened when several brothers marry the same woman.

So, polyandry is generally considered an obstacle in the way of social progress. It causes harm to married life and creates several other psychological problems. It is on this account that polyandry has come to an end in those societies also wherein it once prevailed.[20]

Monogamy

Monogamy is the form of marriage in which one man marries one woman at a given time. This is the most widespread form of marriage found among the primitives as well as the civilised people and is the leading form of marriage.[21] It produces the highest type of affection and sincere devotion. According to Malinowski "Monogamy is, has been, and will remain the only true type of marriage." [22] It is practised among the tribals such as the Kadars, the Santals, the Khasis, the Canella, the Hopi, the Iroquois, the Andaman Islanders and few others.

Monogamy has a long history of its own. Westermarck is of the opinion that monogamy is as old as humanity. Ancient Greek philosopher Aristotle had recommended only monogamous marriage. Ancient Hindus regarded monogamy as the most ideal form of marriage.[23]

Advantages

Monogamy seems to be superior to other forms of marriage. It enjoys certain merits over other forms and these merits are now well recognised. Some of them are:

- *Universally Practicable:* Since there is one-to-one ratio in almost all the societies, only monogamy can provide marital opportunity and satisfaction to all the individuals. No other forms can equally satisfy all. Economically Better Suited: No man of ordinary income can think of practising polygyny. Only a rich man can maintain a couple of wives and their children. Only monogamy can adjust itself with poverty.

- *Promotes better Understanding between Husband and Wife:* Monogamy produces the highest type of love and affection between husband and wife. It contributes to family peace, solidarity and happiness. Vatsayana, remarked "At best a man can only please one woman physically, mentally and spiritually. Therefore, the man who enters into marriage relations with more than one woman, voluntarily courts unhappiness and misery"
- *Contributes to stable Family and Sex life:* Monogamous family is more stable and long lasting. It is free from conflicts that are commonly found in polyandrous and polygynous families. Herbert Spencer has said that monogamy is more stable and the consequent family bond is stronger.
- *Aged parents are not neglected:* It is only in monogamy that old parents are protected and looked after properly.
- ***Provides better Status for Women:*** Women are given only a very low position in polygyny. Their rights are never recognised. They can be divorced at will. But in monogamy, women enjoy better social status. In the modern societies they enjoy almost equal social status with men.[24] Thus some cultures value monogamy as an ideal form of family organization. However, many cultures prefer other forms of family organization. Anthropological data suggests a majority of societies prefer polygamous marriage as a cultural ideal. There are multiple forms of non monogamy that are used to organize families, as well multiple forms of monogamy such as marriage, cohabitation and extended families.

Rules of Marriage

Marriage as we know is a very important social institution. That is why no society allows a couple quietly to pair off and start living as husband and wife. Marriage brings a number of obligations and privileges affecting many people. Every society has, therefore, developed a pattern for guiding marriages. So for marriage the most important step is the choice of mates. Though there are no standard laid down for choosing a partner yet from time to time rules have been made to regulate the selection of mates.[25]

Exogamy

In every human society there are certain regulations which control the relation of the sexes and the selection of a mate. Intercourse between close blood-relations as brother and sister, father and daughter, and mother and son, is almost everywhere condemned. But among very many tribes it is forbidden both on grounds of consanguinity and because two individuals are members of the same social group. This prohibition, based upon common membership of a social group, is the law of exogamy. If the group is a territorial unit, e.g., a village, the exogamy is local. More commonly, membership of the group concerned is determined by kinship, real or fictitious, as in the clan. Hence exogamy is often loosely used to indicate clan exogamy.

That exogamy prevents the marriage of all near relatives is true only if membership of the exogamous group is determined by descent reckoned through both parents, but this is very rare. Normally descent is traced through only one parent and it is therefore inevitable that certain close blood-relations will not belong to the same group and will therefore be possible mates for each other. Thus if a tribe is patrilineal a man can select wives from among his mother's sisters, her brother's daughters and her brother's son's daughters, and, were exogamy the only marriage prohibition, even his mother would be available to him. On the other hand, clan exogamy does

prevent unions between people bearing no relationship to each other, since membership of a clan is dependent upon fictive, not blood relationship.

The rigidity with which the law of exogamy is observed varies considerably. Among some people a breach of it is regarded as incest; among others, though marriage is forbidden, extra-marital relations between clan members are tolerated; while in some cases even marriage can be condoned.

McLennan, who first coined the word, regarded it as the outcome of female infanticide which, by limiting the number of women available within the group, forced tribesmen to capture their wives from their neighbours, but increased knowledge of the facts has made this theory untenable. Another suggestion is that the horror of incest, supposedly innate, has extended to all those women whom, under the classificatory system of relationship, a man addresses by the term for "sister." On another view the original form was local exogamy arising from a natural distaste on the part of those who have been reared together to cohabit. Others believe it originated with Totemism while the diffusionists consider that it developed under special conditions in one place and spread thence throughout the world.[26]

Forms of Exogamy

1. Following are the forms of Exogamy found in India: *Gotra Exogamy:* Among the Hindus the prevailing practice is to marry outside the 'gotra'. People who marry within the 'gotra' have to repent and treat the woman as a sister or mother. The offspring resulting from her is believed to be heathen. This restriction has been imposed since people of same 'gotra' are believed to have similar blood.[27]
2. *Pravar Exogamy:* Besides forbidding marriage within the gotra, the Brahmins also forbid marriage between persons belonging to the same pravar. People who utter the name of a common saint at religious functions are believed to be of the same pravar. Thus, pravar is kind of religious and spiritual bond.[28]
3. *Village Exogamy:* Among many Indian tribes there is the recognised custom to marry outside the village. This restriction is prevalent in the Munda and other tribes of Chhota Nagpur of Madhya Pradesh. Among some tribes of Baroda, marriage is forbidden within the village since the residents of same village are considered as relatives.[29]
4. *Pinda Exogamy:* In Hindu society, marriage within the panda is prohibited. There is no one opinion as to who can be said to belong to the same pinda. According to Brahaspati, offspring from five maternal, generations and seven paternal generations are sapinda and they cannot inter-marry. The opinion of Brahaspati is not universally accepted. In several parts of India the generations of mother is not considered to be sapinda. Sapinda marriages take place in the southern parts of India whereas it is not usually practiced in the northern parts.[30]

Today, there is a greater trend towards exogamous marriages. Exogamy is appreciated as progressive and more scientific. Exogamy has brought people of various castes, races, religious groups, tribals together. It can effectively reduce social distance among peoples and encourage and support social solidarity and communal unity.

Endogamy

Endogamy is the form of marriage in which one must marry within one's own caste or other group. This rule doesn't permit marriage of close kin. Endogamous marriage is one which is

confined within the group. As a matter of fact, endogamy and exogamy are relative terms. That which is endogamous from one viewpoint is exogamous from the other.[31]

Forms of Endogamy

In India, following forms of endogamy are to be found:

1. *Divisional or Tribal Endogamy:* This is the endogamy in which no individual can marry outside his division or tribe.
2. ***Caste Endogamy:*** In this endogamy, marriage is contracted within the caste.
3. *Class Endogamy:* Class Endogamy is in which marriage can take place between people of one class or of particular status.
4. *Sub-Caste Endogamy:* this is the endogamy in which choice for marriage is restricted to the sub-caste.
5. *Race Endogamy:* Race endogamy is that in which one can marry in the race. People of the Veddah race never marry outside their race.[32]

Advantages

- Preserves the group's homogeneity.
- Protects its prestige and status.
- Maintains the numerical force of its group.
- Preserves the purity in the group.
- Keeps women happier.
- Fosters the sense of unity within the group.
- Keeps property within the group.[33]

Disadvantages

- Endogamy shatters the national unity, because the nation is divided into small endogamous groups.
- The scope of choice of a life partner is limited[34] due to which malpractices such as unsuitable marriage, polygamy, dowry system, bride price etc. are fostered.
- It generates hatred and jealousy for other groups. This is the main cause at the root of casteism in India.

Thus, Endogamy as a rule of marriage has both its advantages and disadvantages. But due to its disadvantages, endogamy is condemned. The modern civilised people are more in favour of exogamy than endogamy.[35]

Hindu Marriage

The institution of Hindu marriage occupies a prominent place in the social institutions of the civilised world. Hindu marriage can be defined as religious sacrament in which a man and woman are bound in permanent relationship for physical, social and spiritual purposes of dharma, procreation and sexual pleasure. Thus, Hindu marriage is not merely a social contract

but a religious sacrament. It results in more or less permanent relationship between a man and woman. Its aim is not merely physical pleasure but spiritual advancement. It is not merely an individual function but has social importance. Its ideals are fulfilment of Dharma, procreation and enjoyment of sexual pleasure. It exhibits an integral approach to this social institution.

Aims of the Hindu Marriage

1. *Fulfilment of Dharma or religious duties:* According to the Hindu scriptures marriage is the basis of all religious activities.[36] In the words of K.M. Kapadia "marriage being thus primarily for the fulfilment of duties, the basic aim of marriage was Dharma."[37] According to Mahabharata, "wife is very source of the Purusharthas , not only of Dharma, Artha and Kama but even of Moksha. Those that have wives can fulfil their due obligations in this world; those that have wives can be happy, and those that have wives can lead a full life." [38]
2. *Procreation:* In the Hindu family, the child is given a very important place. According to Rigveda, the husband accepts the palm of the wife in order to get a high breed progeny. According to Manu, the chief aim of marriage is procreation.[39]
3. *Sexual Pleasure:* According to Manu, marriage is a asocial institution for the regulation of proper relation between the sexes.[40] The Hindu scriptures have compared the sexual pleasure with the realization of divine bliss. According to Vatsyayan sexual pleasure is the chief aim of the marriage. A maiden who has attained youth should herself get married without waiting for the assistance of elders.[41]

Forms of Hindu Marriage

The Hindu scriptures admit the following eight forms of marriage:[42]

1. *Brahma marriage:* In this form of marriage the girl, decorated with clothes and ornaments, is given in marriage to a learned and gentle bridegroom.[43] This is the prevalent form of marriage in Hindu society today.
2. *Prajapatya marriage:* In this form of marriage the daughter is offered to the bride-groom by blessing them with the enjoyment of marital bliss and the fulfilment of dharma.[44]
3. *Aarsh marriage:* In this form of marriage a rishi used to accept a girl in marriage after giving a cow or bull and some clothes to the parents of the girl.(id.III,29). These articles were not the price of the bride but indicated the resolve of the rishi to lead a house-hold life. According to P.K.Acharya the word aarsh has been derived from the word rishi.
4. *Daiva Marriage:* In this form of marriage the girl, decorated with ornaments and clothes, was offered to the person who conducted the function of a Purohit in yajna.[45]
5. *Asura marriage:* In this form of marriage the bride-groom gets the bride in exchange of some money or articles given to the family members of the bride.[46] Such form of marriage was conducted in the case of marriage of Pandu with Madri. Gandharva marriage: This form is marriage is the result of mutual affection and love of the bride and the bride-groom. An example of this type of marriage is the marriage of the King Dushyanata with Shakuntala. In this form of marriage the ceremonies can be performed after sexual relationship between the bride and the bride-groom.[47] In Taittariya Samhita it has been pointed out that this type of marriage has been so named because of its prevalence among the Gandharvas.

6. *Rakshas marriage:* This type of marriage was prevalent in the age when women were considered to be the prize of the war. In this type of marriage the bride-groom takes away the bride from her house forcibly after killing and injuring her relatives.[48]

7. *Paisach marriage:* This type of marriage has been called to be most degenerate. In this type a man enters into sexual relationship with a sleeping, drunk or unconscious woman.[49] Such acts were regularised after the performance of marriage ceremony which took place after physical relationship between the man and woman.

About the present conditions of the above mentioned forms, Dr. D.N. Majumdar has said, "Hindu society now recognises only two forms, the Brahma, and the Asura, the higher castes preferring the former, the backward castes the latter, though here and there among the higher castes the Asura practice has not died out.[50] This view rightly describes the present position of the traditional forms of Hindu marriage.

Conditions for a Hindu Marriage

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-[51]

1. Neither party has a spouse living at the time of the marriage;

2. At the time of the marriage, neither party-

3. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

4. Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

5. Has been subject to recurrent attacks of insanity. [52] The bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;

6. The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

7. The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

8. [53]

Hindu Marriage Act,1955

This act applies to all members of Hindu society. It has made the following important changes in the institution of Hindu marriage:

- *Classification of Hindu marriage:* According to this act, Hindu marriage can be divided into three classes – void, voidable and valid

- *Determination of the age for marriages:* by the provisions of this act, the minimum age limit for the boys and girls has been fixed at 18 and 15 years respectively.

- *Provision for monogamy:* According to this act, a Hindu male or female can enter into matrimony only if no spouse of either is alive at the time of the marriage. Thus, Section 5 and Clause 1 of this Act provide for monogamy in Hindu society.

- *Provision for the Guardianship of the Mother:* According to this act, the mother will be considered as the legal guardian of the minor son or daughter after the father.
- *Provison for Divorce:* This act provides for divorce by wife or husband under certain specific circumstances.

Special Marriage Act, 1954

Section 4 of the Special Marriage Act 1954 lays down conditions for solemnisation of special marriages. It states:

Conditions relating to solemnization of special marriages. – A marriage between any two persons may be solemnized under this Act, if at the time of marriage the following conditions are fulfilled, namely:

1. Neither party has a spouse living;
2. Neither party-
3. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
4. Though incapable of giving a valid consent, has been suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

- Has been subject to recurrent attacks of insanity;

1. The male has completed the age of twenty-one years and the female the age of eighteen years;
2. The parties are not within the degrees of prohibited relationship;
3. Where the marriage is solemnized in the state of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Important Rites in the Hindu marriage

Among the Hindus there are certain rites which must be performed for marriage to be complete. These rites and the importance attached to them have added to the sanctity of the Hindu marriage. The main rites are:[54]

Vagdana (Oral Promise): In the presence of the people gathered for the marriage the names, gotras and pravaras of the bride and the bridegroom are announced along with the announcement that they are ready for the marriage. The ritual is known as "Panigrahana Sankalpa" or Vagdana.

Homa: 'Homa' refers to the offering in the sacred fire. A number of 'homas' or fire rituals are observed in the marriage of which "Laja Homa" is an important one. This 'homa' is symbolic of fecundity and prosperity. Fred grains dipped in ghee are offered to fire [that is lord Agni] by the couple with a prayer to the God requesting him to bless them with progeny and prosperity.

Kanyadaana: This is the most important ceremony connected with marriage. It is the ceremony of giving away the bride as a gift to the bridegroom in presence of the sacred fire and in the presence of the people gathered. The father of the bride gifts her away to the bridegroom with a promise on his part that he would not transgress her "in the attainment of piety, wealth and desire". The same promise is repeated thrice and the bridegroom affirms his promise thrice.

Panigrahana(Holding the Hand of the Bride): This ritual refers to taking the right hand of the bride with the words: "I seize thy hand for the sake of happiness that you may live to old age with me…" With this the bridegroom takes the responsibility of looking after the bride.

Mangalaya Dharana(Tying of the Tali or Mangalasutra): This involves the act of tying the tali or mangalasutra(which is regarded as the sign of longevity of the husband) round the neck of the bride by the bridegroom. This ritual for which there is no reference in the Dharmashastras is more in practice in South India than in North India.

Saptapadi: This is the ritual in which the bride and the bridegroom go 'seven-steps' together. The husband makes the bride step forward in northern direction seven steps with the words : "one step for sap, two for juice, three for wealth, four for comfort, five for cattle, six for seasons, friend be with seven steps united to me". This ritual is important from the legal point of view, for the Hindu marriage is regarded legally complete only after it is performed.

The rites cited above are performed by a Brahmin priest in the presence of the sacred fire and are accompanied by the Vedic mantras. "They are necessary for marriage to be complete, because when they or any of them are not properly performed, the marriage may be legally questioned. Hindu marriage is a sacrament. It is considered sacred because it is said to be complete only on the performance of the sacred rites accompanied by the sacred formulae".

Modern Changes in the Hindu Marriage

Due to the influence of Western culture and English education the Hindu marriage system has undergone considerable changes. Some of the important ones are:[55]

- *Marriage is not held as compulsory:* In the Hindu society formerly marriage was considered to be absolutely compulsory for both male and female. According to Hindu scriptures, a person who does not beget a son through marriage cannot attain heaven. No man could perform 'yajna' without a wife. Marriage therefore was necessary even for religious purposes. But, due to influence of Western culture many males and females do not consider marriage to be necessary these days. Due to economic difficulties also some persons do not enter into matrimony. The modern educated Hindu girl is not ready to accept the slavery of male. The educated men and women do not believe in the ancient religious values and therefore do not consider marriage to be necessary. Breaking of the taboos of Sagotra and Sapravar marriage: Ancient Hindu tradition forbids the marriage of persons belonging to same Gotra and Pravar. This very much restricts the field of choice of mate. Therefore, at the present the educated persons are gradually violating the restriction. It has been also rejected by law.
- *Opposition of Child Marriages:* In medieval India the custom of child marriage was very much in vogue. After the passing of Sarada Act child marriages have become illegal. Another factor leading to the restriction of child marriage in Hindu society is the tremendous increase of women education. The boys do not marry early because of late settlement in career.
- *Permission of Inter-caste Marriage:* Formerly, inter-caste marriage was considered to be wrong in the Hindu society. It has now been legally permitted. With the increase of co-education, women education and the democratic ideal of equality and liberty, inter-caste marriages are now considered to be signs of forwardness.

- *Permission of Widow Remarriage:* due to the untiring efforts of the social reformers and educated persons widow remarriage is no more considered to be wrong in Hindu society. Consequently, its incidence is now on the decrease.
- *Prohibition of Polygamy:* Formerly, a man was allowed to marry several women in order to get a son. With the increase of women education the ladies are demanding equal rights in marriage. The Hindu Marriage Act of 1955 has declared polygamy to be illegal. No one can marry a second time, while the former spouse is alive.
- *Provision for Divorce:* The Hindu Marriage Act of 1955 has introduced a significant change in the institution of Hindu marriage by permitting divorce under certain specific circumstances.

Problems of Marriage

Following are the main problems faced by the institution of Hindu marriage:[56]

- *Child marriage:* The problem of child marriage was very serious in Hindu society till the passing of Sarada Act. The reasons behind the child marriages in Hindu society were religious conservatism, endogamy, sati-custom, the custom of dowry and the joint family. The Hindu marriage act of 1955 has fixed the valid age for marriage of the boys and girls at 18 and 15 respectively. These legal steps could not work immediately because of the widespread conservatism among Hindus, incompleteness of Prohibitive Act and the absence of female education. With the removal of these difficulties in the way of restraint of child marriages, this problem has appreciably diminished in Hindu society.
- *Widow Remarriage:* About the condition of widow remarriage in ancient India, A.S.Aletkar has written, "side by side with Niyoga, the widow remarriage also prevailed in the Vedic society."[57] The custom of widow remarriage, however, disappeared gradually and it was considered to be wrong as early as 200 AD. The restriction of widow remarriage resulted in the increase of immorality among widows, sexual exploitation of child widows, increase of prostitutes and the lowering of general status of women in the Hindu society. Then due to the untiring efforts of Ishwarchandra Vidyasagar the Hindu Widows Remarriage Act was passed in the year of 1856 which declared the legal validity of widow remarriage and laid specific circumstances for its validity.
- *Dowry:* According to Max Radin, "ordinarily dowry is the property which a man receives when he marries, either from his wife or her family."[58] The Websters New International Dictionary has defined dowry as, "the money, goods or estate, which a woman brings to her husband in marriage."[59] In brief, dowry is that money, property or valuables which the bride party has to give to the bride-groom party in exchange of marriage.[60]. Some persons have pointed out to some so-called advantages of the dowry system. They have maintained that it helps in the establishment of the new house-hold of the newly married couple and that the lure of dowry helps in marriage of ugly and uneducated girls. But these advantages do not have a stand before the gross evils of dowry systems such as murder of female children, increasing family disharmony, child marriages to avoid dowry and finally in the hindrance of women education. Recently, some sort of legal restriction on dowry was made by an act passed by the government. This however has not been sufficiently effective.

Divorce in India

The Hindu shastras regarded marriage a bond indissoluble in life. the wife was to worship her husband as a god. To Hindu Law there was no such thing as divorce. The custom of divorce existed only among the lower castes.[61]

The term 'divorce' comes from the Latin word 'divortium' which means to turn aside; to separate. Divorce is the legal cessation of a matrimonial bond. All the personal laws in India provide for divorce under certain grounds and conditions. Though there are different Acts governing people belonging to different religions, the grounds provided for divorce are more or less the same, with minor variations though.[62]

Divorce provisions and grounds under the laws are as follows:

Hindu Law[63]

Section 13 of the Hindu Marriage Act 1955, which provides for divorce, is as follows:

(1) Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party –

- has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- has, after the solemnization of marriage, treated the petitioner with cruelty; or
- has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- has ceased to be a Hindu by conversion to another religion; or
- has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot be reasonably expected to live with the respondent.
- has been suffering from a virulent and incurable form of leprosy; or
- has been suffering from venereal disease in a communicable form; or
- has renounced the world by entering any religious order; or
- has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

(1A) either party to a marriage whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

- that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- That there has been no restitution of conjugal rights in a proceeding to which they were parties.

(2.) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-

- In the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner. Provided that in either case the other wife is alive at the time of the presentation of the petition, or
- that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or
- that in a suit under section 18 of the Hindu Adoption and Maintenance Act 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure 1973(2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure Code 1898) (5 of 1898) a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;
- that her marriage(whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before the age of eighteen years.

Special Marriage Act, 1954[64]

The divorce provision under the Special Marriage Act 1954, is contained in Section 27, which is as follows:

(1.) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or thee wife on the ground that the respondent-

- has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code(45 of 1860);
- has since the solemnization of the marriage treated the petitioner with cruelty; or
- has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
- has been suffering from venereal disease in a communicable form; or
- has been suffering from leprosy, the disease not having been contracted from the petitioner; or
- has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive;

(1-A) A wife may also present a petition for divorce to the district on the ground,-

- that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.
- that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956(78 of 1956) or in a proceeding under section 125 of the Code of Criminal Procedure 1973(2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure of 1898) (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.
- Subject to the provisions of this Act and to the rules thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage(Amendment) Act, 1970(29 0f 1970), may present a petition for divorce to the district court on the ground-
- that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

Although it may be said that divorce has helped the women to develop the feeling of independence in them and make them feel equal partner, yet it may not be advocated that divorce should not be easily granted by the courts. It cannot be denied that divorce causes instability of family. In view of its serious repercussions on family life, divorce should not be within easy reach of these partners. Efforts should be made to bring reunion between husband and wife. Divorce should be granted only when it has become unavoidable and is in the interests of both the husband and wife and the society at large.[65]

Conclusion

Marriage is considered to be an institution in India. It is a 'sanskara' or purificatory ceremony obligatory for every Hindu. The Hindu religious books have enjoined marriage as a duty because an unmarried man cannot perform some of the most important religious ceremonies. There are various types of marriages that are followed in our country monogamy being followed at large.

As the society has advanced the Hindu marriage has gone through various changes. Even values attached to it have changed tremendously. Individuals now are selecting their mates according to their own requirements. Many are not getting into matrimonial alliances due to some problems.

The marriages in India are governed by Hindu Marriage Act and Special Marriage Act which regulates the marriage. The provision of divorce has also helped many people to come out of their marriage. Thus, as believed Hindu marriage is no more indissoluble.

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DIVORCE

SHAYARA BANO VERSUS UNION OF INDIA AND OTHERS

IN THE SUPREME COURT OF INDIA
Original Civil Jurisdiction

Bench: Hon'ble Mr. Justice Jagdish Singh Khehar, CJI. Hon'ble Mr. Justice Kurian Joseph, Hon'ble Mr. Justice R.F. Nariman, Hon'ble Mr. Justice Uday Umesh Lalit & Hon'ble Mr. Justice S.Abdul Nazeer

Writ Petition (C) No. 118 of 2016

Shayara Bano … Petitioner
versus
Union of India and others … Respondents

with
Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality
versus
Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri … Petitioner
versus
Union of India and others … Respondents

JUDGMENT

Hon'ble Mr. Justice Jagdish Singh Khehar, CJI.

Only important paragraphs of the judgments :

11. Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubaraat' – divorce by mutual consent.

12. 'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The petitioner's contention before this Court is, that 'talaq-e-ahsan', and 'talaqe-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-ehasan' is also considered as 'reasonable'. It was submitted, that 'talaq-ebiddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanctal to Muslim religion. The controversy which has arisen for consideration before this Court, is with referenc to 'talaq-ebiddat'.

13. It is necessary for the determination of the present controversy, to understand the parameters, and the nature of the different kinds of 'talaq'. 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. Conversely, if there is no resumption of cohabitation or intimacy, during the period of 'iddat', then the divorce becomes final and irrevocable, after the expiry of the 'iddat' period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh 'nikah' (-marriage), with a fresh 'mahr'. 'Mahr' is a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through 'talaq' - divorce, or death), can the couple remarry. Amongst Muslims, 'talaq-e-ahsan' is regarded as – 'the most proper' form of divorce.

14. 'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-eahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have not been resumed). 'Talaq' is pronounced again. After the second pronouncement of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, 'talaq' pronounced by the

husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third 'tuhr' (period of purity), as soon as the third declaration is made, the 'talaq' becomes irrevocable, and the marriage stands dissolved, whereafter, the wife has to observe the required 'iddat' (the period after divorce, during which a woman cannot remarry. Its purpose is to ensure, that the male parent of any offspring is clearly identified). And after the third 'iddat', the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry. The distinction between 'talaq-eashan' and 'talaq-e-hasan' is, that in the former there is a single pronouncement of 'talaq' followed by abstinence during the period of 'iddat', whereas, in the latter there are three pronouncements of 'talaq', interspersed with abstinence. As against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'.

15. The third kind of 'talaq' is – 'talaq-e-biddat'. This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.

16. According to the petitioner, there is no mention of 'talaq-e-biddat' in the Quran. It was however acknowledged, that the practice of 'talaq-ebiddat' can be traced to the second century, after the advent of Islam. It was submitted, that 'talaq-e-biddat' is recognized only by a few Sunni schools. Most prominently, by the Hanafi sect of Sunni Muslims. It was however emphasized, that even those schools that recognized 'talaq-ebiddat' described it, "as a sinful form of divorce". It is acknowledged, that this form of divorce, has been described as "bad in theology, but good in law". We have recorded the instant position at this juncture, because learned counsel for the rival parties, uniformly acknowledge the same.

(17-27) "..."

Part-5.

Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States:

28. 'Muslim Law in India and Abroad', by Tahir Mahmood and Saif Mahmood (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012 edition), records the following position about the abrogation of the practice of 'talaqe-biddat' as a means of divorce, through statutory enactments, the world over. The countries which have abolished 'talaq-e-biddat' have been divided into Arab States, Southeast Asian States, and Subcontinental States. We have maintained the above classifications, in order to establish their factual positions. Firstly, to demonstrate that the practice was prevalent across the globe in States having sizeable Muslim populations. And secondly, that the practice has been done away with, by way of legislation, in the countries referred to below.

A. Laws of Arab States

(i) Algeria: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Family Law 1984

Law No.84-11 of 1984 as amended in 2005

"Article 49. Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months."

(ii) Egypt: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Law of Personal Status 1929

Law 25 of 1929 as amended by Law 100 of 1985

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

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

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

Article 4. Symbolic expressions of talaq, i.e., words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it."

(iii) Iraq: Is a theocratic State, which declares Islam to be its official religion.

The majority of Iraq's Muslims is Shias. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1959

Law 188 of 1959 as amended by Law 90 of 1987

"Article 35. No divorce shall be effective when pronounced by the persons mentioned below:

(a) one who is intoxicated, insane or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age or sickness;

(b) a person in death-sickness or in a condition which in all probabilities is fatal and of which he actually dies, survived by his wife."

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Article 37. (1) Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(2) If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.

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Article 39. (1) When a person intends to divorce his wife, he shall institute a suit in the Court of Personal Status requesting that it be effected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of Iddat shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court."

(iv) Jordan: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1976

Law 61 of 1976

"Article 88. (1) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep.

(2) 'Bewildered' is one who has lost senses due to anger or provocation, etc., and cannot understand what he is saying.

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Article 90. A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

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Article 94. Every divorce shall be revocable except the final third, one before consummation and one with consideration.

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Article 98. Where an irrevocable Talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited."

(v) Kuwait: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Personal Status 1984

Law 51 of 1984

"Article 102. Talaq may be effected by major and sane men acting by their free will and understanding the implications of their action. Therefore Talaq shall not take effect if the husband is mentally handicapped, imbecile, under coercion, mistake, intoxication, fear or high anger affecting his speech and action.

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Article 109. If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect."

(vi) Lebanon: Is a secular State. Muslims constitute its majority, which is estimated to be 54% (27% Shia, and 27% Sunni). On the issue in hand, it has enacted the following legislation:

Family Rights Law 1962

Law of 16 July 1962

"Article 104. A divorce by a drunk person shall have no effect.

Article 105. A divorce pronounced under coercion shall have no effect."

(vii) Libya: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Family Law 1984

Law 10 of 1984 as amended by Law 15 of 1984

"Article 28. Divorce is termination of the marriage bond. No divorce will become effective in any case except by a decree of a competent court and subject to the provision of Article 30.

Article 29. Divorce is of two kinds – revocable and irrevocable. Revocable divorce does not terminate the marriage till the expiry of Iddat.

Irrevocable divorce terminates the marriage forthwith.

Article 30. All divorces shall be revocable except a third-time divorce, one before consummation of marriage, one for a consideration, and those specified in this law to be irrevocable.

Article 31. A divorce shall be effective only if pronounced in clear words showing intention to dissolve the marriage. Symbolic or metaphorical expression will not dissolve the marriage.

Article 32. A divorce pronounced by a minor or insane person, or if pronounced under coercion, or with no clear intention to dissolve the marriage, shall have no legal effect.

Article 33. (1) A divorce meant to be effect on some action or omission of the wife shall have no legal effect.

(2) A divorce given with a view to binding the wife to an oath or restrain her from doing something shall have no legal effect.

(3) A divorce to which a number is attached, by express words or a gesture, shall effect only a single revocable divorce, except when it is pronounced for the third time.

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Article 35. The marriage may be dissolved by mutual consent of the parties. Such a divorce must be registered with the court. If the parties cannot agree on the terms of

such a divorce, they shall approach the court and it will appoint arbitrators to settle the matter or reconcile them.

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Article 47. A divorce must be pronounced in a court and in the presence of the other party or his or her representative. The court shall before giving effect to a divorce exhaust all possibilities of reconciliation."

(viii) Morocco: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 2004

Law 70.03 of 2004

"Article 79. Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situate, or where the wife resides, or where the marriage took place.

Article 80. The petition will mention the identity of spouses, their professions, addresses, number of children, if any, with their age, health condition and educational status. It must be supported by a copy of the marriage agreement and a document stating the husband's social status and financial obligations.

Article 81. The court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be withdrawal of the petition. If the wife abstains, the court will notify her that if she does not present herself the petition may be decided in her absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance.

Article 82. The court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court.

Article 83. If reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife's post-divorce dues and maintenance of children.

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Article 90. No divorce is permissible for a person who is not in his senses or is under coercion or provocation.

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Article 92. Multiple expressions of divorce, oral or written, shall have the effect of a single divorce only.

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Article 123. Every divorce pronounced by the husband shall be revocable, except a third-time divorce, divorce before consummation of marriage, divorce by mutual consent, and divorce by Khula or Talaq-e-Tafweez.

(ix) Sudan: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law on Talaq 1935

Judicial Proclamation No.4 of 1935

"Article 1. A divorce uttered in a state of intoxication or under duress shall be invalid and ineffective.

Article 2. A contingent divorce which is not meant to be effective immediately and is used as an inducement or threat shall have not effect.

Article 3. A formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.

Article 4. Metaphorical expressions used for a divorce shall have the effect of dissolving the marriage only if the husband actually meant a divorce."

(x) Syria: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1953

Law 59 of 1953 as amended by Law 34 of 1975

"Article 89. No divorce shall take place when the man is drunk, out of his senses, or under duress. A person is out of his senses when due to anger, etc. he does not appreciate what he says.

Article 90. A conditional divorce shall have no effect if not actually intended and used only as an inducement to do or abstain from doing something or as an oath or persuasion.

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Article 92. If a divorce is coupled with a number, expressly or impliedly, not more than one divorce shall take place.

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Article 94. Every divorce shall be revocable except a third-time divorce, one before consummation, a divorce with a consideration, and a divorce stated in this Code to be irrevocable.

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Article 117. Where a person divorces his wife the court may, if satisfied that he has arbitrarily done so without any reasonable cause and that as a result of the divorce the wife shall suffer damage and become destitute, give a decision, with due regard to the husband's financial condition and the amount of wife's suffering, that he

should pay her compensation not exceeding three years' maintenance, in addition to maintenance payable during the period of Iddat. It may be directed to be paid either in a lump sum or in instalments as the circumstances of a case may require.

(xi) Tunisia: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1956

Law 13-8 of 1956 as amended by Law 7 of 1981

"Article 31.(1) A decree of divorce shall be given: (i) with the mutual consent of the parties; or (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it. The party causing material or mental injury by the fact of divorce under clauses (ii) and (iii) shall be directed to indemnify the aggrieved spouse.

(2) As regards the woman to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of Iddat and may be in the form of retention of the matrimonial home. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by marrying again. If the former husband dies, this indemnity will be a charge on his estate and will have to be met by his heirs if they consent to it and will be decided by the court if they disagree. They may pay her in a lump sum within one year from the former husband's death the indemnity claimable by her.

Article 32 (1) No divorce shall be decreed except after the court has made an overall inquiry into the causes of rift and failed to effect reconciliation.

(2) Where no reconciliation is possible the court shall provide, even if not asked to, for all important matters relating to the residence of the spouses, maintenance and custody of children and meeting the children, except when the parties specifically agree to forgo all or any of these rights. The court shall fix the maintenance on the basis of all those facts which it comes to know while attempting reconciliation. All important matters shall be provided for in the decree, which shall be nonappealable but can be reviewed for making additional provisions.

(3) The court of first instance shall pass orders in the matters of divorce and all concerning matters including the compensation money to which the divorced wife may be entitled after the expiry of Iddat. The portions of the decree relating to custody, maintenance, compensation, residence and right to visit children shall be executed immediately."

(xii) United Arab Emirates: Is a theocratic State, as the Federal Constitution declares Islam to be the official religion. The Constitution also provides for freedom of religion, in accordance with established customs. Muslims of the Shia sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law of Personal Status 2005

Federal Law No.28 of 2005

"Article 140(1). If a husband divorces his wife after consummation of a valid marriage by his unilateral action and without any move for divorce from her side, she will be entitled to compensation besides maintenance for Iddat. The amount of compensation will be decided with due regard to the means of the husband and the hardship suffered by the wife, but it shall not exceed the amount of one year's maintenance payable in law to a woman of her status.

(2) The Kazi may decree the compensation, to be paid as a lump sum or in instalments, according to the husband's ability to pay."

(xiii) Yemen: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Decree on Personal Status 1992

Decree 20 of 1992

"Article 61. A divorce shall not be effective if pronounced by a man who is drunk, or has lost his senses, or has no power of discernment, if this is shown by his condition and action.

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Article 64. A divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce.

Article 65. The words saying that if the wife did or failed to do something she will stand divorced will not effect a divorce.

Article 66. The words that if an oath or vow is broken it will effect a divorce will not dissolve the marriage even if the said oath or vow is broken.

Article 67. A divorce can be revoked by the husband during the Iddat period. After the expiry of Iddat, a direct remarriage between them will be lawful.

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Article 71. If a man arbitrarily divorces his wife without any reasonable ground and it causes hardship to her, the court may grant her compensation payable by the husband not exceeding maintenance for one year in accordance with her status. The court may decide if the compensation will be paid as a lump sum or in instalments."

B. Laws of Southeast Asian States

(i) Indonesia: The Constitution of Indonesia guarantees freedom of religion among Indonesians. However, the Government recognizes only six official religions – Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

(a) Law of Marriage 1974

Law 1 of 1974

"Article 38. A divorce shall be effected only in the court and the court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of marriage.

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

(b) Marriage Regulations 1975

Regulation 9 of 1975

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

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

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

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

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Article 19. A divorce may be allowed on the petition of either party if the other party:

(a) has committed adultery or become addict to alcohol, drugs, gambling or another serious vice;

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

(c) has been imprisoned for at least five years;

(d) has treated the aggrieved party with cruelty of an injurious nature;

(e) has been suffering from a physical deformity affecting conjugal duties, or where relations between the spouses have become too much strained making reconciliation impossible."

(ii) Malaysia: Under the Constitution of Malaysia, Islam is the official religion of the country, but other religions are permitted to be practiced in peace and harmony. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Islamic Family Law Act 1984

Act 304 of 1984

"Article 47. (1) A husband or a wife who desires a divorce shall present an application for divorce to the court in the prescribed form accompanied by a statutory declaration containing (a) particulars of the marriage and the name, ages and sex of the children, if any, of the marriage; (b) particulars of the facts giving the court jurisdiction under Section 45; (c) particulars of any previous matrimonial proceedings between the parties, including the place of the proceedings; (d) a statement as to the reasons for desiring divorce; (e) a statement as to whether any, and if so, what steps have been taken to effect reconciliation; (f) the terms of any agreement regarding maintenance and habitation of the wife and the children of the marriage, if any, and the division of any assets acquired through the joint effort of the parties, if any, or where no such agreement has been reached, the applicant's proposals regarding those matters; and (g) particulars of the order sought.

(2) Upon receiving an application for divorce, the court shall cause summons to be served on the other party together with a copy of the application and the statutory declaration made by the applicant, and the summons shall direct the other party to appear before the court so as to enable it to inquire whether or not the other party consents to the divorce.

(3) If the other party consents to the divorce and the court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one Talaq before the court.

(4) The court shall record the fact of the pronouncement of one Talaq and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(5) Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall as soon as possible appoint a Conciliatory Committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the Committee.

(6) In appointing the two persons under sub-section (5) the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.

(7) The court may give directions to the Conciliatory Committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.

(8) If the Committee is unable to agree or if the court is not satisfied with its conduct of the conciliation, the court may remove the Committee and appoint another Committee in its place.

(9) The Committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the court.

(10) The Committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(11) If the Conciliatory Committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage, if any, regarding division of property and other matters related to the marriage.

(12) No advocate and solicitor shall appear or act for any party in any proceeding before a Conciliatory Committee and no party shall be represented by any person other than a member of his or her family without the leave of the Conciliatory Committee.

(13) Where the Committee reports to the court that reconciliation has been effected and the parties have resumed their conjugal relationship, the court shall dismiss the application for divorce.

(14) Where the Committee submits to the court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the court shall advise the husband to pronounce one Talaq before the court, and where the court is unable to procure the presence of the husband before the court to pronounce one Talaq, or where the husband refuses to pronounce one Talaq, the court shall refer the case to the Hakams [arbitrators] for action according to section 48.

(15) The requirement of sub-section (5) as to reference to a Conciliatory Committee shall not apply in any case (a) where the applicant alleges that he or she has been deserted by an does not know the whereabouts of the other party; (b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the court within six months after the date of the application; (c) where the other party is imprisoned for a term of three years or more; (d) where the applicant alleges that the other party is suffering from incurable mental illness; or (e) where the court is satisfied that there are exceptional circumstances which make reference to a Conciliatory Committee impracticable.

(16) Save as provided in sub-section (17), a Talaq pronounced by the husband or an order made by the court shall not be effective until the expiry of the Iddat.

(17) If the wife is pregnant at the time the Talaq is pronounced or the order is made, the Talaq or the order shall not be effective until the pregnancy ends."

(iii) Philippines: Is a secular State. Christians constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Muslim Personal Law 1977

Decree No.1083 of 1977

"Article 46. (1) A divorce by Talaq may be effected by the husband in a single repudiation of his wife during her Tuhr [non-menstrual period] within which he has totally abstained from carnal relations with her.

(2) Any number of repudiations made during one Tuhr [non-menstrual period] shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed Iddat.

(3) A husband who repudiates his wife, either for the first or second time, shall have the right to take her back within the Iddat period by resumption of cohabitation without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.

xxx xxx xxx

Article 85. Within seven days after the revocation of a divorce the husband shall, with the wife's consent, send a statement thereof to the Circuit Registrar in whose records the divorce was previously entered.

xxx xxx xxx

Article 161. (1) A Muslim male who has pronounced a Talaq shall, without delay, file with the Clerk of the Sharia Circuit Court of the place where his family resides a written notice of such fact and the circumstances attending thereto, after having served a copy to the wife concerned. The Talaq pronounced shall not become irrevocable until after the expiration of the prescribed Iddat.

(2) Within seven days from receipt of notice the Clerk of the Court shall require each of the parties to nominate a representative. The representatives shall be appointed by the court to constitute, with the Clerk of the Court as Chairman, an Agama [religious scholars] Arbitration Council which shall try and submit to the court a report on the result of arbitration on the basis of which, and such other evidence as may be allowed, the court will pass an order.

(3) The provisions of this Article will be observed if the wife exercises right to Talaq-e-Tafweez.

xxx xxx xxx

Article 183. A person who fails to comply with the requirements of Article 85, 161 and 162 of this Code shall be penalized by imprisonment or a fine of two hundred to two thousand Pesos, or both."

C. Laws of Sub-continental States

(i) Pakistan & Bangladesh: Are both theocratic States, wherein Islam is the official religion. In both countries Muslims of the Sunni sect constitute the majority. On the issue in hand, it has the following legislation in place:

Muslim Family Laws Ordinance 1961
Ordinance VIII of 1961 amended in Bangladesh by Ordinance 114 of 1985
(Bangladesh changes noted below relevant provisions)

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

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

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

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

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

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

(ii) Sri Lanka: Is a secular State. Buddhists constitute its majority. On the issue in hand, it has the following legislation in place:

Muslim Marriage and Divorce Act 1951

Act 6 of 1951 as amended by Act 40 of 2006

"Section 17 (4) Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.

(5) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage; (a) the bridegroom, (b) the guardian of the bride, and (c) the person who conducted the Nikah ceremony connected with the marriage.

Section 27. Where a husband desires to divorce his wife the procedure laid down in Schedule II shall be followed."

(2) Where a wife desires to effect a divorce from her husband on any ground not referred to in sub-section (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Schedule III shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure.

29. 'Talaq-e-biddat' is effective, the very moment it is pronounced. It is irrevocable when it is pronounced.

X. Conclusions emerging out of the above consideration:

190. The following conclusions emerge from the considerations recorded at I to IX above:

(1) Despite the decision of the Rashid Ahmad case1 on the subject of 'talaq-e-biddat', by the Privy Council, the issue needs a fresh examination, in view of the subsequent developments in the matter.

(2) All the parties were unanimous, that despite the practice of 'talaq-ebiddat' being considered sinful, it was accepted amongst Sunni Muslims belonging to the Hanafi school, as valid in law, and has been in practice amongst them.

(3) It would not be appropriate for this Court, to record a finding, whether the practice of 'talaq-e-biddat' is, or is not, affirmed by 'hadiths', in view of the enormous contradictions in the 'hadiths', relied upon by the rival parties.

