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Rationale of Restriction on Strikes in Public Utilities

Strike as a weapon has to be used sparingly for redressal of urgent and pressing grievances when no other means are available or when available means have failed to resolve a dispute. Every dispute between an employer and employee has to take into consideration the third dimension, viz. the interest of the society as a whole. However, the workers must have the right to strike for the redress of their grievances and they must be paid wages for the strike period when the strike is legal and justified. The state of India's economy calls for more and more production. Thus reckless use of strike by the workmen creates the risk of unnecessary stoppages. These stoppages create worse tensions and frictions and may results in the violation of law and order.

DR. BABITA CHUGH

Introduction :

In India unlike U.S.A. the right to strike is not expressly recognized by law. Before 1926 there was no statutory law in India concerning industrial strikes for reasons that such strikes were not common in this country. As the frequency of industrial strikes increased after the First World War the Indian Trade Unions Act, 1926 for the first time indirectly recognized[(1)] the right to strike by legalizing certain activities of registered trade unions in furtherance of trade disputes. The Indian Trade Unions Act, therefore, confers the right to strike which otherwise would have been a breach of common law[(2)] and thus actionable. Today while the right to strike is recognized as a legitimate economic weapon of trade unions its exercise is so circumscribed so as to give to the government freedom to determine its legal or illegal character. it is thus a recognized weapon of the workmen to be resorted to by them for asserting their bargaining power and for backing up their collective demands upon an unwilling employer.

The term public utility service is commonly used to designate those industries and services which are vital to the welfare of the general community. For instance supply of water, gas, electricity, telephone, mail, railway and motor transportation, food stuffs etc. may be such services or industries. The employed in public utility services to go on a strike without a pervious notice. The rationale behind such law is that persons whose work is vital to the welfare of the community generally should not be entitled to go on a strike before sufficient time had been given to examine the merits of their grievances and to explore the possibilities of arriving at a settlement. A similar observation has been made by the Kansas Court of U.S.A. that :

Heretofore the industrial relationship has been tacitly regarded as existing between two members- industrial manager and industrial worker. They have joined whole-heartedly in excluding others. The legislature proceeded on the theory that there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life - the public Whenever the dissensions of the two become flagrant, the third member may see to it the business does not stop.[(3)]

Strikes and Compliance of Statutory Conditions : Section 22 of the Industrial Disputes Act, 1947, sets out the circumstances when a strike is deemed to be illegal. In other words certain conditions have to be fulfilled before resorting to a strike (or lockout) in a public utility undertaking. These conditions are : **(1)** notice of strike to the employer within six weeks before striking, or **(2)** no strike within 14 days of giving such notice, or **(3)** no strike before the expiry of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings. No notice, however, is necessary for a strike if it is already in existence. A strike, therefore, shall be illegal if it is commenced or declared in contravention of the aforesaid conditions. The avowed object of section 32 is to interdict strikes in the interest of general public. The employee or worker in not restrained from going on a strike by the section but is required of him to fulfill certain conditions as enumerated in four different clauses. In other words, there is no strike ban but only certain procedural mandatory requirements are laid down which the employees are to abide for the compliance of statutory conditions.

Department of Law, University of Rajasthan, Jaipur (Rajasthan)

Strikes and Breach of Contract : It is clear that employees in a public utility service cannot go on a strike in breach of contract, without complying certain formalities. The question arises[4] whether such strike results in a breach of contract between the employer and the employee? It is generally agreed' that industrial matters are not entirely governed by ordinary law of contract of master and servant. The expression breach of contract does not mean breach of a condition of service, and it is not incumbent on the prosecution to produce and prove the standing rules in order to establish that the employees were guilty of breaking the contract.

However, the phrase breach of contract as used in sections 22 and 23 means breach of contract of service or employment and not of a special contract not to go on strike. While there must necessarily be a contract of service, express or implied between a workman and his employer, a special contract not to goon a strike does not constitute an essential part of the contract between a workman and his employer. Besides if the expression breach of contract in sections 22 and 23 really referred to a contract not to strike, the prohibition in these two sections would be almost meaningless. For there could not possibly be any strike in breach of contract where there is no such special contract at all.

Notice - Requirements : The requirement of notice of strike by employees in the public utility service to the employer within specified period of six weeks is one of the prerequisites for a strike to be veiled under section 22 (I) (a) of the Industrial Disputes Act. The notice so required to be given by the employees must conform to Form N appended to the Industrial Disputes (Central) Rules[5] 1957. Where notice of public utility service was not in the form prescribed for the same inasmuch as it did not mention the date of the proposed strike, the notice must be ineffective and the strike lanced in pursuance to such notice consequently would be illegal. If the notice[6] of the strike is not legal because it does not conform to the requirements of section 22 government have no power to make it legal.

Limitations to Strike : The employees in the public utility service cannot go on a strike within fourteen days of six week notice period. That is to say, they can go on strike only after the expiry of fourteen days, viz, within the period of twenty-eight days only. Where fourteen clays notice[7] was not given to the employer by the union and there is no controversy about the non-fulfillment of the four conditions as in the four clauses following sub-section (I) a strike of the employees or workers will automatically become as one under section 26 of the Act. The fourteen days notice as contemplated by section 22(1) (b) of the Act is to be counted[8] from the date of the receipt of the notice by the employer.

Strike in public utility service cannot be legal also if it takes place before the expiry of the date of strike specified in any such notice. So it is necessary that the notice must specify a date from which strike would commence. Thus a strike which was to have commenced after the date fixed in the notice, having begun on the date of the notice was illegal.

Pendency of Conciliation Proceedings in Reference to Strike : Section 22 (1) (b) prohibits strikes during the pendency of conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceeding. The object of this clause is to preserve industrial peace during the settlement of the industrial dispute by amicable means through conciliation. The effect of section 12(6) which deals with submission of conciliation report within 14 days is not that, as soon as 14 days expire, the conciliation officer[9] virtually becomes functus officio and the proceedings which were comes functus office and the proceedings which were validly pending before him till then become wholly invalid thereafter, in considering the question as to the effect of the provisions of section 12 (6), it would be relevant to bear in mind the provisions of section 20 which gives artificial denotation to the expressions commencement and conclusion of the proceedings which is to be found in section 20(2) is applicable to the conciliation proceedings pending before the conciliation officer. That provides an additional ground in favour of the construction that the proceedings beyond 14 days do not become invalid. The pendency of these proceedings continue until the report is received in fact by the appropriate government. Therefore unilateral change by the employer when conciliation proceedings are pending beyond 14 days is illegal and is guilty of an office under section 31 (1) and 33 of the Industrial Disputes Act. Similarly a strike commenced during the pendency of conciliation proceedings contravenes[10] the provisions of the clause (d) of section 22(1) of the Act and is illegal. The Supreme Court also observed :

The Act requires that conciliation officer must submit his report within 14 days from the commencement of conciliation proceedings and then on receipt of the report by the appropriate government the conciliation proceedings are to be deemed to have concluded. Although factually the conciliation proceedings terminate when a settlement is arrived at before the conciliation arrived at the Act be a legal fiction prolongs the conciliation proceedings until the actual receipt of the report by the appropriate government and goes on to provide that appropriate government must have seven days' time to consider what further steps it would take under the Act. Up to the expiry of this period of seven days the Act permits no strike but after that period is over the employees are left free to resort to collective action by way of strike. Indeed, it is on the basis of these provisions that date of strike has to be carefully selected and specified in the notice of strike to be given by the employees under section 22 (1) of the Act.

The failure to send report to the government in contravention of section 12 (6) may be a breach of duty on the part of the conciliation officer[11] but does not affect the legality of conciliation proceedings which terminate in a

settlement as provided by section 20(2)) of the Act. Conversely unless a notice of strike in a public utility service is given under section 22 of the Act it is not obligatory on the conciliation officer to hold conciliation proceedings. It is discretionary with him Section 22(3) provides that no notice is required for a strike if a strike is already in existence in a public utility concern. The employer, however, must send information of such strike on the day on which it is declared to such authorities as are specified by the government.

Conclusion :

Rationale of restriction on strikes mainly a factor based on the mutual behavior of employer and employee. although in certain circumstance it may be a result of one side over emphasis. Therefore, circumstance should be established in such a way that whole working may be enlightened through the course of check and balances covering the provisions of law.

Strike as a weapon has to be used sparingly for redressal of urgent and pressing grievances when no other means are available or when available means have failed to resolve a dispute. Every dispute between an employer and employee has to take into consideration the third dimension, viz. the interest of the society as a whole. However, the workers must have the right to strike for the redress of their grievances and they must be paid wages for the strike period when the strike is legal and justified. The state of India's economy calls for more and more production. Thus reckless use of strike by the workmen creates the risk of unnecessary stoppages. These stoppages create worse tensions and frictions and may results in the violation of law and order. India cannot tolerate frequent stoppages of work for frivolous reasons. Above all from the public point of view they retard the nation's economic development. Though, a legitimate strike is a weapon that empowers the disempowered to fight in oppressive cases when no constructive option is left. It is a weapon of the last resort taken out of exasperation. It is this weapon, which provides an opportunity for collective bargaining. The right to strike is not fundamental and absolute right in India in any special and common law, whether the undertaking is industry or not. This is a conditional right only available after certain pre-condition are fulfilled. If the constitution maker had intended to confer on the citizen as a fundamental right the right to go on strike, they should have expressly said so.

Unless the strike is banned with in the meaning of Sec 22 (1) of the Industrial Disputes act, the same cannot be termed as illegal attracting Sec 24 of the Act.

Section 22(1) provides that no person employed in public utility service shall go on strike in breach of contract: (a) without giving to the employer notice of the strike within six weeks before striking; or (b) within fourteen days of giving such notice ; or (c) before the expiry of the date of strike specified in any such notice as afore said ; or (d) during the pendency of any conciliation proceeding before a conciliation officer and seven days after the conclusion of such proceedings.

This legislation makes a point clear that the courts presumed the right to strike as a legally justifiable right. The point in which the courts were traditionally interfered was with the legality of the 'strike' and not the right to strike. For a worker the right to strike is fundamental as it is intertwined with very source of livelihood. It is expedient on the judiciary, at least the apex judiciary to recognise this right for the working class to survive in a mixed economy.

Even though there is no express statement in our constitutional law incorporating in it the doctrine of separation of powers, in the interpretation of the Constitution, this Court has broadly adopted the said doctrine in Indira Nehru Gandhi v. Shri Raj Narain and others. Even though by virtue of its powers by interpretation of law the court in an indirect way is making law, it should be stated that there are well recognised limitations on the power of the court making inroads into the legitimate domain of the legislature. If the legislature exceeds its power, this Court steps in. If the executive exceeds its power, then also this Court steps in. If this Court exceeds its power, what can people do? Should they be driven to seek an amendment of the law on every such occasion? The only proper solution is the observance of restraint by this Court in its pronouncements so that they do not go beyond its own legitimate sphere. It is expedient on this court to recognize the right to strike in this context to provide the legitimate locus for the workers.

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(1) *Sections 17 and 18. So was the position in many Asian Countries, e.g.*

(2) *Buckingham Carnatic Company's Case 1920.*

(3) *State v Howat, 109 Kans. 376 (U.S.A.)*

(4) *Shri Meen a Kashi Mills v. State of Madreas A .1 R. 1951 Mad*

(5) *Rule73.*

(6) *Papanasam Labour union sate of Madras*

(7) *Modi Industries v Their Employees 1949 L.LL 821*

(8) *Section 22 (1) (c) Industrial dispute.*

(9) *State v. Andheri - Moral Kurla - Act.*

(10) *Colliery mazdoor congress v Nw Beerbhum Coal Co. 1952 1.AC. 219.*

(11) *State of Bihar v. Kripa Shanker jaiswal AIR. 1916 SC. 304.*

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Protection of Indian Women in Reference to Domestic Violence Act 2005

"It is from women, the condemned one that we are conceived and it is from her that we are born. It is to women that we are engaged and married. It is women who are our 1f long friend. And it is she who keeps our race going. It is women through whom we establish our socialites. Then why denounce her from whom even kings and great men are born." - Guru Nanak

DR. PARMANAND SHARMA

Introduction :

The growing international concern for women's issues has motivated many Governments to study the problems of women and to provide some measures of social security and status to women. So far as Indian Government is concerned, it responded by enacting some laws for creation of authorities to deal with matters relating to women, like National Commission for Women under the National Commission for Women Act, 1990 and Human Rights Commission under the Protection of Human Rights Act, 1993. National Commission for Women Act, 1990 was passed by Parliament with a view to set-up the National Commission for Women with the objective to investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws. For enactment of the Protection of Women from Domestic Violence Act, 2005, National Commission for Women was very instrumental.