(4) 'Talaq-e-biddat' is integral to the religious denomination of Sunnis belonging to the Hanafi school. The same is a part of their faith, having been followed for more than 1400 years, and as such, has to be accepted as being constituent of their 'personal law'.

(5) The contention of the petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law', cannot be accepted, and is accordingly rejected.

(6) 'Talaq-e-biddat', does not violate the parameters expressed in Article 25 of the Constitution. The practice is not contrary to public order, morality and health. The practice also does not violate Articles 14, 15 and 21 of the Constitution, which are limited to State actions alone.

(7) The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.

(8) Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible under Articles 25(2) and 44, read with entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution. The said procedure alone need to be followed with reference to the practice of 'talaq-e-biddat', if the same is to be set aside.

(9) International conventions and declarations are of no avail in the present controversy, because the practice of 'talaq-e-biddat', is a component of 'personal law', and has the protection of Article 25 of the Constitution.

Part-10.

The declaration:

191. The whole nation seems to be up in arms. There is seemingly an overwhelming majority of Muslim-women, demanding that the practice of 'talaq-e-biddat' which is sinful in theology, be declared as impermissible in law. The Union of India, has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting, that it even violates constitutional morality. During the course of hearing, the issue was hotly canvassed in the media. Most of the views expressed in erudite articles on the subject, hugely affirmed that the practice was demeaning. Interestingly even during the course of hearing, learned counsel appearing for the rival parties, were in agreement, and described the practice of 'talaq-e-biddat' differently as, unpleasant, distasteful and unsavory. The position adopted by others was harsher, they considered it as disgusting, loathsome and obnoxious. Some even described it as being debased, abhorrent and wretched.

192. We have arrived at the conclusion, that 'talaq-e-biddat', is a matter of 'personal law' of Sunni Muslims, belonging to the Hanafi school. It constitutes a matter of their faith. It has been practiced by them, for at least 1400 years. We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution.

193. Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion. The Constitution allows the followers of every religion, to follow their beliefs and religious traditions. The Constitution assures believers of all faiths, that their way of life, is guaranteed, and would not be subjected to any challenge, even though they may seem to others (-and even rationalists, practicing the same faith) unacceptable, in today's world and age. The Constitution extends this guarantee, because faith constitutes the religious consciousness, of the followers. It is this religious consciousness, which binds believers into separate entities. The Constitution endevours to protect and preserve, the beliefs of each of the separate entities, under Article 25.

194. Despite the views expressed by those who challenged the practice of 'talaq-e-biddat', being able to demonstrate that the practice transcends the barriers of constitutional morality (emerging from different provisions of the Constitution), we have found ourselves unable to persuade ourselves, from reaching out in support of the petitioners concerns. We cannot accept the petitioners' claim, because the challenge raised is in respect of an issue of 'personal law' which has constitutional protection.

195. In continuation of the position expressed above, we may acknowledge, that most of the prayers made to the Court (-at least on first blush) were persuasive enough, to solicit acceptance. Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. We are however satisfied that, that would not be the rightful course to tread. We were obliged to keep reminding ourselves, of the wisdoms of the framers of the Constitution, who placed matters of faith in Part III of the Constitution.

Therefore, any endeavour to proceed on issues canvassed before us would, tantamount to overlooking the clear letter of law. We cannot nullify and declare as unacceptable in law, what the Constitution decrees us, not only to protect, but also to enforce. The authority to safeguard and compel compliance, is vested under a special jurisdiction in constitutional Courts (-under Article 32, with the Supreme Court; and under Article 226, with the High Courts). Accepting the petitioners prayers, would be in clear transgression of the constitutional mandate contained in Article 25.

196. Such a call of conscience, as the petitioners desire us to accept, may well have a cascading effect. We say so, because the contention of the learned Attorney General was, that 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat' (-for details, refer to paragraph 77 above). According to the learned Attorney General, the said forms of talaq also suffered from the same infirmities as 'talaq-e-biddat'. The practices of 'polygamy' and 'halala' amongst Muslims are already under challenge before us. It is not difficult to comprehend, what kind of challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded, lest we find our conscience traversing into every nook and corner of religious practices, and 'personal law'. Can a court, based on a righteous endeavour, declare that a matter of faith, be replaced – or be completely done away with. In the instant case, both prayers have been made. Replacement has been sought by reading the three pronouncements in 'talaq-e-biddat', as one. Alternatively, replacement has been sought by reading into 'talaq-e-biddat', measures of arbitration and conciliation, described in the Quran and the 'hadiths'. The prayer is also for setting aside the practice, by holding it to be unconstitutional. The wisdom emerging from judgments rendered by this Court is unambiguous, namely, that while examining issues falling in the realm of religious practices or 'personal law', it is not for a court to make a choice of something which it considers as forward looking or non-fundamentalist. It is not for a court to determine whether religious practices were prudent or progressive or regressive. Religion and 'personal law', must be perceived, as it is accepted, by the followers of the faith. And not, how another would like it to be (-including self-proclaimed rationalists, of the same faith). Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault

therewith. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem. It is therefore, that this Court had the occasion to observe, "….. However laudible, desirable and attractive the result may seem … an activist Court is not fully equipped to cope with the intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of this Court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint ….."[30]

197. We have arrived at the conclusion, that the legal challenge raised at the behest of the petitioners must fail, on the judicial front. Be that as it may, the question still remains, whether this is a fit case for us to exercise our jurisdiction under Article 142, "…for doing complete justice …", in the matter. The reason for us to probe the possibility of exercising our jurisdiction under Article 142, arises only for one simple reason, that all concerned are unequivocal, that besides being arbitrary the practice of 'talaq-e-biddat' is gender discriminatory.

198. A perusal of the consideration recorded by us reveals, that the practice of 'talaq-e-biddat' has been done away with, by way of legislation in a large number of egalitarian States, with sizeable Muslim population and even by theocratic Islamic States. Even the AIMPLB, the main contestant of the petitioners' prayers, whilst accepting the position canvassed on behalf of the petitioners, assumed the position, that it was not within the realm of judicial discretion, to set aside a matter of faith and religion. We have accepted the position assumed by the AIMPLB. It was however acknowledged even by the AIMPLB, that legislative will, could salvage the situation. This assertion was based on a conjoint reading of Articles 25(2) and Article 44 of the Constitution, read with entry 5 of the Concurrent List contained in the Seventh Schedule of the Constitution. There can be no doubt, and it is our definitive conclusion, that the position can only be salvaged by way of legislation. We understand, that it is not appropriate to tender advice to the legislature, to enact law on an issue. However, the position as it presents in the present case, seems to be a little different. Herein, the views expressed by the rival parties are not in contradiction. The Union of India has appeared before us in support of the cause of the petitioners. The stance adopted by the Union of India is sufficient for us to assume, that the Union of India supports the petitioners' cause.

Unfortunately, the Union seeks at our hands, what truly falls in its own. The main party that opposed the petitoners' challenge, namely, the AIMPLB filed an affidavit before this Court affirming the following position:

"1. I am the Secretary of All India Muslim Personal Board will issue an advisory through its Website, Publications and Social Media Platforms and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:-

(a) At the time of performing 'Nikah' (marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;

(b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.

3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain resolutions in the meeting held on 15th & 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 along with the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos. 4 to 12] to the present Affidavit."

A perusal of the above affidavit reveals, that the AIMPLB has undertaken to issue an advisory through its website, to advise those who enter into a matrimonial alliance, to agree in the 'nikah-nama', that their marriage would not be dissolvable by 'talaq-e-biddat'. The AIMPLB has sworn an affidavit to prescribe guidelines, to be followed in matters of divorce, emphasizing that 'talaq-e-biddat' be avoided. It would not be incorrect to assume, that even the AIMPLB is on board, to assuage the petitioner's cause.

199. In view of the position expressed above, we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see at IX – Reforms to 'personal law' in India), even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.

200. Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-ebiddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

201. Disposed of in the above terms.

..……..…..……CJI.

(Jagdish Singh Khehar)

..……..…..…….……J.

(S. Abdul Nazeer)

New Delhi; August 22, 2017.

Note: The emphases supplied in all the quotations in the instant judgment, are ours.

Per **Hon'ble Mr. Justice Kurian Joseph :—**

1. What is bad in theology was once good in law but after Shariat has been declared as the personal law, whether what is Quranically wrong can be legally right is the issue to be considered in this case. Therefore, the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity. That is no more res integra. This Court in Shamim Ara v. State of UP and Another[1] has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141[2], Shamim Ara is the law that is applicable in India.

2. Having said that, I shall also make an independent endeavor to explain the legal position in Shamim Ara and lay down the law explicitly.

3. The Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as "the 1937 Act") was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community.[3] Section 2 is most relevant in the face of the present controversy.

> 2. Application of Personal law to Muslims. –
>
> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the

1 (2002) 7 SCC 518

2 141. Law declared by Supreme Court to be binding on all courts.-The law declared by the Supreme Court shall be binding on all courts within the territory of India.

3 STATEMENT OF OBJECTS AND REASONS
For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law. (Emphasis supplied)

parties are Muslims shall be Muslim Personal Law (Shariat).
(Emphasis supplied)

4. After the 1937 Act, in respect of the enumerated subjects under Section 2 regarding "marriage, dissolution of marriage, including talaq", the law that is applicable to Muslims shall be only their personal law namely Shariat. Nothing more, nothing less. It is not a legislation regulating talaq. In contradistinction, The Dissolution of Muslim Marriages Act, 1939 provides for the grounds for dissolution of marriage. So is the case with the Hindu Marriage Act, 1955. The 1937 Act simply makes Shariat applicable as the rule of decision in the matters enumerated in section 2.

Therefore, while talaq is governed by Shariat, the specific grounds and procedure for talaq have not been codified in the 1937 Act.

5. In that view of the matter, I wholly agree with the learned Chief Justice that the 1937 Act is not a legislation regulating talaq. Consequently, I respectfully disagree with the stand taken by Nariman, J. that the 1937 Act is a legislation regulating triple talaq and hence, the same can be tested on the anvil of Article 14. However, on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman, J. I am also of the strong view that the Constitutional democracy of India cannot conceive of a legislation which is arbitrary.

6. Shariat, having been declared to be Muslim Personal Law by the 1937 Act, we have to necessarily see what Shariat is. This has been beautifully explained by the renowned author, Asaf A.A. Fyzee in his book Outlines of Muhammadan Law, 5th Edition, 2008 at page 10.[4]

"…What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are the Traditions of the Prophet- the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law."

7. There are four sources for Islamic law- (i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran.

4 Tahir Mahmood (ed.), Asaf A.A. Fyzee Outlines of Muhammadan Law, 5th edition 2008.

According to Justice Bader Durrez Ahmad in Masroor Ahmed v. State (NCT of Delhi) & Another[5]:

"14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of ijtihad employing the sophisticated jurisprudential techniques. The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the hadis and upon driving a consensus. The differences arose between the schools because of reliance on different hadis, differences in consensus and differences on qiyas and aql as the case may be."

(Emphasis supplied)

8. It is in that background that I make an attempt to see what the Quran states on talaq. There is reference to talaq in three Surasin Sura II while dealing with social life of the community, in Sura IV while dealing with decencies of family life and in Sura LXV while dealing explicitly with talaq.

9. Sura LXV of the Quran deals with talaq. It reads as follows:

"Talaq, or Divorce.

In the name of God, Most Gracious,

Most Merciful.

1. O Prophet! When ye
Do divorce women,
Divorce them at their
Prescribed periods,
And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits
Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:

5 ILR (2007) II Delhi 1329

Thou knowest not if
Perchance God will
Bring about thereafter
Some new situation.

2. Thus when they fulfill
Their term appointed,
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God. Such
Is the admonition given
To him who believes
In God and the Last Day.
And for those who fear
God, He (ever) prepares
A way out,

3. And He provides for him
From (sources) he never
Could imagine. And if
Any one puts his trust
In God, sufficient is (God)
For him. For God will
Surely accomplish His purpose :
Verily, for all things
Has God appointed
A due proportion.

4. Such of your women
As have passed the age

Of monthly courses, for them
The prescribed period, if ye
Have any doubts, is
Three months, and for those
Who have no courses
(It is the same):
For those who carry
(Life within their wombs),
Their period is until
They deliver their burdens :
And for those who
Fear God, He will
Make their path easy.

5. That is the Command
Of God, which He
Has sent down to you :
And if any one fears God,
He will remove his ills
From him, and will enlarge
His reward.

6. Let the women live
(In 'iddat) in the same
Style as ye live,
According to your means :
Annoy them not, so as
To restrict them.
And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver
Their burden : and if
They suckle your (offspring),
Give them their recompense :

And take mutual counsel
Together, according to
What is just and reasonable.
And if ye find yourselves
In difficulties, let another
Woman suckle (the child)
On the (father's) behalf.

7. Let the man of means
Spend according to
His means : and the man
Whose resources are restricted,
Let him spend according
To what God has given him.
God puts no burden
On any person beyond
What He has given him.
After a difficulty, God
Will soon grant relief."

Verse 35 in Sura IV of the Quran speaks on arbitration for reconciliation-

"35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."

Sura II contains the following verses pertaining to divorce:

"226.For those who take
An oath for abstention

From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft–forgiving,
Most Merciful.
227.But if their intention
Is firm for divorce,
God heareth
And knoweth all things.
228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(of advantage) over them.
And God is Exalted in Power, Wise."
"229. A divorce is only
Permissible twice: after that,
The parties should either hold

Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others).
230. So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided

They feel that they
Can keep the limits
Ordained by God.
Such other limits
Ordained by God,
Which He makes plain
To those who understand.
231. When ye divorce
Women, and they fulfill
The term of their ('Iddat),
Either take them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If anyone does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He
Sent down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things."[6]

6 Verses from the Holy Quran as extracted above are taken from "The Holy Quran" translated by Abdullah Yusuf Ali which was agreed to be a fair translation by all parties.

10. These instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality.[7] In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.

11. The above view has been endorsed by various High Courts, finally culminating in Shamim Ara by this Court which has since been taken as the law for banning triple talaq. Interestingly, prior to Shamim Ara, Krishna Iyer, J. in Fuzlunbi v. K Khader Vali and Another[8], while in a three judge bench in this Court, made a very poignant observation on the erroneous approach of Batchelor, J. in Sarabai v. Rabiabai[9] on the famous comment "good in law, though bad in theology". To quote:

"20. Before we bid farewell to Fuzlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor, J. that this view "is good in law, though bad in theology". Maybe, when the point directly arises, the question will have to be considered by this Court but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."

12. More than two decades later, Shamim Ara has referred to, as already noted above, the legal perspective across the country on the issue of triple talaq starting with the decision of the Calcutta High Court in Furzund Hossein v. Janu Bibee[10] in 1878 and finally, after discussing two decisions of the Gauhati High Court namely Jiauddin Ahmed v. Anwara Begum[11] and Rukia Khatun v. Abdul Khalique Laskar[12], this Court held as follows-

"13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Jiauddin Ahmed v. Anwara Begum (1981) 1 Gau LR 358 and later speaking for the Division Bench in Rukia Khatun v.Abdul Khalique Laskar (1981) 1 Gau LR 375. In Jiauddin Ahmed case a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights

7 Similar observations were made by the High Court of Gauhati through Baharul Islam, J. in Jiauddin Ahmed v. Anwara Begum(1981) 1 Gau LR 358 wherein he noted that "though marriage under Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriagetie , Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution". This view has been noted and approved of in Shamim Ara at paragraph 13.(Emphasis supplied)

8 (1980) 4 SCC 125

9 ILR 30 Bom 537

10 ILR (1878) 4 Cal 588

11 (1981) 1 Gau LR 358

12 (1981) 1 Gau LR 375

and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail, 'talaq' may be effected. (para 13). In Rukia Khatun case, the Division Bench stated that the correct law of talaq as ordained by the Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the above said observations made by the learned Judges of High Courts…." (Emphasis supplied)

13. There is also a fruitful reference to two judgments of the Kerala High Court - one of Justice Krishna Iyer in A. Yousuf Rawther v. Sowramma[13] and the other of Justice V. Khalid in Mohd. Haneefa v. Pathummal Beevi[14]. No doubt, Sowaramma was not a case on triple talaq, however, the issue has been discussed in the judgment in paragraph 7 which has also been quoted in Shamim Ara.

"..The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. …It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"'. (Quoran IV:34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." ….Commentators on the Quoran have rightly observed - and this tallies with the law now administered in some Muslim countries like Iraq - that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit

13 AIR 1971 Ker 261
14 1972 KLT 512

of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce…"

14. Khalid, J. has been more vocal in Mohd. Haneefa:

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

15. After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in Shamim Ara, at paragraph 15 that "…there are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq." It has to be particularly noted that this conclusion by the Bench in Shamim Ara is made after "respectful agreement" with Jiauddin Ahmed that "talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, 'talaq' may be effected." In the light of such specific findings as to how triple talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no ratio decidendi on triple talaq in Shamim Ara.

16. Shamim Ara has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to the tenets of the Holy Quran. Consequently, triple talaq lacks the approval of Shariat.

17. The High Court of Andhra Pradesh, in Zamrud Begum v. K. Md. Haneef and another[15], is one of the first High Courts to affirm the view adopted in Shamim Ara. The High Court, after referring to Shamim Ara and all the other decisions mentioned therein, held in paragraphs 13 and 17 as follows:

"13. It is observed by the Supreme Court in the above said decision that talaq may be oral or in writing and it must be for a reasonable cause. It must be preceded by an attempt of reconciliation of husband and wife by two arbitrators one chosen from the family of the wife and other by husband. If their attempts fail then talaq may be effected by pronouncement. The said procedure has not been followed. The Supreme Court has culled out the same from Mulla and the principles of Mahammedan Law.

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17. I am of the considered view that the alleged talaq is not a valid talaq as it is not in accordance with the principles laid down by the Supreme Court. If there is no valid talaq the relationship of the wife with her husband still continues and she cannot be treated as a divorced wife…." (Emphasis supplied)

18. In A. S. Parveen Akthar v. The Union of India[16], the High Court of Madras was posed with the question on the validity and constitutionality of Section 2 of the 1937 Act in so far as it recognises triple talaq as a valid form of divorce. The Court referred to the provisions

15 (2003) 3 ALD 220
16 2003-1-L.W. 370

of the Quran, opinions of various eminent scholars of Islamic Law and previous judicial pronouncements including Shamim Ara and came to the following conclusion:

"45. Thus, the law with regard to talaq, as declared by the apex Court, is that talaq must be for a reasonable cause and must be preceded by attempt at reconciliation between the husband and the wife by two arbiters one chosen by wife's family and the other from husband's family and it is only if their attempts fail, talaq may be effected.

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48. Having regard to the law now declared by the apex Court in the case of Shamim Ara, 2002 AIR SCW 4162, talaq, in whatever form, must be for a reasonable cause, and must be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses, the petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of talaq is valid, is based on a misunderstanding of the law." (Emphasis supplied)

As far as the constitutionality of Section 2 is concerned, the Court refrained from going into the question in view of the decisions of this Court in Shri Krishna Singh v. Mathura Ahir and Others [17] and Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India[18].

19. The High Court of Jammu and Kashmir, in Manzoor Ahmad Khan v.Saja & Ors.[19], has also placed reliance on Shamim Ara. The Court, at paragraph 11, noted that in Shamim Ara, the Apex Court relied upon the passages from judgments of various High Courts "which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice." The Court finally held that the marriage between the parties did not stand dissolved.

20. In Ummer Farooque v. Naseema[20], Justices R Bhaskaran and K.P. Balachandran of the High Court of Kerala, after due consideration of the prior decisions of the various Courts, in paragraphs 5 and 6 held that:

"5…The general impression as reflected in the decision of a Division Bench of this Court in Pathayi v. Moideen (1968 KLT 763) was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not be even addressed to her and it takes effect the moment it comes to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in Shamim Ara v. State of U.P. [2002 (3) KLT 537 (SC)].

6. The only thing to be further considered in this case is whether the divorce alleged to have been effected by the husband by pronouncement of talaq on 23-7-1999 is proved or not. The mere pronouncement of talaq three times even in the presence

17 (1981) 3 SCC 689
18 (1997) 3 SCC 573
19 2010 (4) JKJ 380
20 2005 (4) KLT 565

of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in Shamim Ara's case [2002 (3) KLT 537 (SC)], there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife…"

(Emphasis supplied)

21. In Masroor Ahmed, Justice Badar Durrez Ahmed, held as follows:

"32. In these circumstances (the circumstances being – (1) no evidence of pronouncement of talaq; (2) no reasons and justification of talaq; amd (3) no plea or proof that talaq was preceded by efforts towards reconciliation), the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after Shamim Ara (supra), the position of the law relating to talaq, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of talaq must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that talaq was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place…."

(Emphasis supplied)

22. As recently as in 2016, Mustaque, J. of the High Court of Kerala in Nazeer @ Oyoor Nazeer v. Shemeema[21], has inter alia referred to Shamim Ara and has disapproved triple talaq.

23. Therefore, I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law.

24. To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Indian Constitution. That is subject only to the following- (1) public order, (2) health, (3) morality and (4) other provisions of Part III dealing with Fundamental Rights. Under Article 25 (2) of the Constitution of India, the State is also granted power to make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." Except to the above extent, the freedom of religion under the Constitution of India is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree.

Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice and thus, my disagreement with the learned Chief Justice for the constitutional protection

21 2017 (1) KLT 300

given to triple talaq. I also have serious doubts as to whether, even under Article 142, the exercise of a Fundamental Right can be injuncted.

25. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the same is possible, but the process of harmonizing different interests is within the powers of the legislature. Of course, this power has to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the Courts to direct for any legislation.

26. Fortunately, this Court has done its part in Shamim Ara. I expressly endorse and re-iterate the law declared in Shamim Ara. What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.

.....J.

(KURIAN JOSEPH)

New Delhi; August 22, 2017.

Per **Hon'ble Mr. Justice R.F. Nariman for himself & Hon'ble Mr. Justice U.U. Lalit**

Having perused a copy of the learned Chief Justice's judgment, I am in respectful disagreement with the same.

1. This matter has found its way to a Constitution Bench of this Court because of certain newspaper articles which a Division Bench of this Court in Prakash v. Phulavati, (2016) 2 SCC 36, adverted to, and then stated:

> "28. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights of Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution, Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in Ahmedabad Women Action Group (AWAG) v. Union of India [Ahmedabad Women Action Group (AWAG) v. Union of India, (1997) 3 SCC 573], this Court did not go into the merits of the discrimination with the observation that the issue involved State policy to be dealt with by the legislature. [This Court referred to the observations of Sahai, J. in Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569 that a climate was required to be built for a uniform civil code. Reference was also made to observations in Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125 to the effect that the Court could at best advise and focus attention to the problem instead of playing an activist role.] It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the Constitution Bench and there was no reason to multiply proceedings on such an issue.
>
> 31. It was, thus, submitted that this aspect of the matter may be gone into by separately registering the matter as public interest litigation (PIL). We are of the view that

the suggestion needs consideration in view of the earlier decisions of this Court. The issue has also been highlighted in recent articles appearing in the press on this subject. [The Tribune dated 24-9-2015 "Muslim Women's Quest for Equality" by Vandana Shukla and Sunday Express Magazine dated 4-10-2015 "In Her Court" by Dipti Nagpaul D'Souza.]

32. For this purpose, a PIL be separately registered and put up before the appropriate Bench as per orders of Hon'ble the Chief Justice of India." (at pages 53 and 55)

Several writ petitions have thereafter been filed and are before us seeking in different forms the same relief – namely, that a Triple Talaq at one go by a Muslim husband which severs the marital bond is bad in constitutional law.

2. Wide ranging arguments have been made by various counsel appearing for the parties. These have been referred to in great detail in the judgment of the learned Chief Justice. In essence, the petitioners, supported by the Union of India, state that Triple Talaq is an anachronism in today's day and age and, constitutionally speaking, is anathema. Gender discrimination is put at the forefront of the argument, and it is stated that even though Triple Talaq may be sanctioned by the Shariat law as applicable to Sunni Muslims in India, it is violative of Muslim women's fundamental rights to be found, more particularly, in Articles 14, 15(1) and 21 of the Constitution of India. Opposing this, counsel for the Muslim Personal Board and others who supported them, then relied heavily upon a Bombay High Court judgment, being State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84, for the proposition that personal laws are beyond the pale of the fundamental rights Chapter of the Constitution and hence cannot be struck down by this Court. According to them, in this view of the matter, this Court should fold its hands and send Muslim women and other women's organisations back to the legislature, as according to them, if Triple Talaq is to be removed as a measure of social welfare and reform under Article 25(2), the legislature alone should do so. To this, the counter argument of the other side is that Muslim personal laws are not being attacked as such. What is the subject matter of attack in these matters is a statute, namely, the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as the "1937 Act"). According to them, Triple Talaq is specifically sanctioned by statutory law vide Section 2 of the 1937 Act and what is sought for is a declaration that Section 2 of the 1937 Act is constitutionally invalid to the aforesaid extent. To this, the Muslim Personal Board states that Section 2 is not in order to apply the Muslim law of Triple Talaq, but is primarily intended to do away with custom or usage to the contrary, as the non-obstante clause in Section 2 indicates. Therefore, according to them, the Muslim personal law of Triple Talaq operates of its own force and cannot be included in Article 13(1) as "laws in force" as has been held in Narasu Appa (supra).

3. The question, therefore, posed before this Court is finally in a very narrow compass. Triple Talaq alone is the subject matter of challenge – other forms of Talaq are not. The neat question that arises before this Court is, therefore, whether the 1937 Act can be said to recognize and enforce Triple Talaq as a rule of law to be followed by the Courts in India and if not whether Narasu Appa (supra) which states that personal laws are outside Article 13(1) of the Constitution is correct in law.

4. Inasmuch as the Muslims in India are divided into two main sects, namely Sunnis and Shias, and this case pertains only to Sunnis as Shias do not recognize Triple Talaq, it is important to begin at the very beginning.

5. In a most illuminating introduction to Mulla's Principles of Mahomedan Law (16th Ed.) (1968), Justice Hidayatullah, after speaking about Prophet Mahomed, has this to say:

> "The Prophet had established himself as the supreme overlord and the supreme preceptor. Arabia was steeped in ignorance and barbarism, superstition and vice. Female infanticide, drinking, lechery and other vices were rampant.
>
> However, the Prophet did not nominate a successor. His death was announced by Abu Bakr and immediate action was taken to hold an election. As it happened, the Chiefs of the tribe of Banu Khazraj were holding a meeting to elect a Chief and the Companions went to the place. This meeting elected Abu Bakr as the successor. The next day Abu Bakr ascended the pulpit and everyone took an oath of allegiance (Bai'at).
>
> This election led to the great schism between the Sunnis and Shias. The Koreish tribe was divided into Ommayads and Hashimites. The Hashimites were named after Hashim the great grand-father of the Prophet. There was bitter enmity between the Ommayads and the Hashimites. The Hashimites favoured the succession of Ali and claimed that he ought to have been chosen because of appointment by the Prophet and propinquity to him. The election in fact took place when the household of the Prophet (including Ali) was engaged in the obsequies. This offended the Hashimites. It may, however, be said that Ali, regardless of his own claims, immediately swore allegiance to Abu Bakr. Ali was not set up when the second and third elections of Omar and Osman took place, but he never went against these decisions and accepted the new Caliph each time and gave him unstinted support.
>
> Abu Bakr was sixty years old and was Caliph only for two years (d. 634 A.D.). Even when he was Caliph, the power behind him was Omar Ibnul Khattab. It is said that Abu Bakr named Omar as his successor. Even if this be not true, it is obvious that the election was a mere formality. Omar was assassinated after ten years as Caliph (644 A.D.). Osman was elected as the third Caliph. Tradition is that Omar had formed an inner panel of electors (six in number), but this is discountenanced by some leading historians. Later this tradition was used by the Abbasids to form an inner conclave for their elections. This special election used to be accepted by the people at a general, but somewhat formal, election. Osman was Caliph for 12 years and was assassinated (656 A.D.). Ali was at last elected as the fourth Caliph. The election of the first four Caliphs, who are known as Khulfai-i-Rashidin (rightly-guided Caliphs) was real, although it may be said that each time the choice was such as to leave no room for opposition. Ali was Caliph for five years. He was killed in battle in 661 A.D. Ali's son Hasan resigned in favour of Muavia the founder of the Ommayad dynasty. Hasan was, however, murdered. The partisans of Ali persuaded Hussain, the second son of Ali, to revolt against Mauvia's son Yezid, but at Kerbala, Husain died fighting after suffering great privations. The rift between the Sunnis and the Shias (Shiat-i-Ali party of Ali) became very great thereafter."

6. It is in this historical setting that it is necessary to advert to the various sub-sects of the Sunnis. Four major sub-sects are broadly recognized schools of Sunni law. They are the

Hanafi school, Maliki school, Shafi'i school and Hanbali school. The overwhelming majority of Sunnis in India follow the Hanafi school of law. Mulla in Principles of Mahomedan Law (20th Ed.), pg. xix to xxi, has this to say about the Hanafi school:

"This is the most famous of the four schools of Hanafi law. This school was founded by Abu Hanifa (699-767 A.D.). The school is also known as "Kufa School". Although taught by the great Imam Jafar-as-Sadik, the founder of the Shia School, Abu Hanifa was, also a pupil of Abu Abdullah ibn-ul- Mubarak and Hamid bin-Sulaiman and this may account for his founding a separate school. This school was favoured by the Abbasid Caliphs and its doctrines spread far and wide. Abu Hanifa earned the appellation "The Great Imam". The school was fortunate in possessing, besides Abu Hanifa, his two more celebrated pupils, Abu Yusuf (who became the Chief Kazi at Baghdad) and Imam Muhammad Ash-Shaybani, a prolific writer, who has left behind a number of books on jurisprudence. The founder of the school himself left very little written work. The home of this school was Iraq but it shares this territory with other schools although there is a fair representation. The Ottoman Turks and the Seljuk Turks were Hanafis. The doctrines of this school spread to Syria, Afghanistan, Turkish Central Asia and India. Other names connected with the Kufa School are Ibn Abi Layla and Safyan Thawri. Books on the doctrines are al- Hidaay of Marghinani (translated by Hamilton), Radd-al-Mukhtar and Durr-ul-Mukhtar of Ibn Abidin and al-Mukhtasar of Kuduri. The Fatawa-i-Alamgiri collected in Aurangzeb's time contain the doctrines of this school with other material."

7. Needless to add, the Hanafi school has supported the practice of Triple Talaq amongst the Sunni Muslims in India for many centuries.

8. Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There is something astonishingly modern about this – no public declaration is a condition precedent to the validity of a Muslim marriage nor is any religious ceremony deemed absolutely essential, though they are usually carried out. Apparently, before the time of Prophet Mahomed, the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mahomed had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this is not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

9. This then leads us to the forms of divorce recognized in Islamic Law. Mulla (supra), at pages 393-395, puts it thus:

"S.311. Different modes of talak. – A talak may be effected in any of the following ways:-

(1) Talak ahsan. – This consists of a single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.

When the marriage has not been consummated, a talak in the ahsan form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a tuhr is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.

Talak Ahsan is based on the following verses of Holy Quran: "and the divorced woman should keep themselves in waiting for three courses." (II:228).

"And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses." (LXV: 4).

(2) Talak hasan- This consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

The first pronouncement should be made during a tuhr, the second during the next tuhr, and the third during the succeeding tuhr.

Talak Hasan is based on the following Quranic injunctions:

"Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness." (II: 229).

"So if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person." (II: 230).

(3) Talak-ul-bidaat or talak-i-badai.- This consists of –

(i) Three pronouncements made during a single tuhr either in one sentence, e.g., "I divorce thee thrice," - or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee", or

(ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage, e.g., "I divorce thee irrevocably."

Talak-us-sunnat and talak-ul-biddat

The Hanafis recognized two kinds of talak, namely, (1) talak-us-sunnat, that is, talak according to the rules laid down in the sunnat (traditions) of the Prophet; and (2) talak-ul-biddat, that is, new or irregular talak. Talak-ul-biddat was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. Talak-ulsunnat is of two kinds, namely, (1) ahsan, that is, most proper, and (2) hasan, that is, proper. The talak-ul-biddat or heretical divorce is good in law, though bad in theology and it is the most common and prevalent mode of divorce in this country, including Oudh. In the case of talak ahsan and talak hasan, the husband has an opportunity of reconsidering his decision, for the talak in both these cases does not become absolute until a certain period has elapsed (S.312), and the husband has the option to revoke it before then. But the talak-ul-biddat becomes irrevocable immediately it is pronounced (S.312). The essential feature of a talak-ul-biddat is its irrevocability. One of tests of irrevocability is the repetition three times of the formula of divorce within one tuhr. But the triple repetition is not a necessary condition of talak-ul-biddat, and the

intention to render a talak irrevocable may be expressed even by a single declaration. Thus if a man says "I have divorced you by a talak-ul-bain (irrevocable divorce)", the talak is talak-ulbiddat or talak-i-badai and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "bain" (irrevocable) manifests of itself the intention to effect an irrevocable divorce."
[Emphasis Supplied]

10. "..."

11. It is at this stage that the 1937 Act needs consideration. The Statement of Objects and Reasons of this Act are as follows:

"For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naurally entitled.

In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law."
[Emphasis Supplied]

12. It is a short Act consisting of 6 Sections. We are directly concerned in these cases with Section 2. Section 2 of the 1937 Act states:

"2. Application of Personal law to Muslims. - Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

13. A word as to the meaning of the expression "Shariat". A.A.A. Fyzee (supra), at pages 9-11, describes "Shariat" as follows:

"Coming to law proper, it is necessary to remember that there are two different conceptions of law. Law may be considered to be of divine origin, as is the case with the Hindu law and the Islamic law, or it may be conceived as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law. We may be compelled to act in accordance with certain principles because God desires us to do so, or in the alternative because the King or the Assembly of wise men or the leader of the community or social custom demand it of us, for the good of the people in general. In the case of Hindu law, it is based first on the Vedas or Sruti (that which is heard); secondly on the Smriti (that which is remembered by the sages or rishis).

Although the effect of custom is undoubtedly great yet dharma, as defined by Hindu lawyers, implies a course of conduct which is approved by God.

Now, what is the Islamic notion of law? In the words of Justice Mahmood, 'It is to be remembered that Hindu and Muhammadan law are so intimately connected with religion that they cannot readily be dissevered from it'. There is in Islam a doctrine of 'certitude' (ilm al-yaqin) in the matter of Good and Evil. We in our weakness cannot understand what Good and Evil are unless we are guided in the matter by an inspired Prophet. Good and Evil – husn (beauty) and qubh (ugliness) – are to be taken in the ethical acceptation of the terms. What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are Traditions of the Prophet – the records of his actions and his sayings – from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law. Modern jurists emphasize the importance of law for understanding the character and ethos of a people. Law, says a modern jurist, 'streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force'; it is 'the distilled essence of the civilization of a people'; it reflects the people's soul more clearly than any other organism. This is true of Islam more than of any other faith.

The Shari'at is the central core of Islam; no understanding of its civilization, its social history or its political system, is possible without a knowledge and appreciation of its legal system.

Shariat (lit., the road to the watering place, the path to be followed) as a technical term means the Canon law of Islam, the totality of Allah's commandments. Each one of such commandments is called hukm (pl. ahkam). The law of Allah and its inner meaning is not easy to grasp; and Shariat embraces all human actions. For this reason it is not 'law' in the modern sense; it contains an infallible guide to ethics. It is fundamentally a Doctrine of

Duties, a code of obligations. Legal considerations and individual rights have a secondary place in it; above all the tendency towards a religious evaluation of all the affairs of life is supreme.

According to the Shariat religious injunctions are of five kinds, al-ahkam alkhamsah. Those strictly enjoined are farz, and those strictly forbidden are haram. Between them we have two middle categories, namely, things which you are advised to do (mandub), and things which you are advised to refrain from (makruh) and finally there are things about which religion is indifferent (ja'iz). The daily prayers, five in number, are farz; wine is haram; the addition prayers like those on the Eid are mandub; certain kinds of fish are makruh; and there are thousands of ja'iz things such as travelling by air. Thus the Shariat is totalitarian; all human activity is embraced in its sovereign domain. This fivefold division must be carefully noted; for unless this is done it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity and if in law these distinctions are not kept in mind error and confusion are the inevitable result."

14. It can be seen that the 1937 Act is a preconstitutional legislative measure which would fall directly within Article 13(1) of the Constitution of India, which reads as under:

"Article 13 - Laws inconsistent with or in derogation of the fundamental rights -

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

(2) xxx xxx xxx

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

15. However, learned counsel for the Muslim Personal Board as well as other counsel supporting their stand have argued that, read in light of the Objects and Reasons, the 1937 Act was not meant to enforce Muslim personal law, which was enforceable by itself through the Courts in India. The 1937 Act was only meant, as the non-obstante clause in Section 2 indicates, to do away with custom or usage which is contrary to Muslim personal law.

16. We are afraid that such a constricted reading of the statute would be impermissible in law. True, the Objects and Reasons of a statute throw light on the background in which the statute was enacted, but it is difficult to read the non-obstante clause of Section 2 as governing the enacting part of the Section, or otherwise it will become a case of the tail wagging the dog. A similar attempt was made many years ago and rejected in Aswini

Kumar Ghosh v. Arabinda Bose, 1953 SCR 1. This Court was concerned with Section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951. Section 2 of the said Act read as follows:

"Notwithstanding anything contained in the Indian Bar Councils Act, 1926, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may, be permitted to practice in that High Court every Advocate of the Supreme Court shall be entitled as of right to practice in any High Court whether or not he is an Advocate of that High Court:

Provided that nothing in this section shall be deemed to entitle any person, merely by reason of his being an Advocate of the Supreme Court, to practice in any High Court of which he was at any time a judge, if he had given an undertaking not to practice therein after ceasing to hold office as such judge."

17. "..."

18. It is, therefore, clear that all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq when it comes to the Muslim personal law applicable to Sunnis in India. Therefore, it is very difficult to accept the argument on behalf of the Muslim Personal Board that Section 2 does not recognize or enforce Triple Talaq. It clearly and obviously does both, because the Section makes Triple Talaq "the rule of decision in cases where the parties are Muslims".

19. As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency.

20-23. "..."

24. "Religion" has been given the widest possible meaning by this Court in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 at 1023-1024. In this country, therefore, atheism would also form part of "religion". But one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected under Article 25. A few decisions have laid down what constitutes an essential religious practice. Thus, in Javed v. State of Haryana, 2003 (8) SCC 369, this Court stated as under:

"60. Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted.

Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does."

(at page 394)

And in Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, 2004 (12) SCC 770, it was stated as under:

"9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion.

What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005], Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (sic essential) part or practices."

(at pages 782-783)

25. Applying the aforesaid tests, it is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it.

According to Javed (supra), therefore, this would not form part of any essential religious practice. Applying the test stated in Acharya Jagdishwarananda (supra), it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice.

Indeed, Islam divides all human action into five kinds, as has been stated by Hidayatullah, J. in his introduction to Mulla (supra). There it is stated:

"E. Degrees of obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) First degree: Fard. Whatever is commanded in the Koran, Hadis or ijmaa must be obeyed. Wajib. Perhaps a little less compulsory than Fard but only slightly less so.

(ii) Second degree: Masnun, Mandub and Mustahab: These are recommended actions.

(iii) Third degree: Jaiz or Mubah: These are permissible actions as to which religion is indifferent.

(iv) Fourth degree: Makruh: That which is reprobated as unworthy.

(v) Fifth degree: Haram: That which is forbidden."

Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally Talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article 25(1). This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.

26. And this brings us to the question as to when petitions have been filed under Article 32 of the Constitution of India, is it permissible for us to state that we will not decide an alleged breach of a fundamental right, but will send the matter back to the legislature to remedy such a wrong.

27-40. "..."

41. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 (at pages 740-741):

"16... The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification.

Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification

is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3, 38: 1974 SCC (L&S) 165, 200: (1974) 2 SCR 348] that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: [SCC p. 38: SCC (L&S) p. 200, para 85] "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its allembracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa case [(1975) 1 SCC 485: 1975 SCC (L&S) 99: (1975) 3 SCR 616] and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7) "Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article?

There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in International Airport Authority case [(1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative

or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution." [Emphasis Supplied]

42. In this view of the law, a three Judge Bench of this Court in K.R. Lakshmanan (Dr.) v. State of T.N., (1996) 2 SCC 226, struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One was that the Act in question was discriminatory and, therefore, violative of Article 14. The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of Article 14. This is clear from paragraph 45 of the said judgment. The judgment went on to accept both these arguments. In so far as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paragraphs 46 and 47.

Paragraphs 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows (at pages 256-257):

"48. We see considerable force in the contention of Mr. Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of 'gaming' was amended. The object of the amendment was to include horse-racing in the definition of 'gaming'. The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horseraces in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law. The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the contention of Mr. Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling?

Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State

Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. It is ex facie irrational to invoke "public good and public purpose" for declaring horseracing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act.

49. We, therefore, hold that the provisions of 1986 Act are discriminatory and arbitrary and as such violate and infract the right to equality enshrined under Article 14 of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates Article 14 of the Constitution, it is not necessary for us to go into the question of its validity on the ground of Article 19 of the Constitution." [Emphasis Supplied]

43. Close upon the heels of this judgment, a discordant note was struck in State of A.P. v. McDowell & Co., (1996) 3 SCC 709. Another three Judge Bench, in repelling an argument based on the arbitrariness facet of Article 14, held:

"43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in State of T.N. v. Ananthi Ammal [(1995) 1 SCC 519]. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can

be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see Council of Civil Service Unions v. Minister for Civil Service [1985 AC 374: (1984) 3 All ER 935: (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in R. v. Secy. of State for Home Deptt., ex p Brind [1991 AC 696: (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted."

(at pages 737-739)

44. This judgment failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in Ajay Hasia (supra) and second, the judgment of a coordinate three judge bench in Lakshmanan (supra). Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows:

(1) According to the Bench in McDowell (supra), substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of substantive due process being read into Article 14 cannot be applied. A Constitution Bench in Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 737, has held, following the celebrated Maneka Gandhi (supra), as follows:

"27. The stage was now set for the judgment in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723: SCC pp. 338-39, para 85)

> "85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."
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> 28. Close on the heels of Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248] came Mithu v. State of Punjab [(1983) 2 SCC 277: 1983 SCC (Cri) 405], in which case the Court noted as follows: (SCC pp. 283-84, para 6)
>
> "6. … In Sunil Batra v. Delhi Admn. [(1978) 4 SCC 494: 1979 SCC (Cri) 155], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in Bank Nationalisation case [Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248] and Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248] ….
>
> In Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684: 1980 SCC (Cri) 580] which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (1978) 1 SCC 248], it will read to say that : (SCC p. 730, para 136)
>
> '136. "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."
>
> The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty." (at pages 755-756)

Clearly, therefore, the three Judge Bench has not noticed Maneka Gandhi (supra) cited in Mohd. Arif (supra) to show that the wheel has turned full circle and substantive due process is part of Article 21 as it is to be read with Articles 14 and 19.