Role of Voluntary and non voluntary Organizations :

There are several types of voluntary and women's organisations and each may offer a special type of assistanceshelter, medical and legal aid. While some organizations will themselves assist the women in generating the options, it always helps to have an idea of the kind of assistance one may want. The role of the voluntary organizations in providing support to women has been explicitly recognized under the Domestic Violence Act as Service Providers. Even if a woman wants to avoid the legal action or wants to wait for some more time before she tries it out, there are some options as statutory bodies and institutions where she could think about.

Role of National Commission for Women :

The United Nations Commission on the Status of Women in its Twenty fifth Report had recommended to all member-states to establish National Commissions for women or similar bodies with a mandate to review, estimate and recommend measures and priorities to ensure equality between men and women and full protection of women in all spheres of her national and individual life.[(1)]

Looking to the demand for effective legal measures, the Parliament enacted the National Commission for Women, 1990.

In order to ensure the implementation of various measures, the committee recommended the constitution of statutory autonomous commissions at the Centre and in all the States except Jammu & Kashmir.[(2)]

The Committee on the Status of Women in India (CSWI) recommended nearly two decades ago, the setting up of a National Commission for women to fulfil the surveillance functions to facilitate redressal of grievances and to accelerate the socio-economic development of women. The background of passing of the Act reveals that successive Committees/Commissions/Plans including the National Perspective Plan for Women (1988-2000) had demanded for time to time for an effective body. During 1990, the central government held consultations with NGOs; social workers and experts, regarding the structure, functions, powers, etc. of the Commission proposed to be set-up. In May 1990, the Bill to constitute a Commission for women was introduced in the Lok Sabha. In July 1990, the HRD Ministry organized a National Level Conference to elicit suggestions regarding the Bill. In August, 1990 the government moved several

Department of Law, University of Rajasthan, Jaipur (Rajasthan)

amendments and introduced new provisions to vest the commission with the power of a civil court. Ultimately the Bill was passed and received accent of the President on 30th August 1990.

Thus, it is in this context that the National Commission for 'Women Act, 1990 was passed. It was a major step in the protection of women's rights and enhancement of their status.

Functions of the Commission :

The National Commission for Women was set-up as a statutory body in January, 1992 under the National Commission for Women Act, 1990 (Act No. 20 of 1990) of Govt. of India, to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women.

Thus, the main task of the Commission is to study and monitor all matters relating to the constitutional and legal safeguards provided for women, to review the existing legislation and suggest amendments, wherever necessary. It will also look into the complaints and take suo-moto notice of the cases involving deprivation of the rights of women in order to provide support, legal or otherwise, to helpless women even within the family. To protect the rights of women so enable them to achieve equality in all spheres of life and equal participation in the development of the nation.[3] The commission regularly publishes a monthly newsletter, Rtzshtra Mahila in both Hindi and English.[4]

In keeping with its mandate, the Commission initiated various steps to improve the status of women and worked for their economic empowerment. The Commission completed its visits to all the States & Union Territories except Lalcshadweep and prepared Gender Profiles to assess the status of women and their empowerment. It received a large number of complaints and acted suo-moto in several cases to provide speedy justice. It took up the issue of child marriage, sponsored legal awareness programmes, Parivarik Mahila Lok Adalats and reviewed laws such as Dowry Prohibition Act, 1961 , The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Indian Penal Code, 1860 and the National Commission for Women Act, 1990 to make them more stringent and effective. It organized workshops! consultations, constituted expert committees on economic empowerment of women, conducted workshops & seminars for gender awareness and took up publicity campaign against female foeticide, violence against women, etc. in order to generate awareness in the society against these social evils.[5]

Constitution of the Commission :

Section 3 of the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India)

(1) The Central Government shall constitute a body to be known as the National Commission for Women to exercise the powers conferred on and to perform the functions assigned to it under this Act.

(2) The Commission shall consist of :

(a) A Chairpersons committed to the cause of women, to be nominated by the Central Government.

(b) Five Members to be nominated by the Central Government from amongst persons of ability integrity and standing who have had experience in law or legislations trade unionism, management of an industry potential of women, women's voluntary organizations (including women activist), administration, economic development, health, education or social welfare; Provided that at least one Member each shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes respectively.

(c) A Member-Secretary to be nominated by the Central Government who shall be :

(i) an expert in the field of management, organizational structure or sociological movement, or

(ii) an officer who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union with appropriate experience.[6]

Complaint and Investigation Cell :

The commission have various cells but Complaint & Investigation Cell is one of very important Cell of them. The Complaints and Investigation Cell of the commission processes the complaints received oral, written or suo-moto under Section 1 0 of the NCW Act. The complaints received relate to domestic violence, harassment, dowry, torture, desertion, bigamy, rape, and refusal to register First Information Report, cruelty by husband, deprivation, gender discrimination and sexual harassment at work place.

The Complaints are tackled as below :

(i) Investigations by the police are expedited and monitored.

(ii) Family disputes are resolved or compromised through counseling.

(iii) For serious crimes, the Commission constitutes an Inquiry Committee which makes spot enquiries, examines various witnesses, collects evidence and submits the report with recommendations . Such investigations help in providing immediate relief and justice to the victims of violence and atrocities. The implementation of the report is monitored by the NCW.

Procedure of the Commission :

The women can make an application seeking the assistance of the NCW (unless one is from the State of Jammu and Kashmir, where the law does not apply). Such an application need not be technical or complicated. There is no specific format for it.

If the NCW is of the opinion that the women has a genuine case, it can issue a 'notice' and call the abusers to investigate the matter. It has powers of a Civil Court in summoning witnesses and enforcing production of documents. So, if the women doesn't want to involve the police but wish that one's case be investigated, she may approach the NCW.

The NCW has constituted a complaint and prelitigation cell which would investigate the woman's case.

The NCW could also write letters to the police to co-operate with the victim or to give her protection and to help in getting her belongings back.

The NCW could also use its offices to bring about conciliation or a settlement. However, as it has no powers of enforcement, the NCW cannot be a substitute for a legal option.[7]

Conclusion and Analysis :

The crime recording authorities have not started collecting the data on the head of Domestic Violence against women, neither at the national level nor at the State level. The data are still recorded on different crimes against women under Indian Penal Code. As per the report of Law Ministry and Home Ministry tabled in Parliament national data of 2006-2010 are analysed. A total of 2,13,585 incidents of crime against women (both under IPC and SLL) were reported in the country during 2010 as compared to 2,03,804 during 2009 recording an increase of 4.8% during 2010. These crimes have continuously increased during 2006-2010 with 1,64,765 cases in 2006; 1,85,312 cases in 2007; 1,95,856 cases in 2008; 2,03,804 cases in 2009 and 2,13,585 cases in 2010.

The crime against women has increased by 4.8% over 2009 and by 29.6% over 2006. The IPC component of crimes against women has accounted for 96% of total crimes and the rest 4% were SLL crimes against women. The proportion of IPC crimes committed against women towards total IPC crimes has increased continuously during last 5 years from 8.2% in 2006 to 9.6% during 2010.

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Religious Facets of Adoption Under Personal Laws in India

The enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its subsequent amendment in 2006 is definitely a significant effort of the legislature towards recognition of adoption of orphan, abandoned and surrendered children by people irrespective of their religious status. It can't be denied that it is a secular legislation only under which any person can adopt a child or orphan, abandoned and surrendered child irrespective of his or her religion. The Supreme Court of India has delivered a landmark judgement in Shabnam Hashmi v. Union of India and others, (2014) 4 SCC 1, that irrespective of religion, any person can adopt under the Juvenile Justice (Care and Protection of Children) Act, 2000.

DR. MONIKA AHUJA

Adoption can be a most beautiful solution not only for childless couples and single people but also for homeless children. It enables a parent-child relationship to be established between persons not biologically related. It is defined as a process by which people take a child not born to them and raise it as a member of their family.[1]

This paper on Adoption Laws will trace the adoption practice in English Law, Muslim Law, Parsi Law, Christian Law and Hindu Law.

Adoption Under English Law :

English Law of adoption is very similar to the Hindu Law of Adoption in as much as it lay down that the adopted child, for all intents and purposes, becomes like a natural child and the child's ties with his natural family are severed.

The English of adoption traces back to ancient times. Examples of Moses being adopted and the adoption of King Octavian Augustus. Modern adoption laws came into existence only after the First World War. The main reasons were the influenza epidemic and the aftermath of World War First. Many kids were abandoned by their parents, others were separated from their biological families. The confusion and chaos caused due to the War influenced many countries to enact new legislations or modify previously existing laws on adoption.[2]

The first adoption laws were passed by England and Wales. It was the Adoption of Children Act, 1926. Until that date adoption had not been recognized as a legal concept. This law required the consent of both the biological parents and that of the adoptive parents. Although the Act recognized that adopted children benefited from the same rights, duties, liabilities and obligations as a birth child, it did not ensure the child's full integration into the adoptive family, not were inheritance rights replaced in the birth family.[3]

Adoption Under Muslim Law :

There is nothing like adoption in Muslim law. So, Muslim law does not recognize adoption. In Pre-Islamic Arabia, adoption was prevalent but the Prophet Mohammed was against it and so it was abrogated by a verse of the Quran.[4]

(a) By Custom : If there is some custom prevailing among some Muslim communities, then that may be the force of law. Among some Hindu converts to Islam, the custom of adoption still prevails.[5] But the burden of proof that such custom is prevailing is on the person who asserts.[6] But after the coming into force of the Shariat Act, 1937, such custom seems to be abrogated because custom will prevail over the provisions of Muslim law except to the extent to which they have been abrogated by Section 3(1) of this Act and if a declaration is made as required by it, the custom shall stand abrogated.[7]

(b) By Law : If some provisions of any Act permit adoption, then it may have the force of law. Section 29 of the Oudh Estates Act, 1869 permits a Muslim talukdar to adopt a son.[8] The law has not been superseded by the Shariat Act, 1937.

Recently, on a petition filed by Shabnam Hashmi[9], who had approached the Apex Court after she was refused permission to adopt a girl-child the Court upheld the provision of the Juvenile Justice (Care and Protection of Children) Act, 2000 for adoption of children, which is a secular law, holding that personal law of Muslims and others could not stop this. The court has said that the right to adopt

Assistant Professor (Department of Law), Punjabi University, Patiala (Punjab)

provided under the Juvenile Justice (Care and Protection of children) Act, 2000 cannot be stultified by a personal law.[10] Until the Juvenile Justice (Care and Protection of Children) Act, 2000 was amended in 2006, minorities like Muslims, Christians, Parsis and Jews who adopted children were only allowed "guardianship" or "foster care" until their "wards" turned 18. They were not recognized as legal parents, and their adopted children did not have inheritance rights. However, the Hindu Adoptions and Maintenance Act, 1956 allows Hindus, Buddhists, Jains and Sikhs to be a legal parents and gives their adopted children the same inheritance rights as biological children.

The discrepancy arose from the fact that minority communities are governed by specific "personal laws", based on the provisions of their religious texts. These personal laws do not acknowledge adoption. instead, adoption for minorities was determined by the Guardians and Wards Act, 1890. In 2006, the Juvenile Justice (Care and Protection of Children) Act, 2000 was amended to give adopted children "all rights, privileges and responsibilities" of biological children. "The latest Supreme Court judgement is significant because it interprets this aspect of the Juvenile Justice (Care and Protection of children) Act, 2000 in the context of religion and states that it is applicable to all religions and communities," said Dibyajyoti Jaipuriar, one of the lawyers who handled the PIL. "Children adopted under this Act get all the rights that biological children have. Over the post four or five years, several parents from minority communities have already taken advantage of the amended Juvenile Justice (Care and Protection of Children) Act, 2000 to adopt children. The Supreme Court judgement makes it clear that all Indian citizens have the right to adopt legally, irrespective of personal religious laws.

Adoption under Parsi and Christian Laws :

The personal laws of these communities also do not recognize adoption and here too adoption can take place from an orphanage by obtaining permission from the court under the Guardian and Wards Act, 1890. A Christian has no adoption law.[11]

Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Christians have no adoption laws and have to approach court under the Guardian and Wards Act, 1890. National Commission on Women has stressed on the need for a uniform adoption law. Christians 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 his connections. Besides, such a child does not have legal right of inheritance.[12] The general law relating to guardians and wards is contained in the Guardian and Wards Act, 1890.

The adoption under Hindu Law is governed by The Hindu Adoption and Maintenance Act, 1956 :

The Hindu Adoption and Maintenance Act, 1956 extends to only the Hindus, which are defined under Section 2 of the Act and include any person, who is a Hindu by religion, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj, or a Buddhist, Jaina or Sikh by religion, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh.

Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Adoption in the Hindus is covered by this Act and after the coming of this Act all adoptions can be made in accordance with this Act. Prior to this Act, only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir.

Requisites for a valid adoption :

The Act reads,

(a) No adoption is valid unless :

(i) The person adopting has the capacity, and also the right, to take in adoption[13];

(ii) The person giving in adoption has the capacity to do so[14];

(iii) The person adopted is capable of being taken in adoption[15]; and

(iv) The adoption is made in compliance with the other conditions mentioned in the Act.[16]

(b) Other conditions for a valid adoption :

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth [or in the case of abandoned child or child whose parentage is not known the place or family where it has been brought up] to the family of its adoption;

Provided that the performance of Datta Homam shall not be essential to the validity of adoption.[17]

Adoption under Juvenile Justice (Care and Protection of Children) Act, 2000 :

Considering all the aspects mentioned above, laudable attempt were undertaken by the legislature have been made in chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000. This enactment shows that the legislature may be found to have accepted the concept of secular adoption whereby without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt.

There arises confusion as to the interpretation as well as concept of adoption as because the expression "Adoption" has not been defined at all the enactments like Hindu Adoption and Maintenance Act, 1956 and the Guardian and Wards Act, 1890. Moreover, the legal status of the adopted child has not declared to be equal to that of a biological legitimate child. Though at the initial stage the Juvenile Justice (Care and Protection of Children) Act, 2000 did not contain these factors, these are introduced in Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. The concept of adoption has been well defined in Section 2(aa) of the said Act, which is as follows:

"Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship."

The Act introduced an expression "child in need of care and protection" and it has been defined in Section 2(d) of the Act. The definition covers what is meant by orphan, abandoned and surrendered children.

Conclusion :

The children are considered as blessings from god and a bundle of joy to the parents. Not every parent or couple has got the pleasure to become a biological parent. Nowadays, the parents or couples who cannot have their own biological children due to numerous reasons, go in for adoptions and the rate of it has gone up in these days as the mentality or thinking of people is changing from orthodox to modern with a lot of western influence. In India, adoption is the subject matter of personal laws of different sections of the society like Muslim, Christians, Hindus, Parsis. At present, the Hindu Adoption and Maintenance Act, 1956 governs the adoption under Hindu Law. Section 2 of the said Act extends to only Hindus and it states that a person who is a Virashiaiva, Lingayat or Buddhist, Jain, or Sikh by religion is a Hindu.

The enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its subsequent amendment in 2006 is definitely a significant effort of the legislature towards recognition of adoption of orphan, abandoned and surrendered children by people irrespective of their religious status. It can't be denied that it is a secular legislation only under which any person can adopt a child or orphan, abandoned and surrendered child irrespective of his or her religion. The Supreme Court of India has delivered a landmark judgement in Shabnam Hashmi v. Union of India and others, (2014) 4 SCC 1, that irrespective of religion, any person can adopt under the Juvenile Justice (Care and Protection of Children) Act, 2000. The Supreme Court upheld the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, for adoption of children, which is a secular law, holding that personal law of Muslims and others cannot stop this. The court has held that the right to adopt provided under the Juvenile Justice (Care and Protection of Children) Act, 2000 cannot be stultified by any personal law. Even a Hindu now can adopt more than one child of the same sex or even if he has a son or daughter, he or she can adopt another son(s)/daughter(s) under this Act.

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RERA - 2016 : Cleaning Up The Real-Estate

RERA is aimed at building transparency in the real estate sector. The Act comes as a promise to protect the rights of the consumers. Implementation of the Act has been described by the government as consumer-centric and marks the beginning of a new era where consumer is the king. Even Real-estate players approve of the Act and believe that the Act will bring about a paradigm shift in the function of India's Real-estate sector.

KESHAV JHA

Introduction :

Real Estate is the second largest employer, after agriculture and constitutes almost 6% of our GDP. It has been estimated that the real estate sector will generate revenues worth $180 billion by 2020 against $66.8 billion in 2010-11. Several policies and schemes announced by the Government of India have benefitted the real estate sector profusely in the recent years. To promote this sector even more, on 25 March 2016, RERA received the assent of the President of India. It has paved the way to setting up of a real estate regulator.

The real estate sector is headed for greater transparency, and accountability after the introduction of Real Estate Regulation and Development Act, 2016 (RERA) and various other regulatory and policy initiatives. In March 2016, both houses of Parliament passed the real estate bill that ensures transparency and protection of interests of both the buyers and builders. It is a model law, which means it is up to the states to draft and pass their own laws according to the guidelines, as land is a state subject. The centre asked all states to notify the Act before 30 April.

Need :

There are 8 major real estate markets in the country, with Mumbai, NCR and Bengaluru being the top cities, followed by Pune, Hyderabad, Chennai, Kolkata and Ahmedabad. The residential real estate segment is fragmented by nature with dominant regional players and very few developers having a pan-India presence. Commercial real estate and Retail real estate segment has fewer players which hold most of the quality office and retail spaces which ensures transparent transactions and accountability in the business for investors and buyers/leasers alike compared with the residential segment.

Homebuyers, at the receiving end of such delays, overcharging, and other fraudulent practices of real estate developers, have until now had no option but to watch their cases languish for years in the over-burdened consumer courts. Moreover, states have had obscure and varying definitions for terms such as carpet area, common areas, or car parking, leaving ample room for manipulation by developers. The new law provides for a series of safeguards to not only redress such situations, but to also pre-empt them. At the level of the state, the Regulatory Authority and Appellate Tribunal must dispose of cases within 60 days. Appeals to the High court can be made within 60 days. The law attempts to end the non-transparency that characterizes transactions, where agreements are often tilted in favour of developers. Builders of both new and ongoing projects (ones that have not received completion certificate) must mandatorily register their project with the Authority in the next 3 months. Real estate agents too have to register themselves with the Authority within 3 months.

The sector post-introduction of Real Estate (Regulation and Development) Act (RERA) is on the path to transformation, especially for the residential real estate segment. Some of the new regulations under RERA include disallowing the common practice among many developers of pre-launching projects without getting requisite approvals from the local authorities, making project registration mandatory with the regulator and developers will have to disclose approval status, project layout and timeframe for completion to the regulator as well as customers.

Additionally, in order to curb diversion of funds the developer will now have to deposit 70% of the project funds in a separate account which can only be used for the earmarked project. The Act also restricts developers from changing plans post approvals without the consent of the buyers further empowering the buyers.