Mathew, J., while delivering the first Tej Bahadur Sapru Memorial Lecture entitled "Democracy and Judicial Review", has pointed out:

"Still another point and I am done. The constitutional makers have formally refused to incorporate the "due process clause" in our Constitution on the basis, it seems, of the advice tendered by Justice Frankfurter to Shri B.N. Rau thinking that it will make the Court a third Chamber and widen the area of Judicial review. But unwittingly, I should think, they have imported the most vital and active element of the concept by their theory of review of 'reasonable restrictions' which might be imposed by law on many of the fundamental rights. Taken in its modern expanded sense, the American "due process clause" stands as

a high level guarantee of 'reasonableness' in relation between man and state, an injunction against arbitrariness or oppressiveness. I have had occasion to consider this question in Kesavananda Bharati's case. I said:

"When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources… If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause."

In fact, Mithu v. State of Punjab, (1983) 2 SCC 277, followed a Constitution Bench judgment in Sunil Batra v. Delhi Administration & Ors., (1978) 4 SCC 494. In that case, Section 30(2) of the Prisons Act was challenged as being unconstitutional, because every prisoner under sentence of death shall be confined in a cell apart from all other prisoners, that is to say he will be placed under solitary confinement. The Constitution Bench read down Section 30(2) to refer only to a person who is sentenced to death finally, which would include petitions for mercy to the Governor and/or to the President which have not yet been disposed of. In so holding, Desai, J. speaking for four learned Judges, held (at pages 574-575):

"228. The challenge under Article 21 must fail on our interpretation of sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi's case (supra) that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law."

[Emphasis Supplied]

In a long and illuminating concurring judgment, Krishna Iyer, J., added (at page 518):

"52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after R.C. Cooper v. Union of India, (1970) 1 SCC 248 and Maneka Gandhi v. Union of India, (1978) 1 SCC 248, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."
[Emphasis Supplied]

Coming to Mithu (supra), a Constitution Bench of this Court struck down Section 303 of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail.

The argument made by the learned counsel on behalf of the petitioner was set out thus:

"5. But before we proceed to point out the infirmities from which Section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down."

(at page 283)

After quoting from Sunil Batra (supra), the question before the Court was set out thus:

"6……The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21."

(at page 285)

After setting out the question thus, the Court further stated:

"9…...Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?"

(at page 287)

The question was then answered in the following manner:

"18. It is because the death sentence has been made mandatory by Section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under Section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the court is relieved from its obligation under Section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust."

19… To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the question of sentence, it would have to put some such question to the accused:

"You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death?"

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law." (at pages 293, 294 and 296)

In a concurring judgment, Chinnappa Reddy, J., struck down the Section in the following terms:

"25. Judged in the light shed by Maneka Gandhi [(1978) 1 SCC 248] and Bachan Singh [(1980) 2 SCC 684], it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

(at page 298)

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

However, the three Judge Bench in Mcdowell (supra) dealt with the binding Constitution Bench decision in Mithu (supra) as follows (at page 739):

"45. Reference was then made by Shri G. Ramaswamy to the decision in Mithu v. State of Punjab [(1983) 2 SCC 277: 1983 SCC (Cri) 405] wherein Section 303 of the Indian Penal Code was struck down. But that decision turned mainly on Article 21 though Article 14 is also referred to along with Article 21. Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the accused of the procedural safeguards contained in Sections 235(2) and 354(3) of the Criminal Procedure Code. The ratio of the said decision is thus of no assistance to the petitioners herein."

A binding judgment of five learned Judges of this Court cannot be said to be of "no assistance" by stating that the decision turned mainly on Article 21, though Article 14 was also referred to. It is clear that the ratio of the said Constitution Bench was based both on Article 14 and Article 21 as is clear from the judgment of the four learned Judges in paragraphs 19 and 23 set out supra.[22] A three Judge Bench in the teeth of this ratio

22 It is clear that one judgment can have more than one ratio decidendi. This was recognized early on by the Privy Council in an appeal from the Supreme Court of New South Wales, in Commissioners of Taxation for the State of New South Wales v. Palmer & Others, 1907 Appeal Cases 179 at 184. Lord Macnaghten put it thus:

cannot, therefore, be said to be good law. Also, the binding Constitution Bench decision in Sunil Batra (supra), which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three Judge Bench decision in Mcdowell (supra).

(2) The second reason given is that a challenge under Article 14 has to be viewed separately from a challenge under Article 19, which is a reiteration of the point of view of A.K. Gopalan v. State of Madras, 1950 SCR 88, that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven Judge Bench of this Court in Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, and followed in Maneka Gandhi (supra). Arbitrariness in legislation is very much a facet of unreasonableness in Article 19(2) to (6), as has been laid down in several Judgments of this Court, some of which are referred to in Om Kumar (infra) and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.

(3) The third reason given is that the Courts cannot sit in Judgment over Parliamentary wisdom. Our law reports are replete with instance after instance where Parliamentary wisdom has been successfully set at naught by this Court because such laws did not pass muster on account of their being "unreasonable", which is referred to in Om Kumar (infra).

We must never forget the admonition given by Khanna, J. in State of Punjab v. Khan Chand, (1974) 1 SCC 549. He said:

"12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment.

The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional,

"… But it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined."

In Jacobs v. London County Council, [1950] 1 All E.R. 737 at 741, the House of Lords, after referring to some earlier decisions held, as follows: "..However, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in London Jewellers, Ltd., v. Attenborough ([1934] 2 K.B. 206). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in Folkes v. King ([1923] 1 K.B. 282), in which the court had given two grounds for its decision, the second of which [as stated by Greer, L.J. ([1934] 2 K.B. 222), in Attenborough's case ([1934] 2 K.B. 206)] was that:

"….where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick."

In Attenborough's case ([1934] 2 K.B. 206) it was contended that, since there was another reason given for the decision in Folkes' case ([1923] 1 K.B. 282), the second reason was obiter, but Greer, L.J., said ([1934] 2 K.B. 222) in reference to the argument of counsel:

"I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in Folkes v. King ([1923] 1 K.B. 282), but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. King ([1923] 1 K.B. 282). In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment."

So, also, in Cheater v. Cater ([1918] 1 K.B. 247) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane ((1873), 8 Ch. App. 756), said ([1918] 1 K.B. 252):

"That is a distinct statement of the law and not a dictum. It is the second ground given by the lord justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum."

even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution.

Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found' to suffer from no such infirmity."

This again cannot detain us.

(4) One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of Article 14 in constitutional law. Proportionality as a constitutional doctrine has been highlighted in Om Kumar v. Union of India, (2001) 2 SCC 386 at 400- 401 as follows:

"30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India — such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India — this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered.

In Chintamanrao v. State of M.P. [AIR 1951 SC 118: 1950 SCR 759] Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public". "Reasonable" implied intelligent care and deliberation, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in State of Madras v. V.G. Row [AIR 1952 SC 196: 1952

SCR 597: 1952 Cri LJ 966], observed that the Court must keep in mind the "nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time". This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in State of A.P. v. McDowell & Co. [(1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1974 and the Indian Penal Code came up for consideration in Bachan Singh v. State of Punjab [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (see Bachan Singh v. State of Punjab [(1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was disproportionate.

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see Air India v. Nergesh Meerza [(1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in State of A.P. v. McDowell and Co. [(1996) 3 SCC 709] ."

45. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in McDowell (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

46. We only need to point out that even after McDowell (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paragraphs 8 to 15 and 31).

47. Similarly in Mardia Chemicals Ltd. & Ors. v. Union of India & Ors. etc. etc., (2004) 4 SCC 311 at 354, this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows:

"64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, subsection (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

48. In two other fairly recent judgments namely State of Tamil Nadu v. K. Shyam Sunder, (2011) 8 SCC 737 at paragraphs 50 to 53, and A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy, (2011) 9 SCC 286 at paragraph 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

49. In a Constitution Bench decision in Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 at 524, an extravagant argument that the impugned legislation was intended to please a section of the community as part of the vote catching mechanism was held to not be a legally acceptable plea and rejected by holding that:

"219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in State of Rajasthan v. Union of India [(1977) 3 SCC 592] said: (SCC p. 660, para 149)

"149. … if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities."

50. A subsequent Constitution Bench in K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1, dealt with the constitutional validity of the Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996, the legal validity of Section 110 of the Karnataka Land

Reforms Act, 1961, Notification No. RD 217 LRA 93 dated 8-3-1994 issued by the State Government thereunder and the scope and content of Article 300-A of the Constitution. While examining the validity of a legislation which deprives a person of property under Article 300-A, this Court when faced with Mcdowell (supra) pointed out that (at page 58):

"203. Even in McDowell case [(1996) 3 SCC 709], it was pointed out that some or other constitutional infirmity may be sufficient to invalidate the statute. A three- Judge Bench of this Court in McDowell & Co. case [(1996) 3 SCC 709] held as follows: (SCC pp. 737-38, para 43)

"43. … The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.… No enactment can be struck down by just saying that it is arbitrary or unreasonable.

Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom."

204. A two-Judge Bench of this Court in Union of India v. G. Ganayutham [(1997) 7 SCC 463: 1997 SCC (L&S) 1806], after referring to McDowell case [(1996) 3 SCC 709] stated as under: (G. Ganayutham case [(1997) 7 SCC 463: 1997 SCC (L&S) 1806] , SCC p. 476, para 22)

"22. … That a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the statute and that the court can go into the question whether there is a proper balancing of the fundamental right and the restriction imposed, is well settled."

205. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy."
[Emphasis Supplied]

51. In a recent Constitution Bench decision in Natural Resources Allocation, In re, Special Reference No.1 of 2012, (2012) 10 SCC 1, this Court went into the arbitrariness doctrine in some detail. It referred to Royappa (supra), Maneka Gandhi (supra) and Ajay Hasia (supra) (and quoted from paragraph 16 which says that "… the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached…"). It then went on to state that "arbitrariness" and "unreasonableness" have been used interchangeably as follows:

"103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other.

More recently, in Sharma Transport v. Govt. of A.P. [(2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)

"25. … In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means:

in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone." (at page 81)

After stating all this, it then went on to comment, referring to McDowell (supra) that no arbitrary use should be made of the arbitrariness doctrine. It then concluded (at page 83):

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell case [(1996) 3 SCC 709] has said.

Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, noncapricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."
[Emphasis Supplied]

On a reading of this judgment, it is clear that this Court did not read McDowell (supra) as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and Ajay Hasia (supra) in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment.

Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

52. Another Constitution Bench decision reported as Dr. Subramanian Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682, dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This Section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in Dr. Subramanian Swamy v. Director, Central Bureau of Investigation, (2005) 2 SCC 317, and after referring to several judgments including Ajay Hasia (supra), Mardia Chemicals (supra), Malpe Vishwanath

Acharya (supra) and McDowell (supra), the reference inter alia was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

After referring to the submissions of counsel, and several judgments on the discrimination aspect of Article 14, this Court held:

"48. In E.P. Royappa [E.P. Royappa v. State of T.N., (1974) 4 SCC 3: 1974 SCC (L&S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)

"85. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment." Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is." (at pages 721-722)

Since the Court ultimately struck down Section 6-A on the ground that it was discriminatory, it became unnecessary to pronounce on one of the questions referred to it, namely, as to whether arbitrariness could be a ground for invalidating legislation under Article 14. Indeed the Court said as much in paragraph 98 of the judgment as under (at page 740):

"Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14."

53. However, in State of Bihar v. Bihar Distillery Ltd., (1997) 2 SCC 453 at paragraph 22, in State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312 at paragraphs 17 to 19, in Rajbala v. State of Haryana & Ors., (2016) 2 SCC 445 at paragraphs 53 to 65 and Binoy Viswam v. Union of India, (2017) 7 SCC 59 at paragraphs 80 to 82, McDowell (supra) was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, Mcdowell (supra) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell (supra) are, therefore, no longer good law.

54. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In Cellular Operators Association of India v. Telecom Regulatory Authority of India, (2016) 7 SCC 703, this Court referred to earlier precedents, and held:

"Violation of fundamental rights 42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation.

(See Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641: 1985 SCC (Tax) 121], SCC at p. 689, para 75.)

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In Khoday Distilleries Ltd. v. State of Karnataka [(1996) 10 SCC 304], this Court held: (SCC p. 314, para 13)

"13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action.

However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641 : 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'.

Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution.

But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

44. Also, in Sharma Transport v. State of A.P. [(2002) 2 SCC 188], this Court held:

(SCC pp. 203-04, para 25)

"25. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone." (at pages 736-737)

55. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.

56. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in Shamim Ara v. State of U.P., (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

"13…The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13).

In Rukia Khatun case [(1981) 1 Gau LR 375] the Division Bench stated that the correct law of talaq, as ordained by the Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts." (at page 526)

57. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid Ahmad (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.

.....J.

(Rohinton Fali Nariman)

.....J.

(Uday Umesh Lalit)

New Delhi;

August 22, 2017.

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IN THE SUPREME COURT OF INDIA
Original Civil Jurisdiction

Writ Petition (C) No. 118 of 2016

Shayara Bano … Petitioner
versus
Union of India and others … Respondents

with

Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality
versus
Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri … Petitioner
versus
Union of India and others … Respondents

ORDER OF THE COURT

In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat' – triple talaq is set aside.

..……..…..……CJI.
(Jagdish Singh Khehar)

..……..…..…….……J.
(Kurian Joseph)

..……..…..…….……J.
(Rohinton Fali Nariman)

..……..…..…….……J.
(Uday Umesh Lalit)

..……..…..…….……J.
(S. Abdul Nazeer)

New Delhi; August 22, 2017.

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DIVORCE

DR. (MRS.) MALATHI RAVI, M.D. VERSUS DR. B.V. RAVI, M.D.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5862 OF 2014

(Arising out of S.L.P. (C) No. 17 of 2010)
Bench : Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya & Hon'ble Mr. Justice Dipak Misra

Dr. (Mrs.) Malathi Ravi, M.D. ... Appellant
Versus
Dr. B.V. Ravi, M.D. ...Respondent

"18. Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

19. First we intend to state the subsequent events. As has been narrated earlier, after the application of the wife was allowed granting restitution of conjugal rights, the husband communicated to her to join him, but she chose not to join him immediately and thereafter went to the matrimonial home along with a relative who is a police officer. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged FIR No. 401/2004 on 17.10.2004 for the offences under Sections 498A and 506/34 of the Indian Penal Code and the provisions under Dowry Prohibition Act, 1961 against the husband, his mother and the sister. Because of the FIR the husband was arrested and remained in custody for a day. The ladies availed the benefit of anticipatory bail. The learned trial Magistrate, as we find, recorded a judgment of acquittal. Against the judgment of acquittal, the appellant preferred an appeal before the High Court after obtaining special leave which was ultimately dismissed as withdrawn since in the meantime the State had preferred an appeal before the Court of Session. At this juncture, we make it absolutely clear that we will not advert to the legal tenability of the judgment of acquittal as the appeal, as we have been apprised, is subjudice. However, we take note of certain aspects which have been taken note of by the High Court and also brought on record for a different purpose.

20. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that

the subsequent conduct of the wife can be taken into consideration. It settled in law that subsequent facts under certain circumstances can be taken into consideration.

21. In ***A. Jayachandra v. Aneel Kaur***[1] it has been held thus: -

> *"If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."*

22. In ***Suman Kapur v. Sudhir Kapur***[2] this Court had accepted what the High Court had taken note of despite the fact that it was a subsequent event. It is necessary to reproduce the necessary paragraphs from the said decision to perceive the approach of this Court: -

> *"46. The High Court further noted that the appellant wife sent a notice through her advocate to the respondent husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income tax return, the husband mentioned the social security number of his wife as 476-15-6010, a number which did not belong to the appellant wife, but to some American lady (Sarah Awegtalewis).*
>
> *47. The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving social security number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in social security number, the appellant wife had gone to the extent of making serious allegation that the respondent had married an American woman whose social security number was wrongly typed in the income tax return of the respondent husband."*

23. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain for consideration whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive. Learned counsel for the appellant has urged with vehemence that when dissolution of marriage was sought on the ground of desertion alone, the issue of mental cruelty can neither be raised nor can be addressed to. Regard being had to the said submission, we are constrained to pose the question whether in a case of the present nature we should require the respondent-husband to amend the petition and direct the learned Family Judge to consider the issue of mental cruelty or we should ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. In our considered opinion the issue of mental cruelty should be addressed to by this Court for the sake of doing complete

1 (2005) 2 SCC 22
2 (2009) 1 SCC 422

justice. We think, it is the bounden duty of this Court to do so and not to leave the parties to fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes our judicial conscience that it is a fit case where the plentitude of power conferred on this Court under Article 142 deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise we are certain that it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so.

24. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In ***Vinit Saxena v. Pankaj Pandit***[3], while dealing with the issue of mental cruelty, the Court held as follows: -

> *"31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.*
>
> xxx xxx xxx
>
> *35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered."*

25. In ***Samar Ghosh v. Jaya Ghosh***[4], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations:-

> "(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> xxx xxx xxx

3 (2006) 3 SCC 778
4 (2007) 4 SCC 511

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

xxx xxx xxx

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

xxx xxx xxx

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

xxx xxx xxx

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

26. In the said case the Court has also observed thus:-

"99. … The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances…."

27. In ***Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal***[5], while dealing with mental cruelty, it has been opined thus: -

"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu

5 (2012) 7 SCC 288

to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."

28. In the said case, analyzing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: -

"In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."

29. In ***U. Sree v. U. Srinivas***[6], the Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his "sadhna" in music and had exhibited total indifference to him, observed as follows: -

"It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family."

30. In ***K. Srinivas Rao v. D.A. Deepa***[7], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh certain other illustrations could be added. We think it seemly to reproduce the observations: -

"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

31. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurized by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurizing him not to allow the

6 (2013) 2 SCC 114
7 (2013) 5 SCC 226

wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behavior has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband despite all his co-operation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. View from a different angle, it tantamounts to totally ignoring the family of the husband.

32. Another incident deserves to be noted. The wife went to Gulbarga to join her studies and the husband was not aware of it and only come to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition.

33. We have already stated the legal position that subsequent events can be taken note of. After the judgment and decree was passed by the learned Family Judge, the husband sent a notice through his counsel dated 14.7.2004 and intimated her as follows: -

> *"According to the operative portion of the order, my client has to welcome you to join him with the child within three months which please note.*
>
> *My client's address is Dr. B.V. Ravi, M.D., residing in No. 428. 2nd Across, 6th Main, 3rd Stage, 3rd Block, Basaveshwaranagar, Bangalore-79 and his Telephone No. 23229865. In obedience to the Hon'ble Court order, you called upon to join Dr. B.V. Ravi to the above said address any day after 18th of July, 2004, as this period upto 17th is inauspicious because of "Ashada"."*

34. As it appears, she did not join and the husband was compelled to send a telegram. Thereafter, on 13.8.2004 a reply was sent on her behalf that she would be joining after 15.8.2004 but the exact date was not intimated. Thereafter, on 14.8.2004 a reply was sent to the legal notice dated 14.7.2004 sent by the husband. It is appropriate to reproduce the relevant two paragraphs: -

"In this context, we hereby inform you that our client will be coming to join your client in the above said address along with the child on Sunday the 22nd August 2004 as the auspicious NIJASHRAVANA MONTH commences from 16th August 2004.

Further our client expects reasonable amount of care and cordiality from your client's side. Please ensure the same."

35. The purpose of referring to these communications is that despite obtaining decree for restitution of conjugal rights the wife waited till the last day of the expiration of the period as per the decree to join the husband. There may be no legal fallacy, but the attitude gets reflected. The reply also states that there is expectation of reasonable amount of care and cordiality. This reflects both, a sense of doubt and a hidden threat. As the facts unfurl, the wife stays for two months and then leaves the matrimonial home and lodges the first information report against the husband and his mother and sister for the offences punishable under Sections 498A, 506/34 of the Indian Penal Code and under the provisions of Dowry Prohibition Act. The husband suffers a day's custody and the mother and the sister availed anticipatory bail.

36. The High Court has taken note of all these aspects and held that the wife has no intention to lead a normal marital life. That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. This Court in certain cases, namely, ***G.V.N. Kameswara Rao v. G. Jabilli***[8]***, Parveen Mehta v. Inderjit Mehta***[9]***, Vijayakumar R. Bhate v. Neela Vijayakumar Bhate***[10]***, Durga Prasanna Tripathy v. Arundhati Tripathy***[11]***, Naveen Kohli v. Neelu Kohli***[12] ***and Samar Ghosh v. Jaya Ghosh (supra)***, has invoked the principle of irretrievably breaking down of marriage.

37. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society.

The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies.

8 (2002) 2 SCC 296
9 (2002) 5 SCC 706
10 (2003) 6 SCC 334
11 (2005) 7 SCC 353
12 (2006) 4 SCC 558

That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of Chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life."

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CUSTODY OF CHILD

CUSTODY OF CHILD

GAYTRI BAJAJ VERSUS JITEN BHALLA

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice P. Sathasivam and Hon'ble Mr. Justice Ranjan Gogoi

Gaytri Bajaj Appellant
Versus
Jiten Bhalla Respondent

Civil Appeal Nos. 7232-7233 of 2012

(Arising out of SLP (Civil) 35468-69 of 2009)

Decided on 5 October, 2012

"3. The facts lies in a short compass and may be usefully recapitulated at this stage. The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as the Act) seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act.

4. It appears that without waiting for the period prescribed under Section 13B (2) of the Act, a second Motion was moved by the parties before the learned Court on 26.05.2003 seeking divorce by mutual consent. By order dated 3.6.2003 the learned trial court, after recording its satisfaction in the matter, granted a decree of divorce under the aforesaid provision of the Act. It may be specifically noticed, at this stage, that in the joint petition filed before the learned trial court it was specifically stated that, under the terms of the agreement between the parties, the respondent-husband was to have sole custody of the two minor daughters and the appellant-wife had agreed to forego her rights of visitation keeping in view the best interest and welfare of the children.

5. After the expiry of a period of almost three years from the date of decree of the divorce granted by the learned trial court, the appellant- wife instituted a suit seeking a declaration that the decree of divorce dated 3.6.2003 is null and void on the ground that her consent was obtained by acts of fraud and deceit committed by the respondent husband. A further declaration that the marriage between the parties is subsisting and for a decree of perpetual injunction restraining the husband from marrying again was also prayed for in the suit. The respondent-husband filed written statement in the suit denying the statements made and contesting the challenge to the decree of divorce. While the aforesaid suit was pending, the appellant-wife filed an application under Section 151 of the Code of Civil Procedure to recall/set aside the judgment and decree dated 03.06.2003 passed

in the divorce proceeding between the parties. The aforesaid application under section 151 of the Code was filed despite the institution of the separate suit seeking the same/ similar reliefs. On the basis of the aforesaid application filed by the appellant-wife the learned trial court by order dated 25.09.2007 recalled the decree of divorce dated 3.6.2003. Aggrieved, an appeal i.e. Matrimonial appeal No. 72/2007, was filed by the respondent-husband in the High Court of Delhi which was allowed by the order dated 08.09.2008. The application seeking review of the aforesaid order dated 08.09.2008 was dismissed by the High Court on 10.07.2009. Both the aforesaid orders dated 08.09.2008 and 10.07.2009 have been assailed before us in the present appeals.

6. In so far as the validity of the decree of divorce dated 03.06.2003 is concerned we do not propose and also do not consider it necessary to go into the merits of the said decree inasmuch as the High Court, while setting aside the order of the learned trial court dated 25.09.2007 recalling the decree of divorce, had clearly observed that it is open for the appellant-wife to establish the challenge to the said decree made in the suit already instituted by her. Thus, while taking the view that the order of the learned trial court dated 25.09.2007 recalling the decree of divorce was not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.

7. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.

8. We have already noticed that in the joint petition filed by the parties seeking a decree of divorce by mutual consent it was clearly and categorically stated that the husband would have custody of the children and the wife will not insist on any visitation rights. It was also stated that the wife had agreed to do so in the interest and welfare of the children.

9. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to continue to live with their father and they do not want to go with their mother.

This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children.

However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually

built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over bo`th of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent- husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

(ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.

10. What happened thereafter has been stated in an application filed by the respondent-husband before this Court (Interlocutory Application No.4/2012) seeking vacation/ modification of the interim arrangement made by the order dated 16.12.2011. In the said application, it has been stated that pursuant to the order dated 16.12.2011 the respondent-father along with both the children had come to the Supreme Court Mediation Centre at about 10 a.m. on 17.12.2011. However, the children refused to go with their mother and the appointed Mediator, inspite of all efforts, did not succeed in persuading the children. At about 1.30 p.m. the respondent, who had left the children in the Mediation Centre, received a call that he should come and take the children back with him. In the aforesaid I.A. it has been further stated that on 30.12.2011 when the children were due to visit the Mediation Centre once again, both the children started behaving abnormally since the morning and had even refused to take any food. After reaching the Mediation Centre, the children once again refused to go with their mother and the mediator had also failed to convince the children.

Eventually, at about 12.00 p.m., the respondent took both the children home. Thereafter, both the children have declined to visit the Mediation Centre any further. Before the next date for appearance in the Mediation Centre, i.e., 14.01.2012 the said fact was informed to the learned counsel for the appellant by the respondent through his counsel by letter dated 13.01.2012.

11. Though the above facts stated in the aforesaid I.A. are not mentioned in the report of the Mediator submitted to this Court, what is stated in the aforesaid report dated 14.01.2012 is that on 14.01.2012 the respondent and the children were not present and that a letter dated 13.01.2012 from the counsel for the respondent had been placed before the Mediator wherein it has been stated that though the children had earlier attended the Mediation Centre they are now refusing to come to the Centre and all efforts in this regard made by their father have failed. It will also be significant to note that the statements made in the I.A. have not been controverted by the appellant - wife in any manner.

12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal[1] the principles of English and American law in this regard were considered by this Court to hold that the

legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved[2]; Rosy Jacob v. Jacob A Chakramakkal[3] and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka[4] this Court eventually concluded in paragraph 50 and 51 that: 50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues.

The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Gangulis case the court has to give due weightage to the childs ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word welfare used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

13. The views expressed in Para 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli[5] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree[6] would also require a special mention.

14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory

conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court."

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SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Madan B. Lokur & Hon'ble Mr. Justice Uday Umesh Lalit

Surya Vadanan …Appellant
Versus
State of Tamil Nadu & Ors. …Respondents

CRIMINAL APPEAL NO. 395 OF 2015

(Arising out of S.L.P. (Crl.) No.3634 of 2014)

"2. The question before us relates to the refusal by the Madras High Court to issue a writ of habeas corpus for the production of the children of Surya Vadanan and Mayura Vadanan. The appellant sought their production to enable him to take the children with him to the U.K. since they were wards of the court in the U.K. to enable the foreign court to decide the issue of their custody.

3. In our opinion, the High Court was in error in declining to issue the writ of habeas corpus.

The facts

4. The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India.

5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

6. On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age.

7. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them.

   According to Surya, the reason for the purchase of roundtrip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

8. Be that as it may, on her arrival in India, Mayura and her daughters went to her parents house in Coimbatore (Tamil Nadu) and have been staying there ever since.

9. On 21st August, 2012 Mayura prepared and signed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955[1] seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.

10. On or about 23rd August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.

11. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.

12. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012. We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein.

Proceedings in the U.K.

13. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8th November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that perhaps they would not be returning to continue their studies.

14. On 13th November, 2012 the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. The relevant extract of the order passed by the foreign court on 13th November, 2012 reads as under:-

> *"IT IS ORDERED THAT:*
>
> *1. The children SNEHA LAKSHMI VADANAN AND KAMINI LAKSHMI VADANAN shall be and remain wards of this Honourable Court during their*

1 13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or [rest of the provision is not relevant]

minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court.

2. The Respondent mother shall :

a. By no later than 4 p.m. on 20th November 2012 inform the father, through his solicitors (Messrs Dawson Cornwell, 15 Red Lion Square, London, WC1R 4QT. Tel: 0207 242 2556 Ref: SJ/AMH), of the current care arrangements for the children;

b. By no later than 4 p.m. on 20th November 2012 inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;

c. Return the children to the jurisdiction of England and Wales by no later than 11.59 p.m. on 27th November 2012;

d. Attend at the hearing listed pursuant to paragraph 3 herein, together with solicitors and/or counsel if so instructed. A penal notice is attached to this paragraph.

3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London on 29th November 2012 at 2 p.m. with a time estimate of 30 minutes.

4. The mother shall have leave, if so advised, to file and serve a statement in response to the statement of the Applicant father. Such statement to be filed and served by no later than 12 noon on 29th November 2012.

5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the order of the court.

6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.

7. The Applicant father shall have leave to disclose this order to:

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London

d. Into any proceedings as the mother may have issued of India, including any divorce proceedings.

8. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction

of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

15. In response to the petition filed by Surya, a written statement was filed by Mayura on 20th November, 2012. A rejoinder was filed by Surya on 13th December, 2012.

16. Apparently, after taking into consideration the written statement, the foreign court passed another order on 29th November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The relevant extract of the order dated 29th November, 2012 reads as under:-

"IT IS ORDERED THAT :

1. The children SNEHA LAKSHMI VADANAN AND KAMINI VADANAN shall be and remain wards of this Hon'ble Court during their minority and until such time as this provision of this Order is varied or alternatively discharged by the further Order of the Court.

2. The 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal Grandmother shall:

a. Forthwith upon serve of this Order upon them inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;[2]

b. Return the children to the jurisdiction of England and Wales forthwith upon service of this Order upon them;

A penal notice is attached to this paragraph.

3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London within 72 hours of the return of the children or alternatively upon application to the Court for a further hearing.

4. The father shall have leave, if so advised, to file and serve a statement of the mother. Such statement to be filed and served by no later than 12 noon on 13th December 2012.

5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the Order of the Court.

6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this Order, upon the Respondent mother outside of the jurisdiction

2 There is no paragraph 2(c) in the text of the order supplied to this court.

of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.

7. The Applicant father shall have leave to disclose this order to:

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London;

d. Into any proceedings as the mother may have issued in the jurisdiction of India, including any divorce proceedings.

8. The maternal grandparents Dr. Srinivasan Muralidharan and Mrs. Rajkumari Murlidharan shall be joined as Respondents to this application as the 2nd and 3rd Respondents respectively.

9. The mother shall make the children available for skype or alternatively telephone contact each Sunday and each Wednesday at 5.30 p.m. Indian time.

10. Liberty to the 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal grandmother to apply to vary and/or discharge this order (or any part of it) upon reasonable notice to the Court and to the solicitors for the father.

11. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

17. We are told that no further effective or substantial orders have been passed by the foreign court thereafter.

Proceedings in the High Court

18. Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

19. After completion of pleadings, the petition filed by Surya was heard by the Madras High Court and by a judgment and order dated 4th November, 2013 the writ petition was effectively dismissed.

20. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the

High Court was of opinion that since the children were in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of habeas corpus.

21. Feeling aggrieved, Surya has preferred the present appeal on or about 9th April, 2014.

Important decisions of this court

22. There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are: (1) Sarita Sharma v. Sushil Sharma[3], (2) Shilpa Aggarwal v. Aviral Mittal & Anr.[4], (3) V. Ravi Chandran v. Union of India[5], (4) Ruchi Majoo v. Sanjeev Majoo[6], and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao.[7] These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma

23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.

24. Subsequently on 12th June, 1997 Sushil Sharma obtained a divorce decree from the foreign court and also an order that the sole custody of the children shall be with him. Armed with this, he moved the Delhi High Court on 9th September, 1997 for a writ of habeas corpus seeking custody of the children. The High Court allowed the writ petition and ordered that the passports of the children be handed over to Sushil Sharma and it was declared that he could take the children to USA without any hindrance. Feeling aggrieved, Sarita Sharma preferred an appeal in this court.

25. This court noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. It also noted that Sarita Sharma's conduct was not "very satisfactory" but that before she came to India, she was in lawful custody of the children but "she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission."

26. This court noted the following principles regarding custody of the minor children of the couple:

    (1) The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.[8]

3 (2000) 3 SCC 14
4 (2010) 1 SCC 591
5 (2010) 1 SCC 174
6 (2011) 6 SCC 479
7 (2013) 15 SCC 790
8 Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698

(2) Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.[9]

(3) The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.[10]

On the merits of the case, this Court observed:

> *"Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held."*

27. Notwithstanding this, neither was the matter remanded to the High Court for issuing such a direction to Sushil Sharma to approach the appropriate court for conducting a "full and thorough" inquiry nor was such a direction issued by this court. The order of the Delhi High Court was simply set aside and the writ petition filed by Sushil Sharma was dismissed.

28. We may note that significantly, this court did not make any reference at all to the principle of comity of courts nor give any importance (apart from its mention) to the passage quoted from Surinder Kaur Sandhu to the effect that:

> *"The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."*

(2) Shilpa Aggarwal v. Aviral Mittal & Anr.

29. Shilpa Aggarwal and her husband Aviral Mittal were both British citizens of Indian origin. They had a minor child (also a foreign national) from their marriage. They had matrimonial differences and as a result, Shilpa Aggarwal came to India from the U.K. with their minor child. She was expected to return to the U.K. but cancelled their return tickets and chose to stay on in India. Aviral Mittal thereupon initiated proceedings before the High Court of Justice, Family Division, U.K. and on 26th November, 2008 the foreign court directed Shilpa Aggarwal, inter alia, to return the minor child to the jurisdiction of

9 Surinder Kaur Sandhu v. Harbax Singh Sandhu

10 Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 which in turn referred to McKee v. McKee, 1951 AC 352: (1951) 1 All ER 942 (PC)

that foreign court. Incidentally, the order passed by the foreign court is strikingly similar to the order passed by the foreign court subject matter of the present appeal.

30. Soon thereafter, Shilpa Aggarwal's father filed a writ petition in the Delhi High Court seeking protection of the child and for a direction that the custody of the child be handed over to him. The High Court effectively dismissed the writ petition and granted time to Shilpa Aggarwal to take the child on her own to the U.K. and participate in the proceedings in the foreign court failing which the child be handed over to Aviral Mittal to be taken to the U.K. as a measure of interim custody, leaving it for the foreign court to determine which parent would be best suited to have the custody of the child.

31. Feeling aggrieved, Shilpa Aggarwal preferred an appeal before this court which noted and observed that the following principles were applicable for deciding a case of this nature:

(1) There are two contrasting principles of law, namely, comity of courts and welfare of the child.

(2) In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.[11] Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.[12]

32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact[13] with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.

(3) V. Ravi Chandran v. Union of India

33. The mother (Vijayasree Voora) had removed her minor child (a foreign national) from the U.S.A. in violation of a custody order dated 18th June, 2007 passed by the Family Court of the State of New York. The custody order was passed with her consent and with the consent of the child's father (Ravi Chandran, also a foreign national).

34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed to immediately turn over the minor child and his passport to Ravi Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

35. On these broad facts, Ravi Chandran moved a petition for a writ of habeas corpus in this court for the production of the child and for his custody. The child was produced in this court and the question for consideration was: "What should be the order in the facts and

11 Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.

12 Sarita Sharma v. Sushil Sharma

13 Surinder Kaur Sandhu v. Harbax Singh Sandhu

circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national."

36. This court referred to a large number of decisions and accepted the following observations, conclusions and principles:

(1) The comity of nations does not require a court to blindly follow an order made by a foreign court.[14]

(2) Due weight should be given to the views formed by the courts of a foreign country of which the child is a national. The comity of courts demands not the enforcement of an order of a foreign court but its grave consideration.[15] The weight and persuasive effect of a foreign judgment must depend on the facts and circumstances of each case.[16]

(3) The welfare of the child is the first and paramount consideration,[17] whatever orders may have been passed by the foreign court.[18]

(4) The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other.[19]

(5) One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country.[20]

(6) While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custody of the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances.[21] An order that the child should be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.[22]

(7) The modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous

14 B's Settlement, In re. B. v. B.,1940 Ch 54: (1951) 1 All ER 949 and McKee v. McKee
15 McKee v. McKee
16 McKee v. McKee
17 McKee v. McKee
18 B's Settlement, In re
19 Kernot v. Kernot, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 All ER 339
20 H. (Infants) , In re, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)
21 L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)
22 L. (Minors), In re,

circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.[23]

37. On the facts of the case, it was held that an elaborate inquiry was not required to be conducted. It was also observed that there was nothing on record which could remotely suggest that it would be harmful for the child to return to his native country. Consequently, this court directed the repatriation of the child to the jurisdiction of the foreign court subject to certain directions given in the judgment.

38. This court also quoted a passage from Sarita Sharma to the effect that a decree passed by a foreign court cannot override the consideration of welfare of a child.

(4) Ruchi Majoo v. Sanjeev Majoo

39. Ruchi Majoo (wife) had come to India with her child consequent to matrimonial differences between her and her husband (Sanjeev Majoo). All three that is Ruchi Majoo, Sanjeev Majoo and their child were foreign nationals.

40. Soon after Ruchi Majoo came to India, Sanjeev Majoo approached the Superior Court of California, County of Ventura in the USA seeking a divorce from Ruchi Majoo and obtained a protective custody warrant order on 9th September, 2008 which required Ruchi Majoo to appear before the foreign court. She did not obey the order of the foreign court perhaps because she had initiated proceedings before the Guardian Court at Delhi on 28th August, 2008. In any event, the Guardian Court passed an ex-parte ad interim order on 16th September, 2008 (after the protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.

41. Aggrieved by this order, Rajiv Majoo challenged it through a petition under Article 227 of the Constitution filed in the Delhi High Court. The order of 16th September, 2008 was set aside by the High Court on the ground that the Guardian Court had no jurisdiction to entertain the proceedings since the child was not ordinarily resident in Delhi. It was also held that the issue of the child's custody ought to be decided by the foreign court for the reason that it had already passed the protective custody warrant order and also because the child and his parents were American citizens.

42. On these broad facts, this court framed three questions for determination. These questions are as follows:-

(i) Whether the High Court was justified in dismissing the petition for custody of the child on the ground that the court at Delhi had no jurisdiction to entertain it;

(ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts; and

(iii) Whether the order granting interim custody of the child to Ruchi Majoo calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

43. We are not concerned with the first and the third question. As far as the second question is concerned, this court was of the view that there were four reasons for answering the

23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

question in the negative. Be that as it may, the following principles were accepted and adopted by this court:

(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.[24]

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.[25]

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.[26]

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.[27]

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.[28]

(6) Since the interest and welfare of the child is paramount, a domestic court "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."

44. On the facts of the case, this court held that "repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage." Accordingly, it was held that the "Interest of the minor shall be better served if he continued to be in the custody of his mother [Ruchi Majoo]."

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

24 Dhanwanti Joshi v. Madhav Unde
25 Dhanwanti Joshi v. Madhav Unde
26 Sarita Sharma v. Sushil Sharma
27 V. Ravi Chandran and Aviral Mittal
28 Dhanwanti Joshi referring to Elizabeth Dinshaw v. Arvand M. Dinshaw

45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.

46. In violation of an order passed by the foreign court, Arathi Bandi brought the child to India on 17th July, 2008. Since she did not return with the child to the jurisdiction of the foreign court bailable warrants were issued for her arrest by the foreign court.

47. On or about 20th November, 2009 Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25th January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this court.

48. This court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this court was of the view that given her conduct, no relief could be granted to Arathi Bandi.

49. This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:

    (1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.[29]

    (2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.[30]

    (3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.[31]

Discussion of the law

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.

29 Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw
30 V. Ravi Chandran v. Union of India
31 V. Ravi Chandran v. Union of India

51. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved – it is not the beginning of the exercise but the end.

52. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"[32] but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.

53. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.

54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court – the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.[33] In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

32 Shilpa Aggarwal v. Aviral Mittal

33 13. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in India.

55. If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child.

This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

56. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).

57. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

58. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction

to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

59. Finally, this court has accepted the view[34] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.[35] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and

34 L. (Minors), In re,
35 Arathi Bandi

is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Discussion on facts

61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different from the education system in India.[36] The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

62. Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.

63. Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.

64. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we

36 In our order dated 9th July, 2014 we have noted that according to Mayura the children are attending some extra classes. This is perhaps to enable them to adjust to the education system and curriculum in India.

are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

66. The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the children should be with Mayura in India.

67. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare.

68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

69. We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances,

it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.

70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits.

71. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in L. (Minors) - this elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children.

72. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court.

73. Accordingly, we direct as follows:-

(1) Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.

(2) Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

(3) Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate

out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).

(4) Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.

(5) In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan."

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ALIMONY & MAINTENANCE

ALIMONY & MAINTENANCE

MRS. ARUNA BASU MULLICK VERSUS MRS. DOROTHEA MITRA

Supreme Court of India

Bench: Hon'ble Mr. Justice Rangnath Misra, Hon'ble Mr. Justice P.N. Bhagwati & Hon'ble Mr. Justice Amarendra Nath Sen

Mrs. Aruna Basu Mullick
Versus
Mrs. Dorothea Mitra

Civil Appeal No. 1997 of 1980.

Decided on 2 August, 1983

JUDGMENT

"The Judgment of the Court was delivered by

Hon'ble Mr. Justice Ranganath Misra :—

This appeal by certificate from the Calcutta High Court raises the question whether a decree for permanent alimony passed under section 37 of the Special Marriage Act, 1954 (hereinafter referred to as 'the Act'), is wiped out with the death of the husband judgment-debtor. Respondent Dorothea and one Prafulla Kumar Mitra were married under the Special Marriage Act, 1872, in January 1952. Respondent asked for divorce in 1961 and obtained a decree on May 2, 1962, to the effect: "The petitioner's (Dorothea Mitra's) marriage with the respondent Prafulla Kumar Mitra be dissolved by a decree of divorce. The petitioner do get Rs. 300 p.m. as maintenance from the respondent to be paid by the 1st week of each month following for which it is due until she re-marries ....." Respondent levied execution of the decree and the same was compromised and payment of the arrears was undertaken to be made in instalments. Prafulla Kumar Mitra executed a Will on March 31, 1965, but made no provision therein for satisfaction of the maintence decree. He died on April, 3, 1965, and the appellant who was the executrix under the Will got it duly probated. There is no dispute that the executrix paid the maintenance in December 1975 for a period after the death of Prafulla Kumar Mitra. But since no payment was made thereafter, respondent levied execution in Matrimonial Case No. 1/77 claiming recovery of arrears of Rs. 19,500. Appellant objected to the claim under s. 47 of the Code of Civil Procedure by pleading that the order of alimony not being charged, the death of Parfulla Kumar Mitra has extinguished the claim of the purported decree holder. The executing court overruled the objection whereupon the appellant invoked the revisional jurisdiction of the High Court. A Division Bench agreed with the executing Court but while dismissing the revision application, granted certificate of appeal to this Court. The sole controversy is whether the order for alimony got extinguished with the death of Prafulla Kumar Mitra. Admittedly, the order was made in exercise of powers under s. 37 of the Act. lt provides:

"37. Permanent alimony and maintence-(1) Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the

wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any her husband's property and ability and the conduct of the parties, it may seem to the Court to be just; (2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the Court to be just (3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it shall rescind the order."

The language of the section does not warrant the conclusion that there is extinguishment of the decree for alimony upon the death of the judgment-debtor husband. We have been told at the Bar that there is no decision on the point and, therefore, English decisions should be considered for deciding the matter.