The aim of the Act is to safeguard the interest of home buyers in the primary real estate market. The Act stipulates compulsory registration of all the residential projects with plot size more than 500 sq. meters. The developer will need to disclose draft of builder buyer agreements, to the authority. A clear picture of the number of units sold and construction status also has to be disclosed. Incorrect or incomplete disclosure will attract a penalty of 5% of project cost. Buyer will be able to get information on defaulting developers. It has been decided that a developer can sell only on the basis

Assistant Professor (Department of Law), Amity University Rajasthan, NH-11-C, Kant Kalwar, Jaipur (Rajasthan)

of usable area. This helps a home buyer understand how much he is paying for each sq. ft that he will get for his use.

Boon for Homebuyers :

RERA will be applicable to all proposed and ongoing residential and commercial realty projects over a minimum area of 500 sq m, or having 8 flats, including projects outside urban areas. Developers cannot even market the project without registering it with the Regulatory Authority; the registration can be revoked in case of violations.

In such cases, the bank account of the project can be frozen, and the money used to complete the work. Builders have to mandatorily disclose every detail of the project on the website of the Authority, and update them quarterly.

Failure to do so can attract a penalty up to 10% of the estimated cost of the project. Repeat offenders can be fined an additional 10% of the project cost, or sent to jail for up to 3 years. Real estate agents and brokers too have to be registered. Non-compliance with the orders of the Appellate Tribunal, by both brokers and property buyers, could attract a penalty up to 10% of the apartment cost and/or a jail term of 1 year. In the case of builders, the jail term may extend up to 3 years.

In case of deliberate delays, builders will have to pay the same rate of interest as they levy on defaulting buyers. The consent of two-thirds of buyers will be required for a builder to make changes to the original plan, even if the planning body sanctions the modifications.

Implementation :

RERA is a central law, its implementation requires the co-operation of state governments. The law requires each state and Union Territory to set up its own real estate regulatory authority. It will be this authority that should frame the rules under which the Act will operate in that state or Union Territory. All the projects and agents operating in the state are supposed to register with this state-level regulatory authority within three months of the notification of the Act. This provides important transparency to buyers. A website needs to be maintained by the state level regulator, so that buyer can check the details of the project's regulatory filings.

RERA mandates 70% of the amount collected from buyers in respect to a specific project,should be deposited in an escrow account to cover the cost of construction and land cost and should be used for the earmarked project. This puts an end to a widespread diversion of funds into other projects, and thereby, delaying the project at hand for years. The setback is this provision lacks an insight into the practicality of real estate business. Cost of land including interest cost and approval cost may be significantly higher than the 30% of the amount collected from the buyers which can be freely withdrawn by the developer.

In case of a joint development agreement, which is a usual feature of the development this issue may not be significant but acquisition of land for construction could be a challenge.

Issues with Implementation :

Many state governments are lagging in the full and proper implantation of the Act. The real estate sector has been highly affected by demonetization and GST tax regimes. Many projects and agents have to wait leading to a slow pace of registration. For instance, only three projects were reported as having been registered in Rajasthan. In Mumbai, although there may be as many as 800 real estate projects under way in the city proper, not one had sought registration. Some major disruption of business seems inevitable for the sector. Undoubtedly, it's a delightful scenario for buyers. But, any right can't be seen in isolation. A right is always accompanied by a duty. So, to make the law more holistic and transparent in its approach, there is one dimension to it- a home buyer, too, can be jailed, up to one year, if he fails to obey the orders of regulatory authorities or appellate tribunal.

Although homebuyers have panned the provision, saying that the law which has been framed to address the woes of homebuyers can't have the provisions to bite them, lawmakers say, any rule can't be made lopsided. But there are many homebuyers who feel that the provision to put homebuyers behind bars would be misused by all powerful developer's lobby to further harass homebuyers.

Conclusion :

RERA is aimed at building transparency in the real estate sector. The Act comes as a promise to protect the rights of the consumers. Implementation of the Act has been described by the government as consumer-centric and marks the beginning of a new era where consumer is the king. Even Real-estate players approve of the Act and believe that the Act will bring about a paradigm shift in the function of India's Real-estate sector.

With the important rules like-Complete information to buyers, booking amount reduction from 20% to 10% to be paid only after registering the agreement of sale with the builder, mandatory project registration requirement, compulsory requirements for advertisements, compensation for delayed delivery, protection against structural defects up to 5(five) years(that may be found after possession), protection from discrimination on the part of buyers on the grounds of caste, gender and religion, RERA-2016 certainly has the potential to become a boon for the home buyers and radicalize the whole Real-estate sector ,provided the implementation issues are smartly sorted out.

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Spread of Islamic Law and Child's Right

The British applied the Islamic legal principles to the Muslim community as a matter of administrative policy. They permitted the Muslims to continue to be governed by their personal laws. This permission assumed a statutory status under the provision of the Charter of George IInd granted in 1753, whereby Muslims in their cases adjudicated on the basis of their personal laws. And the study of the history reveals this type of administration of justice they inherited from Moghul administration. Where the personal law applies in accordance with the caste and religion of the party concerned. Again in 1937 British Legislatures re-assured the determination of Muslim Personal Law through the application of Shariat Laws.

RAJKUMAR SAINI

Introduction :

Islamic Law in the Indian context generally refers to that part of law which is administered by the courts in respect to personal matters of Muslims. The reception of Islamic law dates back to more than one thousand years in India. Before the advent of British Raj in Indian peninsula Islamic law was applicable in public and private affairs in large part of the country. The British Government took away almost whole of the public law of Islam, leaving only certain part of personal law relating to marriage, divorce, dower, maintenance, parentage, legitimacy and acknowledgment, guardianship, gift, wakf, will and inheritance. The British courts did not faithfully adhere to the true Islamic precepts even these areas. Several legislations were introduced by the Britishers to regulate the matters even in the above mentioned areas. However, the Muslim Personal Law (Shariat) Application Act, XXVI of 1937 provides a protection to the Muslims to be governed by the Sharia Law.

The trend set by British judges continued even after independence. With the inauguration of the Indian Constitution in 1950, some new areas of controversy have cropped up. The foremost is the very existence and the survival of "Muslim Personal Law" which in view of Article 44 is at stake. There have been some recent cases in which the legitimacy of several aspects of Muslim have been under attack.

The country like India which is inhibited by various religious and ethnic groups that have their own culture, attitude and approaches towards the question of matrimonial law. There is no uniform code of law to martial relations of all religious groups. There are approximately 425 million Muslims in 20 Muslims countries of Asia, Africa, Europe and including 110 million Muslims in India and Pakistan. From above mentioned data it can be said that one-sixth of the total world population is practicing Islam. Peoples who claim to be Muslim are generally governed by their rules derived from Shariah.

Spread of Islamic Law :

Islam which in this present era is passing through most crucial periods. Prophet Mohammad was the last messenger and truly spread Islam in Arabians society. Today to propagate Islam is not as such difficult as it was in that period. Islam is not merely a collection of dogmas and rituals. It is complete way of life. It is the embodiment of divine guidance for all fields of human life, may they be private or public, political or economical, social or cultural, moral or legal or judicial. Islamic ideology spread rapidly and was embraced by masses. Prophet Mohammad regarded religion as a straight natural law, for man to follow wherein was no perplexity or ambiguity.

The Holy Quran says: "Those who, if given them power in the land observe the prayer and pay the Zakat and enjoin what is good and forbid what is evil."

The function of administration of justice is called the 'Quda' in terminology of Islamic law. Under Islamic Law, Muslim jurists say that administration of justice is a part of the great responsibility of entrusted by Allah to human beings. According to Shariah men have to seek their fulfillment in such a way that the rights of other people are not infringed and violated. It has tried to strike a balance in the rights of man and the rights of the society. So that no conflict may arise between the law of Allah, certain restrictions and

Department of Law, University of Rajasthan, Jaipur (Rajasthan)

limitations have been imposed upon man to prevent from encroaching the rights of the others by Islamic Law. But one should co-operate each other and establish such mutual relations and social institutions that contribute towards the welfare of all and the establishment of an ideal human society. Islamic law gives us in all respects.

The British applied the Islamic legal principles to the Muslim community as a matter of administrative policy. They permitted the Muslims to continue to be governed by their personal laws. This permission assumed a statutory status under the provision of the Charter of George IInd granted in 1753, whereby Muslims in their cases adjudicated on the basis of their personal laws. And the study of the history reveals this type of administration of justice they inherited from Moghul administration. Where the personal law applies in accordance with the caste and religion of the party concerned. Again in 1937 British Legislatures re-assured the determination of Muslim Personal Law through the application of Shariat Laws.

Legitimacy of Child :

The child is legitimate if he receives the child into his home and it lives with him and he publicly recognizes the child as his, with the acquiescence of his wife if he is married without disputing his paternity field within one year with the court by the child's mother or another man claiming to be the child's father. The child is legitimate when declared such by the court under the provisions of this Act.

(1) Artificial Insemination : (Sec.11-12), If the husband has consented to artificial insemination of his wife, a resulting child is the legitimate child of the husband and wife. The husband's consent shall be in writing and be kept in safe custody with the authority so appointed by the central Government and it shall be kept in a sealed cover.

(2) Dispute as to Presumption of paternity : (Sec. 13-14), A presumption established by section 6-9 may be disputed only by a presumed father within 6 months and not thereafter with a clear and convincing evidence and the Court shall decide the presumption on the weightier consideration so produced and shall be guided by the paramount interests of the child. No time limitation shall apply to legitimation of a child.

(3) Children of void and voidable marriage : (Sec. 15) (1) Notwithstanding that a marriage is void, any child of such marriage is a child as born in wedlock. (2) Any child of voidable marriage is a child born of such marriage provided the child is born, within the permissible time limit as prescribed under section 112 of the Indian Evidence Act, 1872.

(4) Chid's Right of Support : (Sec.16-17), The father and mother of a child are severally liable for the support of the child. The provisions of this Act concerning support are supplementary and not derogatory to any obligations of support arising under any other law. In determining the amount due from the father for support of the child and the period during which such support is due, the court shall consider all relevant facts.

(5) Child's Right to Property : (Sec.18-19), Notwithstanding any thing contained in any other law, the child so legitimated shall be entitled and has right in or to the property of any person including the parents. Such child shall be entitled to all the rights, benefits and privileges accorded to it under wills, trusts and other instruments employing the operative term or terms in singular or plural, "child", "descendant", "heir", "issue" or similar terms and not expressly excluding children born out of wedlock or limited to children born in wedlock.

Judicial Views of Legitimacy :

The Muslim law relating to 'acknowledgment of paternity' has been recognized and enforced in India in several well-known cases in the past, and it continues to be fully in force. Beginning with the celebrated judgment of justice Syed Mahmood handed down in 1888 in the case of Mohd. Allahdad v. Mohd. Ismail[(1)], in many old case the courts explained various aspects and implications of this law as follows :

(1) The doctrine of acknowledgment is a part of the substantive (Muslim) law of inheritance and not a mere rule of evidence.

(2) An acknowledgment may be implied in the conduct of the person who has constantly treated another as his legitimate child, it can thus be inferred from conduct and need not be specifically made in every case.

(3) The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence is not proved in the sense of law as distinguished from disproved[(2)], i.e. is neither proved nor disproved.[(3)]

(4) Where the fact of marriage between the acknowledger and the child's mother is clearly disproved, the acknowledgment can have no legal effect.[(4)]

(5) Where the child is proved to be otherwise illegitimate (either because there is no marriage between the acknowledgment and the child's mother or since their marriage is void at law) acknowledgment can have no effect.

(6) Where the acknowledged child is proved to be the issue of a third person, acknowledgment can have no effect.

(7) Subject to the aforementioned legal conditions, acknowledgment of a child of either sex is lawful.

(8) Acknowledgment of paternity, if valid prima facie operates as acknowledgment of a child of either sex is lawful.[(5)]

(9) Neither an acknowledgment which is casual and is not intended to have legal effects, nor concubinage can operate as an implied acknowledgment the intention of the acknowledger to confer a status (of legitimate child) but be clear.

(10) An acknowledgment may be accepted even if the acknowledged child's mother was originally a prostitute but if it is proved beyond doubt that the acknowledger never married her, the acknowledgment will fail.[(6)]

(11) A child acknowledgment is irrevocable is, its subsequent retraction by the acknowledger can have no effect.

(12) A clear repudiation of the child by the alleged 'acknowledger' is fatal, if such a repudiation is proved, acknowledger's conduct cannot be deemed to imply an acknowledgment.