Section 37 of the Act more or less corresponds to the provisions of ss. 19, 20 and 22 of the English Matrimonial Causes Act, 1950, except that there is nn corresponding provision in the English Act for sub-s. (3) of the Indian Act. A close look at sub-ss. (2) and (3) of s. 19 of the English Act will indicate that maintenance can be required to be paid for a term not exceeding the life of the wife or during the joint lives of the husband and tho wife. These two sub-sections of the English Act read thus:

"(2). On any petition for divorce or nullity of marriage the Court may, if it thinks fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum for any term not exceeding her life, as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, the court may deem to be reasonable. (3). On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section."

We have also been referred to some other English statutes where this distinction has been manintained. In case of a direction for payment during the joint lives, there can be no dispute that on the death of one of the spouses the obligation under the decree ceases. English Courts have taken the view that even where a direction is for payment during the life of the wife, it abates with the death of the husband. In paragraph 891, Vol. 13, Halsbsury' Laws of England, 4th Edn., it has been said that "in the absence of an order directing security for periodical payments the court has no jurisdiction to order a man's personal representatives to make payments for his children after his death." The decision in Sugden v. Sugden,(1) of the Court of Appeal has been relied upon for this view. Lord Denning in the leading judgment said:

"There is no difficulty in an ordinary action in determining when the right or liability accrued due; but there is more difficulty in proceedings in the Divorce Court. In that court there is no right to maintenance, or to a secured provision, or the life, until the court R makes an order directing it. There is therefore no cause of action for such matters until an order is made. In order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments."

This view of proceedings in the Divorce Court is supported by the decision of Hodson, J. in Dipple v. Dipple,(1) where he pointed out that "all that the wife had was the hope that the court would in its discretion order a secured provision .. In the present case, there was no right or liability subsisting against the father at the time of his death. He had paid everything up to that time. If there had been any arrears of maintence payable by him at that time, then no doubt they would be payable by his estate after his death under s. 1 (1) of the Act of 1934; but there were no arrears. There was nothing, therefore, to come within the Act of 1934 at all. The right to maintenance after his death must come from the terms of the order itself or not at all." Under the order in Sugden's case the maintenance of 1s. a year for the wife was payable by the husband during their joint lives. On the terms of the order, therefore, the liability was to come to an end upon the death of the husband. We have no difficulty in accepting the submission of Mr. Ghosh for the appellant that matrimonial proceedings abate on the death of either party and legal representatives cannot be brought on record and the proceedings cannot be continued any further. Bowen, L.J. in Stanhope v. Stanhope,(1) very appropriately said:

"A man can no more be divorced after his death, than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives, unless it be dissolved sooner, and the court cannot dissolve a union which has already been determined. No person can dissolve a marriage which is dissolved by act of God. If a decree nisi is made, and the husband dies before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. Thus how can a decree be made which would displace a dissolution of the marriage by death, and untie a knot that no longer exists ? How can a woman, once a widow, be converted into a divorcee, unless there is some enactment enabling the court such a retrospective order"

The question to ask at this stage is, while a matrimonial proceeding comes to an end with the death of either spouse, where the proceeding has terminated and a decree has emerged, would the decree also abate.

There can be no manner of doubt and it has also been fairly conceded before us that where maintenance has been made a charge on the husband's estate, the death of the husband would not at all affect the decree and notwithstanding such death, the estate can be proceeded against for realisation of the maintenance dues for post- death period.

Mr. Ghosh had to concede that if there be a decree arising out of a civil action death would not result in wiping out the decree. If decree arising not out of a matrimonial dispute would not abate and the estate of the judgment-debtor would be liable for its satisfaction and a decree for alimony or maintenance would not abate when the same is charged upon the husband's estate, we asked Mr. Ghosh to indicate the justification for his contention that a decree for maintenance or alimony not charged upon the husband's estate would abate with the death of the husband. Apart from relying on the English decisions, Mr. Ghosh was not able to indicate any independent reason. We have not been able to find any legal principle in the cases placed before us except that the view taken in the English Courts appears to be based on precedents. There is no rationality in the contention that a decree for maintenance or alimony gets extinguished with the death of the husband when any other decree even though not charged on the husband's property would not get so extinguished. A decree against the husband is executable against the estate of the husband in the hands of the heirs and there is no personal liability. In law a maintenance decree would not make any difference. The decree indicates that maintenance was payable during the life time of the widow. To make such a decree contingent upon the life of the husband is contrary to

the terms and the spirit of the decree and the appellant has taken a stand that though the widow is alive, the decree obtained by her would become ineffective with the passing away of the husband.

The Special Marriage Act is a statute of 1954 made by the Indian Parliament after independence. For the interpreation of a provision of this statute there is no warrant to be guided by English decisions. There is no ambiguity in s. 37 for the interpretation of which it is necessary to go beyond the provision itself. It is one of the settled principles of interpretation that the Court should lean in favour of sustaining a decree and should not permit the benefits under a decree to be lost unless there be any special reason for it. In incorporating a provision like s. 37 in the Act, Parliament intended to protect the wife at the time of divorce by providing for payment of maintenance. If the husband has left behind an estate at the time of his death there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying the decree.

We are incline(1 to agree with the view of the Calcutta High Court that the decree in the instant case was not extinguished with the death of Prafulla Kumar Mitra and the assets left behind by him are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance.

Before the Calcutta High Court it had been contended that the phrase 'at the instance of either party' occurring in sub-s. (2) of s. 37 would cover the husband and the wife and no one else and on this meaning given to the phrase, support was sought for the contention that the order of maintenance was intended to continue only during the life of the husband. This question was left open by the High Court. We, however, see no justification for the view that the phrase should be confined to the spouses. There is no dispute that the order for maintenance can be varied or rescinded with change of circumstances. Sub-section (3) clearly provides that on remarriage or on a finding that the wife is not leading a chaste life, the order of maintenance can be rescinded. Upon the husband's death his estate passes on to his legal heirs and the intention of the Legislature being clear that upon remarriage or non-leading of a chaste life, the benefit conferred by the statute should empire and the estate should become free from the liability of satisfying the decree for maintenance, the application for varying, modifying or rescinding the order for maintenance can be made even by those who have succeeded to the husband's estate and the estate can be freed from the liability. There is nothing in the provision to support the view that the words 'either party' should be confined to the spouses. Examining the scheme of the statute and the purpose for which such a provision has been made, we are inclined to agree with the learned counsel for the respondent that the words 'either party' would also cover the legal heirs who have stepped into the shoes of the spouses under the law and such persons would also be competent to ask for variation, modification or rescission of the order for maintenance. That term would also include the holders of the estate with lawful title for the time being. Once such a meaning is given to the phrase, the support which Mr. Ghosh wanted to draw by restricting the phrase to spouses and contending that it indicated the legislative intention that the order of maintenance should survive only until the life time of the husband, loses force.

We accordingly dismiss the appeal and confirm the order of Calcutta High Court. The respondent shall be entitled to her costs throughout.

Appeal dismissed"

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DANIAL LATIFI & ANR VERSUS UNION OF INDIA

Bench: Hon'ble Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice S. Rajendra Babu, Hon'ble Mr. Justice D.P. Mohapatra, Hon'ble Mr. Justice Doraiswamy Raju & Hon'ble Mr. Justice Shivaraj V. Patil

Danial Latifi & Anr.
Vs.
Union of India

Writ Petition (Civil) 868 of 1986

(2001) 7 SCC 740
Date of Judgment : 28/09/2001

The Supreme Court in the case of Daniel Latifi v. Union of India a held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only. The Constitutional validity of the Act was also upheld.

JUDGMENT

Hon'ble Mr. Justice S. Rajendra Babu :—

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section

125CrPC. A Five-Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour ofSection 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b)CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura

241. This Court, after referring to the various text books on Muslim law, held that the divorced wifes right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

   (a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

   (b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, andFuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or the Parsis, pagans or heathens. It is submitted thatSection 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the

Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application ofSection 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a muslim woman from availing of the remedies available under Section 125CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided

underSection 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;
2. Persian Translation of the Quran by Shah Waliullah Dahlavi
3. Al-Manar Commentary on the Quran (Arabic);
4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;
6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;
7. Commentary on the Quran by Baidavi (Arabic);
8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;
9. Al Muhalla by Ibne Hazm (Arabic);
10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision ofSection 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and

4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

[On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and alsoArticle 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided bySection 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian,

racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband;

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

(d) all the properties given to her by her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance

ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note thatSection 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either underIndian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat

period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided inSection 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to

pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision inSection 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned

Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language ofSections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhashed Hazi v. Amena, 1995 Crl.L.J. 3371;K. Zunaideen v. Ameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus

preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

[G.B. PATTANAIK], [S. RAJENDRA BABU], [D.P. MOHAPATRA],
SEPTEMBER 28, 2001. **[DORAISWAMY RAJU], [SHIVARAJ V. PATIL]**

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ADOPTION

ADOPTION

LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

Supreme Court of India

Bench: Hon'ble Mr. Justice P.N. Bhagwati, Hon'ble Mr. Justice R.S. Pathak & Hon'ble Mr. Justice Amarendra Nath Sen

Lakshmi Kant Pandey
vs
Union Of India

1984 SCR (2) 795

1984 AIR 469
Decided on 6 February, 1984

JUDGMENT

Hon'ble Mr. Justice P.N. Bhagwati :—

This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the Shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents." The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated 1st September, 1982 the Court issued notice to the Union of India the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration

the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called `Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

It appears that the Indian Council of Social Welfare thereafter in compliance with the directions given by the Court, filed copies of the Adoption of Children Bill, 1972 and the adoption of Children Bill, 1980. The adoption of Children Bill, 1972 was introduced in the Rajya Sabha sometime in 1972 but it was subsequently dropped, presumably because of the opposition of the Muslims stemming from the fact that it was intended to provide for a uniform law of adoption applicable to all communities including the Muslims. It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strong sentiments expressed by the members of the Muslim Community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill, 1980 which was introduced in the Lok Sabha eight years later on 16th December, 1980, contained an express provision that it shall not be applicable to Muslims. Apart from this change in its coverage the Adoption of Children Bill, 1980 was substantially

in the same terms as the Adoption of Children Bill, 1972. The Adoption of Children Bill 1980 has unfortunately not yet been enacted into law but it would be useful to notice some of the relevant provisions of this Bill in so far as they indicate what principles and norms the Central Government regarded as necessary to be observed for securing the welfare of children sought to be given in adoption to foreign parents and what procedural safeguards the Central Government thought, were essential for securing this end. Clauses 23 and 24 of the Adoption of Children Bill, 1980 dealt with the problem of adoption of Indian children by parents domiciled abroad and, in so far as material, they provided as follows:

> *"23 (1) Except under the authority of an order under section 24, it shall not be lawful for any person to take or send out of India a child who is a citizen of India to any place outside India with a view to the adoption of the child by any person."*

(2) Any person who takes or sends a child out of India to any place outside India in contravention of sub-section (1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose shall be punishable with imprisonment for a term which may extend to six months or with fine, or with both. (24) (1) If upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

Provided that no application shall be entertained unless it is accompanied by a certificate by the Central Government to the effect that- (i) the applicant is in its opinion a fit person to adopt the child; (ii) the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant; (iii) the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this Act to enable the child to be repatriated to India, should it become necessary for any reason.

(2) The provisions of this Act relating to an adoption order shall, as far as may be apply in relation to a provisional adoption order made under this section. The other clauses of the Adoption of Children Bill, 1980 were sought to be made applicable in relation to a provisional adoption order by reason of sub-clause (3) of clause 24. The net effect of this provision, if the Bill were enacted into law, would be that in view of clause 17 no institution or organisation can make any arrangement for the adoption of an Indian child by foreign parents unless such institution or organisation is licensed as a social welfare institution and under Clause 21, it would be unlawful to make or to give to any person any payment or reward for or in consideration of the grant by that person of any consent required in connection with the adoption of a child or the transfer by that person of the care and custody of such child with a view to its adoption or the making by that person of any arrangements for such adoption. Moreover, in view of Clause 8, no provisional adoption order can be made in respect of an Indian child except with the consent of the parent or guardian of such child and if such child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the District Court can dispense with such consent if it is satisfied that the person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without reasonable cause to discharge

his obligation as parent or guardian or can not be found or is incapable of giving consent or is withholding consent unreasonably. When a provisional adoption order is made by the District Court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which he is domiciled. These provisions in the Adoption of Children Bill, 1980 will have to be borne in mind when we formulate the guidelines which must be observed in permitting an Indian child to be given in adoption to foreign parents. Besides filing copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980 the Indian Council of Social Welfare also filed two lists, one list giving names and particulars of recognised agencies in foreign countries engaged in facilitating procurement of children from other countries for adoption in their own respective countries and the other list containing names and particulars of institutions and organisations in India engaged in the work of offering and placing Indian children for adoption by foreign parents.

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits or statements should be filed on or before 27th November, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to 1st October, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to 1st December 1982 in order that the record may be completed by that time. Pursuant to these directions given by the Court, various affidavits and statements were filed on behalf of the Indian Council of Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for promotion of Adoption Kuan-yin Charitable Trust, Terre Des Homes (India) Society, Maharashtra State Women's Council, Legal Aid Services West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such inter-

country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen

family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment." The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has Constituted the National Children's Board with the Prime Minister as the chair person. It is the function of the National Children's Board to provide a focus for planning and review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose:

"PRINCIPLE 2: The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically mentally morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

PRINCIPLE 3: The child shall be entitled from his birth to a name and a nationality.

PRINCIPLE 6: The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

PRINCIPLE 9: The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

PRINCIPLE 10: The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look

after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is

some time called 'inter country adoption' should be acceptable. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption' within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982, recognise the validity of this principle in clause 3.1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if: a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted aboard."

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

"*(a) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations and guidelines incorporated in the report of the Secretary General and the relevant material submitted by Governments already available to the Secretary General and the regional commissions.*

(b) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development-including family and child welfare-programmes."

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and

Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner. None of the parties appearing could give us information whether any action has been taken by the General Assembly. But the draft Declaration is a very important document in as much it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage:

"Art. 2. It is recognised that the best child welfare is good family welfare.

4. When biological family care is unavailable or in appropriate, substitute family care should be considered.

7. Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility.

8. Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive.

12. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family.

14. In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned.

15. Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible.

16. Legislation and services should ensure that the child becomes an integral part of the adoptive family.

17. The need of adult adoptees to know about their background should be recognized.

19. Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter- country adoption may be considered as a suitable means of providing them with a oily.

21. In each country, placements should be made through authorized agencies competent to deal with inter country adoption services and providing the same safeguards and standards as are applied in national adoptions.

22. Proxy adoptions are not acceptable, in consideration of the child's legal and social safety.

23. No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.

24. In inter-country adoptions, legal validation of the adoption should be assured in the countries involved.

25. The child should at all times have a name, nationality and legal guardian."

Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on 4th September, 1982. These guidelines were based on the Draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U.K. There are quite a few of these guidelines which are important and which deserve serious consideration by us:

"1.4. In all inter-country adoption arrangements, the welfare of the child shall be prime consideration. Biological Parents:

2.2. When the biological parents are known they shall be offered social work services by professionally qualified workers (or experienced personnel who are supervised by such qualified workers) before and after the birth of the child.

2.3. These services shall assist the parents to consider all the alternatives for the child's future. Parents shall not be subject to any duress in making a decision about adoption. No commitment to an adoption plan shall be permitted before the birth of the child. After allowing parents a reasonable time to reconsider any decision to relinquish a child for adoption, the decision should become irrevocable.

2.5. If the parents decide to relinquish the child for adoption, they shall be helped to understand all the implications, including the possibility of adoption by foreigners and of no further contact with the child. 2.6. Parents should be encouraged, where possible, to provide information about the child's background and development, and their own health.

2.8. It is the responsibility of the appropriate authority or agency to ensure that when the parents relinquish a child for adoption all of the legal requirements are met.

2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

3.1. Before any plans are considered for a child to be adopted by foreigners, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country.

3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.

3.3 As far as possible, the child-study report shall include the following:

3.3.1. Identifying information, supported where possible by documents.

3.3.2. Information about original parents, including their health and details of the mother's pregnancy and the birth.

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

3.3.6. Present environment-category of care (Own home, foster home, institution, etc.) relationships, routines and habits.

3.3.7. Social Worker's assessment and reasons for suggesting inter-country adoption.

3.4. Brothers and sisters and other children who have been cared for as siblings should not be separated by adoption placement except for special reasons.

3.5. When a decision about an adoption placement is finalised, adequate time and effort shall be given to preparation of the child in a manner appropriate to his/her age and level of development. Information about the child's new country and new home, and counselling shall be provided by a skilled worker. 3.5. (a) Before any adoption placement is finalized the child concerned shall be consulted in a manner appropriate to his/her age and level of development.

3.6. When older children are placed for adoption, the adoptive parents should be encouraged to come to the child's country of origin, to meet him/her there, learn personally about his/her first environment and escort the child to its new home.

Adoptive Parents:

4.3. In addition to the usual capacity for adoptive, parenthood applicants need to have the capacity to handle the trans-racial, trans-cultural and trans-national aspects of inter-country adoptions.

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant in formation for other authorities such as Courts.

4.5. The report on the family study which must be made in the community where the applicants are residing, shall include details of the following:

4.5.1. Identifying information about parents and other members of the family, including any necessary documentation.

4.5.2. Emotional and intellectual capacities of prospective adopters, and their motivation to adoption. 4.5.3. Relationship (material, family, relatives, friends, community)

4.5.4. Health.

4.5.5. Accommodation and financial position. 4.5.6. Employment and other interests.

4.5.7. Religious affiliations and/or attitude. 4.5.8. Capacity for adoptive parenthood, and details of child preferred (age, sex, degree of disability).

4.5.9. Support available from relatives, friends, community.

4.5.10. Social worker's assessment and details of adoption authority's approval.

4,5.11. Recent photograph of family. Adoption Authorities and Agencies:

5.1. Inter-country adoption arrangements should be made only through Government adoption authorities (or agencies recognised by them) in both sending and receiving countries. They shall use experienced staff with professional social work education or experienced personnel supervised by such qualified workers.

5.2. The appropriate authority or agency in the child's country should be informed of all proposed inter-country adoptions and have the opportunity to satisfy itself that all alternatives in the country have been considered, and that inter-country adoption is the optimal choice of care for the child. 5.3. Before any inter-country adoption plan is considered, the appropriate authority or agency in the child's country should be responsible for establishing that the child is legally free for adoption, and that the necessary documentation is legally valid in both countries.

5.4. Approval of inter-country adoption applicants is a responsibility of the appropriate authorities or agencies in both sending and receiving countries. An application to adopt a child shall not be considered by a sending country unless it is forwarded through the appropriate authority or agency in the receiving country.

5.5. The appropriate authority or agency in both countries shall monitor the reimbursement of costs involved in inter-country adoption to prevent profiteering and traffic king in children.

5.6. XX XX XX XX

5.7. When a child goes to another country to be adopted, the appropriate authority or agency of the receiving country shall accept responsibility for supervision of the placement, and for the provision of progress reports for the adoption authority or agency in the sending country for the period agreed upon.

5.8. In cases where the adoption is not to be finalised in the sending country, the adoption authority in the receiving country shall ensure that an adoption order is sought as soon as possible but not later than 2 years after placement. It is the responsibility of the appropriate authority or agency in the receiving country to inform the appropriate authority or agency in the sending country of the details of the adoption order when it is granted.

5.8.1. In cases where the adoption is to be finalised in the sending country after placement, it is the responsibility of the appropriate authority or agency in both the sending and receiving country to ensure that the adoption is finalised as soon as possible.

5.9. If the placement is disrupted before the adoption is finalised, the adoption authority in the receiving country shall be responsible for ensuring, with the agreement of the adoption authority in the sending country that a satisfactory alternative placement is made with

prospective adoptive parents who are approved by the adoption authorities of both countries.

Adoption Services and Communities:

6.1. Appropriate authorities or agencies in receiving countries shall ensure that there is adequate feedback to the appropriate authorities or agencies in sending countries, both in relation to inter-country adoption generally and to individual children where required.

6.2. XX XX XX XX

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the Child:

7.1. Family:

It is essential that in inter-country adoption child is given the same legal status and rights of inheritance, as if she/he had been born to the adoptive parents in marriage.

7.2. Name:

When the legal adoption process is concluded the child shall have the equivalent of a birth registration certificate.

7.3. Nationality:

When the legal adoption is concluded, the child shall be granted appropriate citizenship.

7.4. XX XX XX XX

7.5. Immigration:

Before an inter-country adoption placement with particular prospective adopters is proposed, the appropriate authority or agency in the child's country shall ensure that there is no hindrance, to the child entering the prospective adopters' country, and that travel documents can be obtained at the appropriate time. We shall examine these provisions of the Draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in intercountry adoption.

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court"

is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

"When a foreigner makes an application for being appointed as the guardian of the person or property of a minor, the Prothonotary and Senior Master shall address a letter to the Secretary of the Indian Council of Social Welfare, informing him of the presentation of the application and the date fixed for the hearing thereof-he shall also inform him that any representation which the Indian Council of Social Welfare may make in the matter would be considered by the Court before passing the order on the application. A copy of the application shall be forwarded to the Secretary of the Indian Council of Social Welfare along with the letter of Prothonotary and Senior Master."

The High Court of Delhi has also issued instructions on the same lines to the Courts subordinate to it and these instructions read as follows:

(i) A foreigner desirous of being appointed guardian or the person of a minor and praying for leave to remove the minor to a foreign country, shall make an application for the purpose in the prescribed form under the Guardians and Wards Act, attaching with it three copies of passport size photographs of the minor, duly attested by the person having custody of the minor at the time;

(ii) If the court is satisfied that there is no ground for proceedings on the application, it shall fix a day for the hearing there of and cause notice of the application and of the date fixed for the hearing on the person and in the manner mentioned in Section 11, Guardians and Wards Act, 1890 as also to the general public and the Secretary of the Indian Council of child Welfare and consider their representation;

(iii) Every person appointed guardian of the person of a minor shall execute a bond with or without a surety or sureties as the court may think fit to direct and in such sum as the court may fix, having regard to the welfare of the minor and to ensure his production in the court if and when so required by the court;

(iv) On the court making an order for the appointment of a foreigner guardian of the person of an Indian minor, a copy of the minor's photograph shall be counter-signed by the Court and issued to the guardian or joint guardian, as the case may be, appointed by the court alongwith the certificate or guardianship."

The High Court of Gujarat has not framed any specific rule for this purpose like the High Courts of Bombay and Delhi but in a judgment delivered in 1982 in the case of Rasiklal Chaganlal Mehta,(1) the High Court of Gujarat has made the following observations:

"In order that the Courts can satisfactorily decide an intercountry adoption case against the aforesaid background and in the light of the above referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naroji Road, Bombay-400001) and seek its assistance. If the Indian Council of Social Welfare so desires it should be made a party to the proceedings. If the Indian Council of Social Welfare does not appear, or if it is unable, for some reason, to render assistance, the Court should issue notice to an independent, reputed and publicly/officially recognised social welfare agency working in the field and in that area and request it to render assistance in the matter."

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus

has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility

of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certificate by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in

favour of an Officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter- country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves

as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has

come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not

to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

"(1) Identifying information, supported where possible by documents.

(2) Information about original parents, including their health and details of the mother's pregnancy and birth.

(3) Physical, intellectual and emotional development.

(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.

(5) Recent photograph.

(6) Present environment-category of care (Own home, foster home, institution etc.) relationships, routines and habits.

(7) Social worker's assessment and reasons for suggesting inter-country adoption."

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner

for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare,

Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must, before offering a child in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for the adoption. It is also necessary that the recognised welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or

child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

We must emphasize strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading upto the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.

We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be some what difficult for a grown up child to get acclimatized to new surroundings in a different land and some times a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child. But we make it clear that we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years. We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference. The statistics placed before us show that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents.

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application

should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as

also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents.

Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have the effect of exciting his curiosity to meet its biological parents resulting in unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a

period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of Social Welfare of each of the State Governments as also to all the High Courts in the country and to the Indian Council of Social Welfare and the Indian Council of Child Welfare. We would direct that copies of this Order shall also be supplied to the Embassies and Diplomatic Missions of Norway, Sweden, France, Federal Republic of Germany and the United States of America and the High Commissions of Canada and Australia for their informations since the statistics show that these are the countries where Indian children are taken in adoption. S.R.

ANNEXURE-'A'

1. Source of Referral.
2. Number of single and joint interviews.
3. Personality of husband and wife.
4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),
5. Social status and family background.
6. Nature and Adjustment with occupation.
7. Relationship with community.
8. Description of home.
9. Accommodation for the child.
10. Schooling facilities.
11. Amenities in the home.
12. Standard of living as it appears in the home.
13. Type of neighbourhood.
14. Current relationship between husband and wife.
15. (a) Current relationship between parents and children (if any children).
    (b) Development of already adopted children (if any) and their acceptance of the child to be adopted.
16. Current relationship between the couple and the members of each other's families.
17. If the wife is working, will she be able to give up the job ?
18. If she cannot leave the job, what arrangements will she make to look after the child ?
19. Is adoption considered because of sterility of one of the maritial partners ?

20. If not, can they eventually have children of their own ?
21. If a child is born to them, how will they treat the adopted child ?
22. If the couple already has children how will these children react to an adopted child ?
23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.
24. Reasons for wanting to adopt an Indian child.
25. Attitude of grand-parents and relatives towards the adoption.
26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.
27. Anticipated plans for the adopted child.
28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)
29. Do the adoptive parents know any one who adopted a child from their own country or another country ? Who are they ? From where did they fail to get a child from that source ?
30. Did the couple apply for a child from any other source ? If yes, which source ?
31. What type of child is the couple interested in ? (sex, age, and for what reasons.)
32. Worker's recommendation concerning the family and the type of child which would best fit into this home.
33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.
34. Name of agency responsible for post placement, supervision and follow up.

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DOMESTIC VIOLENCE-
NATURE AND CAUSES

DOMESTIC VIOLENCE-NATURE AND CAUSES

Introduction

"From the cradle to the grave, women are objects of violence from those nearest and dearest to them. And it is *a never ending cycle for there* is *considerable evidence of intergenerational transmission of domestic violence". (* Freeman,1979, p 239)

Development is about protection of human rights of the concerned populations. It pre-supposes active participation of the population in the decision-making processes while social justice remains one of the most important and cherished goals of development. However, contradictions do remain as a result of various processes not only among nations at a global level, but also significantly within sections of population within a country. People continue to be marginalized on the basis of caste, class, religion, ethnicity, colour, and sex etc. in India. Discrimination and exploitation on the basis of gender constitutes a serious issue which effectively means that half the human race is unable to realize its potential and condemned to sub-optimal standards of existence. This problem has received world-wide attention and several efforts have been made to bridge the seemingly ever-widening gap. Yet even after years of efforts to integrate women into the mainstream development process the effectively of the same remains to be questioned owing to a multitude of factors which aid the continued marginalization of women. Women's access to education, health, employment and political spaces still remain distant goals in many nations of the world. One of the most serious impediments to women's development is the phenomenon of continuing and increasing violence against them. Needless to say, this constitutes a serious violation of women's human rights. Violence against women is one of the most significant, yet little understood and acknowledged factor instrumental in the phenomenon of marginalization of women in the development processes. Gender violence manifests itself in *various* forms female foeticide and infanticide, sexual abuse, incest, molestation, sexual harassment at work and on the streets, marital rape, domestic violence in the form of wife assault and

woman battering. In some places, there exist culture-specific forms of violence against women like female genital mutilation in some African countries and harassment/ murder /beating for dowry in India. Of all the forms of violence that women face, domestic violence remains the least reported and largely suppressed.

For women, violence is a phenomenon which starts at conception and carries on through their entire life span. In India, pre-birth selection and consequent infanticide is a common occurrence and the preference for a male offspring widespread. Discrimination continues by way of access to adequate food, prompt medical facilities, burden of household work, care of siblings and so on leading to lack of education and consequent lack of awareness and empowerment and imparting of skills. Adolescence brings with it the complete withdrawal of the little freedom of mobility, fear of and occurrence of sexual assaults; both within and outside of the family. Vulnerability is further compounded by early marriages and early child bearing and the disastrous consequences of the same on the health of women. In India, specifically, child marriages further accentuate the girl's vulnerability. The reproductive age is, for a lot of women, punctuated with physical, mental and emotional abuse by their husbands. Millions of Indian women face severe harassment due to unfulfilled dowry demands and many are victims of homicide and are even driven to suicide. All these foster a deep and inescapable sense of dependency in women who are left with no alternative but to continue to live with and depend on *abusive* partners for want of any other choice. Additionally, women constantly need to negotiate their space and contend with abuse at the workplace too. An important aspect is that a woman may experience violence either once in one of her life-cycle phases or be continually exposed to multiple instances of violence at various points in time. It has, however been established beyond doubt that domestic violence is probably one of the most endemic forms of violence against women throughout the world.

What sets out domestic violence from other forms of violence against women is that it occurs within the framework of intimate relationships in a situation of dependency, making reporting and access to legal aid and other support services difficult. Moreover that domestic violence exists is not even recognized by the law.

Domestic violence is still an issue that 'can be sorted out within the four walls of the house' and some amount of violence is considered part of the normal *'wear and tear of marriage'*. However, change comes in society, may not for better. Cases on atrocities against women are showing rising trend so much so that every day the columns in newspapers are full of reports of abuse of children and women and deaths of women or suicide committed for not fulfilling the greedy demands of the husbands and/ or their near relatives.

Women constitutes about one-half of the global population, but they are placed at various disadvantageous positions due to gender difference and bias. They have been the victims of violence and exploitation by the male dominated society all over the world. Indian society is a tradition bound society where women have been socially, economically, physically, psychologically and sexually exploited from time immemorial, sometimes in the name of religion, sometimes on the pretext of writing in the scriptures and sometimes by the social sanctions. The concept of equality between male and female was almost unknown to us before enactment of the Constitution of India. Of course, the Constitution, which is the supreme law of the land, seeks to secure to its citizens including women folk, justice-social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and promote fraternity assuring dignity of the individual[1]. The difference in treatment between men and women by the state is totally prohibited by the Constitution of India. But the equality of status guaranteed[2] by the Constitution is only a myth to millions of women for whom life is stalked by various kinds of violence within their homes.

Domestic violence is the most serious violation of all basic rights that a woman suffers in her own home at the hands of members within her own family. The manifold problems associated with domestic violence have been systematically exposed by data and in depth work undertaken by several people in the women's movement. Indeed, a number of recent studies such as the National Family Health Survey and National Crimes Records Bureau[3] have identified the home as the site of violence against women and girl children. Almost every six hours, some where in India, a young married woman is being burnt alive, beaten to death, or forced to

commit suicide. At least 20percent of married women between the ages of 15 and 49 have experienced domestic violence at some point in their lives, domestic violence has not only serious consequences for the health and well-being of the individual women, but it also serves to maintain their subjugation as a class.[4] It is generally denying the woman her rights as an individual.

With independence, women were granted equal status with men. The government made an all out effort to raise the status of women in the various fields through legislation. Compulsory Education, the Hindu Marriage Act, 1955, raising of marriageable age, the Adoption Act, 1956, Dowry Prohibition Act, 1961 and legalizing of abortion are all in favour of women. But the law alone is not enough to bring about a radical change.[5] With rapid urbanization and industrialization of the century, exploitation of women in recent years has been a serious menace to our society.

Notwithstanding the multiplication of legislation on various fields, with a view to improve the social, political and economic conditions and status of women, even the ancient forms of victimization, child marriage and premature consummation resulting in early and dangerous pregnancies *sati,* female infanticide, illegal abortions, dowry deaths, rape, eve-teasing and various other forms of molestation of women still continue. In fact, since the passing of the Dowry Prohibition Act and even after several amendments to the I.P.C., Cr. P. C. and the Evidence Act, dowry deaths are on the increase. The Hindu Marriage Act of 1955 and the Hindu Succession Act, 1956 securing for women the right to divorce and property have not automatically given women rights. Under the Hindu Succession Act, parents are depriving daughters even from ancestral property. Though, bigamy is an offence, the rate of desertion by Hindu husbands and illegal second marriage is higher than "Talaq" rate of the Muslims.

Women's health is given consideration only in terms of maternity, leaving women beyond the reproductive age, young, unmarried girls and widows outside health and nutrition schemes. The government's family planning programmes have a heavy gender bias.[6]

The condition of elderly women is also not satisfactory especially those of widows. She has to earn and run the house to raise her children. If she does not earn,

her condition is even worse. If the widow has no issues, she has to work hard as a maid servant in her husband's joint family or relations who might have taken her in and is totally dependent, for all her needs, on others. She has neither economic security nor a say in decisions concerning her and her children. Families still believe that once a daughter is given away in marriage, she can not be given away again to another person. Hence, widow remarriage, though sanctioned by Hindu Widows Remarriage Act of 1856, seldom takes place and is discouraged.[7]

Thus, we see that the condition of Indian woman is very much unhappy. Woman in India is still surrounded by violence, neglect and exploitation. What is the price fixed for a woman's services day and night within the household? Love is the reward, but where is the reward of the husband and the in-laws don't appreciate the bride's services? Perhaps nowhere, except the fire on her clothes and her body. This is happening everywhere in our country these days and the number is increasing alarmingly. Even the educated urban and well informed women are exposed to such events. *The Committee on the Status of Women in India (1974)* rightly concludes that "the entire exercise of our committees has indicated that in certain important areas and for certain sections of the female population there has been repression from the normative attitudes developed during the freedom movement. Large section of women have suffered a decline of economic status. Even after the promulgation of these laws (legal measures), the protection enjoyed by the large masses of women from exploitation and injustice is negligible. Though women don't numerically constitute a minority, they are beginning to acquire the features of a minority community by the recognized dimensions of inequality of class, economic situation, status (social position) and political power. The chasm between the values of a new social order proclaimed by the constitution and the realities of contemporary Indian society as far as women's rights are concerned remains as great as at the time of independence.[8]

DOMESTIC VIOLENCE: CONCEPTUAL CLARIFICATION

In Indian society, violence is bursting. It is present almost everywhere and nowhere is this eruption more intense than right behind the doors of our homes. Behind closed doors of homes all across the country, women are being tortured, beaten and killed. It is happening in rural areas, towns, cities and in metropolitans as well. It is crossing all social classes, genders, racial lines and age groups. It is becoming a legacy being passed on from one generation to another.

The term used to describe this exploding problem of violence within our homes is Domestic Violence. This violence is towards someone who we are in a relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a male's or a female's atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms such as physical, economic, sexual or emotional.

Domestic violence may be perpetrated by spouses, lineal ascendants and descendants and the lateral branch of the family up to the IV degree whether they are related by blood, marriage, fosterage or adoption, or by intimate partners or legal guardians. Violence within families, right from the denigration of honour, is considered to be domestic violence and is covered under the general provisions of penal codes even if it not explicitly mentioned therein. Moreover, the laws themselves have been amended and harmonised so as to remove obstacles in tackling the issue of domestic violence. For example, earlier definitions of rape exclusively spoke of extra-marital rape, and marital rape did not expressly constitute an offence (in most cases).

The spectrum of domestic violence (which, incidentally, has a high level of recidivism) may include psychological, physical, sexual, financial and emotional abuse which may manifest itself as physical injury, the deprivation of food, money or other resources, intimidation, humiliation and degradation, and may result in an hedonism, pain, exhaustion, isolation, alienation, depression, fear, and decreased levels of self-esteem, productivity and attentiveness.

LEXICON MEANING OF VIOLENCE

The lexicon meaning of the violence refers to any physical force or any damage or injury to person or property. According to Webster's New Collegiate Dictionary[9] violence means "exertion of any physical force for instance: (a) violent treatment or procedure, (b) profanation infringement, outrage, assault, (c) strength, energy, activity displayed or exerted, vehement, forcible or destructive action or force, (d) vehemence in feeling, passion, order, furry, fervor.

The Chamber's twentieth century dictionary describes violence as excessive unrestrained or unjustifiable use of force. Violence also means outrage, profanation injury or rape. Infliction of injury on other people is the essence of violence. It may be either physical or mental. On the legal level, it is illegal employment of methods of physical coercion for personal or group ends. The infliction of injury by police is exercise of state's force as long as it is legal. But as soon as it crosses the boundary of legality and inflicts injury for lust or for personal gain, it becomes violence and is more dangerous than the violence by ill armed and ill organized collectivity people[10].

According to Encyclopaedia of Crime and Justice[11] in a broad sense, "violence is a general term referring to all types of behaviour either threatened or actual, that result in the damage or destruction of property or the injury or death of an individual". In a limited sense, violence means "all types of illegal behaviour, either threatened or actual that results in damage or destruction of property, or in the injury or death of an individual". In general; the definition covers that behaviour, generally considered as violent including such crimes as criminal homicide, forcible rape, child abuse, aggravated assault and most kinds of collective violence.

According to Black's Law Dictionary, "violence means unjust or unwarranted use of force usually accompanied by fury, vehemence, or outrage, physical force unlawfully exercised with the intent to harm".[12]

The Encyclopaedia of Social Sciences[13] defines violence in the social context as "the illegal employment of methods of physical coercion for personal or group ends ... which is distinct from force or power" ... a purely physical concept. It goes beyond the dictionary meaning of the term 'violence' as merely the exercise of physical force so -as to inflict injury or damage to persons or property both spiritual

and non-spiritual. The "illegality" and "illegitimacy" of social violence will differ on situational norms and social context. There has been overlapping between "force" and "violence", "legitimate" and "illegal violence", between "violence" on the one hand and "discrimination" and "oppressions" perpetuated on the female folks as a group. For all these reasons, 'social violence' is roughly defined as the illegal use of physical, mental and social concern or use of threats for personal or group ends reflected broadly in our traditional social structure and present day developmental processes. Here, the 'coercive' aspects (physical, psychological and social), 'threats' for harm (battering, killing, insulting, isolating, molestation and rape, eve teasing) and the 'discriminating' and 'oppressive' aspects (subjugation in different walks of life i.e. child rearing and child bearing, employment, low wages, education, health, denial of opportunities for dissent, etc.) are included.

Thus, the social violence means illegal use of force or threats for use of such force by the patriarchal social order and their agents (e.g. men) against women folks in general for perpetuating the goals of that group (e.g. men) for subjugating women physically, socially and psychologically.[14]

According to Elise Boulding[15](1981) structural violence refers to the structural patterning of the family, cultural norms and values and also political and economic system of a particular society that determine who will injure and who will endure. Some individuals are deprived of society's benefits and are rendered more vulnerable to sufferings than others. Structural violence establishes physical violence. Women experience both structural and behavioural violence. In all societies, where patriarchal family structure prevails, women are protected by the patriarch from other men, but they become victims of men in their own families. In many societies, women are not allowed to born even (foeticide) or female children are killed for fear of financial burden in their marriages. Pregnant and lactating women are ill fed and may face risks of death in child birth in many societies. Most pitiable conditions are of single women like unmarried, widowed, deserted or divorced.

Thus, sociologists have explained the "why" aspect of violence and not what the term violence in itself means. No doubt, many manifestations of violence against women (foeticide, female infanticide, bride burning, wife battering, deprivations and

discriminations in child rearing practices) have their causes in the social structure and systems.[16]

The social psychologist Moyer[17](1976) defines violence as a form of human aggression that *involves* inflicting physical damage persons or property. For psychologists, violence and aggression are twin terms but with certain differences between them. Allen[18] uses the term aggression in both constructive and destructive senses, whereas violence is used only in destructive senses. Aggression can be sublimated in intrinsic, assertive or domineering behaviour such as humour sports, scientific research etc., but violence can not be sublimated. It can only be redirected or substituted. Social psychologists have dealt with inter-personal behavioural violence. They have tried to define violence in terms of human aggression which inflicts physical injury. In violence against women, cases of female infanticide, bride burning, dowry murder, rape, women battering, etc. may be included which involve physical injury.

A definition of aggression, acceptable to most social psychologists says" Aggression in any form of behaviour directed towards the goal of harming or injuring another living being who is motivated to avoid such treatment.[19] However, the concept of intentionality is important in separating aggressive behaviour from other forms of behaviour that might lead to some harm. Wrightsman and Deaux (1981)[20] argue that the definition of aggression does not limit aggression to physical harm. Verbal insults and even the refusal to give a person something that he or she needs can be considered a form of aggression.

As per Niroj Sinha(1987)[21] 'violence' may include specially in relation to females both the physical violence against women and exploitation of all kinds. But she is not satisfied with such a definition, to her any group of persons may be identified as "victims" of violence if they are shown the threat of use of force against them if they do not act as per the desires of the group of persons, identified as oppressors. It not only includes all kinds of physical violence against women but will also include the context and particular situations under which such "threats of use of force" are indicated. This definition also suffers from a few limitations i.e. it does not operationally define the context and situations under which the use of force

becomes violence.

Niroj Sinha(1989) is probably correct when she indicates that "threat of use of force against female forcing her unwillingly to do a thing in a particular situation that she would not do is an indicator of violence against her. This may be a sensitive definition if all the indicators of situational oppressions., are clarified. The "illegitimate use of force" in critical areas of choice for female e.g. vocation, selection of life partner (marriage), sex behaviour, search for self-identity, participation in public life, etc. as customarily revealed in social customs, traditions and laws is considered as violence. Gelles[20] categorized family violence into three varieties e.g., (a) normal violence (routine, normative and necessary), (b) secondary violence (when the use of violence to resolve a conflict is contrary to family norms, it creates additional conflict over violence which produces further violence), and (c) volcanic violence occurs when the offender has reached the end of line, has run out of patience, it is illegitimate violence that is explained as arising out of the building of stress and frustration the stress builds up to the point where the offender "erupts" into violence .

A narrow concept of violence may suggest an act of illegal, criminal use of physical force, but it also includes exploitation, discrimination, upholding of an unequal economic and social structure, the creation of an atmosphere of terror a situation of threat, reprisal and other forms of violence.

While these concepts of violence are interrelated, the specificity of violence related to the situation of women demands a closed and critical look of the aspects of structural violence, i.e. acts of violence that are exercised on the part of the family and society .The state not only. tends to overlook these forms of violence but perpetuates them in the name of the cultural legitimacy and the maintenance of 'law and order'.

OPERATIONAL DEFINITION OF VIOLENCE

An operational definition[22] of violence is still lacking which can include all cases of violence against women.

Besides cases which involve physical injury, cases of verbal abuse, rebuke, threats, eve teasing, deprivations, discriminations and obstructions in attaining goal responses of women are all violence against women. Even if they do not involve physical injury, they lead to psychological injury and destruction of the personality

of a woman.

Even in cases of physical injury, it is justified to say that there is no psychological hurting. In every case of inter-personal violence, the element of psychological injury is present except in the case of murder where the person does not exist to experience the psychological torture at all.

An operational definition of violence can include all cases of violence against women:

"Any aggressive behaviour of a person or persons hurting body or positive regard or both of another person or persons is human violence". When analyzed:

1. Aggressive behaviour means vigorous behaviour or action.
2. A person' means a victimizer either male or female. 'Hurting body' means inflicting physical injury (in destructive sense).
3. Positive regard' means need to be loved or accepted by others as a person.
4. Another person means the victim.

CONCEPT OF DOMESTIC VIOLENCE

Domestic violence is an extremely complex and vicious form of abuse, committed most often within the four walls of the family house and/or within a particular deep-rooted power dynamic and socio-economic structure, which do not allow even the acknowledgement or recognition of this abuse. Meaning and detection of domestic violence itself is the most demanding task. Violence against women in any form is a violation of the right of equality. State inaction in the field of preventing violence would itself be a violation of fundamental right to equality.

United Nations General Assembly adopted the Declaration on the Elimination of All forms of violence against women on 20th December 1993 which recognized that violence against women is a manifestation of historically unequal power relations between men and women which have led to domination over and discrimination against women by men and the prevention of the full advancement of women. Article 1 of the Declaration defined violence against women as follows-

"Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to

women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".[23]

According to Black's Law Dictionary, "domestic violence means violence between members of a household, usually spouses, an assault or other violent act committed by one member of a household against another".[24]

The meaning of domestic violence and the range of acts which amount to domestic violence will become clear from a look at the general laws, criminal and civil, which address acts which could constitute domestic violence.

CRIMINAL LAW PERSPECTIVE

The Criminal law in India is contained primarily in the Indian Penal Code, 1860 (IPC). The IPC is supplemented by special laws, which define and punish specific offences.

The Indian Penal Code

Under the IPC, there is no direct definition of the term domestic violence but its meaning can be inferred from various provision such as 'culpable homicide' [25], murder [26],dowry death [27], Abetment of suicide[28] cruelty by the husband or relatives[29], Female infanticide, or forcing the wife to terminate her pregnancy[30], misappropriation of the spouse's property,[31] hurt[32] grievous hurt,[33] grievous hurt by dangerous weapons'[34] and voluntarily causing hurt to extort property,[35] wrongful restraint[36] or confinement[37] of the spouse within her matrimonial home, use of force[38] and assault[39] on the spouse, are also forms of domestic violence recognized as offences under the IPC. Marital rape is yet another common form of domestic violence[40].

In 1983, matrimonial cruelty was introduced as an offence in the IPC.[41] Cruelty was defined as "any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life or limb or health (whether mental or physical) of the woman". It includes harassment of the woman in connection with demands for property and the like.

This is a grey area of law and evidence. While many progressive nations have legislated on marital rape, our law has so far only conferred a limited recognition. Non-consensual sexual intercourse by a man with his own wife may be an offence if she is living separately under a decree of separation or any custom.[42] In many a

violent marriage, the spouse subjects the wife to acts of sexual humiliation. Interestingly the IPC even addresses such forms of violence-the provision for 'unnatural offences'.[43] However, this provision has rarely been used in the matrimonial context.

CONCEPT UNDER SPECIAL LAWS

Under some special legislation the domestic violence has been recognized in various forms such as the Dowry Prohibition Act,1961, criminalizes the giving and taking of dowry.[44] There is another form of domestic violence which was rampant in our past but ebbed in the last century, i.e. *Sati which* means the burning or burying alive of widow along with the body of her deceased husband or any other relative, or with any article, object or thing associated with the husband or relative.[45] *The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994* recognizes that domestic violence is also perpetrated in the form of forced termination of female fetuses [46].

CIVIL LAW ON DOMESTIC VIOLENCE

Civil law too follows criminal law, inasmuch as it addresses facets of domestic violence without specifically defining domestic violence. Even references in the statutes to aspects of domestic violence are generic and it is only through judicial decisions that such provisions have been given life and meaning.

The Dissolution* of *Muslim Marriages Act,* 1939 *(DMMA),stipulates cruelty [47] as a ground for divorce.

The Hindu Marriage Act,* 1955 *(HMA,)*[48]** term cruelty has been understood to mean acts of physical as well as mental cruelty ***and is a ground for divorce as well as judicial separation.[49] The Special Marriage Act, 1954 (SMA)[50], the Indian Divorce Act (IDA),[51] and the Parsi Marriage and Divorce Act (PMDA),[52] all allow 'cruelty' as a ground for divorce. However, none of the Acts elaborate or detail the nature of cruelty. Domestic violence would certainly qualify as cruelty under these statutes.

UNDER THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

To be honest, before 2005, there was no definition of domestic violence in Indian law. A frequent perception of domestic violence against women is that it is

limited to physical harm perpetrated on adult women within a marital relationship. But the definition of domestic violence has been made broad by the Act of 2005 which acknowledges the multiple possibilities would lead to domestic violence that are more inclusive of the experiences of all women.[53] This Act defines the expression" domestic violence" to include actual abuse or threat of abuse-physical, sexual, verbal, emotional or economic violence[54].

The core of a definition of domestic violence consists of all the acts that constitute violence. Some definitions are narrow and focus on a specific act of violence and others are broader and incorporate the full range of acts. In India, public discourse and the media equate domestic violence with dowry violence. This incomplete representation undermines awareness of the widespread, daily psychological, physical, and sexual abuse women confront that is often unrelated to dowry. As a result, newspapers may fail to report the less sensational stories that do not involve bride-burning and unnatural death. Indian legislation on marital violence perpetuates this narrow definition. For example, both Section 498A of the Indian Penal Code and the Dowry Prohibition Act emphasize violence within the context of dowry harassment. However, informal discussions with women by researchers and activists have underlined the need for greater study of other factors and characteristics associated with abuse.[55]

NATURE AND CHARACTERISTICS OF DOMESTIC VIOLENCE

Domestic violence can also be seen as a violation of the fundamental right to live with dignity, and of the right to equality and equal protection of the law guaranteed under the Indian Constitution[56]. Domestic Violence is in the majority of cases, violence against a woman by the members of the house where she resides. It can be the husband, his parents, or siblings or any other resident who has the overt or covert latitude for actions that can cause physical or mental agony to the woman. But, the most important aspect of this kind of violence is the fact that "it happens behind the closed doors" and is most often denied by the very woman who has been the victim of violence. It is this aspect of the crime that segregates itself from all other kinds of social violence.[57]

Domestic violence is violent victimization of women, within the boundaries of

family, usually by men (or his family).[58] A woman may of any age,[59] she may be a girl child, unmarried, married or elderly woman including a widow or such women with whom men have marriage like relationship. Violence can be both physical and psychological. It indicates threats or aggressive behaviour towards her not only to her physical being, but towards her self-respect and self-confidence.

Domestic violence against women may be psychological, physical or sexual. Psychological violence is carried out with psychological weapons (threats, insults, humiliating treatment, denial of human existence) rather than physical attack. Physical violence 'includes all types of aggressive physical behaviour towards the woman's body (victim). Sexual violence could include both passive (denial) or active violence. It will also include cases of perversity.Victimiser of domestic violence may be husband or his family members. Domestic violence could occasionally be seen in other relations also (i.e. by parents, brothers or others in parents family).

Domestic Violence knows no age, socio-economic, religious, racial, gender or educational. barriers. It is a myth that only the poor or uneducated are victims of domestic abuse. Most studies indicate that there is also a high incidence of spousal abuse in the more affluent neighbourhoods. Although a poor victim has the terrible problem of not having resources available, the more affluent spouse may also be in an equally desperate trap due to social stigmas, greater economic pressures and the increased societal position and power that the partner may have at his or her disposal.

Family and friends are indirect victims of abuse. The isolation and terror that victim lives with deprives those closest to him or her from meaningful and fulfilling relationships. Often the abuser will harm others close to the victim in an effort to hurt or control the victim. An abuser may harm children, other family members, friends, pets, personal belongings and the family home.[60] Isolation keeps a victim trapped. Frequently, a batterer isolates the victim from the family socially, emotionally and geographically. The victim is frequently forbidden to see trusted friends and family, and is denied the opportunity to go to school or work outside the home. There is little or no access to or control 'over finances, in the midst of this terrible isolation, the abuser employs "brainwashing" tactics, and with no input to the contrary from anyone outside the relationship, there will be no way for the victim to test reality.[61]

RECOGNIZING THE VIOLENCE

Forms* of *Physical Abuse Physical Abuse Indicators

The following is a list of Physical Abuse Indicators in the order of less to more severe on a lethality or injury scale. Most ongoing abuse escalates in more or less this order, so that the presence of an action identified below is indicative of probable past abuse, even if there have been no serious physical injuries or prior police or court involvement. In addition, even if the abuse has not reached a certain danger level, it does not mean that the situation is not dangerous or physically abusive. A person can be severely injured as a result of "minor abuse".

Verbal abuse, humiliation, isolation from family and friends. Throwing things, punching walls, hurting pets, not letting the victim leave, demanding sex. Pushing, shoving, grabbing, shaking, throwing things at the victim. Slapping with open or back of hand, twisting arms, legs and fingers. Kicking, biting, hair pulling, banging or shaking head. Choking, attempted strangulation, smothering. Beating up (pinned to the wall/floor, repeated kicks and punches). Threatening with weapons, knives, guns, autos, poisons. Assault with a weapon.

Forced sex.

Research has found that there are certain factors that are important in assessing the lethality potential in a particular situation. However, predicting lethality is difficult, as all serious battering relationships can be unpredictable and have the potential to flare up quickly. Nonetheless, the reported presence of some of these factors can be used to assist in making judgments about the level of protection necessary at any particular moment.[62]

Forms* of *Emotional Abuse Insults

Constant or extreme criticisms that injure the personal, emotional sexual and professional image. Insults can greatly undermine a person's self-confidence and eventually render the victim emotionally incapacitated.

Rejection

Direct or indirect statements that create feelings of unworthiness. Constant rejection teaches a victim that he or she is unworthy of receiving loving behaviour. Rejection can be used as punishment for not cooperating with an abusive partner.

Abusers may also employ rejection in an attempt to justify their anger towards the victim.

Emotional Threats and Accusations

Direct or indirect statements made in an attempt to cause emotional or physical harm to the victim. This includes lying about the victim's behaviour, attitude or emotional state.

Emotional Blackmail

A statement or behavior that uses fear, guilt, insecurity or confusion to trap a victim into giving the abuser power over him or her.

Possessive and Punitive Behaviour

Perceiving another person as physical property or an emotional extension of himself or herself. Behaviour includes jealousy, limiting freedom, creating isolation, denying a person's capabilities or opportunities to develop. Many times it includes using shame and guilt to prevent a victim from getting the deserved support and protection.

Basing Relationships* on *Unrealistic Expectations

This includes an assumption by the abuser that he or she knows what is best for the victim. Denying someone the opportunity to discover and define himself or herself prevents the possibility of a mutually beneficial and realistic relationship.

Threats* to *Harm* or *Take Away Children

One of the most common reasons given for resuming an abusive relationship is the fear that the abuser will act on the threats of taking the children from the victim.[63]

Other Forms of Domestic Violence

Sexual Abuse

Sexual abuse is often present along with physical and emotional abuse. It is very difficult for the victim to describe sexual abuse that may be coerced by threats of further harm or actually accompanied by physical force. Most often a victim is bullied into complying with the abuser's demands to engage in sexual acts, or at a time when she is not physically fit for sexual activity, such as immediately after childbirth,

surgery or during illness. The shame a victim feels afterwards further ties her to the batterer.

Child Abuse

Studies suggest that in approximately one-half of those abusive families where children are present, some form of physical and/ or sexual abuse of children exists. The abusive partner usually is the one who may abuse the children. In most cases, where children witness domestic violence, they can be expected to have emotional effects and are at a higher risk for violence themselves. Additionally studies show that violence affects children before birth. Assaults during pregnancy may lead to miscarriage, fetal injury and pre-term labour. The presence of child abuse makes a dangerous situation more lethal especially when there is intervention by social services without an understanding of the dynamics of violent relationships. Removing the abusive partner or a child from the home may escalate the violence rather than stop it.

Elder Abuse

In Asia, studies by researchers in China (Hong Kong SAR), India, Japan and the Republic of Korea have drawn attention to the problem of elder abuse, but no official action, in terms of policies or programme development, has followed so far.

The definition developed by Action on Elder Abuse in the United Kingdom[64] and adopted by the International Network for the Prevention of Elder Abuse states that: ''Elder abuse is a single or repeatedact, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.'' Such abuse is generally divided into the following categories:

- .Physical abuse – the infliction of pain or injury, physical coercion, or physical or drug induced restraint.
- Psychological or emotional abuse – the infliction of mental anguish.
- Financial or material abuse – the illegal or improper exploitation or use of funds or resources of the older person.
- Sexual abuse – non-consensual sexual contact of any kind with the older person.

- Neglect – the refusal or failure to fulfil a care giving obligation. This may or may not involve a conscious and intentional attempt to inflict physical or emotional distress on the older person.

A workshop on elder abuse held in South Africa in 1992 drew a distinction between mistreatment (such as verbal abuse, passive and active neglect, financial exploitation and overmedication) and abuse (including physical, psychological and sexual violence, and theft) [65]. Since then, focus groups have been held with older people recruited from three historically ''black'' townships in South Africa to determine the level of knowledge and understanding of elder abuse within these communities.

In addition to the typical Western schema that comprises physical, verbal, financial and sexual abuse, and neglect, the participants wished to add to the definition:

- loss of respect for elders, which was equated with neglect;
- accusations of witchcraft;
- abuse by systems (mistreatment at health clinics and by bureaucratic bodies).

The focus groups produced the following definitions[66] :

- .Physical abuse – beating and physical manhandling.
- Emotional and verbal abuse – discrimination on the basis of age, insults and hurtful words, denigration, intimidation, false accusations, psychological pain and distress.
- Financial abuse – extortion and control of pension money, theft of property, and exploitation of older people to force them to care for grandchildren.
- Sexual abuse – incest, rape and other types of sexual coercion.
- Neglect – loss of respect for elders, withholding of affection, and lack of interest in the older person's well-being.
- Accusations of witchcraft – stigmatization and ostracization.
- Abuse by systems – the dehumanizing treatment older people are liable to suffer at health clinics and pension offices, and marginalization by the government.

In India research suggests that an elderly victim is abused more often by an aging partner and care taking children than those who are harmed by non-family caretakers. Family violence does not usually stop on its Own. Family violence is a public health problem[67].

Mutual Violence

Dating Violence

Dating violence refers to verbal, physical, psychological or Economic Violence

Victim is frequently denied opportunities or capabilities to develop and work. There may be discrimination, deprivation and obstruction in goal achievement. Victim may be denied opportunities to go to schools or work outside the home, they may have little or no access to or control over finances.

A victim of domestic violence may act in ways that seem incomprehensible to people not aware of the dynamics of abuse. The victim may not understand his or her actions, denying the abuse in a desperate attempt for self-preservation.

The abuser's control of a victim may affect the simplest decision a victim may need to make. Domestic Violence is a crime by perpetrator, not the victim. A batterer must take full responsibility for his or her violent behaviour[68] sexual abuse that occurs in relationships before partners marry or begin cohabiting. The term does not imply anything about the length or stability of the relationship. An act is classified as dating violence whether it occurred within the context of a single date or over a long period of time. Although popular attention has focused on sexual violence within dating relationships (date rape), researchers have noted that the full gamut of aggressive behaviour, including murder, occurs within violent dating relationships.

ABUSE ESCALATES IN FREQUENCY AND SEVERITY OVER TIME

A victim of domestic violence will often lose the ability view other people's behaviour in an objective or neutral light. victim loses the ability to trust other people. Thus, he or she often feels isolated.

Many people believe that the victim of violence must somehow have invited it, encouraged it, or even found some kind satisfaction from it. No victim likes to be abused. Victims ha the same expectations of love, trust and a fulfilling relationship as

we all do. Thus, we see that even in present Indian society, position of the woman is not better. While she is held in high esteem, worshipped, considered as an embodiment of tolerance and virtue, she has also been the victim of untold miseries, hardships, atrocities and violence caused and perpetrated by the male dominated society, in her most sacred and safe place-the home.

DOMESTIC VIOLENCE IN INDIA

In India, we have unique situation of co-existence of all forms of violence especially of elimination of women, e.g. selective female foeticide, female infanticide, bride burning and *sati.* The incidence of violence of all forms within family has also gone up. Even today, various forms of violence against women are prevalent in our society, though many cases remain unreported due to cultural norms, apathy or ignorance. They may manifest themselves directly in wife battering, abduction, eve-teasing, verbal abuses or verbal rebukes. Women on many occasions are victimized by all sorts of discriminations, deprivations and obstructions in goal achieving and responses. These incidents may occur in the family, offices, agricultural fields, industries or even public places. It sounds surprising that on animal level predatory aggression (killing and eating) occurs between the species and not within the species, but. a human being, the highest on the evolutionary level, kills another human being of his own species.[69]

Inflicting and experiencing violence in many subtle forms causing and suffering mental pain in day-to-day life, has become ways of our world in inter-personal relationships. The cruelty, the hate that exists in ourselves is expressed in the exploitation of the weak by the powerful and the cunning .[70]

The worst part of the problem is that women today, are not feeling safe and secured even in the family. The concept of home, sweet home is no more, so far many women, who suffer violence against themselves by the members of the family. Home is no safe place when it comes to aggressive behaviour. [71]

In the last four decades, there has been an alarming increase in the incidence of violence within and outside the family. Today, we hear more about wife beating, dowry deaths, sexual crimes and even reversion to medieval practices like "sati". Over the years, the nature of domestic violence has changed, now it has assumed

following characteristics:

1. Differences between the husband and wife and increasing divorce is becoming common.
2. Men are marrying more than once, partly because they can get a new girl and partly because of the dowry.
3. Human feelings are gradually evaporating. A man resorts even to murder the wife if he does not get the expected dowry or if he is attracted to another girl.
4. The growing dowry system is gradually making the baby girl unwanted. People are restoring to foeticide and sometimes, baby girls are even killed after birth. Besides this-
5. Women are ignored in house work and outside home. They are suffering innumerable tortures from their in-laws and husbands. They are frequently beaten up and denied food and shelter.

All these cases reveal the true nature of the system of marriage and family in our society. The stereotypes rules of men and women are rigidly defined. While the material gains brought by the men are for everyone to see the inputs provided by the women being distant are often invisible. The amount of time, energy and labour spent by women in performing her duties go unnoticed. Often, she has to pay in terms of sacrificing her likings, interests and skills while the society offers man many opportunities to go out of house and share with others his joys and sorrows, such opportunities are very less for a woman. This mental violence, agony of losing life's most precious treasures and the lack of opportunities to share it with somebody also stems out of our societal structure. In such violence, there are no visible body marks. But the wounds inflicted on the mind are difficult to heal.

The woman right from the moment of stepping into the husband's home tries to forget her own identity and adjust everything according to the needs of the new place and the people living in it. In spite of it, she is under a constant watch and is often criticized for anything, e.g. for not bringing enough money from her parents, for not being trained properly, etc. She tends to overlook these facts, because she has been 'trained' to do so. The society, the religion, her parents and in-laws, everyone

expects her to become her husband's shadow. The worst thing is that all these come as a rude shock to her after marriage, because the institution of marriage in our society is highly glamorized. Hence for a woman, 'the union of souls' turning into a nightmare is a truly horrifying and shattering experience. The mental violence may be committed in such a subtle manner that others will never come to know of it.[72]

FORMS OF DOMESTIC VIOLENCE IN INDIA

Violence against women is not a myth, but a reality. It exists and exists everywhere. The problem of violence against women is as old as the world in cosmologies, mythologies or legends. The type, frequency, intensity and control of violence against women may vary from time-to-time or place-to-place.

In India, we have unique situation of co-existence of all forms of violence specially of elimination of women, e.g. selective female foeticide, female infanticide, bride burning and *sati.* The incidence of violence of all forms within family has also gone up. Even today, various forms of violence against women are prevalent in our society, though many cases remain unreported due to cultural norms, apathy or ignorance. They may manifest themselves directly in wife battering, abduction, eve-teasing, verbal abuses Domestic violence may take many forms. The main categories are usually identified-physical, sexual and emotional or psychological; but this classification is fairly crude and there are endless variations within each category.

Domestic Violence Against Women

This form of domestic violence is most common of all. One of the reasons for it being so prevalent is the orthodox and idiotic mindset of the society that women are physically and emotionally weaker than the males. Though women today have proved themselves in almost every field of life affirming that they are no less than men, the reports of violence against them are much larger in number than against men. The possible reasons are many and are diversified over the length and breadth of the country. According to United Nation Population Fund Report, around two-third of married Indian women are victims of domestic violence and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from domestic violence, especially in the states of Bihar, U.P., M.P. and other northern states.

The most common causes for women stalking and battering include dissatisfaction with the dowry and exploiting women for more of it, arguing with the partner, refusing to have sex with him, neglecting children, going out of home without telling the partner, not cooking properly or on time, indulging in extra marital affairs, not looking after in-laws etc. In some cases infertility in females also leads to their assault by the family members. The greed for dowry, desire for a male child and alcoholism of the spouse are major factors of domestic violence against women in rural areas. There have been gruesome reports of young bride being burnt alive or subjected to continuous harassment for not bringing home the amount of demanded dowry. Women in India also admit to hitting or beating because of their suspicion about the husband's sexual involvement with other women. The Tandoor Murder Case of Naina Sahni in New Delhi in the year 1995 is one such dreadful incident of a woman being killed and then burnt in a Tandoor by his husband. This incidence was an outcome of suspicion of extra marital affairs of Naina Sahni which led to marital discord and domestic violence against her.

In urban areas there are many more factors which lead to differences in the beginning and later take the shape of domestic violence. These include – more income of a working woman than her partner, her absence in the house till late night, abusing and neglecting in-laws, being more forward socially etc. Working women are quite often subjected to assaults and coercion sex by employees of the organization. At times, it could be voluntary for a better pay and designation in the office.

Violence against young widows has also been on a rise in India. Most often they are cursed for their husband's death and are deprived of proper food and clothing. They are not allowed or encouraged for remarriage in most of the homes, especially in rural areas. There have been cases of molestation and rape attempts of women by other family members in nuclear families or someone in the neighbourhood. At times, women are even sexually coerced by their partner themselves against their will. They are brutally beaten and tortured for not conceiving a male child. Incidents like, ripping off a woman's womb for killing the female foetus when she disagrees for abortion have also come to light especially in rural areas. Female foeticide and female infanticide continue to be a rising concern.

Also as expressed by Rebecca J. Burns in the following lines, "When I am asked why a woman doesn't leave abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving." A common Indian house wife has a tendency to bear the harassment she is subjected to by her husband and the family. One reason could be to prevent the children from undergoing the hardships if she separates from the spouse. Also the traditional and orthodox mindset makes them bear the sufferings without any protest.

Other forms of physical abuse against women include slapping, punching, grabbing, burdening them with drudgery, public humiliation and the neglect of their health problems. Some of the other forms of psychological torment against them could be curtailment of their rights to self-expression and curbing the freedom to associate with the natal family and friends.

DOMESTIC VIOLENCE AGAINST MEN

There is no question that domestic violence directed against women is a serious and bigger problem, but domestic violence against men is also increasing gradually in India. The supremacy of men in the society makes one believe that they are not vulnerable to domestic violence. Battering of men by their spouse and family members has become a concerned issue and is another form of domestic violence under purview of judiciary. In India, compared to violence against women, violence against men is less frequent but it has already taken a deadly shape in many of the western countries by now.

Males have reported incidences of assault against them like pushing, shoving, slapping, grabbing, hitting which are intended to harm them and also take their lives on many occasions. Recently, hundreds of husbands gathered in Chandigarh and Shimla to voice their opinion for men's rights and protection against domestic violence subjected to them by their wives and other family members. It reflects the need for a special law for curbing domestic violence against men in present times.

If we contemplate over the reasons behind this form of domestic violence we would find some of the possible causes such as not abiding by the instructions of the wives', inadequate earning of men, infidelity towards wives, not helping the partner in

household activities, not taking a proper care of children, abusing the spouse's family, infertility of men, spying the activities of partner, doubting the partner all the time and not trusting her, revolt by the wife when asked to look after in-laws etc. On many occasions the spat between men and women becomes public thereby influencing the society around especially in the villages. In urban areas such forms of violence may go unreported because of greater privacy. Also the families find their reputation at stake in urban areas.

DOMESTIC VIOLENCE AGAINST CHILDREN/TEENS

Children and teenagers in our society are not spared from the evil of domestic violence. In fact, this form of violence is second in terms of number of reported cases after the 'violence against women'. There is a lot of variation in the form of its occurrence in urban and rural areas and in upper/middle class and lower class families in India. In urban regions, it is more private and concealed within the four walls of homes. The possible reasons could be disobeying parental advises and orders, poor performance in academics or not being at par with other children in neighbourhood, debating with parents and other family members etc. In addition to this, factors like not being socially intelligent or as active as the parents expect them to be, abusing the parents or speaking ill about other family members, not returning home on time are some other factors.

In rural areas it could be harassment for child labour, physical abuse or harm for not following family traditions, forcing them to stay at home and not allowing them to go to school etc. Domestic violence against girls is in fact more severe at homes. As the common mob mentality of India prefers to have at least one male child after marriage, the girls in most of the occasions are cursed and assaulted for having taken birth in the home. This kind abuse is prevalent both in cities and villages but is more common in latter case. Then there are cases of paedophilia causing sexual harassment of children in homes by family member themselves. In fact the number of rape cases of pre-matured girls has been rising since last few years. A survey of teens and college students found that rape accounted for 67 percent of sexual assaults in

girls. Apart from sexual abuse and rape, pushing, slapping, punching, stalking and emotional abuse are other forms of domestic violence against children.

Adding to the above mentioned causes, there are also instances of abuse against children who are physically and/or mentally challenged. Instead of providing them proper health care and treating them politely, these children are beaten and harassed for not cooperating and attending to what family members ask them to do. They are even emotionally abused by cursing them having been in such retarded or handicapped state. In fact in poor families, there have been reports of selling body organs of the retarded children for getting money in return. It reflects the height of cruelness and violence against innocent children.

DOMESTIC VIOLENCE AGAINST OLDS

This form of domestic violence refers to the violence which old people at home are subjected to by their children and other family members. This category of domestic violence largely goes under-reported in India. It is because of the dependency of olds on their children and having a fear of not being looked after or even ousted if the violence is revealed in public. The main causes of violence against aged people are – children being hesitant in bearing the expenses of the old parents, emotionally victimising the olds and beating them to death to get rid of them. On various occasions, they are beaten for doing something against the desire of family members. One of the very common reasons includes torture for property grabbing.

A perturbing trend is the vulnerability of ageing women to domestic violence in various forms. Given existing structures of gender discrimination, old women are prone to a greater risk than men of becoming victims of material exploitation, financial deprivation, property grabbing, abandonment, verbal humiliation, emotional and psychological torment. When they fall seriously ill, it is more likely that it is the elderly women in the family who will be denied proper health care. There is also a widespread understanding that the neglect, deprivation and marginalisation of older women are the normal consequences of ageing. In fact the plight of young widows in homes as discussed above now becomes more serious as a result of the ageing of those women. They are cut off from the society they are living in, ignored, abused, cursed, and considered as bad omens. The atrocities of sons, daughter-in-laws,

daughters and husbands could be another cause of domestic violence specifically against older women. They are restrained from cooking, housekeeping, or participating in activities outside the home.

While it is difficult to accurately measure the extent of the problem on a national scale, given the fact that most families deny that such abuse but we do know that the number of old people in our midst is growing. A current estimate puts the 60-plus population at around 90 million in India and is projected to have a population of 142 million older people by 2020. Given this demographic reality an important concern is the kind of action the country can take at the individual and societal level to alleviate abuse and neglect of elderly class.

OTHER FORMS OF DOMESTIC VIOLENCE IN INDIA

There are some more possible forms of domestic violence prevalent in India other than the ones listed above. On a serious note, family wars or clan wars are deadly forms of domestic violence across the country. The reason of such type of violence include dispute over property, physically or emotionally abusing any member of other family or clan, any religious cause or conflict arising during a religious ceremony, jealousy because of progress and financial status of other family, inter-caste marriage etc. This form of violence is common in many states like Haryana, Punjab, Andhra Pradesh etc.

One of the other forms of domestic violence is ill-treatment of servants and maids in households. In many of the affluent homes, servants are deprived of their salary and basic necessities. They are harassed and beaten and to work without even taking adequate rest. Similarly maids are molested by males in the family. Atrocities against small children working as servants are common and increasing.

CAUSES OF DOMESTIC VIOLENCE

Violence against married women is also a manifestation of class oppression. The specificity of violence on women involves as analysis of gender and its centrality to the family which has gender inequalities in day-to-day life. Domestic violence, battering, dowry, rape, suicide are the manifestations of gender inequalities within the family system. Women's exclusion from the ownership of land is largely the basis of their subordination and dependence on men.

Women activists regard specificity of violence against women as a part of general violence against oppressed classes. The forms of control and coercion exercised in the case of women are gender specific and arise out of a hierarchical gender relationship, where men are dominant and women are subordinate. Women are instruments through which the social system reproduces itself and through which systematic inequality is maintained. This inequality is further strengthened and maintained overtime by the socialization process. She believes it to be true. She accepts whatever is given to her as her fate.[73]

The causes of domestic violence are not known to date. The research carried out in different parts of the world indicates that any social structure which treats women as fundamentally of less value than men is conducive to violence against women. Victims of violence are predominantly women while perpetrators are overwhelmingly males, which give credence to the theory that violence is an outcome of gender inequality.[74]

Violence against women in marital situation has more to do with the relationship of husband and wife in the social matrix. The 'cultural factors relating to marriage, status of women and power structure relationship between man and woman in the society are important while describing violence against women in the family context. It may also have its origin in psychological factors like irrational, pathological behaviour of abuser and the victim, which subsequently affect the interpersonal relationship of both the parties. It has also been considered as the condition of learned helplessness. Absence of viable alternatives of survival and lack of proper support group also forces a woman to continue tolerating violent behaviour. It has been seen that men feel relieved after seeing the battered faces of their wives. It boosts and nurtures their egoistic superiority complex. On the other hand, woman's acceptance of beating as a common phenomenon and as a way of interaction with their husband further perpetuates violence. It has been noticed that lack of awareness of their own rights and a general social belief in women's subordination perpetuates a low self-image in women and her inferior status, especially in a country like India. She is taught that marriage is the ultimate goal she has to achieve; 'only her dead body will come out of her in-law's house'. All this conditioning gradually becomes

the nature of an Indian woman.[75]

Poverty, alcoholism, unemployment, frustration and poor role modeling also contribute to violent behaviour. But alcohol or drug abuse, depression, lack of money or lack of a job do not directly cause domestic violence. These may be factors which may put women at greater risk of violence because of the stresses created by financial hardship and relationship crises.

Many abusers blame the victim or other things for their violent acts and do not take responsibility for the abusive behaviour. But in reality, domestic violence is not caused or *provoked* by the actions or inactions of the woman.

The major factor behind the violent behaviour of men as explained by a group of researchers is the patriarchal attitude of the Indian society which perceives woman as an 'object' rather than a 'subject' and gives her a low status in the society. Patriarchy legitimizes violence in man-woman relationship.

Violence arises from patriarchal notions of ownership over women's bodies, sexuality, labour, reproductive rights, mobility, and level of autonomy. Deep-rooted ideas about male superiority enable men to freely exercise unlimited power over women's lives and 'effectively legitimizes it too'. Violence is thus a tool that men use constantly to control women as a result of highly internalized patriarchal conditioning which accords men the right to beat their wives and thus ostensibly perform the duty of chastising them. The unequal and hierarchical gender relation manifests itself clearly in the familial setup and is accentuated by clear demarcation of sex roles and sexual division of labour.

There is enough data to suggest that the family is the most physically violent group or institution that the individual is likely to encounter, "The perception that the family is the most loving and supportive group or institution has blinded us from seeing the violent side of family life".[76] The family has been described as "the cradle of violence"[77] and the marriage license as "the hitting license".[78]

Traditional sex role socialization reinforced the idea that the women's needs were fulfilled and their identities derived only directly through men. Cultural norms encouraged the belief that the failure of the marriage represented the women's failure as individuals. Thus, it is in the process of trying to save the marriage at all costs, that

women suffer from intense feelings of shame and guilt, and this keep them trapped in their relationships. Victimization also occurs through a process called "brain washing" in which not only are the victims merely psychologically exploited or physically injured, but the abusers use their power and the sanctity of family relations to control and manipulate the victim's perception of reality.

Many cultures, including Indian, consider the integrity of the group or community to be of greater importance in sustaining the quality of life, rather than the needs of the individual. The Indian woman is directly or indirectly encouraged to sacrifice her own needs, feelings or interests constantly for the needs, feelings and interests of some other person or community: be it children, husband, family or community.[79]

This social conditioning results in the basic difference between how men and women view themselves and the reasons for their violent interactions. There is a tendency in the wives of violent husbands to perceive their husband's violence as caused by factors internal to them. The husbands on the other hand, externalizes the causes of his behaviour. He blames his violence on circumstances such as stress, his partner's behaviour, a "bad day," alcohol or other factors.

Studies have shown that adults who were abused or neglected as children were more likely to be involved in delinquency and adult criminal behaviour. Likewise, parents who were abused when they were children were approximately six times more likely to abuse their own children. There are also reports available of women who succumb to the abuse and continue staying on with the perpetrator despite repeated victimization. Repeated violent victimization rendered women less skilled at self-protection, less sure of themselves and their own worth, and more apt to accept victimization as a part of being female.

Other factors indicated that abused women were more likely to stay if:

(a) the abuse was less severe and less frequent;

(b) they had experienced violence as children; and

(c) they had fewer resources and less power in terms of education or employment.

In short, the more entrapped a woman was in her marriage; the more she suffered at the hands of her husband, without calling for help outside the home. There is

another perspective, which surmises that women themselves are to a large extent responsible for their abusive status. This behaviour has been referred to as "learned helplessness" and serves as an explanation as to why some women who even after separation from their abusive husbands, tended to re-marry similar kind of men.[80]

The crime of wife battering and cruelty has received social, moral and religious sanction form our society. State in turn, seems to protect that culture of violence and battering by adopting the role of onlookers to the incidence of domestic violence.

Historically, violence against women has not been treated as a "real" crime. This is evident in the lack of severe consequences such as incarceration or economic penalties for men guilty of battering their partners. Rarely are batterers ostracized in their communities, even if they are known to have physically assaulted their partners. Batterers come from all groups and backgrounds, and from all personality profiles.

In the case of *Kundalabala* v. *State of Andhra Pradesh,*[81] Dr. Anand, J. observed: "Of late there has been an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. This growing cult of violence and exploitation of the young brides continues unabated. There is a constant erosion of the basic human values of tolerance and the spirit of "live and let live". Lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime".

Understanding a complex phenomenon like violence against married women so deeply embedded in the socio-cultural context, is by no means an easy task. Though many women would prefer to opt out of the abusive situations, it is important to understand why it becomes difficult for most of them to do so. Religious philosophy, customs and rituals serve to reinforce the phenomenon of Sati-Savitri and Pati-vrata and keep alive the tradition of male dominance and female oppression[82].

The Indian culture which glorifies the image of a woman who is tolerant and receptive of whatever is given to her by the husband, is another reason which prevents women from walking out of the violent relationship. At times, religion perpetuates a culture where a woman is supposed to be submissive, respecting her in-laws and considering their husbands like a lord or the master. Symbolic emotional

appeal has been used to confine the Indian woman into the vicious circle of subjugation and oppression.[83]

In trying to leave her husband's abode the Indian woman would be defying cultural norms and would end up inviting society's wrath, ostracism and disrespect. It is the inability to face these frightening consequences that makes most women choose to cope within the boundaries of their tormented surroundings. Many women also express suicidal thoughts but do not attempt suicide. It has been found that one of the factors deterring abused women from suicide is their dependant young children, for whom these women visualized a bleak future.[84]

Thus, there are several causes of violence against married women. More so, these are guises under which violence is inflicted. Important among them are the husband's personality traits like jealousy, suspicious domination and demanding his emotional disturbances and his low self-esteem. The precipitating characteristics of wives are: (a) irritative nature, (b) disobedience or questioning attitude, (c) petty issues of house management, (d) her refusing to act as an instrument for satisfying husband's ambition, (e) suspicion about sexual infidelity, (f) getting money from wives as a right, (g) just to exercise control over wife. Though alcoholism and unemployment or financial constraints appear as causes, even non-alcoholics as well as economically stable families have an equal number of incidents of violence. The former types of families have a dual problem of alcoholism as well as violence. Violence and cruelty due to dowry demands is one of the most common causal factors peculiar to Indian society.

Many theories have been developed to explain why some men use violence against their partners. These theories include family dysfunction, inadequate communication skills, provocation by women, stress, chemical dependency, lack of spirituality and economic hardship. The major ones are the "generational theory" (batterer's history of abuse as a child), the "social learning theory" (learning to use violence as a method of conflict resolution) and the "provocative wife theory" i.e., wife provoking misconduct. The wife's tolerance is explained in terms of "traditional socialization", or "learned helplessness" (Ahuja, 1988; Agnes, 1980; Sinha, 1989; and Mahajan, 1988). The Social Bond Theory of Ahuja (1988) attributes this to the social

structural conditions like family crisis, role frustrations, inappropriate upbringing and unfortunate incidents in life.[85].

All these issues may be associated with battering of women, *but they are not the causes. Removing these associated factors will not end men's violence against women. The batterer begins* and continues his behaviour because *violence* is an *effective* method for gaining and keeping control over another person *and* he usually does not suffer adverse consequences as a result of his behaviour.

CONSEQUENCES OF VIOLENCE AGAINST WOMEN.

Physical and mental health consequences of violence and abuse

Gender-based violence against women is a major public health problem, resulting in considerable avoidable morbidity and mortality. The global health burden because of violence among women in the reproductive age group is 9.5 million Disability Adjusted Life Years (DALYs), which is as high as some other major health concerns such as Tuberculosis (10.9 million DALYs), HIV (10.0 million DALYs) and sepsis during childbirth (10 million DALYs)[86].

Violence can in extreme cases also lead to death as in cases of suicides and homicides. Accidents and injuries, including self inflicted injuries and intentional injuries by others are also found to be associated with violence among women. Two studies from Bangladesh and India shed light on cases of deaths due to abuse of the women. The study from Bangladesh examined 270 cases of deaths due to abuse reported in newspapers in 1982-1985. 29percent of the women had been beaten to death, 39 percent had been subjected to other forms of physical torture and 18percent had been attacked with sharp weapons. In an Indian study of 120 dowry deaths, all the women were found to be below 25 years of age. 46percent of the women had died because of burns, 34percent had died because of drowning. In 86percent of the cases homicide, the principal accused were the husbands.[87]. Three studies from India that have documented deaths by suicide have found that marital discord has been an important factor leading to suicides among women. For example, in a study in Delhi, there were 56percent suicide cases among women, which were attributed to marital discord and ill treatment by the husband and the in-laws. In Madras and Daspur, women between the age groups of 15 to 24 years had committed suicide and the

reasons for these were quarrel or maladjustment with their husbands. Abuse can also lead to a number of physical ailments such as irritable bowel syndrome, gastrointestinal disorders, and other chronic pain syndromes[88].

In addition to immediate physical injury, violence can make women vulnerable to a number of immediate and long term effects such as infectious diseases, mental health problems, injuries, chronic pain syndromes, gastrointestinal problems, hypertension, diabetes and asthma [89].

Gender-based violence also affects women's mental health. It erodes women's self confidence and leads to problems such as depression, post traumatic stress disorders, suicides and alcohol and drug abuse, sleeping as well as eating disorders, anxieties and phobias[90].

In cases of Intimate Partner Violence (IPV), violence against women leads them to maintain a distance from their partner. Their sexual life is affected adversely. Many of them file for divorce and seek separation which again affects the life of children. Some continue to be exploited in lack of proper awareness of human rights and laws of the constitution.

Impact on women's reproductive health

A growing number of studies show that violence by partners and sexual abuse affects the sexual and reproductive health of women in numerous ways.

Forced sex is associated with trauma

In many parts of the world, marriage is taken as granting men the right to have sexual relations with their wife and to use force and power to demand sex from the wife even if she does not want sex. Sexual coercion ranges from rape to different forms of pressure, force and fear that compel girls to have sex against their will. Studies such as those from India[91] and Philippines found that women agree to have sex even if they do not want it because of fear of violence from their husbands. In a Philippines survey, it was found that 43percent of married women from the reproductive age group said that they could not refuse sex with their husband because of fear of beatings from them[92].

Forced sexual initiation could be extremely traumatic for many young women. Studies in Africa, New Zealand and the US show that many women experience forced

sexual initiation at very young ages. Even within marriage, the first sexual experience is very traumatic for women, especially in those parts of the world where women are not given adequate information on sex. For example, a study on married women in a low-income community in India found that women found their first sexual experience extremely traumatic with 18 percent having only having a vague idea of what to expect on the wedding night[93]. Child sexual abuse is a common form of violence in all societies that remains undetected to a great extent. Studies have shown that sexual abuse is much more common among girls than among boys (it is about 1.5 to 3 times more among girls than among boys). Sexual abuse can lead to a wide range of behavioural and psychological problems among children along with sexual dysfunction, low self esteem, depression, thoughts of suicide, alcohol and substance abuse and sexual risk taking[94].

Violence can lead to unwanted pregnancies

Lack of autonomy and powerlessness can lead to unwanted pregnancies among the women as the women do not have the right to deny sex with their husbands nor can they use any form of contraception. For example, a study in Nicaragua found that abused women were twice as likely to have four or more children than those who were not abused. Another large-scale survey among married men in Uttar Pradesh, India found that forced sex could lead to unintended pregnancies. Men who admitted to having forced sex with their wives were found to be 2.6 times likely than other men to cause an unplanned pregnancy[95].

Violence prevents the use of contraceptives and increases the risk of sexually transmitted infections

Many studies have shown that women are afraid to bring up the issues of contraception with their husbands because of the fear of being beaten up. Husbands do not like their wives to use contraception in some cultures because of the fear that this might encourage their wives to be unfaithful. Having many children can be considered as a sign of virility by the husbands and the desire from the wife to use contraception as a challenge to his masculinity[96]. Unprotected sex can also increase the risk of women who are unable to negotiate condom use with their partners to a

number of sexually transmitted diseases such as STIs and HIV, and to unwanted pregnancies.

Violence can also lead to high-risk pregnancies among women

It has been found that around the world, one woman in every four is sexually abused by her partner during pregnancy. Women experiencing violence before and during pregnancy are found to be more likely to delay check-ups and treatment during pregnancy, have less weight gain. They are also prone to infections such as sexually transmitted infections, unwanted or mistimed pregnancies, vaginal and cervical infections, kidney infections and bleeding during pregnancies [97].

Violence is also linked with adverse pregnancy outcomes such as abortions, miscarriages, premature labour and foetal distress. Seven studies in developing countries have shown that violence during pregnancy leads to low birth weight. Violence can also indirectly affect the pregnancy by influencing the woman's health behaviour such as alcoholism, smoking and substance abuse. Stress and anxiety because of violence can also affect a pregnant woman leading to preterm deliveries, decreased food intake [98].

Violence may also lead to maternal deaths

In the Indian subcontinent, it has been found that violence leads to a considerable amount of maternal deaths. A recent study of over 400 villages and seven hospitals in India in the three districts of Maharashtra found that 16percent of all deaths during pregnancy were due to domestic violence[99]. Another study in rural Bangladesh related to homicides and suicides found that forms of violence such as dowry related harassment, stigma because of rape or pregnancy outside marriage led to 6percent of the maternal deaths between 1976 and 1986 and 31percent of maternal deaths among women in the age group of 15-19[100].

Violence increases the risk of gynaecological problems among women.

Gynaecological disorders such as chronic pelvic pain which is associated with 10percent of gynaecological visits in many countries and one quarter of hysterectomies. Various studies have found an association between chronic pelvic pain and history of sexual abuse, sexual assault and or physical or sexual abuse by partners. This may be due to injuries, stress or an expression of psychological distress

through physical symptoms. Sexual abuse during childhood has also been associated with increased sexual risk taking leading to sexually transmitted infections leading to chronic pelvic pain associated with pelvic inflammatory diseases. Sexual violence can also lead to irregular vaginal bleeding, vaginal discharge, painful menstruation, pre-menstrual distress, pelvic inflammatory diseases and sexual dysfunction with problems such as lack of desire, difficulty with orgasms etc [101].

Gender based violence and abuse hinders development

Besides its direct impact on women's health, gender-based violence against women has other human costs. It also hinders development by undermining women's participation in development related activities, reduces their labour participation and earnings.

One of the most affected groups are children who witness violence. Such children have an increased risk for emotional and behavioural problems such as anxiety, depression, poor self-esteem, poor school performance, disobedience, nightmares, and physical health complaints. For example, in a study in rural Karnataka, it was found that children of mothers who were beaten received less food than other children did, which implies that these women probably could not bargain with their husbands on their children's behalf[102].

Economic multiplier effects

These take into consideration the economic impact of violence on the life of the woman as well as on economic productivity. Violence has been found to lead to decreased labour participation of the women, reduced productivity at work and lower earnings affecting the quality of life of the woman. For example, it has been found that about 30percent of the women lost their jobs in the United States as a direct effect of abuse. Another study in Chile found that women who had undergone abuse were found to earn less than half of the earnings as compared to other women.

EFFECTS ON CHILDREN

One of the severe effects of domestic violence against women is its effect on her children. It is nature's phenomenon that a child generally has a greater attachment towards the mother for she is the one who gives birth. As long as the violence

subjected to the mother is hidden from the child, he/she may behave normally at home. The day when mother's grief and suffering is revealed, a child may become upset about the happening deeply. Children may not even comprehend the severity of the problem. They may turn silent, reserved and express solace to the mother. When the violence against women is openly done in front of them since their childhood, it may have a deeper and gruesome impact in their mindset. They get used to such happenings at home, and have a tendency to reciprocate the same in their lives. It's common in especially in rural homes in India which are victimised by the evil of domestic violence.

EFFECT OF DOMESTIC VIOLENCE ON THE SOCIETY

All the different forms of violence discussed in this essay adversely affect the society. Violence against women may keep them locked in homes succumbing to the torture they face. If they come out in open and reveal the wrong done to them for help and rescue, it influences the society both positively and negatively. At one hand where it acts as an inspiration and ray of hope for other suffering women, on the other hand it also spoils the atmosphere of the society. When something of this kind happens in the society, few families may witness the evil of domestic violence knocking their door steps. Some families try to imitate what others indulge in irrespective of it being good or bad for the family.

EFFECTS ON THE PRODUCTIVITY

As mentioned earlier, domestic violence affects the productivity level of the victim negatively. Men and women lose interest in household activities. If they are employed they fail to work with full capabilities in workplace. Children are found to concentrate less on studies. They drop out of school and do not get the education which otherwise they might have got if they were not tormented and thus the country loses a productive asset. Therefore, the nation's productivity altogether gets affected because of domestic violence in homes. When old people are tortured and physically abused, they separate themselves from family members and their daily activities are restricted to themselves. The guardianship they can provide out of their experience, the moral values which they can instill in the grandchildren are all not done as they

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[30]Sections 313-316, IPC.

[31] Section 405 read with section 406, IPC

[32] Section 321, IPC.

[33] Section 322, IPC. Read with sec. Section 323, IPC

[34]. Section 326, IPC.

[35]. Section 327, IPC

[36] Section 349, IPC.

[37]Section 340, IPC.

[38] Section 349, IPC. A person is said to use force to another if he causes, motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion as brings the substance into contact with any part of the other's body, or with anything which that other is wearing or carrying or with anything so situated that such contacts affect that other's sense of feeling.

[39] Section 351, IPC. Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

[40] Section 375 IPC

[41] Section 498A, IPC

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[54] Section 3 of the Act says that any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce him or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause(a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

For the purpose of section 3 :

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan,* property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonable required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

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THE ROLE OF THE FAMILY COURTS IN INDIA

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History of the Family Courts:

Although the ancestor of family court was really child or juvenile court, the framers of family court probably could not have understood it. It had become a tribunal for every family related dispute as it exists today.[1]

The concept actually arose in the late nineteenth century. The first separate juvenile court was established in *Chicago*, *Massachusetts, Rhode Island* and *Indiana* were under the auspices of the "common law doctrine" to try for children. Since this time the seeds of *parent's patria*, or protection for children against themselves or their parents began. With the common law system, the law is made not by legislators but by the courts and the judges. It is often referred to as the "unwritten law". In substance, common law lies in the published court decisions. This offered judges within this system wide discretion to shape the family law.[2]

Justice Potter Stewart stated in the case of *Parham v. J.R.* (1979)[3], "issues involving the family are the most difficult that the courts have to face". Hence, it is no surprise that family law cases are some of the most disputable

[1]. History of Family Court, by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-1, dt.2-8-2013.
[2] . History of Family Court, by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-1, dt.2-8-2013.
[3] . Article History of Family Court by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-1,

and the cases actually places State and federal regulations against disputes brought by father, mother, husbands, wives and children. Consequently, some intricate legal doctrines have arisen trying to define the responsibilities of the family. Under nineteenth century federalism, the States had primary responsibility for family laws, including marriage, divorce, childrearing and inheritance. In *Maynard v. Hill*[4] the Supreme Court stated that State had jurisdiction over the family endorsing State regulation of the family.

In *Myer v. Nebraska*[5], the first federal judicial involvement began under the guise of parent's rights, which affirmed the right of parents to choose a curriculum. This was further affirmed in the case of *Pierce v. Society of Sister*[6]. The Supreme Court upheld the right of parent to direct his or her child's education endorsing parental authority as absolute and constitutionally protected in choosing which school was appropriated for their child. In *prince v. Mass*[7], the court broadened this ruling by declaring that family life could not be disturbed by intervention of the State without substantial justification.

[4]. 125 US. 190, (18880. cf: History of Family Court, by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-1, dt.2-8-2013.
[5]. 262 US. 390, (1923), Ibid.
[6]. 268 US. 510, (1925). Ibid.
[7]. 321 US. 158, (1944)

In *Stachokus v. Meyers*[8], *Ms. Meyers* was ten weeks pregnancy at the time of end of their relationship and she wished to terminate it. *Mr. Stachokus* who did not want the pregnancy terminated was granted a temporary injunction against *Ms. Meyers*. The injunction was quickly withdrawn and *Ms. Meyers* was granted relief to obtain an abortion. Increasing divorce, women entering the workforce, the fright to use birth control and abortion was influencing decisions. Further, alternative family arrangements through homosexuality, surrogacy and foster homes further complicated family courts. Subsequently the family fell under more courts scrutiny and spurred the creation of more extensive family law[9].

The superior Family Court has undergone a number of necessary changes in order to meet the unique and pressing needs of families in need and children in crisis.[10]

Family courts were established several decades ago in the Countries like Britain, Japan, Australia, China etc.

[8] . it was referred in the article of History of Family Court, by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-1, dt.2-8-2013

[9]. History of Family Court, by Effie Belou, downloaded from the website of www.parentsinaction.et/english/familycourt/Hinstory of Family Court.htm. page-2, dt.2-8-2013.

[10] . Superior Court of Justice, Family Court History, downloaded from www.ontariocourts.ca/scj./3n/famct/history.htm, dt.2.8.2013.

Origin to establish the Family Courts in India:

The need to establish the family courts was first emphasized in India by the late *Smt. Durgabai Deshmukh*, after a tour of China in 1953, where she had an occasion to study the working of family courts. She discussed the subject with certain judges and legal experts and then made a proposal to set up family courts in India to Prime Minister Jawaharlal Nehru.[11]

Another reason for setting up of family courts was the mounting pressures from several women's associations, welfare organizations and individuals for establishment of such courts with a view to provide a forum for speedy settlement of family related disputes. Importance was laid on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs.

The matrimonial litigation is a traumatic experience in the lives of parents and their children. Apart from emotional problems, it creates many legal, social and practical complications. It is unfortunate; however, that generally the only way available to parties to obtain "relief" from an unhappy

[11]. Article of Family Courts in India: An Overview, downloaded from the website of http://www.legalserviceindia.com/article/1356.

and intolerable relationship is by subjecting themselves and their spouses to the hazards of ordinary court procedures.[12]

In India the Hindu Marriage Act, 1955 was passed, till date, several amendments have been made to liberalize the grounds for divorce; coupled with that, the Courts have also so construed and applied the provisions as to provide maximum relief with least hardship to any of the parties. The same is true in regard to other personal law statutes governing *Christians, Parsis* and *Muslims* as well[13].

Thereafter, the Law Commission, in its report, as early as 1973 (Fifty Fourth Report on the Code of Civil Procedure), strongly recommended the need for special handling of matters pertaining to divorce.[14]

Subsequently several associations of women, other organizations and individuals have urged, from time to time, that the family courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission

[12] . Report on Working of Family Courts and Model Family Courts, held on 20.3.2002 by National Commission for women, New Delhi, downloaded from the website of ncw.nic.in/… dt.8.2.2013.
[13] . Ibid, page No.2
[14] . Marriage Laws & Family Courts Act, by E.L. Bhagiratha Rao's, 10th edn., 2013, Asian Law House, Hyderabad.

in its 59th report in 1974 had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for settlement before the commencement of trial.[15]

Consequent to these recommendations, Order XXXII-A[16] was incorporated in the Code of Civil Procedure in the year, 1976. This order "seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement. The Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. The need was, therefore, felt, in the public interest, to establish family courts for speedy settlement of family disputes.[17]

After a lot of debate and discussion, the Family Courts Act came into force on 14.9.1984. The whole idea behind the Act is to ensure speedy and inexpensive relief with least formality and technicalities.[18]

[15] . Report on Working of Family Courts and Model Family Courts, held on 20.3.2002 by National Commission for women, New Delhi, downloaded from the website of ncw.nic.in/… dt.8.2.2013.
[16] . Suits relating to matters concerning the family.
[17] . Marriage Laws by E.L. Bhagiratha Rao, 10th edn, p-397, 2013, published by Asia Law House, Hyderabad,
[18] . Report on Working of Family Courts and Model Family Courts, held on 20.3.2002 by National Commission for women, New Delhi, downloaded from the website of ncw.nic.in/… dt.8.2.2013.

In India first and foremost the family court was established in the State of *Rajastan* on 19.11.1985.[19] In *Andhra Pradesh* the family court started it functions on 15.2.1995[20].

The Parliamentary Committee on empowerment of women has recommended that the family courts may be set up in every district. All the State Governments have been requested to set up family courts in all districts. However there are only 212 family courts across the country.[21]

The Family Courts Act, 1984 however does not define 'family'. Matters of serious economic consequences, which effect the family, like testamentary matters are not within the purview of the family courts. Only matters concerning women and children, divorce, maintenance, adoption etc., are within the purview of the family courts.[22]

The words "disputes relating to marriage and family affairs and for matters connected therewith" must be given a broad construction. To read the

[19] . Act enforced on 19.11.1985 (vide Not. No.79/17/85, dt.18.11.1985.
[20] . Under Notification No. S.O. 92 (E), dt.6.2.1995.
[21] . Judicial statistics, Department of Justice, Ministry of Law and Justice, down loaded from the website of doj.gov.in/?q=node/105, dt. 1.2.2013.
[22] . Report on Working of Family Courts and Model Family Courts, held on 20.3.2002 by National Commission for women, New Delhi, p-1, downloaded from the website of ncw.nic.in/… dt.8.2.2013.

words "a suit or proceedings between the parties to a marriage" to mean "parties to a subsisting marriage" would lead to miscarriage of justice[23].

The object for establishment of family courts is to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith[24].

In *Abdul Jaleel v. Shahida*,[25] the Supreme Court held that the Family Courts Act, 1984 was enacted to provide for the establishments of family courts with a view to promote conciliation in and secure speedy settlement of dispute relating to marriage and family affairs and for matters connected therewith by adopting an approach radically different from that adopted in ordinary civil proceedings.

Matters relating to maintenance allowance to wives, children and parents are provided under Sec.125 of the Code of Criminal Procedure, 1973. After enactment of the Family Courts Act, 1984, a proceeding for maintenance falls within the jurisdiction of the family courts at the places where such courts have been established. At other places, the magistrate of the area exercises the jurisdiction in such matters.

[23] . Abdul Jaleel v. Shahida, AIR 2003 SC 2525.
[24] . Family Courts Act, 1984 by Saibaba Itapu,1st edn, 2009, P-99, Published by Sharma Law House, Hyderabad.
[25] . AIR 2003 SC 2525 = 2003 (4) SCC 166.

The family courts are specialized as civil courts, which deal exclusively with dissolution of marriage; declaration of the matrimonial status of any person; declaration of ownership of properties of the parties concerned; interim order of injunction arising out of marital relationships; declaration of legitimacy of any person, or guardianship of a person, or the custody or access of any minor and suits for maintenance.

The Family Courts Act, 1984 was part of the trends of legal reforms concerning women. The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfare of society and dignity of women. Prevalence of gender biased laws and oppressive social practices over centuries have denied justice and basic human rights to Indian women[26].

The State Government after consultation with the High Court and by notification establishes family court for every area in the State comprising a

[26] . Article "Family Court in India: An Overview, downloaded from the website of http://www.legalserviceindia.com/article/1356--familycourts-in India, dt.12.7.2009.

city or town whose population exceeds one million[27] and may establish family courts for such other areas in the State as it may deem necessary[28].

The State Government shall after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a family court shall extend and may, at any time, increase, reduce or alter, such limits[29].

The place of the family court need not be permanent. It can be shifted from one place to yet another place within the area[30].

The State Government may, with the concurrence of the High Court, appoint one or more persons to be the judge or judges of a family court[31].

When a family court consists of more than one judge, each of the judges may exercise all or any of the powers conferred on the court by this Act for the time being in force[32]. The State Government may with the concurrence of the High Court appoint any of the judges to be the principal

[27] . Section 3 (1) (a) of Family Courts Act, 1984.
[28]. Section 3 (1) (b) of the Family Courts Act, 1984.
[29] . Section 3 (2) of the Family Courts Act, 1984.
[30] . Gangadharam v. State of Kerala, AIR 2006 SC 2360.
[31] . Section 4 (1) of the Family Courts Act, 1984.
[32] . Section 4 (2) (a) of the Family Courts Act, 1984.

judge and any other judge to be the additional Principal Judge[33]. The principal judge may, from time to time, make arrangements as he may deem fit for the distribution of the business of the court among the various judges[34]. The additional principal judge may exercise the powers of the principal judge in the event of any vacancy in the office of principal judge or the principal judge goes on leave[35].

For appointment as judges, the persons should have seven years experience in judicial office or the office of a member of a tribunal or any post under the Union or a State requiring special knowledge of law[36], or persons should have seven years experience as an advocate of a High Court or of two or more such courts in succession[37].

The Central Government with the concurrence of the Chief Justice of India may prescribe some other qualifications[38] and also made rules for other qualifications for appointment of a judge of the family court.[39]

[33] . Section 4 (2) (b) of the Family Courts Act, 1984.
[34] . Section 4 (2) (c) of the Family Courts Act, 1984.
[35] . Section 4 (2) (d) of the Family Courts Act, 1984.
[36] . Section 4 (3) (a) of the Family Courts Act, 1984.
[37] . Section 4 (3) (b) of the Family Courts Act, 1984.
[38] . Section 4 (3) (c) of the Family Courts Act, 1984.
[39] . Rule 2 of Family Courts (Other qualifications for appointment of judges) Rules, 1984.

As per Rule 2 of Family Courts (Other qualifications for appointment of judges) Rules, 1984, "Other qualifications for appointment of family court judges" are prescribed. They are:

i) A person shall have possessed a Post-graduate in Law with specialization in Personal Laws; or a Post-graduate degree in Social Sciences such as Master of Social Welfare, Sociology, Psychology or Philosophy with a degree in Law;[40] and

ii) A person shall have at least seven years experience in field work, research or of teaching in a Government or in a College/University or a comparable academic institute, with special reference to problems of women and children; or a person shall have seven years experience in the examination and/or application of Central/State Laws relating to marriage, divorce, maintenance, guardianship, adoption and other family disputes[41].

In India some High Courts are exercising their powers for appointment of judges to the family courts as per Rule 2 of the Family Courts Rules, 1984, but the other High Courts are not following the same. It is a draw back to the family courts for disposing the cases properly and quickly by way of proper conciliation.

[40] . Rule 2 (i) of Family Courts (other qualifications for appointment of judges) Rules, 1984.
[41] . Rule 2 (ii) of Family Courts (other qualifications for appointment of judges) Rules, 1984.

The judges who are appointed to the family courts should be committed to achieve the object of the Act. They have to protect and preserve the institution of marriage and to promote the settlement of disputes by conciliation and counseling[42].

Sub-section (4) of Section (4) of the Act specially says that women shall be appointed as a judge. But still March, 2009 out of 84 judges, in all the 84 courts there were only 18 women were appointed as judges.

Except prescribing the qualifications of judges the Central Government has no role to play in the administration of justice. Different States have different procedure. So there is need to have uniform set of rules in all over India to achieve the object of the Act.

Though the Act laid down broad guidelines, it was left to the State Government to frame the rules of procedure. Still there are some states not yet established courts nor rules.

[42] . Section 4 (4) (a) of the Family Courts Act, 1984.

A person shall be continued in service as a judge of a family court until he attains the age of sixty-two years[43] and their salary or honorarium and other allowances from time to time payable and the other terms and conditions of family court judge are prescribed by the State Government in consultation with the High Court[44].

The State Government may in consultation with the High Court provide rules for the association of social welfare agencies etc., in such manner and for such purposes some conditions specified in the rules, with a family court of:

(i) institutions or organizations engaged in Social Welfare or the representatives thereof[45];

(ii) persons professionally engaged in promoting the welfare of the family[46];

(iii) persons working in the field of social welfare[47]; and

(iv) any other person whose association with a family court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act[48].

[43] . Section 4 (5) of the Family Courts Act, 1984.
[44] . Section 4 (6) of the Family Courts Act, 1984.
[45] . Section 5 (a) of the Family Courts Act, 1984.
[46] . Section 5 (b) of the Family Courts Act, 1984.
[47] Section 5 (c) of the Family Courts Act, 1984.
[48] Section 5 (d) of the Family Courts Act, 1984.

The State Government in consultation with the High Court:

(1) determine the number and categories of counselors, officers and other employees required to assist a family court in discharge of its functions and provide them to assist the family courts[49] and

(2) make rules regarding the terms and conditions of association of the counselors and the terms and conditions of service of the officers and other employees[50].

Role of the counselors in the family courts is very important. Fifty percent of the cases can be solved by way of proper counseling. The process of selection of the counselors is significant for delivery of justice. So far as the judges are concerned, they can also participate in counseling at the second stage. At the first stage the cases are sent to the counselors for counseling. In many cases where at the initial stage the counseling has failed, proactive role of the judge has helped in resolving the dispute[51].

Counseling and conciliation are the two pillars on which the whole structure of family courts is built. Counseling, in fact, is the foundation on which the philosophy of conciliated settlement rests. The role of the

[49]. Section 6 (1) of the Family Courts Act, 1984.
[50] . Section 6 (2) of the Family Courts Act, 1984.
[51] . Report of the Workshop held on 20.3.2002 by National Commission for women, downloaded from the website of www.ncw.nic.in/.....

counselors is not limited to counseling but extends to reconciliation and mutual settlement wherever deemed feasible. Most of the cases filed before the family courts can be resolved by way of proper counseling[52].

The Counselor shall fix time and date of appointment and inform the same to the parties for their appearance. If either of the parties fails to attend on that date the counselor may fix another date and communicate the same to the concerned by registered post. In case of default by either of the parties on the adjourned date, the counselor shall submit a report to the court and then the court will take action against the defaulting parties. On appearance of parties the counselor made efforts to settle the dispute by way of conciliation. The counselor may in discharge of his duties visit the home of either of the parties and interview the relatives, friends and acquaintances of either of the parties[53].

The counselor may take the assistance of any organization, institution or agency in discharge of his duties. The counselor shall submit his report to the Court as and when called for to assist the court in deciding the case on hand. The report of the counselor all points about living environment of the

[52] . Article written by Namita Singh Jamwal on the topic of family dispute conciliation, dt.12.7.2009, down loaded from the website of www.mainstreamweekly.net/article 1205.html, p-1.
[53] . Rule 18 H.C. of A.P. Family Courts Rules, 2005.

parties concerned, personalities, relationship, income and standard of living, educational status of the parties, status in society and counselor's finding[54].

The marriage counselor shall be used the powers against the women in the interest of the family since it is imbibed into the minds of such counselors and their primary commitment is to preserve the institution of marriage. The report of the marriage counselor is kept confidential, and not made a subject of cross-examination[55].

Jurisdiction:

All family courts shall have the power and jurisdiction exercisable by any District Court or any subordinate civil court in suits and proceedings of the nature dealt with explanation to Section 7 (1) of the Act.

Following are the matters which can be filed in the Family Courts:-

1. Decree for nullity of marriage.
2. Restitution of conjugal rights.
3. Judicial separation.
4. Dissolution of marriage.
5. Declaration of matrimonial status of any person.
6. Matrimonial property matters.

[54] . Rule 18 H.C. of A.P. Family Courts (Court) Rules, 2005.
[55] . Rule 20 HC., of A.P. Family Courts (Court) Rules, 2005.

7. Claim of maintenance.

8. Guardianship.

9. Custody of children.

10. Access of children.

11. Application for injunction in matrimonial matters.

12. Custody of children, guardianship, legitimacy of child under the Hindu Minority and Guardianship Act, 1956.

Thus the family court entertain the applications for grant of decree of divorce under the various Acts like Dissolution of Muslim Marriage Act, 1939, Muslim Women (Protection of Rights on Divorce) Act, 1986, the *Parsi* Marriage and Divorce Act, 1936, the Divorce Act, 1869, the Special Marriage Act, 1954, Foreign Marriage Act, 1969 etc.[56]

Validity of marriages under Hindu Marriages (validation of proceedings) Act, 1960, the Muslim Personal Law (*Shariat*) Application Act, 1937, Child Marriage Restraint Act, 1929, *Anand* Marriage Act, 1909, *Arya* Marriage Validation Act, 1937, Marriages Validating Act, 1952.[57]

[56] . Rule 5 (d) of H.C. of A.P. Family Courts (Court) Rules, 2005.
[57] . Ibid.

If any dispute to a marriage between the parties arises irrespective of their caste or creed and validity of a marriage the family court has got jurisdiction[58].

The property dispute between the parties to a marriage the family court can entertain the petition.[59]

The family court entertain suit for partition of the property between parties to a marriage[60].

A suit filed by wife for return of gold ornaments, cash etc., given at the time of marriage even after death of husband being one arising out of marital relationship though not between parties to marriage[61].

The family court can also pass orders or injunctions in circumstances arising out of a marital relationship.[62]

The family court has got jurisdiction to declare of any person as to the legitimacy[63].

[58] . Reddy Ananda Rao vs. Ms. Totavani Sujatha, AIR 2003, NOC 258 AP.
[59] . Explanation (c) in Section 7 (1) of the Family Courts Act., 1984.
[60] . Mrs. Mariamma Ninan v. K.K. Ninan, I (1997) DMC (AP) 570.
[61] . Suprabha v. Sivaraman, AIR 2006 Ker. 187.
[62] . Explanation (d) in Section 7 (1) of the Family Courts Act, 1984.
[63] . Explanation (e) in Section 7 (1) of the Family Courts Act, 1984.

A declaratory suit regarding legitimacy of a person would fall within the jurisdiction of Family Court[64].

The family court has also entertains the application for granting maintenance under the Hindu Adoptions and Maintenance Act, 1956[65].

The family court has jurisdiction to give the custody of the child to a proper person and also to appoint a proper person as guardian to the minor children.[66]

The family court has power to entertain the application under the Guardian and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956[67].

In addition to that, the family court shall have jurisdiction exercisable by a First Class Magistrate under Chapter IX of the Criminal Procedure Code i.e., relating to order for maintenance of wife, children or parents, has also been conferred on the family courts[68]. There is also an enabling provision that the family courts may exercise such other jurisdiction as may be conferred on

[64]. Renubala Moharana v. Mina Mohanty,AIR 2004 SC 3500.
[65]. Rule 5 (d) of H.C. of A.P. Family Courts (Court) Rules, 2005.
[66]. Explanation (g) in Section 7 (1) of the Family Courts Act, 1984.
[67]. Rule 5 (d) of H.C. of A.P. Family Courts (Court) Rules, 2005.
[68]. Section 7 (2) (a) of the Family Courts Act 1984.

them by any other enactment[69]. In this connection the family court exercises its power to grant maintenance under Sec.125 of Criminal procedure Code[70].

The Family Court has no jurisdiction to entertain the applications in certain circumstances. The following cases are some examples.

1. A suit for declaration regarding the illegitimacy of the child cannot be entertained[71].

2. In *Ranjeet Chobra v. Savita Chobra*[72], it was held that a dispute relating to appointment of Guardian of minor's property has come under the jurisdiction of the Civil Court.

3. The family court cannot entertain the suit of a minor's property.[73]

4. The proceedings under Muslim Women (Protection of Rights on Divorce) Act, 1986, a Muslim woman can apply under Sections 3 and 4 of the said Act for maintenance only to Magistrate of the First Class[74].

5. The suit involving a dispute between the brothers, sisters, mothers, fathers etc. concerning property.[75]

6. The suit for declaration that the father should provide necessary funds for his daughter's marriage.[76]

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[69] . Section 7 (2) (b) of the Family Courts Act 1984.
[70] . Rule 5 (d) of H.C. of A.P. Family Courts (Court) Rules, 2005.
[71] . Renubala Maharana vs. Mina Mohanty, AIR 2004, SC.3500.
[72] . 1991 (2) Civil L.J. 483.
[73] . Kamal V.M. Allauddin v. Raja Shaikh AIR 1990 Bom. 299.
[74] . Karim Abdul Rehaman Shaikh v. Shehnaz Karim Shaikh, 2001 (1) ALD (Crl.) 145 (Bom) (FB).
[75] . P. Srihari v. P. Sukunda, II (2001) DMC (AP) 135.

7. Prior to the establishment of the family court, if there was an order already passed by the Civil Court under Hindu Marriage Act, 1955 and any further alteration in that regard is intended it must be made by the Civil Court itself.[77]

8. The ambit and scope of the proceedings of a suit for partition and allotment of shares was completely outside jurisdiction of Family Court[78].

9. The suit relating to joint family property in which the parties other than the spouses are sharers cannot be taken as a suit arising out of matrimonial relationship[79].

Provision has also made to exclude the jurisdiction of other courts in respect of matters for which the Family Court has been conferred jurisdiction.

According to Section 8, after the establishment of the family court, the District Court or any sub-ordinate Civil Court have no jurisdiction to entertain any civil or criminal matters.

Similarly if the Family Court established in any area, the magistrate in that area has no jurisdiction or power to entertain maintenance proceedings under section 125 of the Criminal Procedure Code, 1973. If any cases are

[76] . 1995 AIHC 617 (Ker).
[77] . P. Madhavan Nair v. K. Ravindran Unni, AIR 1993 Karn. 203.
[78] . Mohammed Isaq v. Meharunnisa, I (1998) DMC (Kant.) 20.
[79] . Manita Khurana v. Indra Khurana, AIR 2010 Del. 69.

pending before the Magistrate Court, all such cases shall be transferred to family court immediately after establishment of family court in that area[80].

Except Family Court, no Court shall have jurisdiction to entertain both civil and criminal proceedings with regard to maintenance[81].

Chapter IV of the Family Courts Act deals with the procedure of the family courts in deciding cases before it[82].

A duty has been imposed on the family courts to see that the parties are assisted and persuaded to come to settlement and for this purpose they have been authorized to follow the procedure specified by the High Court by means of rules to be made by it[83].

The role of family courts in settling the matters between the parties speedily by following the rules made by High Courts in India.

Under the provisions, different High Courts have different rules of procedure for the determination and settlement of disputes by the family courts.

[80] . Section 8 (c) (i) and (ii) of the Family Courts Act, 1984
[81] . Abdul Rashid Khan v. Musta Firan Bibi,AIR 2006 Ori. 186.
[82] . Section 9 of the Family Courts Act, 1984.
[83] . Section 9 (1) of the Family Courts Act, 1984.

In the proceedings at any stage, there is a reasonable possibility of settlement between the parties; the family court has empowered to adjourn the proceedings until the settlement is reached [84].

In *Gurubachan Kaur vs. Preetam Singh*,[85] the Division Bench of Allahabad High Court held that "a duty has been imposed under Sec.9 of the Family Courts Act to make all possible endeavour which is at para material with Order XXXIII[86] of CPC. The Court must express its concern that the Family Courts should work in a spirit of dedication to settle the matter by negotiation and all possible methods of persuasion so that the marriage may be preserved. The Court expresses its concern that it should not turn into an ordinary Civil Court as seen by while sitting in this jurisdiction and dispose of the matter as expeditiously as possible and adjournments should be restricted.

While applying the provisions of the Code of Civil Procedure, 1908 in a suit or proceeding before the family court, the family court shall be deemed to be a civil court and shall have the powers of such court.[87] While applying

[84]. Section 9 (2) of the Family Courts Act, 1984.
[85]. AIR 1998, All. 140.
[86]. Suit may be instituted by indigent persons.
[87]. Section 10 (1) of the Family Courts Act, 1984.

the provisions of the Code of Criminal Procedure, 1973, it shall apply to the proceedings under Chapter IX of that Code before a family court[88].

Moreover, the family court laying down its own procedure with a view to arrive at a settlement in respect of subject mater of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other[89].

The Family Court while dealing with the petition preferred under S.125 of the Criminal Procedure Code is bound to follow the procedure prescribed in Section 126 thereof[90].

The Court's duty is even to put questions to elicit truth and should show dynamic approach towards the achievement of the ends of justice[91].

Matters to be disposed off expeditiously and adjournments be restricted[92].

The proceedings may be held in camera if the family court so desires and shall be so held if either party so desires[93].

[88] . Section 10 (2) of the Family Courts Act, 1984.
[89] . Section 10 (3) of the Family Courts Act, 1984.
[90] . Gayithri v. Ramesh, II (1993) DMC (Raj.) 121.
[91] . Velpat Grama Panchayat vs. Asst. Marketing Director, Guntur, AIR 1998, All. 148 at p.144.
[92] . D.S.N.V. Prasad Babu vs. Union of India, AIR 1998, All 140 at P.144.
[93] . Section 11 of the Family Courts Act, 1984.

At the time of recording evidence usually a suffered wife cannot say the real story in the presence of other litigants and legal practitioners at the court-hall due to humiliation and fear as it is her private family matter. In those circumstances, on the request of parties, the judge of the Family Court shall record the evidence after closing the doors of the court-hall by sending out the advocates and other litigants.

The family court has power to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not including a person professionally engaged in promoting the welfare of the family, for the purpose of assisting the family court in discharging the functions imposed by this Act[94].

The Family Court also has power to summon the medical experts to record their evidence relating to the subject matter of the cases.

To exercise inherent powers may direct medical examination of a party to a matrimonial proceeding in appropriate cases[95].

Section 13 of the Act provides that the party in a suit or proceedings before a family court has no right to engage an advocate to represent on his

[94] . Section 12 of the Family Courts Act, 1984.
[95] . Lalit Kishore v. Meeru Sharma & anr., AIR 2010 SC 1240.

behalf. However, the court can seek help or assistance of legal expert as *amicus curiae* (a friend of the court).

The Act and rules excluded the participation of lawyers without making any alternative rules. Litigants are left to the mercy of court clerks to help them. It appears the litigants of their constitutional rights by not allowing the party to engage lawyer of his/her choice.

However, the court shall allow a legal practitioner on either side to appear only as *amicus curiae*, if it finds necessary in the interest of justice. Thus the court has a discretionary power to allow advocate or not to represent on behalf of a party.

To grant permission to a party to be represented by a legal practitioner the court shall maintain a panel of legal experts as *amicus curiae* consisting five members out of legal experts and also from the retired judges of local area, who have expertise in the field. The *amicus curiae* shall be paid a fee by the State Governments in a case which may be determined by the court not exceeding Rs.500/- per day[96].

[96] . Rule 16 explanation (2) H.C. of A.P. Family Courts (Court) Rules, 2005.

Where a party has no means to engage an advocate shall be entitled to free legal aid and advice from the State Legal Services Authority in accordance with the rules made there under by the State[97].

For that Family Court shall maintain a panel of lawyers willing to render free legal aid and advice and the Court select any of the lawyers from the said panel to the poor persons to attend their cases[98].

In every court a legal practitioner has a right to appear on behalf of his client, the said right cannot be claimed before the family court, it is totally left to the discretion of the Family Court to allow any Counsel on behalf of the client and give necessary legal assistance. So, if any of the parties before the Family Court filed a memo or petition seeking permission of the Court for him or her to engage a counsel and have legal assistance, the Family Court, may or may not allow the petition. When so allowed, the Counsel of a party could file the *Vakalat* and do all that is necessary for the client in conduction the case[99].

[97] . Rule 16 explanation (3) H.C. of A.P. Family Courts (Court) Rules, 2005.
[98] . Rule 16 explanation (4) H.C. of A.P. Family Courts (Court) Rules, 2005.
[99] . S. Venkataraman v. L. Vijayasarathan (1997) 1 DMC 507 (Mad).

If one side has been permitted to be represented by a legal practitioner, the Family Court should not refuse permission to the other side to be represented by a legal practitioner[100].

In *Gurubachan Kaur Vs. Preetam Singh*[101], the Division Bench of Allahabad High Court held that "Family Courts if grant opportunity to the parties to be presented by lawyers and it comes to the conclusion that some obstruction is being caused by non-availability of lawyers or otherwise. If some problems come to its notice, the Family Courts can immediately cancel the "*Vakalatnama*", and obey the mandate of legislature rather than prolonging the agony and waiting period of matrimonial disputes. The time spent cannot be regained or recalled and youth cannot be restored. So the Court should also keep in mind also the settlement of the parties by negotiation".

Like other courts, the family court may receive as evidence any report, statement, documents, information or matter for its opinion and assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872[102].

[100] . Komal S. Padukone v. Principal Judge, Family Court, Bangalore, AIR 1999 Kant. 427.
[101]. AIR 1998, All. 140.
[102] . Section 14 of the Family Courts Act, 1984.

In *Manohar Lal Agrawal v. Santosh & Ors.*[103], the High Court held that it is open to the Judge of a Family Court to call a witness, including grown up children to understand the nature of the dispute and to reconcile the parties. It is not proper for the Judge of the Family Court to leave every filing in the hands of the parties who are not conversant with the procedure of the Court.

In *Narayana Roy v. Jamuna Dey (Roy)*[104], it was held that the rigor of the evidence Act is not applicable in reception of evidence by family court.

There is no necessity to record the evidence of witnesses at length in the family court but the judge shall record the evidence of witnesses concisely only subject matter of the proceedings and it shall be signed by the witness and the judge[105].

Like civil courts, in the family court the evidence of any person may be accepted by way of affidavit[106]. On the application of any of the parties to the suit or proceeding, the family court has power to summon and examine any person as to the facts contained in his affidavit[107].

[103] . II (1993) DMC (Raj.) 202.
[104] . AIR 2010 Gau. 75.
[105] . Section 15 of the Family Courts Act, 1984.
[106] . Section 16 (1) of the Family Courts Act, 1984.
[107] . Section 16 (2) of the Family Courts Act, 1984.

The judgment of the family court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision[108].

Usually the legal practitioners filed applications, counters, affidavits and written arguments before the family courts with unnecessary contents, in that circumstances, the judge of the family court shall prepare orders or judgment concisely with important points, which are directly relating to the case facts and section of law under which the application is filed.

The Act also brought civil and criminal jurisdiction under one roof. The family court passed orders under the civil procedure shall be executed the same manner as is prescribed by the Code of Civil procedure[109]. If the family court passed orders under Chapter IX of the Code of Criminal procedure, shall be executed in the manner prescribed for execution of such order by that code[110].

A decree or order may be executed either by the family court which passed it or by the other family court or ordinary civil court to which it is sent for execution[111].

[108]. Section 17 of the Family Courts Act, 1984.
[109]. Section 18 (1) of the Family Courts Act, 1984.
[110]. Section 18 (2) of the Family Courts Act, 1984.
[111]. Section 18 (3) of the Family Courts Act, 1984.

The Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973 or in any other law, an appeal shall lie from every judgment or order of a family court to the High Court both on facts and on law, except interlocutory orders[112].

The family court passed a decree or order with the consent of the parties is not applicable for an appeal[113].

If any appeal is preferred under this Act, it shall be within a period of thirty days from the date of the judgment or order of a family court[114].

The High Court on its own motion call for the record for examination of any proceeding in which the family court situated within its jurisdiction and pass an order under Chapter IX of the Code of the Criminal Procedure, 1973 for the purpose of satisfying itself as to the correctness, legality or propriety of the order[115]. Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a family court[116]. An appeal preferred

[112]. Section 19 (1) of the Family Courts Act, 1984.
[113]. Section 19 (2) of the Family Courts Act, 1984.
[114]. Section 19 (3) of the Family Courts Act, 1984.
[115]. Section 19 (4) of the Family Courts Act, 1984.
[116]. Section 19 (5) of the Family Courts Act, 1984.

under sub-section (1) shall be heard by a Bench consisting of two or more judges[117].

An appeal was filed against the order of the Family Court under the Dissolution of Muslim Marriage Act, it was held that "Learned Family Judge who had occasion to see the witness and record her statement where the wife has alleged assault and humiliation for not bringing enough dowry against her husband, accepted the same to be correct. No infirmity in her evidence has been brought to light. In such circumstance the appeal filed by the husband was dismissed[118].

Where all the presumptions are in favour of the wife, the Order of Family Court rejecting her application for maintenance was set aside and the respondent was directed to pay Rs.300/- per month as maintenance to her[119].

The Family Court Act shall have effect anything inconsistent contained in any other law for the time being in force by virtue of any law other than this Act[120].

[117] . Section 19 (6) of the Family Courts Act, 1984.
[118] . Sirajuddin Ansari v. Bilquees Khatoon, 1995 AIHC 2901 All.
[119] . Prem Singh v. Smt. Madhu Bala, 1995 AIHC 6149 Raj.
[120] . Section 20 of the Family Courts Act, 1984.

By notification in the Official Gazette, the High Court makes rules as it may deem necessary for carrying out the purposes of this Act[121].

In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters:

i) normal working hours of family courts and holding of sittings of family courts on holidays and outside normal working hours[122];

ii) holding of sittings of family courts at places other than their ordinary places of sitting[123];

iii) made efforts to follow the procedure by a family court for assisting and persuading parties to arrive at a settlement[124].

By notification, the Central Government with the concurrence of the Chief Justice of India makes rules prescribing the other qualifications for appointment of judges to the family courts.[125].

Every rule made under this Act by the Central Government shall be laid, and produce before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session on in two or

[121] . Section 21 (1) of the Family Courts Act, 1984.
[122] . Section 21 (2) (a) of the Family Courts Act, 1984.
[123] . Section 21 (2) (b) of the Family Courts Act, 1984.
[124] . Section 21 (2) (c) of the Family Courts Act, 1984.
[125] . Section 22 (1) of the Family Courts Act, 1984.

more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified from or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule[126].

With the consultation of High Court, the State Government makes rules.

i) for carrying out the purposes of this Act[127].

ii) about the salary or honorarium and other allowance of judges;[128]

iii) about the terms and conditions of association of counselors and terms and conditions of service of the officers and other staff of the family court.[129]

iv) for payment of fees and expenses (including traveling expenses) of medical and other experts[130];

v) for payment of fees and expenses to legal practitioners appointed.[131]

vi) for any other matter which is required[132].

[126]. Section 22 (2) of the Family Courts Act, 1984.
[127]. Section 23 (1) of the Family Courts Act, 1984.
[128]. Section 23 (2) (a) of the Family Courts Act, 1984.
[129]. Section 23 (2) (b) of the Family Courts Act, 1984.
[130]. Section 23 (2) (c) of the Family Courts Act, 1984.
[131]. Section 23 (2) (d) of the Family Courts Act, 1984.

Any rule made by a State Government under this Act shall be produced before the State Legislature[133].

A copy or application shall be filed before the family court along with two copies signed by the parties, which are to be sent to the respondent and the family counselor[134].

The family court shall furnish certified copy of judgment to the concerned parties in every case at free of cost.[135]

There is no court fee for the appeal before the High Court against the decree or orders passed by the family court under the civil proceedings[136].

It is evident that the setting up of these Family Courts was a dynamic step so far as reducing the backlog and disposing off cases while ensuring that there is an effective delivery of justice goes. The establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected with.

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[132] . Section 23 (2) (e) of the Family Courts Act, 1984.
[133] . Section 23 (3) of the Family Courts Act, 1984.
[134] . Rule 6 of H.C. of A.P. Family Courts (Court) Rules, 2005.
[135] . Rule 29 of H.C. of A.P. Family Courts (Court) Rules, 2005.
[136] . Rule 30 of H.C. of A.P. Family Courts (Court) Rules, 2005.

The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum, and this forum was expected to work expeditiously, in a just manner and with an approach ensuring maximum welfare of the society and dignity of women. But still some Family Courts are not reached the goal perfectly since most of the judges are not following the procedure and rules of the Act.

Still in some states permanent counseling centers are not established and failed to fulfill the provisions under Section 6 of the Family Courts Act, 1984.

In some family courts the counselors were appointed as family counselors at free of cost, due to which they are not concentrating perfectly for conciliation to the parties so that the rate of result is not reducing through conciliation in the Family Courts.

Fifty percent of the cases can be solved by way of proper counseling and there is a provision to appoint permanent counselors for conciliation to the Family Courts. But the State Governments and High Courts failed to appoint the permanent family counselors to the Family Courts till now. The

temporary counselors are not concentrating on the cases in the Family Courts as like permanent counselor as they have to earn money for their livelihood.

As per the family court rules the family court judge shall maintain the panel of legal experts as *amicus curiae* but the judges are not following the rules properly till now.

The judges appointed to the family courts have not any special experience in dealing with the family matters or training in settling the disputes through conciliation.

Some State Governments and High Courts also failed to give preference for appointing women as family judges.

The personal enquiry of the Researcher and as per the report on working of family courts held by National Commission for Women, it was revealed that the family courts are entrusted with other cases like civil suits, motor vehicle accident cases etc. by the Principal District Judges, due to which the object of the family courts have not fulfilled and the cases relating to marriage have taken much time for disposal. In this connection the maintenance cases before the family courts taking time months together without granting maintenance, due to which number of deserted women and

their minor children are suffering for their livelihood and causing hindrance in the studies of innocent children. Moreover, huge time may be taken for disposal of divorce cases. If the said method is prevented before the family courts, the matrimonial cases will be disposed speedily.

RELOCATION
AND
PARENTAL ABDUCTION

RELOCATION AND PARENTAL ABDUCTION

The abduction of a child is a tragedy. No one can fully understand or appreciate what a parent goes through at such a time, unless they have faced a similar tragedy. Every parent responds differently. Each parent copes with this nightmare in the best way he or she knows how.~ John Walsh, US television personality, criminal investigator, human and victim rights advocate and the host, as well as creator, of America's Most Wanted.

Relocation disputes between parents are frequently in our courts. Where both parents have guardianship, it necessarily follows that consent will be needed when one decides to relocate with a minor child. It is important to note that there is no section in the Children's Act that deals specifically with relocation. The closest the Act gets to relocation is a section that deals with the jurisdiction of the court in matters where a child is removed from South Africa.

It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstruct their lives. Typically, a relocation dispute will arise when one parent, normally the parent of primary residence and with whom the child usually resides, decides to move town/province/country. Often, the parent who is to be left behind will refuse to give consent for the relocation. The primary caregiver can then approach the High Court for an order dispensing with the other parent's consent. It must be noted that it is not a given that the court will automatically give its consent. Because the Act does not set criteria, our courts have to consider various facts and case law before they can grant an order allowing relocation.

Factors a court will rely on in cases of relocation

The court will only grant permission based on the best interests of the child. An important factor that the court will take into consideration is whether the decision by the parent to relocate is reasonable and bona fide. Our courts take a pragmatic approach to such cases, and although the move may be detrimental to the other parent who will have less contact with the child, life must go on. That is not to say that the courts don't consider the impact of the relocation of the left-behind parent, but our courts are compelled to respect the freedom of movement and family life of relocating parents. In looking at what is in the best interests of the child, the court will also consider whether relocation will be compatible with the child's welfare.

Examples of relocation court cases

- The court rejected a mother's application to relocate with her daughter despite finding that the decision to leave was bona fide. What the court found was that the practicalities of her decision to move were ill-researched and outweighed by the child's need to not be separated from either parent.
- The court rejected a father's application to relocate with his daughter. The relationship between the parents was acrimonious and, at the time of divorce, the father alleged that the mother had sexually abused their daughter. Based on this and various other factors, the court awarded care to the father. After several years, the father sought to relocate to Israel. Although the mother initially gave her consent because she was led to believe she would be allowed contact with her child, she later withdrew it when she realised that her belief was false. The court refused the relocation based on the fact that the father could not provide sufficient information about when and where he would be employed, where the

child would be going to school and how she would be assisted to learn Hebrew. The court also found the father to be thwarting attempts by the mother to rebuild her relationship with her daughter. The court emphasised the fact that it was important for the mother and child to re-establish their relationship, and criticised the experts (psychologists) who had recommended the relocation for not considering all the facts.

- The court rejected a mother's application to relocate with her four children, aged eleven and eight (triplets). The parents had been awarded joint care in the divorce settlement agreement, the intention being that the children would spend an equal amount of time with each parent. Three years after the divorce, the wife filed an urgent application in the High Court for variation of the care order: she sought an order declaring her the primary caregiver and granting her the authority to relocate the children from South Africa to Dubai to live with a new man whom she planned to marry. A social worker and a clinical psychologist commissioned by the mother recommended that she be granted primary care and permission to relocate. Experts not commissioned by her held a different view, finding that relocation would not be in the best interests of the children as they would miss their father, school friends and the city to which they were accustomed. The court found that the mother's experts' recommendations were based too heavily on financial issues and did not sufficiently take into account the bond that existed between the children and their father. The court relied, ultimately, on the children's views, having found that they were of an age and maturity to make informed decisions. The mother's application was dismissed as the court found that it was not in the children's best interests.

International Child abduction

The Hague Convention on Civil Aspects of International Child Abduction

South Africa is a party state of the Hague Convention on Civil Aspects of International Child Abduction, an international treaty aimed at preventing the removal of a child from the jurisdiction in which he/she normally resides by a parent or caregiver without the consent of the other parent or caregiver and to facilitate the return of the child wrongfully removed. South Africa ratified the Convention in 1996 and it came into operation on 1 October 1997.

The purpose of the Convention is to secure the prompt return of any child wrongfully removed to or retained in a contracting state. The Convention binds member states to assist the parent or person left behind. By providing a simplified procedure and additional remedies to those seeking the return of a child who has been wrongfully removed or retained, the convention aims to curb international abductions of children.

The purpose of a speedy return is to place the child in the jurisdiction of a court that is better appraised to deal with the merits of the parental dispute. A child removed from one parent and taken to another country is subjected to the concentrated influence of the custodial parent; time favours the abductor. Unless firm steps are taken to ensure the prompt implementation of the Convention procedures, in a prolonged separation, the 'absent' parent's influence on the child will wane. In addition, this parent will be at a considerable disadvantage in litigating a contested claim for custody and access in the courts of a country other than those of the place of habitual residence (the country from which the child has been removed). Few people can readily afford litigation in their own jurisdiction, let alone in foreign courts, where the legal system may be

different, laws and even language unfamiliar, costs substantial, and facilities for legal assistance difficult to obtain or non-existent.

Most European and Commonwealth countries, as well as the US, are members. On the African continent, only South Africa, Mauritius and Zimbabwe subscribe to the Convention. When a child is removed to a country that is not a party state to the Convention, the South African High Court, as the upper guardian of minor children, will have jurisdiction and the application should be made to such a court for the return of the child.

The Convention only applies to wrongful removals/retentions occurring after the treaty became effective between the involved countries.

Wrongful removal or retention of a child

The removal or retention of a child is to be considered wrongful:

- where it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- where, at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned above may arise in particular by operation of law, by reason of judicial or administrative order, or by reason of an agreement having legal effect under the law of that state. The Convention applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights.

Where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the child's immediate return.

In practice, applications are generally heard on an urgent or semi-urgent basis by way of notice of motion proceedings. Inevitably, the overriding principle that our courts refer to is the best interest of the child principle (see page 00). In South African law, the right to consent to or refuse the removal of a child from South Africa is entrenched in the concept of guardianship. In terms of the Children's Act, 38 of 2005, a person who has parental responsibilities and rights in respect of a child has the right to act as guardian of the child, and a guardian must consent to the child's departure or removal from South Africa. Where more than one person has guardianship over a child, all must consent before the child can be removed.

The role of the Central Authority

A contracting state is bound to set up an administrative body known as a Central Authority, whose duty it is to trace the child and take steps to secure the child's return. In South Africa, the Chief Family Advocate is designated as Central Authority.

The Central Authority assists in both 'outgoing' cases (when a child has been wrongfully taken from South Africa to a foreign country or retained in a foreign country), and 'incoming' cases (when a child has been wrongfully brought to, or retained in, South Africa).

An application for the return of or access to a child must be submitted to the Central Authority.

Habitual residence

This concept of 'habitual residence' is not defined by the Convention itself. This is to avoid the development of restrictive rules as to the meaning of habitual residence, so that the facts and circumstances of each case can be assessed free of suppositions and presumptions. This means that close attention must be paid to subjective intent when evaluating an individual's habitual residence.

When a child is removed from its habitual environment, the implication is that it has been removed from the family and social environment in which it developed. The word 'habitual' implies a stable territorial link, which may be achieved through length of stay, or through a particularly close tie between the child and the place. A number of foreign judgements have established that a possible prerequisite for habitual residence is some 'degree of settled purpose or intention'. A settled purpose or settled intention will clearly not be temporary.

Procedures

The Office of the Chief Family Advocate divides the applications into incoming and outgoing applications. Courts and administrative authorities should act quickly when applications are brought before them, but if a decision has not been made within six weeks from the date proceedings commenced, the applicant or the Central Authority of the requested state may officially request a reason for the delay.

The Convention aims to ensure that a competent court in the country of habitual residence decides on the merits of custody, access and even permanent removal to another country. This is based on the premise that courts in the country of habitual residence are better apprised to obtain all relevant evidence regarding the merits of custody, care and contact, and are in a better position to grant an order that will be in the best interests of and/or least detrimental to the welfare of the child. For this reason, the Convention is consistent with our applicable laws and Constitution, through affording the best interests of the child paramount importance

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THE ART OF LISTENING

THE ART OF LISTENING

A zoologist was walking down a busy city street with a friend. In the midst of the honking horns and screeching tires, he exclaimed to his friend, "Listen to that cricket!"

The friend looked at the zoologist in astonishment and said, "You hear a cricket in the middle of all this noise and confusion?"

Without a word, the zoologist reached into his pocket, took out a coin, and flipped it into the air. As it clinked on the sidewalk, a dozen heads turned in response.

The zoologist said quietly to his friend, "We hear what we listen for."

Day after day, inside and outside of business, we miss important information because we don't listen with full attention. We also misunderstand and misinterpret messages and ideas because of our preconceptions, biases, and wishes. Take the manager who dreaded to see his secretary go away for her two-week vacation. When the secretary told the boss she'd be taking time off, it just didn't sink in. Said the secretary later: "I told my boss three times I was planning on taking my vacation in October. It just didn't register."

Minor slipups in communication can have major repercussions, as any sensitive manager knows. Lack of communication between you and others in your company can not only foul up job assignments and raise the cost of doing business, it can also cause hurt feelings and generally lower morale.

Listening is an art that requires work, self-discipline, and skill. The art of communication springs as much from knowing when to listen as it does from knowing how to use words well. Ask any good salesperson or negotiator about the value of silence. He or she will tell you good listeners generally make more sales and better deals than good talkers.

To sharpen listening skills, you need patience and practice. Here are some suggestions that have helped others become better listeners:

1. **RESIST THE TEMPTATION TO MONOPOLIZE CONVERSATION.** If you like to dominate a situation or feel you know everything there is to know about a subject, you're probably a poor listener. Remain open to new ideas instead of impatiently waiting for a chance to butt in with what you think is the final word on the subject. Before you speak, make sure that the speaker has had a chance to make his point.Many people think aloud and tend to grope toward their meaning. Their initial statements may be only a vague approximation of what they mean.
2. **AVOID JUDGING THE SPEAKER TOO SOON.** Good listeners try not to become preoccupied with a speaker's mannerisms or delivery. Instead of thinking, for instance, "What a monotone this guy has," ask yourself, "What's in the message that I should know?" or "What can this add to my knowledge and experience?"
3. **DON'T FAKE ATTENTION.** When we decide that what a speaker has to say is boring or useless, we frequently pretend to listen. It's usually quite easy for an attentive listener to recognize that our "uh-huhs" are really "ho-hums." When he does, his thinking is likely to become confused, he may get annoyed, and his delivery will probably deteriorate.

Attentive listeners remain alert and maintain eye contact. Simple gestures -- nodding, raising the eyebrows, or leaning forward -- all can convey interest. Occasional comments, such as "I see," "That's interest," or "Tell me more about that," if said with genuine interest, can go a long way toward reassuring the speaker.

4. **LISTEN FOR IDEAS, AS WELL AS FACTS.** When we listen, we tend to get bogged down trying to retain the facts and we miss the ideas behind them. For example, when a person starts running through a list of seven points, the listener immediately begins mulling over the first point, trying to remember it. Meanwhile, point two is being explained. How he's preoccupied with two facts and is apt to miss the third point altogether. So it goes through point seven: some facts retained, some missed, and others confused. Instead of getting lost in a string of disassociated fragments, make an effort to understand what the facts add up to by relating them to each other and seeing what key ideas bind them together.

5. **BE ALERT TO NONVERBAL CLUES OR "BODY LANGUAGE."** Try not only to listen to what is said but also to understand the attitudes and motives that lie behind the words. Also remember that the speaker does not always put his entire message into words. For example, there is sometimes considerable difference between the auditory cues and the behavioral cues emitted by the speaker. While his verbal message may convey conviction about a new idea or proposal, his gestures, posture, facial expressions, and tone of voice may convey doubt and lack of enthusiasm.

6. **USE THE SPEED OF THOUGHT PRODUCTIVELY.** Because we usually think three to four times faster than we talk, we often get impatient with a speaker's slow progress, and our minds wander. Try using the extra time by silently reviewing and summarizing the speaker's main points. Then, when he's finished, you can restate the points and ask the speaker if you've understood the message. Questions such as "Is this what you mean?" or "Do I understand you correctly?" are not only supportive because they show your interest, they also reduce the chance of misunderstanding later on.

Everyone thinks they're great listeners.

What's easier than sitting down and just hearing what a person has to say right? Wrong.

Hearing isn't necessarily listening, nor is it necessarily listening well. As G.K. Chesterton said "there's a lot of difference between hearing and listening." The truth is, many people come to conversations with agendas, whether that is to make themselves be heard, or to make themselves not be heard, and to actually escape the conversation altogether. If you're an introvert, you probably opt for the latter.

If you're anything like me you probably find yourself on the receiving end of countless uninitiated conversations. Although you sit quietly and meekly listening to them, the fact is that you'd much prefer to slip away at the soonest given chance. The problem with constantly feeling this way is that we never actually hear the people who speak to us. We don't put our entire attention, interest or heart into listening and truly understanding them.

The Art Of Listening … So Why May I Be Fooling Myself?

Just because you're quiet and you let others do 75% of the talking, doesn't mean you're a good listener. It doesn't mean you've mastered the art of listening either.

Did you know that the need to be understood and listened to is a basic human need, along with food, water and shelter? Well … actually I made that bit up. But it makes sense doesn't it?

How many times have you longed to be heard and understood only to have the receiving end ordering a pizza in the background, shuffling through papers or texting while you talk? Now do you know how it feels?

Everyone Needs Someone To Talk To

And who better than you? After all, if you've got it flaunt it, right? If you're naturally quiet by nature and listen more than talk, why not master the art of listening? After all:

- You'll master a new skill.
- People will be more drawn to you and will like you more.
- You'll be a better friend, lover, teacher, employee and parent.
- Overall you'll be a happier person by making other people happy.

How To Master The Art Of Listening

After researching far and wide across the internet, I've compiled a list of the most important things you should know about the art of listening. Here they are:

1. **Make Eye Contact.**

   This first rule is very obvious but frequently forgotten. If you don't look at the person while they're speaking, you give them the impression that you don't care what they say. In essence, it appears as though you don't even care about them. Simple.

2. **Don't Interrupt.**

   Let the person speak uninterrupted. To master the art of listening you need to halt any good thoughts that come to mind and let the person say everything they need to say. Often times people simply need someone to talk to, not someone who will butt in and give their own thoughts and opinions. The goal is to shine the spotlight on them, not you.

3. **Practice "Active Listening".**

   The art of listening isn't simply about staying quiet 100% of the time, it's also about asking questions. These questions are for clarification, or for further explanation so that you can fully understand what the speaker is telling you. For instance, questions like these are brilliant: "Are you saying that _____", "What I heard you say was _____", "Did you mean that _____".

4. **Show You Understand.**

   Another great way to show that you understand what the person is telling you is to nod. You can also make noises that show you're in tune with what the person is saying such as "yes", "yeah", "mhmm", "okay". This seems trivial, but it's important to not behave like a zombie and demonstrate some interest and comprehension.

5. **Listen Without Thinking.**

   In other words, listen without forming responses in your mind. Be wholehearted and listen to the entire message. It's very tempting to fill the spaces, after all, our minds think

around 800 words per minute, compared to 125-150 words we speak per minute. Don't miss valuable information by letting your mind wander!

6. Listen Without Judgement.

To effectively master the art of listening it's extremely important to withhold any negative evaluations or judgements. Make it your goal to be open minded 100% of the time. After all, who wants to open up to a narrow minded person? It also helps to be mindful of your "shut off" triggers, which are the specific words, looks, or situations that cause you to stop listening. This way, you can prevent yourself from shutting off in the future.

7. Listen To Non-Verbal Communication.

About 60 – 75% of our communication is non-verbal. That's a lot! In order to know whether to encourage the speaker, to open yourself more, or to be more supportive in your approach, it's essential to know what the person's body is saying. Do they display signs of discomfort? Are they untrusting of you? Does their body language align with their words? To learn more about body language, try checking out some of Sol's Body Language articles.

8. Create A Suitable Environment.

It can be really difficult to listen to another person when the TV is screaming, your phone is buzzing and there are thousands of cars passing by. When you remove all of these distractions and find a quiet place to sit down and listen, it's much easier to listen empathetically with an open mind and whole heart. Also, when you indicate it would be good to "find a quiet place", you put importance in the person and what they have to say. Once again, you show care and consideration.

9. Observe Other People.

If you're really serious about mastering the art of listening, why not observe other people? One of the best ways to become a better listener is to observe the way people interact with each other, and all the irritating and rude things they do. Create an "annoying habit" checklist, and see if you do any. If you're brave enough, you can even ask someone you trust about what they like and dislike about the way you interact with others in conversation.

As Diogenes Laertius said: "*We have two ears and only one tongue in order that we may hear more and speak less.*" The art of listening is an invaluable life skill. Not only will it help you communicate better with your friends and family, but it will help you succeed in every area of your life.

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ART OF COMMUNICATION

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As simple as communication seems, a lot of what we try to say to others and what they try to say to us gets misunderstood. Often this causes frustration, conflict and distance in our relationships, both personal and professional. But good and effective communication is essential to the working and cohesiveness of any team, group or partnership.

As L&D professionals, we logically know this but doing it sometimes poses challenges. There are parallels for all of us in the real-life business example that I discuss in this article.

I recently had a client who owns and runs a successful business with his business partner. Let's call him Steve. Steve's problem was that he and his business partner had stopped communicating. Sound familiar? Every time they tried to talk about a difficult issue, it ended in an argument. Things were strained to say the least. While the business was still making money, it was no longer any fun. The level of fight they were in was obvious to me, but less so to them. Find out later how I coached them to communicate across this difficult terrain.

Communication is part of our everyday existence. Not simply when we open our mouths to talk to someone but everywhere we look and listen (newspapers, TV, advertising, radio) we are participants in the act of communication. In fact, everything we do is a communication. What we say, what we don't say, what we wear, how we stand, the expression on our face - we are communicating all the time.

Given that communication is a constant for all of us and given our years of experience communicating with others, you would think that we would be masters of it by now. However the sad truth is that, for many of us, our more challenging communications are not successful and probably quite messy.

As an L&D professional, you will often face challenging conversations, whether they are with a business head in a 1:1, a review meeting with the business or just giving someone difficult feedback, and being able to handle these well is important.

A lot of the articles I read on communication tackle the issue from a quite technical perspective, discussing the theory and the technical aspects of communication. Trying to talk about something as messy as communication in this way is of little practical value and of no help when you are up against it trying to have a difficult conversation.

I want to give you some practical tools you can use straight away to become a more effective and self-aware communicator. Communication goes awry and we get a less than satisfactory outcome when we have not managed our state effectively and I want to explain why we need to value and use our emotional awareness more. To demonstrate how to have a difficult conversation I shan't give you the exact words to use, but I shall give you some principles and tools that you can try out.

One of the most vital communication skills is listening and I will talk about how you can employ greater levels of listening to build relationships.

Most forms of human behaviour in a relationship, by their nature, are messy. Look at marriage - the inability to communicate effectively is what causes all the pain, heartbreak, misunderstanding and

resentment. The same can be observed at national levels, in government and in business. The number of wars, conflicts, legal disputes and divorce is testament to this.

I believe the reason why communication gets messy is because we are unable to deal with the emotions that start to run when we encounter difficult discussions or situations. If we can become more adept at identifying the feelings that are coming up for us in any given moment, we can start to manage our state more effectively.

Our state is defined by our feelings. We all have hundreds of feelings every day - joy, rage, fear, defeat, despair, anxiety, sadness, contentment, vulnerability, worthlessness, happiness - just to mention a few. Being conscious of your feeling realm is a skill at which few of us are masters. Most of the time all we do is act out our feelings without realising why - we fight, argue, defend, withdraw, sulk, drink, take drugs etc.

However, when you are aware, and in control, of your emotions, you can manage stress and challenges, communicate well with others and display empathy. This is the power of developing your own emotional awareness, because it plays such a pivotal role in how well we communicate with others and, ultimately, decides how successful we are at building and managing relationships - at work and in life.

What is emotional intelligence?

At The Millar Method, we define emotional intelligence as an ability to cope with the demands of life in a competent way. This requires us to understand ourselves, our goals and our behaviour. It also requires that we have empathy, which is to understand others and their feelings, knowing that we all act because of how we feel. We believe that it is through emotional intelligence and empathy that we learn to manage relationships, build creative groups and motivate ourselves and others.

Whether we're aware of them or not, emotions are a constant presence in our lives, influencing everything we do. Our emotions, not our thoughts, motivate us. Without an awareness of what we're feeling, it's impossible to fully understand our own behaviour and manage our emotions and actions, let alone understand the needs of others.

In the example of my client Steve, he had no real idea of how he felt about the business and his partner, apart from "extremely frustrated!" In the coaching sessions, I got him to talk about how he really felt and it went something like this: "I feel misunderstood; I don't feel appreciated; I feel that I am the problem; every time I try to talk about things, I am told I am a control freak. I feel I am doing all the work and giving the tough messages. My partner just wants to be liked by everyone."

I asked him what outcome he wanted with his business partner: "I want us to be more honest about what is going on; I want it to be possible to talk about the bad things as well as the good stuff; I want it to be safe for either of us to raise issues without there having to be a fight; but most of all I want it to be fun again."

While I could not guarantee that it would be "fun again", I was able to facilitate him talking to his business partner.

These are six principles which, if you make them conscious, can help to navigate even the toughest of discussions.

Emotional awareness functions like instinct. When it's strongly developed, you'll know what you are feeling without having to think about it-and you'll be able to use these emotional signals to understand what is really going on in a situation and act accordingly.

Listening skills

Coupled with emotional awareness, listening is a key skill in communication. When people are listened to, they feel that they matter, that what they think and feel is important. This builds a solid foundation between two people and demonstrates encouragement and support for the other person.

Steve was able to listen deeply and reflect back what he had heard from his partner. Misunderstandings are common in communication; by listening and reflecting back what he had heard, he ensured his partner felt understood.

There are many levels and types of listening but I have only explored a few of them here and they are the ones I consider most useful and use in my coaching with Steve and his partner.

Internal listening

There are two levels of internal listening, which will be useful to understand.

The first is a focus on your own internal dialogue - the many inner voices that talk to, and about, us and give positive and negative messages both to us and to the outside world. Steve could hear that voice telling him that he was going to mess up and make things worse.

It can take time to develop a healthy relationship to our internal dialogue, as there are many thoughts and concepts we may not want to admit to ourselves. However, listening to it is important for emotional health.

Secondly, there is focused listening, when the focus is on the speaker. When people really listen in a focused way, you may see it reflected in their body language - they lean closer and maintain eye contact with the speaker. This type of listening takes effort.

At this level you take in all the information being conveyed. As well as what is being said, you also focus on the way it is said (the emotions behind the words, the energy with which the words are spoken, for example).

It is a good idea to use the 'three-second principle' in this type of listening: when the speaker stops speaking, wait for three seconds to establish whether they have actually finished talking before you reply.

When we practise effective listening, the results can be quite eye-opening:

- the individual will feel understood, valued and respected
- the individual is more likely to be genuinely disclosing and open
- you will obtain useful and valid data
- it is an opportunity to state thoughts and feelings more clearly
- increased insight may help you to understand others' views
- it opens the door to creative thinking and problem-solving.

In conclusion, unless we evolve our emotional intelligence and learn new methods to communicate and process our experiences, unresolved issues increase the stress in a relationship until something drastic happens - someone leaves or the business collapses. Sometimes, frightened of having to address the issues, teams and partners just withdraw, disregard their emotions and settle for a safe but dull co-existence. No passion, no connection, no creativity, no fun.

Steve and his partner now work with me regularly. They have worked through a lot of stuff and they are both enjoying the business more. They still have their moments but they now have tools and more understanding.

All relationships in business and at home go through changes. Being able to communicate effectively through all of them is the real key to success.

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UNDERSTANDING CONFLICT

UNDERSTANDING CONFLICT

Whenever two individuals opine in different ways, a conflict arises. In a layman's language conflict is nothing but a fight either between two individuals or among group members. No two individuals can think alike and there is definitely a difference in their thought process as well as their understanding. Disagreements among individuals lead to conflicts and fights. **Conflict arises whenever individuals have different values, opinions, needs, interests and are unable to find a middle way.**

Let us understand conflict in a better way

Tim and Joe were working in the same team and were best of friends. One fine day, they were asked to give their inputs on a particular project assigned to them by their superior. There was a major clash in their understanding of the project and both could not agree to each other's opinions. Tim wanted to execute the project in a particular way which did not go well with Joe. The outcome of the difference in their opinions was a conflict between the two and now both of them just can't stand each other.

The dissimilarity in the interest, thought process, nature and attitude of Tim and Joe gave rise to a conflict between the two.

Conflict is defined as a clash between individuals arising out of a difference in thought process, attitudes, understanding, interests, requirements and even sometimes perceptions. A conflict results in heated arguments, physical abuses and definitely loss of peace and harmony. A conflict can actually change relationships. Friends can become foes as a result of conflict just as in the case of Tim and Joe.

A Conflict not only can arise between individuals but also among countries, political parties and states as well. A small conflict not controlled at the correct time may lead to a large war and rifts among countries leading to major unrest and disharmony.

It is a well known fact that neighbours are our biggest assets as they always stand by us whenever we need them. Let us take the example of India and China or for that matter India and Pakistan. India and Pakistan are twin sisters as there is hardly any difference in the culture, religion, climatic conditions, eating habits of the people staying in both the countries, but still the two countries are always at loggerheads and the reason is actually unknown. Small issues between the two countries have triggered a conflict between them which has now become a major concern for both the countries.

Misunderstandings as well as ego clashes also lead to conflicts. Every individual has a different way to look at things and react to various situations.

Mike wanted to meet Henry at the church. He called up Henry and following was the conversation between them.

Mike - "Henry, I want to meet you tomorrow at 9"

Henry tried Mike's number a several times but could not speak to him. Mike waited the whole day for Henry and finally there was a major fight between them. For Mike 9 meant 9 in the morning whereas Henry misunderstood it for 9 in the evening and hence a major conflict between the two. It is always advisable to be very clear and very specific to avoid misunderstandings

and conflicts. Any feedback or suggestion by an individual might not go very well with other individual leading to severe displeasure. It might hurt the ego of the other person resulting in a fight and major disagreement.

Phases of conflict

A conflict has five phases.

1. **Prelude to conflict** - It involves all the factors which possibly arise a conflict among individuals. Lack of coordination, differences in interests, dissimilarity in cultural, religion, educational background all are instrumental in arising a conflict.
2. **Triggering Event** - No conflict can arise on its own. There has to be an event which triggers the conflict. Jenny and Ali never got along very well with each other. They were from different cultural backgrounds, a very strong factor for possibility of a conflict.Ali was in the mid of a presentation when Jenny stood up and criticized him for the lack of relevant content in his presentation, thus triggering the conflict between them.
3. **Initiation Phase** - Initiation phase is actually the phase when the conflict has already begun. Heated arguments, abuses, verbal disagreements are all warning alarms which indicate that the fight is already on.
4. **Differentiation Phase** - It is the phase when the individuals voice out their differences against each other. The reasons for the conflict are raised in the differentiation phase.
5. **Resolution Phase** - A Conflict leads to nowhere. Individuals must try to compromise to some extent and resolve the conflict soon. The resolution phase explores the various options to resolve the conflict.

Conflicts can be of many types like verbal conflict, religious conflict, emotional conflict, social conflict, personal conflict, organizational conflict, community conflict and so on.

Conflicts and fighting with each other never lead to a conclusion. If you are not on the same line as the other individual, never fight, instead try your level best to sort out your differences. Discussion is always a better and wiser way to adopt rather than conflicts.

Conflicts in families

Family conflict develops when members of a family have different beliefs or viewpoints, when people misunderstand one another, when someone gets hurt feelings and develops resentment, and when miscommunication leads to mistaken assumptions and subsequent arguments.

Family stages often cause conflicts. These include learning to live as a new couple (cohabiting or married), having the first baby and any subsequent children, sending a child to school, dealing with adolescence and experiencing the passage of young persons into adulthood. Each of these stages has innumerable possibilities for conflicts.

The other times conflicts occur is during changes in family situations. Separation and divorce create conflict, as do moving to a new town, starting a new job or starting a new school. Starting to commute long hours to and from work creates family conflict. Changes in financial circumstances also are life changes that can create conflicts.

Through time, the needs, values and opinions of family members can change and create conflicts. Change can occur between spouses, between parents and children, between siblings, between nuclear families and in-laws, and among extended family members. The above information is from the website of the Department of Health and Human Services, State Government of Victoria, Australia. From the Livestrong Foundation, there is additional information. Expanding on some of the causes of conflicts, one of the most common is money. The conflict can be not having enough money to meet expenses, competition for control of the money between spouses or partners, and disagreements about how to spend money.

Disagreements about types of child discipline cause conflicts. Parents can become polarized into the good parent and the bad parent, or the disciplinarian and the comforter. Such divisions are unhealthy for parents and children.

Sibling rivalry can cause conflicts, such as jealousy leading to teasing, competition, or verbal and physical abuse. If a parent favors one child, there are even greater conflicts. Sibling rivalry is normal provided it is contained by parental intervention and not damaging to the development of any of the children.

In terms of in-laws and extended families, problems arise if family members other than the nuclear family or blended family are intrusive into family matters. In these instances, conflict is inevitable, especially since boundaries and values differ significantly from person to person and family to family.

Studies show children and adolescents who move repeatedly are more likely to have problems in school. If moves coincide with other changes such as divorce, death, decreases in family incomes or new schools, they are even more problematic.

Moves put children into positions of having to make all new friends. Schools differ and have varying curricula and schedules. Children can become stressed, bored or depressed.

Children in kindergarten or first grade are vulnerable to moves because they are already in the process of separating from their parents and adjusting to school. Moving might precipitate these children regressing to more dependent relationships with parents.

Because of the increasing importance of peers, teens and preteens have even more problems moving. They might not talk to parents about their distress but might become depressed, anxious, withdrawn, rebellious or aggressive. If there is disagreement between parents about moving, their conflicts will affect the teenagers and children.

There are additional conflicts between extended family members and nuclear family groups. Common problems include relatives who wear out their welcome by staying too long. Then there are relatives who visit too often. Conflicts also can arise about relatives who call too often or too infrequently.

Interfering relatives who meddle in other people's lives can occur among extended family members or in-laws. It is not unusual for families to have interfering relatives. Further information concerning conflicts with relatives can be found on familyeducation.com.

Unemployment negatively affects families because of the ensuing financial hardships. An article from the University of Michigan Library reported on the effect of unemployment on automobile workers and their families. The results were about workers from a fairly well-off segment of

blue-collar automobile employees, not workers from low paid-jobs. The authors of this article believed results were negative considering that these workers were fairly well-off and the study measured hardships at the end of two years. This data demonstrated families were not prepared ahead of time to sustain periods of unemployment.

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PERSONAL LAW

PERSONAL LAW

The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs, i.e., marriage, divorce, succession, etc.

Marriage

Law relating to marriage and/or divorce has been codified in different enactments applicable to people of different religions. These are:

- The Converts' Marriage Dissolution Act, 1866
- The Indian Divorce Act, 1869
- The Indian Christian Marriage Act, 1872
- The Kazis Act, 1880
- The Anand Marriage Act, 1909
- The Indian Succession Act, 1925
- The Child Marriage Restraint Act, 1929
- The Parsi Marriage and Divorce Act, 1936
- The Dissolution of Muslim Marriage Act, 1939
- The Special Marriage Act, 1954
- The Hindu Marriage Act, 1955
- The Foreign Marriage Act, 1969 and
- The Muslim Women (Protection of Rights on Divorce) Act, 1986.

The Special Marriage Act, 1954 extends to the whole of India except the State of Jammu and Kashmir, but also applies to the citizens of India domiciled in Jammu and Kashmir. Persons governed by this Act can specifically register marriage under the said Act even though they are of different religious faiths. The Act also provides that the marriage celebrated under any other form can also be registered under the Special Marriage Act, if it satisfies the requirements of the Act. The section 4(b) (iii) of the Act was amended to omit the words "or epilepsy." Sections 36 and 38 have been amended to provide that an application for alimony pendente lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the respondent.

An attempt has been made to codify customary law which is prevalent among Hindus by enacting the Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955, which extends to the whole of India, except the State of Jammu and Kashmir, applies also to Hindus domiciled in territories to which the Act extends and those who are outside the said territories. It applies to Hindus (in any of its forms or development) and also to Buddhists, Sikhs, Jains and also those who are not Muslims, Christians, Parsis or Jews by religion. However, the Act does not apply to members of any scheduled tribes unless the Central Government by notification in the official Gazette otherwise directs.

Provisions in regard to divorce are contained in section 13 of the Hindu Marriage Act and section 27 of the Special Marriage Act. Common ground on which divorce can be sought by a husband or a wife under these Acts fall under these broad heads: Adultery, desertion, cruelty, unsoundness of mind, venereal disease, leprosy, mutual consent and being not heard of as alive for seven years.

As regards the Christian community, provisions relating to marriage and divorce are contained in the Indian Christian Marriage Act, 1872 and in section 10 of the Indian Divorce Act, 1869 respectively. Under that section the husband can seek divorce on grounds of adultery on the part of his wife and the wife can seek divorce on the ground that the husband has converted to another religion and has gone through marriage with another woman or has been guilty of:

- Incestuous adultery
- Bigamy with adultery
- Marriage with another woman with adultery
- rape, sodomy or bestiality
- Adultery coupled with such cruelty as without adultery would have entitled her to a divorce, a mensa etoro (a system of divorce created by the Roman Catholic Church equivalent to judicial separation on grounds of adultery, perverse practices, cruelty, heresy and apostasy) and
- Adultery coupled with desertion without reasonable excuse for two years or more.

In the Indian Divorce Act, 1869 comprehensive Amendments were made through the Indian Divorce (Amendment) Act, 2001 (No. 51 of 2001) to remove discriminatory provisions against women in the matter of Divorce. Further, sections 36 and 41 of the Act were amended by the Marriage Laws (Amendment) Act, 2001 to provide that an application for alimony pendente lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the respondent.

As regards Muslims, marriages are governed by the Mohammedan Law prevalent in the country. As regards divorce, i.e., Talaq, a Muslim wife has a much restricted right to dissolve her marriage. Unwritten and traditional law tried to ameliorate her position by permitting her to see dissolution under the following forms:

- **Talaq-I-Tafwid:** This is a form of delegated divorce. According to this, the husband delegates his right to divorce in a marriage contract which may stipulate, inter alia, on his taking another wife, the first wife has a right to divorce him
- **Khula:** this is a dissolution of agreement between the parties to marriage on the wife's giving some consideration to the husband for her release from marriage ties. Terms are a matter of bargain and usually take the form of the wife giving up her mehr or a portion of it, and
- **Mubarat :** this is divorce by mutual consent.

Further, by the Dissolution of Muslim Marriage Act, 1939, a Muslim wife has been given the right to seek dissolution of her marriage on these grounds:

- Whereabouts of the husband have not been known for a period of four years

- Husband is not maintaining her for a period of two years
- Imprisonment of husband for a period of seven years or more
- Failure on the part of husband to perform his marital obligations, without a reasonable cause, for a period of three years
- Impotency of husband
- Two-year long insanity
- Suffering from leprosy or virulent venereal disease'
- Marriage took place before she attained the age of 15 years and not consummated and
- Cruelty.

The Parsi Marriage and Divorce Act, 1936 governs the matrimonial relations of Parsis. The word 'Parsi' is defined in the Act as a Parsi Zoroastrian. A Zoroastrian is a person who professes the Zoroastrian religion. It has a racial significance. Every marriage as well as divorce under this Act is required to be registered in accordance with the procedure prescribed in the Act. However, failure to fulfil requirements on that behalf does not make marriage invalid. The Act provides only for monogamy. By the Parsi Marriage and Divorce (Amendment) Act, 1988, scope of certain provisions of the Parsi Marriage and Divorce Act, 1936 have been enlarged so as to bring them in line with the Hindu Marriage Act, 1955. Recently, sections 39 and 49 of the Parsi Marriage and Divorce Act, 1936 were amended by the Marriage Laws (Amendment) Act, 2001 to provide that an application for alimony pendent lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the wife or the husband as the case may be.

As for the matrimonial laws of Jews, there is no codified law in India. Even today, they are governed by their religious laws. Jews do not regard marriage as a civil contract, but as a relation between two persons involving very sacred duties. Marriage can be dissolved through courts on grounds of adultery or cruelty. Marriages are monogamous.

Child Marriage

The Child Marriage Restraint Act, 1929, from 1 October 1978, provides that marriage age for males will be 21 years and for females 18 years.

Adoption

Although there is no general law of adoption, it is permitted by the Hindu Adoption and Maintenance Act, 1956 amongst Hindus and by custom amongst a few numerically insignificant categories of persons. Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and have to approach the court under the Guardians and Wards Act, 1890. Muslims, Christians and Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all this connections. Besides, such a child does not have the legal right of inheritance. Foreigners, who want to adopt Indian children, have to approach the court under the aforesaid Act.

Hindu law relating to adoption has been amended and codified into the Hindu Adoptions and Maintenance Act, 1956, under which a male or female Hindu having legal capacity, can take a son or daughter in adoption. In dealing with the question of guardianship of a minor child, as in other spheres of family law, there is no uniform law. Hindu Law, Muslim Law and the Guardians and Wards Act, 1890 are three distinct legal systems which are prevalent. A guardian may be a natural guardian, testamentary guardian or a guardian appointed by the court. In deciding the question of guardianship two distinct things have to be taken into account-person of the minor and his property. Often the same person is not entrusted with both.

The Hindu Minority and Guardianship Act, 1956 has codified laws of Hindus relating to minority and guardianship. As in the case of uncodified law, it has upheld the superior right of father. It lays down that a child is a minor till the age of 18 years. Natural guardian for both boys and unmarried girls is first the father and then the mother. Prior right of mother is recognised only for the custody of children below five. In case of illegitimate children, the mother has a better claim than the putative father. The act makes no distinction between the person of the minor and his property and therefore guardianship implies control over both.

Under the Muslim Law, the father enjoys a dominant position. It also makes a distinction between guardianship and custody. For guardianship, which has usually reference to guardianship of property, according to Sunnis, the father is preferred and in his absence his executor. If not executor has been appointed by the father, the guardianship passes on to the paternal grandfather to take over responsibility and not that of the executor. Both schools, however, agree that father while alive is the sole guardian. Mother is not recognised as a natural guardian even after the death of the father.

As regards rights of a natural guardian, there is no doubt that father's right extends both to property and person. Even when mother has the custody of minor child. Father's general right of supervision and control remains. Father can, however, appoint mother as a testamentary guardian. Thus, though mother may not be recognised as natural guardian, there is no objection to her being appointed under the father's will.

Muslim law recognises that mother's right to custody of minor children (Hizanat) is an absolute right. Even the father cannot deprive her of it. Misconduct is the only condition which can deprive the mother of this right. As regards the age at which the right of mother to custody terminates, the Shia school holds that mother's right to the Hizanat is only during the period of rearing which ends when the child completes the age of two, whereas Hanafi school extends the period till the minor son has reached the age of seven. In case of girls, Shia law upholds mother's right till the girl reaches the age of seven and Hanafi school till she attains puberty.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.

Maintenance

Obligation of a husband to maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law.

Under the Code of Criminal Procedure, 1973, (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claims of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs. 500 per month. But, this limit was removed by the Code of Criminal Procedure (Amendment) Act, 2001 (No. 50 of 2001). Inclusion of the right of maintenance under the Code of Criminal Procedure has the advantage of making the remedy both speedy and cheap. However, divorced wives who have received money payable under the customary personal law are not entitled to claim maintenance under the Code of Criminal Procedure.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. But she loses her right if she deviates from the path of chastity. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956. In assessing the amount of maintenance, the court takes into account various factors like position and liabilities of the husband. It also judges whether the wife is justified in living apart from husband. Justifiable reasons are spelt out in the Act. Maintenance pendente lite (pending the suit) and even expenses of a matrimonial suit will be borne by either, husband or wife, if the other spouse has no independent income for his or her support. The same principle will govern payment of permanent maintenance.

Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands and provides for matters connected therewith or incidental thereto. This Act, inter alia, provides that a divorced Muslim woman shall be entitled to:

- Reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband
- Where she herself maintains children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children
- An amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim Law and
- All property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends.

In addition, the Act also provides that where a divorced Muslim woman is unable to maintain herself after the period of iddat, the magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to the Muslim Law and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of such relatives and such maintenance shall be payable by such relatives in proportion to the size of their inheritance of her property and at such periods as he may specify in his order.

Where such divorced woman has children, the magistrate shall order only such children to pay maintenance to her and in the event of any such children being unable to pay such maintenance, the magistrate shall order parents of such divorced woman to pay maintenance to her.

In the absence of such relatives or where such relatives are not in a position to maintain her, the magistrate may direct State Wakf Board established under Section 13 of the Wakf Act, 1995

functioning in the area in which the woman resides, to pay such maintenance as determined by him.

The Parsi Marriage and Divorce Act, 1936 recognises the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by the court as alimony during the time a matrimonial suit is pending in court, is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Indian Divorce Act, 1869 inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi Law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

Succession

The Indian Succession Act was enacted in 1925. The object of the Act was to consolidate the large number of laws which were in existence at that time. Laws governing succession to Muslims and Hindus were excluded from the purview of the Act. While consolidating the law in respect of succession, two schemes, one relating to succession to property of persons like Indian Christians, Jews and persons married under the Special Marriage Act, 1954 and the other relating to succession rights or Parsis, were adopted.

In the first scheme, applying to those other than Parsis, in the case of a person dying intestate leaving behind a widow and lineal descendants, the widow would be entitled to a fixed share of one-third of property and lineal descendants shall be entitled to the remaining two-third. This law was amended subsequently with the object of improving rights of widows and it was provided that where the intestate dies leaving behind his widows and it was provided that where the intestate dies leaving behind his widow and no lineal descendant and the net value of the estate does not exceed Rs 5,000, the widow would be entitled to the whole of this property. Where the net value of the estate exceeds Rs 5,000 she is entitled to charge a sum of Rs. 5,000 with interest at four per cent payment and in the residue, she is entitled to her share. The Act imposes no restriction on the power of a person to will away his property.

Under the second scheme, the Act provides for Parsi intestate succession. By the Indian Succession (Amendment) Act, 1991 (51 of 1991), the Act was amended to provide equal shares for both sons and daughters in their parental properties, irrespective of the fact that it was that of the father or that of the mother. It also enables the Parsis to bequeath their property to religious or charitable purposes, etc., without any restrictions. In effect the amended law provides that where a Parsi dies intestate leaving behind a widow or widower as the case may be, and children, the property shall be divided so that the widow or widower and each child receives equal share. Further, where a Parsi dies leaving behind one or both parents in addition to children, or widow widower and children, the property shall be so divided that the parent or each of the parents shall receive a share equal to half the share of each child.

This Act was amended by the Indian Succession (Amendment) Act, 2002. It was felt that section 32 of the principal Act is discriminatory to widows and as such the proviso to section 32 was omitted to remove discrimination in this regard. Section 213 was also amended by this amending Act to make Christians at par with other communities.

The law relating to intestate succession among Hindus is codified in the Hindu Succession Act, 1956 (30 of 1956). It extends to the whole of India except the State of Jammu and Kashmir. The remarkable features of the Act are the recognition of the right of women to inherit property of an intestate equally with men and abolition of the life estate of female heirs.

A vast majority of Muslims in India follow Hanafi doctrines of Sunni law. Courts presume that Muslims are governed by Hanafi law unless it is established to be the contrary. Though there are many features in common between Shia and Sunni schools, yet there are differences in some respects. Sunni law regards Koranic verses of inheritance as an addendum to pre-Islamic customary law and preserves the superior position of male agnates. Unlike Hindu and Christian laws, Muslim law restricts a person's right of testation. A Muslim can bequeath only one-third of his estate. A bequest to a stranger is valid without the consent of heirs if it does not exceed a third of the estate, but a bequest to an heir without the consent of other heirs is invalid. Consent of heirs to a bequest must be secured after the succession has opened and any consent given to a bequest during the lifetime of the testator can be retracted after his death. Shia law allows Muslims the freedom of bequest within the disposable third.

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HOW TO BE GOOD JUDGE

HOW TO BE A GOOD JUDGE – ADVICE TO NEW JUDGES*

by Justice R.V. Raveendran†

How can you become a good Judge? Is it by serving as a Judge for a long period with a clean record? Is it by promptly and regularly deciding the monthly quota of cases? Is it by writing erudite judgments? Is it by being honest" all through your career? Is it by being considerate and courteous to the litigants?

A Judge's duty is to render justice. Rendering justice, in a larger sense, means giving every person, his or her due. All those entrusted with power— power to govern, power to legislate, power to adjudicate and power to punish or reward—in a sense, render justice. In the context of Judges, rendering justice, means speedy, effective and competent adjudication of disputes and complaints in a fair and impartial manner, in accordance with law, tempered by equity, equality and compassion wherever required and permissible, after due hearing.

A Judge, by his conduct, by his fairness in hearing and by his just and equitable decisions, should earn for himself and the judiciary, the trust and respect of the public and the members of the Bar.

The "Restatement of Values of Judicial Life"[1] and the "Bangalore Principles of Judicial Conduct, 2002"[2] establish the Standards for Ethical Conduct of Judges and provide guidance for proper conduct of Judges.

Article 14(1) of the "International Covenant on Civil and Political Rights"[3] adopted by the UN General Assembly, to which India is a signatory, states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (emphasis supplied) Though the said Article is not. about the qualities of a Judge, it precisely sets out the qualities of a good Judge: (i) that he should be competent, independent and impartial, (ii) that he should give a fair and public hearing; and (iii) that he should treat all persons equal. To achieve these, a Judge has to develop certain judicial skills, certain administrative skills, and more importantly, scrupulously follow certain judicial ethical standards.

Judicial skills

You require five judicial skills to effectively discharge your functions as a Judge — as an adjudicator presiding over a public judicial forum.

Thorough knowledge of procedures

You should have a thorough knowledge of the procedural laws, that is, Codes of Civil Procedure and Criminal Procedure, statutes dealing with evidence, limitation, court fees and stamps, and

* Based on several lectures given to newly appointed Judges at National Judicial Academy, Bhopal and State Judicial Academies of Karnataka, Madhya Pradesh, Delhi, Tamil Nadu, Andhra Pradesh, Uttar Pradesh, Chandigarh.

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1 Code of Conduct adopted in the Chief Justices' Conference, New Delhi on 3-12-1999 and 4-12-1999.

2 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

3 Multilateral treaty adopted by UN General Assembly, New York on 16-12-1966.

forensic and police procedures. This will enable you to have control over the trial and avoid procedural irregularities. Most of the appeals and revisions against interim orders, relate to errors in procedure. When you have mastery over procedure, cases also get decided quickly and effectively.

Broad acquaintance with substantive laws

You should know broadly, all frequently used substantive laws and fundamental constitutional and legal principles. I am using the words "know broadly" and not the words "know thoroughly" as it is not possible to master all laws before becoming a Judge, and in fact even after becoming a Judge. Each provision of law has its own nuances which you will be able to appreciate and understand in the context of specific cases, when issues relating to such laws are argued before you and the lawyers analyse and interpret them in the context of the particular case. If procedural laws help you to control the conduct of the trial, knowledge of substantive laws helps you to render proper and just decisions and prevent injustice.

Art of giving proper hearing

You have to develop the skill of giving a due hearing. If you think about it, you will realise that the entire Codes of Civil and Criminal Procedure are about giving a due hearing, giving effect to the first principle of natural justice — audi alteram partem ("hear both sides" or "no one should be condemned unheard"). Due hearing is due opportunity to put forth one's case. It involves hearing the parties, considering their grievances, complaints, pleas, defences, facts and legal contentions and thereafter reaching a decision, all with an open mind. This is in fact the main function of a Judge. Many Judges, unfortunately, do not cultivate the art of giving a fair and due hearing — they do not follow the case, do not absorb the evidence and do not hear the arguments with an open mind. Instead of controlling the evidence and arguments by effective interventions, or keeping the lawyers on course by steering and guiding them, they either become impatient and refuse to hear relevant submissions or become disinterested «in the proceedings and allow their mind to wander and get distracted. This results in recording of irrelevant evidence and hearing of long arguments and the Judge failing to follow or understand the case. If you have heard the case properly—by reading the pleadings, following the evidence and arguments and making proper notes—reaching a correct decision and writing the judgment becomes easy and simple. In fact, if you record the evidence and hear arguments continuously on day-to-day basis, there would be no need for you to spend much time in reading the files for preparing the judgment.

Some Judges frequently complain that lawyers do not render proper assistance. Over the course of time, such Judges tend to become impatient with lawyers generally. They do not allow lawyers to complete their submissions and cut short the arguments by observing "Yes. Yes. That is all, is it? I have understood the point. Heard. Reserved." This is wrong. It is not possible for a Judge to fully study all the facts and research on all legal issues in all" cases and then write judgments. If a Judge tries to do so, in no° time the cases reserved for judgment will pile up. When the Judge ultimately takes up the file for dictating judgments, he is bound to miss on facts or law and will not be able to render justice. The proper course is to persuade, encourage and motivate the lawyers, even mildly scold and cajole them, to read, to research and prepare well, so that they can effectively assist you; and then hear them fully ensuring that they do not beat around the

bush or mislead you. This way, you will be giving a proper hearing, you will be able to turn out a good quantity of quality work and at the same time improve the standards of the Bar.

Marshalling facts and writing good judgments

You have to learn the skill of marshalling facts and arriving at proper findings, applying the law to those factual findings to arrive at the decision, and putting the facts, reasons and conclusions in a lucid,, logical, precise and coherent manner, in the form of an order/judgment. The litigants, the lawyers and the appellate/revisional courts should be in a position to follow what you have decided. You should have clarity in about what you intend to say. Every judgment need not showcase your erudition. That takes a long time.

Handling interim prayers and requests for adjournments

You have to acquire the skills of considering and disposing of interim prayers, interlocutory applications and requests for adjournments, effectively and firmly. The notorious "delays" associated with Indian judicial system is, to a large extent, on account of ineffective and inefficient handling of these matters. You should keep under check, any unwarranted sympathy while considering requests for adjournments and prayers for interim relief. You should also keep in check the temptation to be a populist Judge. You should be adept at clearing all obstructions, diversions, deviations and camouflages adopted by some litigants and lawyers to delay the progress of cases. You should focus your attention upon deciding the main case. I am not saying that you should not entertain or decide interlocutory applications. Some may be relevant and urgent. All that I am saying is that you should not allow them to bog down the main case. I am not saying that you should deny all requests for adjournments and interim prayers. I am saying that you should be strict in handling them.

The shorter the pendency of a case, lesser the number of interlocutory applications. The stricter you are in granting adjournments, the lesser will be the requests for adjournments. Statistics show that out of the total judicial time spent on each* case from beginning till the end, on an average about one-third of the time is spent on preliminaries, adjournment motions and interlocutory matters. If you can curtail the same to the minimum, your disposals will increase, the period of pendency will be reduced and the proverbial delay could be effectively tackled.

If you acquire a thorough knowledge of the procedural laws and a broad knowledge of legal principles and substantive laws, and develop the skills of giving a proper hearing, marshalling facts and writing cogent judgments/orders, and disposing interlocutory applications and controlling adjournments, you can be said to have acquired necessary judicial skills.

Administrative skills

Side by side with the five judicial skills, you have to develop five administrative skills. Let me describe them briefly.

Time management

You have about 250 working days (that is about 1250 court hours) in a year. This may, of course, vary from State to State. You should plan and allot the judicial time at your disposal, for preliminary work, for recording evidence, for hearing interlocutory applications and for hearing final arguments. You must visualise the entire day, as different units, to manage your time. This

will help you to plan the number of cases you can hear and decide and then gradually increase your output.

For every five to six hours of work in court, you have to spend a couple of hours in chambers on administrative work and four to five hours at home for reading files and writing/dictating/correcting orders and judgments. Please do not forget to provide time slots for your physical and mental well-being (exercise, yoga, meditation) and time for your family.

Board management

On an average, each of you may have anything between 1000 to 3000 cases pending on your board. You should know how to manage your board. If you post a large number of cases every day, then most of the judicial time will be spent in non-productive preliminary hearing. You should assess the number of evidence cases and the number of argument cases that you can realistically handle (providing some margin for the fact that some cases would get adjourned) and standardise your board. You should not list too many cases for evidence and arguments. There is no point in listing, say twenty cases for evidence or twenty cases for arguments. You should apply case management and case-flow management tools effectively. You should also pursuade parties to have recourse to alternative dispute resolution processes. The board management and time management go hand in and will together reduce the pendency and improve efficiency.

Whenever a case is listed for evidence, the litigant is expected to be present and be ready to lead evidence. Imagine the time and energy wasted by a litigant in repeatedly getting ready and attending court for evidence. Same is the position regarding listing too many cases for arguments. Each time a case is listed for arguments, the advocate is required to read the file and get ready. If a case gets adjourned repeatedly, parties and lawyers will stop getting ready on the assumption that the case is not likely to be taken up. When ultimately the case is taken up, many a time, the parties and advocates are unprepared, and the result is a request for adjournment or an ineffective or defective presentation of the case, requiring subsequent "repair" by either recalling witnesses or rehearing arguments. Lesser the number of hearings in a case, speedier will be the disposal of the case and lesser the hassles and harassment for the litigant.

Registry management

You have to exercise control and supervision over your court officers, stenographers, typists, clerical and attendant staff, to ensure that they do their work properly and assist you effectively. Particular attention should be bestowed upon bailiffs/process servers (to ensure prompt service of notices, summons, effecting attachments/sales, etc.), Record Room staff (for proper maintenance of records), and the Materials Room staff (to ensure that material objects and evidence are properly catalogued and stored safe and secure). You should also ensure that the court staff are public-friendly and show patience and courtesy to lawyers and litigants. Please remember that if the staff are not efficient, or lack in integrity or courtesy, that will reflect upon the functioning of the court.

Bar management

Lawyers are officers of the court. Unless you have their cooperation, you cannot expeditiously or effectively dispose of cases. You should show uniform courtesy to the members of the Bar and litigants. You should at the same time be firm and diplomatic in dealing with them. You should earn their respect by your commitment, conduct and behaviour. You should be able to carry

the Bar with you and extract work from them, without making them hostile. You should not be overly rigid. Genuine requests for adjournments should be accommodated. Frivolous and casual requests for adjournments and dilatory tactics should be firmly dealt with. If you grant adjournments merely for the asking, you cannot expect the lawyers and the litigants to be ready. You should dispose of applications for interim relief and bail expeditiously. Nor should you try to be a populist by granting interim relief merely for the asking. You should build a reputation of being a "no-nonsense Judge" — a Judge who will not permit unnecessary evidence, lengthy arguments, frivolous submissions, misrepresentations, of dilatory tactics.

Self-management

This refers to the need for self-discipline, punctuality, commitment, positive attitude and hard work. This refers to maintaining good health and good habits. This refers to being properly and neatly attired.

You should hold court on time. If you are late to court, you cannot expect the lawyers and staff to be punctual. You should be on the seat for the entire court working hours. If you retire to chambers frequently during court hours, you cannot expect the lawyers and litigants to be in court when the cases are taken up. You should be prompt in delivering judgments and orders. You should avoid taking unnecessary leave, as for example, taking leave at the end of the year merely because there is some unutilised casual leave.

You should have good health. Unless you have good health, you cannot function effectively. Having regard to the nature of your work, you are glued to a chair for more than 12 hours each day. Such chair-bound but stressful lifestyle, is an invitation to blood-pressure, diabetes, lower back ache, spondylitis, varicose veins and other ailments. It also makes you tired and irritable in court. Physical exercise, yoga, proper diet are therefore absolutely necessary, if you want to maintain good health and work effectively and efficiently.

You should be comfortable with technology. You should have a working knowledge of computers and information technology. It will help you write and correct orders/judgments, research on case law and articles, maintain statistics and prepare reports. It will broaden your general knowledge and also update you in regard to areas like human rights, forensic science, ADR mechanisms and court management techniques. The days of paperless e-courts, and presentation of evidence and arguments through video conferencing are not far away. Get ready to manage and cope up with technology.

The aforesaid administrative skills will make you efficient. The following guidelines under the caption "competence and diligence" in the "Bangalore Principles of Judicial Conduct (2002)[4] underline the importance of developing judicial and administrative skills side by side:

6.1. The judicial duties of a Judge take precedence over all other activities.

6.2. A Judge shall devote the Judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3. A Judge shall' take reasonable steps to maintain and enhance the Judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking

4 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

advantage for this purpose of the training and other facilities which should be made available, under judicial control, to Judges.

* * *

6.5. A Judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6. A Judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courtedus in relation to litigants, jurors, witnesses, lawyers and others with whom the Judge deals in an official capacity. The Judge shall require similar conduct of legal representatives, court staff and others subject to the Judge's influence, direction or control.

6.7. A Judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Judicial ethics

Let us assume that you are competent having necessary judicial and administrative skills. Will that make you a good Judge? This question brings us to your conduct as a Judge. This brings us to judicial ethics. What are the ethical standards to be followed and practised by a Judge? How should he behave? What should be his demeanour? What do people expect of him?

To be a good Judge, you have to cultivate and maintain five ethical principles — honesty and integrity, judicial aloofness and detachment, judicial independence, judicial temperament and humility, and impartiality. All of you, as Judges, are aware of these standards of judicial conduct. The difficulty is in scrupulously and constantly following them. Let us discuss the principles.

Integrity and honesty

When anyone compliments a Judge as a man of integrity, I feel amused and irritated. In a Judge, honesty and integrity are neither special qualities, nor achievements to be appreciated. They are the fundamental prerequisites for a Judge. They are the non-negotiable eligibility criteria. A Judge is required to be upright and expected to be a man of integrity. If a Judge is not honest or lacks integrity, he has no business to be a Judge. There cannot be a strong and vibrant judiciary unless the Judges are known for their integrity.

We have around fifteen thousand Judges in the country. Even if there are only a few aberrations among them, the public and media tend to tar the entire judiciary as corrupt. When a Judge does something improper, it is not only the erring Judge, but the entire judiciary that will be seen in a bad light. Every improper act and every misbehaviour of a' Judge is likely to be magnified and distorted, thereby reducing the faith and trust of the common man in the judiciary. Having regard to the nature and functions of their office, Judges command a very high respect when compared to servants of other wings of the Government. Correspondingly, public also expect very high standards of probity and integrity from Judges. Judges should therefore be doubly careful in their conduct and behaviour, so as to maintain the high reputation of the judiciary.

Many accused are rich, powerful and resourceful. Many civil litigants indulge in litigation out of ego, greed and jealousy. These litigants—both criminal and civil—would go to any length to succeed, which unfortunately would include attempts to influence the Judges. No other profession or calling requires higher standards of honesty and integrity or provide greater

temptations and opportunities to become corrupt. You should be forever on guard against such temptations. You are the last bastion in the fight against corruption and you should not become a fence that eats the crop.

John Marshall said: "The power of judiciary lies, not in deciding cases, nor in imposing sentences, nor in punishing for contempt, but in the trust, faith and confidence of the common man."[5] If judiciary loses the trust, faith and confidence of the common man, that will be the end of the Rule of Law and democracy.

Some Judges tend to relate corruption to taking a bribe or illegal gratification to decide a case. They assume that taking a favour from a lawyer or politician or businessman, if unrelated to any case pending before them, is not objectionable and will not affect their integrity. But integrity, or corruption which is its antithesis, has several facets. For example, let us assume that a Judge borrows a lawyer's luxury car/SUV for going on a vacation tour; or accepts costly gifts from lawyers, during a family function like marriages, birthday celebrations, etc. Neither of the above two benefits taken by a Judge has anything to do with any case to be decided or judgment to be rendered by him. But any conduct which is likely to affect the Judge's integrity in future or which is likely to affect the credibility of the judiciary in general or the Judge in particular, is objectionable behaviour, even though there may be no specific quid pro quo for the benefit received by the Judge. Receiving any discretionary benefit by a Judge, which is not offered or extended generally to all other Judges, is an objectionable behaviour. Please remember, favours normally come with strings attached. Whenever a concession or favour is shown to a Judge, the person showing it will consider it as an investment for the future and would, when the occasion arises, demand, or at least expect, a return of the favour in some form or the other. The best way to maintain your integrity is not to accept any favour, gift or benefit which may "reasonably be perceived as intended to influence the Judge in the performance of his judicial duties".

You should not only be honest, but seen to be honest. You have to be careful how you deal with others in your private life. You would be wrong to assume: "I am honest. My conscience is clear. Therefore I can freely mix with anyone." You may be honest. But, unfortunately, the litigants and the public do not assume that you are honest. A cynical world, which has seen dishonesty and corruption everywhere, would not hesitate to assume corrupt motives, if your conduct give room for it, even though you may be honest. If they see you in the company of any lawyer or a litigant in a club or a restaurant, they will always assume that some "deal" is going on. They will never think that you are having dinner with friends. If you want to ensure that improper motives are not attributed to you, and to ensure that your good name and the good name of judiciary are not sullied, keep a distance.

The following guidelines in the "Bangalore Principles of Judicial Conduct (2002)"[6] are relevant:

3.1. A Judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2. The behaviour and conduct of a Judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

* * *

5 Quoted in Rajesh Kumar Singh v. High Court of Judicature of M.P., (2007) 14 SCC 126, 137, para 21.

6 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

4.14. A Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties.

4.15. A Judge shall not knowingly permit court staff or others subject to the Judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16. Subject to law and to any legal requirements of public disclosure, a Judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the Judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Judicial aloofness and detachment

Judicial aloofness is conditioning your mind to be aloof, maintaining detachment from the arena of contest and rendering justice unmindful of the consequences. You have to dispassionately decide who is right and who is wrong in accordance with law. Lord Birkett explained a facet of aloofness thus:

The duty of the Judge to keep complete control of the proceedings before him is an essential part of the administration of justice in all our courts. He has a duty to intervene by way of question or otherwise at any time that he deems it necessary to do so. He may wish to make obscurities in the evidence clear and intelligible; he may wish to probe a little further into matters that he deems important; and in a score of ways his interventions may be both desirable and beneficial. But it is safe to "say that all his interventions must be governed by the supreme duty to see that a fair trial is enjoyed by the parties. His interventions must be interventions and not a complete usurpation of the functions of the counsel. But the Judge best serves the administration of justice by preserving the judicial calm and the judicial demeanour, aloof and detached from the arena of contention.[7] (emphasis supplied)

Of course, there are cases {public interest litigation, for example) where a Judge pursuing judicial activism, will have to be mindful of the consequences of his orders and actions. This exception is dealt with in my article "Rendering Judgements — Sonie Basics."[8]

Judicial aloofness is not living in ivory towers. It does not mean that you should not be alive to the problems of the society or that you can ignore the day-to-day realities of life. Judges should be able to understand the needs of the society and "connect" to the problems and difficulties of the weaker sections and provide access to justice to the poor and downtrodden. The rich, the powerful, the unscrupulous and the crooked can protest loudly about violation of their fundamental rights, human rights or property rights and are" capable of protecting their rights by engaging competent lawyers. But for every "capable" who can protect their rights, there are hundreds of "incapable" belonging to weaker sections who cannot protest against injustices, nor engage lawyers and protect their rights. You are the protector of all those who cannot protect themselves. You have special responsibilities when dealing with the rights of not only minors, mentally challenged, religious and charitable institutions, but also women, aged, infirm, poor

7 Harford Montgomery Hyde, Norman Birkett (Reprint Society Ltd., London 1965) 547.
8 (2009) 10 SCC J-1.

and downtrodden. When you are in the protection mode, aloofness and detachment can take the back seat for a while.

Judicial aloofness not only refers to a state of mind, but also refers to maintaining a physical "distance". "Restatement of Values of Judicial Life"[9], states: "A Judge should practice a degree of aloofness consistent with the dignity of his office; close association with individual members of the Bar, particularly those who practise in the same court, shall be eschewed". You should avoid mixing with members of the Bar, politicians or litigant public, except at public functions or at open private events like marriages and deaths. Your smile at a lawyer or a litigant inside a court, your chat with a lawyer or litigant outside the court, your sharing a joke with a politician at a public function, are all likely to be misunderstood and misinterpreted by the public or even members of the Bar. If you meet or mix with them in private, either in your house or their house or places like hotels, restaurants, clubs, you are inviting trouble. Tongues will wag. Unfortunately, we live in a world full of suspicion. More so, in the case of Judges. Therefore, the need for maintaining distance. Let us hope that when Judges and judiciary get an unshakable reputation for integrity and impartiality, the need to keep a distance will disappear.

Whenever I give this advice about maintaining physical "distance", I invariably evoke the following response from an audience of Judges:

You ask us to maintain "distance". But the State Legal Services Authorities require us to hold legal awareness programmes where we have to mix with the public, including lawyers and litigants. We have to seek the cooperation of the district administration, police officers, elected representatives and members of the Bar for organising these functions. How can you expect us to maintain distance and independence?

The issue is no doubt rather delicate. You have two distinct roles. One is that of a Judge, where you are not supposed to mix with lawyers, litigants or take favours from any one. Your other role is that of an authority implementing the provisions of the Legal Services Authorities Act, 1987, where you are required to interact with lawyers/litigants/officials/elected representatives. If you are seen talking to someone at a public function relating to a legal awareness programme, no one is going to question your integrity or independence. But if someone sees you with a lawyer or with a litigant in a private discussion, it will give room for adverse comments. If you keep in mind the distinction between your judicial role and your legal service role, you will be able to avoid embarrassing situations.

I agree that Judges should under no circumstances be put in a position where they feel obliged to lawyers or police officers or officers of the district administration or for that matter, anyone else, whether it is a connection with legal service functions, or visits of any dignitary, or otherwise. If Judges have to seek and get favours for conducting such functions, the next stage would be for them to return the favours in some manner, which means compromising judicial detachment and independence, which in some cases may even lead to losing integrity. My advice therefore is to avoid big and ostentatious functions. Judges are not expected to conduct political size meetings or functions. Small gatherings, select target audiences, and meaningful dialogues are what is needed to spread legal awareness. Please have the courage to organise legal service and other court related functions in a simple and Spartan manner within the sanctioned budgets.

9 Code of Conduct adopted in the Chief Justices' Conference, New Delhi on 3-12-1999 and 4-12-1999.

I may take this opportunity to give an unsolicited word of advice to the Chairpersons of the Legal Services Authorities. Please ensure that in requiring Judges to organise or conduct legal services programmes, their independence is not compromised. In fact it would be better if the legal services activities (other than ADR programmes) are organised by the employees of the Legal Services Authorities, who are not judicial officers and Judges attend such functions only as guests or speakers. Personally, I am of the view that spreading legal awareness and providing access to justice are executive function. I learn that in no other country, spreading legal awareness and extending legal aid are the functions of the judiciary. But, if our Parliament, in its wisdom, has chosen the judiciary to take this burden, Judges have to discharge it sincerely.

The following guidelines given under the caption "propriety" in the "Bangalore Principles of Judicial Conduct (2002)"[10] are relevant:

4.1. A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities.

4.2. As a subject of constant public scrutiny, a Judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a Judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A Judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

Judicial independence

Judicial independence refers to the independence of judiciary as an institution as also the independence of individual Judge in performing his judicial functions. We are concerned here with the independence of individual Judges, which refers to the freedom from any influence or pressure and freedom from any interference from the executive or legislature in the judicial process. You have the right to decide cases in the manner which you consider to be in accordance with law. You have absolute immunity against any actions or reprisals or personal criticism, in respect of your judicial actions and decisions. You have such immunity even when you act without jurisdiction or decide wrongly (that is, when your decision is held to be wrong by a higher forum), provided you have acted in good faith.

When the Constitution of India uses the expression "subordinate judiciary" to describe the Judges other than those belonging to the Supreme Court or the High Courts, it is not with the intention of putting any fetters on their judicial independence. The word "subordinate" literally means someone in a lower position than someone else. The Constitution uses the expression merely to describe Judges who hold a lower position than the Judges of the High Court, in the judicial hierarchy. But of late, the word "subordinate" unfortunately is understood by some Judges, as referring to someone who is subservient. Let us be clear. The higher courts have power to correct you after you render your judgment, but none can direct you as to how you should decide in the first instance or what you should decide. Your independence to decide in accordance with law is not subject to any restrictions or control (except on an appeal or revision, after you decide by a judicial order). In the exercise of your judicial functions you are independent and not

10 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

subordinate to anyone. The difference between the members of the subordinate judiciary and members of the higher judiciary is only in jurisdiction.

Judicial independence is not freedom to. do what you like or what you consider as just and equitable. Judicial independence does not mean you can exercise your discretion as per your whims and fancies. Even when you are exercising "discretion", for which there are no statutory guidelines or precedents, you are required to act justly and fairly and not arbitrarily. You are required to render justice in accordance with law, and not justice as per your convictions or what you consider as just. Justice Cardozo warned:

... The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of]?is own ideal of fairness and justice. He has to draw his inspiration from well-consecrated principles. He is not to yield to spasmatic sentiments, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated in the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.[11]

Judicial independence, it is said, is not a privilege enjoyed by Judges, but is the reflection of the privilege of the people to the Rule of Law in a democracy. It is a safeguard for the protection of the people against the vagaries of the legislature and the executive. It comes with the responsibility to be sincere and conscientious in performing your duties. In Union of India v. Madras Bar Assn.[12], the Supreme Court observed:

46. ... Independence is not the freedom of Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial.[13]

The "Bangalore Principles of Judicial Conduct (2002)"[14] clarifies that judicial independence is a prerequisite to the Rule of Law and a fundamental guarantee of a fair trial, and that a Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. The following guidelines are given in application of the principle:

1.1. A Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2. A Judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the Judge has to adjudicate.

1.3. A Judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of Government, but must also appear to a reasonable observer to be free therefrom.

11 Benjamin Cardozo, The Nature of the Judicial Process (1921).
12 (2010) 11 SCC 1.
13 Ibid., 35, para 46.
14 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

1.4. In performing judicial duties, a Judge shall be independent of judicial colleagues in respect of decisions which the Judge is obliged to make independently.

1.5. A Judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6. A Judge shall exhibit and promote high standards of. judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Judicial temperament and humility

Everyday, everyone, inside and outside the court, address Judges as "My Lord" or "Your Honour". Everyone bows, greets and salutes them and shows them respect and deference. Day after day, they decide the fate of litigants, by granting and rejecting submissions, arguments, complaints, requests and prayers. They can send people to jail. They can declare people to be paupers. They can decide who is right and who is wrong. They have captive audiences in their courts, who give appreciative nods and approving smiles at every witticism and remark. It is but natural that after some time, some Judges start thinking that they are the personification of wisdom, knowledge, and intelligence; and more importantly, their word is law and their wish a command. Humility gradually fades from their mind and demeanour. Harold R. Medina therefore warned:

A Judge is surrounded by his subordinates, lawyers and litigants who keep telling him what a noble, wonderful, wise and knowledgeable person he is. The moment he starts believing them, he becomes a lost soul, ending up the opposite of all that a Judge should be.

Humility is the quality which makes a Judge realise, that he is neither infallible nor omnipotent, that he should hear the lawyers who have studied the facts and researched on the law, and that he should decide all issues by keeping an open mind. Without humility, a Judge becomes arrogant and opinionated, perverse with a closed mind, and starts believing that the lawyers do not know much, that he knows better and that his decisions are always just and right. He tends to showcase his cleverness, knowledge and erudition in his judgments and orders, relegating justice to the back seat. In short, he ceases to be a "Judge" in the true sense.

You should be more concerned about rendering justice rather than trying to exhibit your erudition, intelligence or power, which inevitably leads to injustice. Justice Frankfurter described "Judicial humility" as having a mind that respects law, that can change its thinking, that can accept that another view is possible, that can be persuaded by reason, that which is detached and aloof, that quests for truth and that puts passion behind its judgment and not in front of it.

You should avoid the temptation of jumping to conclusions or taking a "view" and then refusing to budge from it. If you first decide what should be the result without hearing or without hearing fully and properly, and want to stubbornly stick to it, then you will be searching for the law and facts to fit your decision, rather than basing your decision on the facts and law. You will also try to ignore or overlook the law and the facts that are inconvenient or contrary to your view. Choosing the facts and law to support a predetermined view, and ignoring other relevant facts and law is judicial perversity. It is said that many successful and brilliant lawyers fail to transform themselves into good Judges, if they are obsessed with showcasing their intelligence and knowledge in every decision, rather than rendering justice.

You should be careful and balanced in what you say inside and outside the court. The "Bangalore Principles of Judicial Conduct (2002)"[15] gives you the following advice:

46. A Judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a Judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

You should not try to force a compromise or settlement. You should not become peeved or upset when your suggestions for settlement, which you may consider to be reasonable, are not accepted by one of the parties. In fact, without knowing the full facts, you should not even suggest a compromise. Let me clarify. You can always suggest that the parties should settle. In fact, Section 89 CPC requires Judges to encourage settlements. What you should not try to do is to impose your views as to what the terms of settlement should be, at a premature stage. When you suggest a compromise and also the terms which you consider to be fair, in many cases, the party whose case is weak will be eager to agree, while the party with a strong case or a just cause may be reluctant to agree. Having suggested the compromise, you may feel irritated with the party who is not agreeing with your suggestion. When you thereafter hear the matter, your resentment against the party who refused to compromise may make you hostile to the party who did not listen to your suggestions, and emotions may blur your judicial vision. Of course, that is not likely to happen when you develop judicial maturity and experience. A Judge who genuinely feels that a settlement is appropriate in a case and pursues his suggestions with the parties, should recuse himself from hearing it, if the settlement does not materialise.

You should not be perturbed or worried about the comments of the media or adverse reactions of any particular group, in regard to your decisions. Neither your judgment nor your actions should be populist. You are not running for a public office. You are not seeking publicity. If Judges should decide in a manner which will please the majority, no justice can be rendered to the minority. If Judges should go by the views of the rich and powerful, justice cannot be rendered to the poor and downtrodden. If Judges should go by the views of the vociferous groups, justice cannot be rendered to the voiceless majority. The decisions should be based on the merits of the case and not on your emotions and preferences.

A common complaint against Judges is that they live in ivory towers and that they do not understand the ground realities. Do not be worried by such remarks. Judges deal with the problems, concerns and difficulties of the common man everyday. They read newspapers and magazines and watch television. They have access to internet. They have their feet firmly on the ground. In fact, many a times, the worry is that their decisions, particularly in sensational criminal cases, may be influenced by the opinion of the media and the pressure of public opinion.

Another frequent complaint is that some court orders are impractical. The complaint is meaningless. Judges do not make the laws, but only decide in accordance with law. The legislature makes the laws. The grant of relief is circumscribed by the provisions of law, the prayers made and the case made out. Only where the issue is not covered by the provisions of law or precedents of higher courts, a Judge can think of invoking principles of equity to would the relief. If there is any rigidity or impracticality in any judgment, it is the requirement of law.

15 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

Impartiality (freedom from prejudice and bias)

We now come to the most crucial and special among the qualities of a Judge — impartiality. In fact, to achieve impartiality, you should have all the other four qualities mentioned above—honesty and integrity, judicial aloofness, independence, humility—and something more, that is freedom from bias and prejudice. You may have honesty and integrity, but may still suffer from bias and prejudice. Bias and prejudice in a Judge may be of two kinds — external and internal.

External bias and prejudice

When a lawyer of your caste or community appears, the case should not swing in his favour by reason of his caste. If there is a dispute between persons belonging to your caste/community and a person belonging to a rival caste, you should not lean towards the litigant belonging to your caste/community. That will be bias. When a lawyer or litigant appearing before you, belongs to a caste/community which is known to be a traditional rival of your caste/community, you should not, by reason of his caste/community, be harsh or overly strict or hostile. Judges should guard themselves against any prejudice and bias based on caste/community.

Sometimes, a friend or distant relative or even a mentor (or a person who is a leader or member of the political party of which you may be an admirer or follower) may appear before you, as a lawyer or litigant. When that happens, you should curb any inclination or tendency to decide in their favour or to exercise judicial discretion in their favour. If you exercise your discretion in their favour, by granting ex parte interim orders, on the specious justification that when the other side enters appearance, you will modify the orders, you would clearly be guilty of nepotism.

Some Judges think that they should encourage junior members of the Bar and the proper way of doing it is by granting interim orders sought by them. This is on a total misconception of what constitutes encouragement. You "encourage" juniors by giving them a patient hearing, by not being harsh with them, by allowing them to get over their inhibitions, stutters and stumbles, and by permitting them to prepare and argue on another day. In short you "encourage" them by putting them at ease and giving them some latitude. Giving interim orders in undeserving cases, merely because juniors appeared and sought interim relief, is not encouragement of juniors, but abuse of judicial power which causes prejudice to the other party. It is clearly unwarranted bias.

Let me refer to some other instances of bias and prejudice. There are lawyers who are very respectful towards the court, who are always very courteous, who always bow to the Judge when they enter and when they leave a court hall. They sit in the front row and smile appreciatively at all jokes and witticisms of the Judge, howsoever foolish or pedestrian they are, and nod approvingly when the Judge expounds some legal principle, even if it is erroneous or absurd. When this happens, the Judge starts thinking: "Oh, this lawyer is intelligent and good" and starts having "positive vibes" towards such lawyer. On the other hand, there are some lawyers who always sit in the court with a dour face. Whenever the Judge makes a "witty" remark or enunciates some legal principle, they look away disinterestedly or wear an expression of boredom implying that they consider the Judge to be shallow or ignorant. The Judge therefore thinks: "This lawyer cannot appreciate or understand my wit, knowledge or wisdom" and starts developing "negative or hostile vibes" towards such lawyers. After sometime, there is every likelihood of the "pleasant" lawyers having a better chance of winning a march over the "dour" lawyers, in getting discretionary interim orders. This kind of bias and prejudice in action, should be avoided.

There is another version of "good" and "bad" lawyers. Some lawyers are very reasonable in their submissions. They are precise, respectful and brief. Some others are "cantankerous", who will beat around the bush, refuse to come to the point, disagree with the Judge and go on arguing and arguing, testing the patience of the Judge. After some time, whenever the "reasonable" lawyer appears, the Judge will mentally lean forward and whenever the "cantankerous" lawyer appears, he will mentally lean backwards. As a result, when the reasonable lawyer has a bad case, and the cantankerous lawyer has a good case, there is a very good chance of the "good" lawyer with a bad case getting some relief and the "bad" lawyer with a good case not getting adequate relief. Such emotional reactions on the part of the Judge, are nothing but bias and prejudice in action. You should always guard against it. You should neither lean forward nor backward, but always be "upright" and "straight".

Your dislikes and likes for any lawyer or litigant, or your feelings towards or against any particular caste, community, religion, race or region, your kinships, friendships, loyalties to any person or persons, should not have any bearing on your decision or the decision-making process. Every one of these external factors/considerations should be kept away. A case should be decided on its merit, and not on the merit or reputation or status or attitude of the lawyer or the litigant.

Internal bias and prejudice

Let me next refer to "internal bias and prejudice". Every Judge has his own perception about what is right and what is wrong, what is just and what is unjust, and what is fair and unfair, which will have a bearing on his decision. It is said that such perceptions of a Judge, could be based on his personal philosophies developed upon traditional customs and beliefs, acquired convictions and prejudices,0 deeply rooted in his psyche moulded by what he heard, what he read, what he felt and what he experienced (including childhood experiences and mental scars). Over a period of time, these perceptions lead Judges to become typecast in their decision making.

For example, the experiences of a Judge may make him view all police action with suspicion and consequently lead him to believe that most of the accused are framed or falsely accused of offences, and that third-degree methods would have been employed to get tailored false confessions, and that therefore there is a need to give the benefit of doubt to the accused in most cases. He therefore tends to acquit in most of the cases and is therefore identified as an "acquitting Judge". Another Judge may feel that when the police investigate and file a charge-sheet and place evidence supporting the charge, they should not be disbelieved and that the discrepancies in the evidence of the witnesses should be ignored as they are usually due to human "error" 'and defective memory. He therefore tends to convict and is identified as a "convicting Judge". Every defence lawyer would avoid hearing of his case by a "convicting Judge". The very same defence lawyer will always be ready to conduct their cases before an "acquitting Judge". You should be careful to be a neutral Judge deciding cases purely on merit, without being branded as either an acquitting Judge or a convicting Judge.

Let me give another example. Let us say that there are two similar claims for compensation pending before two different Claims Tribunals, where the age, income and number of dependants of the deceased are the same. One Tribunal awards Rs 4 lakhs as compensation, while the other Tribunal awards Rs 6 lakhs. Both the Tribunals may be presided by honest men with utmost integrity. Nevertheless, their personal philosophies enter into their judgments, leading to award of different quantum on similar or same facts. This results in the former being referred to as a

"tight-fisted Judge" and the latter being referred to as a "liberal Judge". Another example: before a particular Judge, 90% of eviction cases may succeed, while before another Judge, 90% of eviction cases may fail. The former will be branded as a "landlord Judge." and the latter as a "tenant Judge". Similarly, in regard to labour cases, some Judges will be called as "pro-management Judges" and some as "pro-labour Judges", depending upon their philosophical preferences.

We cannot afford to have one Judge deciding one way and another Judge deciding another way and a third Judge a third way, on the basis of their personal philosophies. It is true that Judges are not robots or computers to give identical judgments and so long as Judges are human, their personal philosophies will, to a certain extent, mould their decisions. But a litigant, adversely affected by a judgment, will be perplexed as to why he should be the sufferer on account of his case coming up before a particular Judge, when in another identical case which came up before another Judge relief was granted. It is to avoid the ill-effects of personal philosophies and prejudices and to ensure uniformity and consistency in decisions, the Indian courts follow the "precedent" doctrine. I will not elaborate upon precedents now, as it is a subject which requires a separate article.

You should be careful to ensure that your personal philosophy does not gain upper hand when precedents are available. The litigants are not bothered about the length of the judgment or about the erudition of the Judge. He is concerned only with the result — the relief which the Judge grants or does not grant. Therefore, there should be an effort to achieve consistency and uniformity in decision making. I am not saying that you should give up your judicial independence. Nor can I say that your personal convictions and views cannot at all play a part in the decision making. All that I say is that when there are precedents, you are bound to follow them.

You may be from any background, from any religion, from any caste or community. You may have any political conviction. You may be a friend or kin of many and you may be obliged to many — your teachers, mentors and seniors. Whatever may be your background or antecedents, whatever may be your personal philosophies, beliefs or convictions, when you become a Judge, your allegiance should only be to law and justice, and not to your friends and relatives who might have helped you, or the teachers and mentors who moulded you, or the Judges who selected you, or the leaders of the political party whose ideologies have impressed you. Friendship, loyalty, gratitude are great qualities by themselves, but they should always yield to your allegiance to integrity, impartiality and justice. You shall truly and faithfully perform the duties of your office without fear or favour, affection or ill-will. Thomas Fuller said:

When a Judge puts on his judicial robes, he puts off his relationships and friendships, and becomes a person without a relative, without a friend, without an acquaintance. In short, he becomes impartial.

The "Bangalore Principles of Judicial Conduct (2002)"[16] states that the quality of impartiality is essential to the proper discharge of the judicial office, and that it applies not only to the decisions, but also to the process by which the decision is made. They enumerate the standards to achieve impartiality thus:

2.1. A Judge shall perform his or her judicial duties without favour, bias or prejudice.

16 Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

2.2. A Judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the Judge and of the judiciary.

2.3. A Judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the Judge to be disqualified from hearing or deciding cases.

2.4. A Judge shall not knowingly, while a proceeding is before, or could come before, the Judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the Judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. A Judge shall disqualify himself 6r herself from participating in any proceedings in which the Judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where—

2.5.1. the Judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2. the Judge previously served as a lawyer or was a material witness in the matter of controversy; or

2.5.3. the Judge, or a member of the Judge's family, has an economic interest in the outcome of the matter in controversy:

* * *

5.1. A Judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2. A Judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A Judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

Conclusion

You are not legislators; you are not administrators; and you are not experts in fields other than law. You do not make laws. You do not govern the country. But you are the interpreters of law. You are the seekers of truth. You are the Tenderers of justice. You are the guardians of the Rule of Law.

You are the protectors .'and providers of level playing fields for the downtrodden and the weaker sections. You have to remind yourself everyday about the onerous nature of your powers and the limitations on your powers. You should remember that every case that comes up before you will decide the fate of a person relating to his right to livelihood, his right to life, his right to liberty or his right of property. You should remember that every time you fail to do justice, people will

perceive it as an injustice. Pray Almighty everyday to give you the courage and conviction to do justice with humility, wisdom and compassion.,

Knowing the principles of judicial ethics is not sufficient. Practice the ethical principles constantly and vigilantly. Take inspiration from the writings and simple and humble lifestyles of great Judges and leaders. Be good Judges and bring glory and credibility for your great institution.

Dear young Judges, I wish you all a meaningful and fruitful judicial career with courage, commitment, hard work arid ethical behaviour. I also wish you peace, happiness, and contentment in life.

[Note.—Many of you may have different views as to how to practise and maintain judicial ethical standards. Some of you may feel that some parts of my advice regarding ethical standards are homilies which are impractical, unrealistic and ignore ground realities; or that some of my apprehensions are exaggerated. May be. May be not. Recurring aberrations in the judiciary underline the need for strong ethical standards. Let there be no compromise in regard to the adherence to the fundamentals of judicial ethics.]

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In any dispute between the parties, there will be epicentre.
The whole skill of a Family Court Judge is to identify the epicentre of the disputes.

Hon'ble Mr Justice Kurian Joseph
Judge, Supreme Court of India & Chairman
Supreme Court Committee for Sensitization of Family Court Matters

झारखण्ड राज्य विधिक सेवा प्राधिकार
न्याय सब के लिए
ACCESS TO JUSTICE FOR ALL
JHARKHAND STATE LEGAL SERVICES AUTHORITY

Prepared by
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&
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Supreme Committee for Sensitization of Family Court Matters