(13) Where marriage between a person and the child's mother is confirmed by the former, the statement may, after his death be accepted as his acknowledgment of the child's legitimacy.[7]

(14) An acknowledged child is if the acknowledgment is valid. like any other child of the acknowledger and inherits his property.

Conclusion :

In recent years various courts in India have reiterated and re-affirmed certain features and incidents of the Muslim law of acknowledgment of paternity, for instance :

(i) The Supreme Court of India has affirmed that an acknowledgment of paternity can be either express or implied in the conduct of the person concerned.[8]

(ii) The Andhra Pradesh High Court has held that acknowledgment, whether expressly made or inferred from conduct, raises only a presumption of legitimacy which can be rebutted by contrary evidence.[9]

(iii) The Madras High Court has held that if marriage is disputed it has to be established before pleading an acknowledgment, and if marriage is found not possible, acknowledgment cannot be accepted.[10]

As regards the rules of Muslim law under which a person falsely claimed to be the father of a child can disclaim its paternity, while the penal rules of Islam are not enforceable in India, the Muslim law of divorce based on lian has been applied by the courts with certain reservations relating to the husband's right to retract the disclaimer.[11]

The privy council held in Mahomed Bakar v. Shurjoon Nissa[12] "The legitimacy or legitimation of a child of Muslim parents may properly be presumed or inferred from circumstances without proof or at least any direct proof, either of a marriage between the parents or any formal act of legitimation." In other cases of privy council, Hidayat Ollah v. Rai Jan Khanum[13] and Shumsson-nissa v. Rai Jan Khanum[14] it was stated that the there had been 'a consecutive course of treatment both of the mother and of the child for a period between seven to eight years which would not have been adopted except on the presumption of cohabitation and the son being the issue of the putative father." Being, however a presumption of fact, and not jusis et de jure, it is like every other presumption of fact capable of being set aside by contrary proof.

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Marriage, Sexuality And Society : Capacity & Legal Recognition

Marriage is a union of two souls, along with legal recognition. When a person chooses his or her life partner, and enters into the sacred institution of marriage, he or she begins a new chapter in his or her life. It is a journey, wherein two individuals share their lives, joys, sorrows, success and failures. The relationship is based on trust and understanding, love and care for each other, and it is a journey of a lifetime. Sexual intimacy is an integral part of a marriage, and a marriage cannot survive without it. In India, homosexuality has been a taboo since a very long time. Marriage is considered to be a holy sacrament by society and union between persons of the same sex has been considered to be immoral and inappropriate. Since marriage is seen mostly from a religious angle, a same sex marriage is presumed to be unholy and against God himself. The aim of this paper is to determine the recognition of same-sex marriage.

VIJAY LUXMI SINGH

Introduction :

In India, citizens have a choice to be married under their various personal laws, or a common law of civil marriage. While none of the acts have explicitly defined marriage as a union between a man and a woman, it has been interpreted and understood to mean that a marriage is always between a man and a woman. Words like 'bride and bridegroom', 'husband and wife' imply that the laws are valid only for couples of the opposite sex. The Hindu Marriage Act, 1955, is applicable for Hindus, Sikhs, Jains and Buddhists. Section 5 of this Act says that a marriage may be solemnized between any two Hindus, if the bridegroom has completed the age of twenty- one years and the bride the age of eighteen years at the time of the marriage. Also, Section 60 of the Indian Christian Marriage Act, 1872, lays down that the age of man intending to be married shall not be under twenty- one years, and the age of woman intending to be married shall not be under eighteen years. Thus, both these legislations have heterosexist underpinnings. As per Islamic law, marriage is a contract, and the purpose of marriage is to legalise sexual relations between a man and a woman, for the procreation of children. The Special Marriage Act, 1954, allows for marriages between individuals from different religions and castes. While no separate definition of marriage is given, the Act also has heterosexist underpinnings, such as the definition of a 'prohibited relationship' which only considers a relationship between a man and a woman within certain degrees of familial relations. Thus, India does not have any legislation that legalises same sex marriages. It is believed by many Indians, that the concept of same sex unions has been brought by the Western countries, and it is this bad Western influence on the Indians that is leading to their rise.

Arguments Against Same-Sex Marriage :

Marriage must involve a man and a woman, they contend: a relationship between people of the same sex simply cannot be a marriage, as a matter of definition, morality, and Western practice. The main argument against same-sex marriage is definitional: marriage is necessarily different-sex and therefore cannot include same-sex couples. Hence, the authors of any statute that talks of "marriage" could have only contemplated different-sex couples, even if the statute is not gendered, i.e., does not use the specific terms "husband" and "wife." If same-sex marriage still ought to be a plank in the gaylegal platform, there remains the problem of persuading straight society to acquiesce in it. The three traditional arguments against same-sex marriage, either as a matter of statutory right or constitutional mandate is: same-sex marriage **(1)** is inconsistent with the nature, history, and/or essence of marriage, **(2)** is contrary to community values and traditional moral teachings, and **(3)** would be disruptive to settled expectations.

Liberal Meta-Arguments :

In response to the definitional, moral, and pragmatic arguments mentioned above, the gaylegal community and

Research Scholar (Faculty of Law), University of Allahabad, Allahabad (Uttar Pradesh)

its allies have developed liberal meta-arguments. The main pitch has been libertarian: the state should allow people to marry whomever they desire so long as there are no grave third-party effects of a tangible and significant nature. Under a libertarian view, the definitional argument is circular-the state cannot defend its prohibition of same-sex marriages simply because it does not believe them to be marriages.[1] Cases upholding the right to marry require the state to provide an independent reason, one grounded upon third-party harms and not just moral disapproval or a sectarian understanding of marriage.[2] Also, as a practical matter, state prohibition of same-sex marriage serves none of the family values trumpeted by those who resist the institution. By denying gay and lesbian couples the legal protections and household stability facilitated by marriage laws, the state only impedes our ability to create "families we choose."[3]

Same-Sex Unions In Various Cultures :

(i) In Pre-Modern Western Cultures :

The early Egyptian and Mesopotamian societies that are considered important antecedents for Western culture apparently not only tolerated same-sex relationships, but also recognized such relationships in their culture, literature, and mythology. Evidence of same-sex marriage is at best indirect in these ancient societies, however. One finds slightly stronger and more direct evidence of same-sex marriages in Greek and early Roman culture, in imperial Rome, and in Western Europe for much of the Christian Middle Ages.

(ii) In Non-Western Cultures :

There is very strong evidence demonstrating the existence of same-sex unions, including legally recognized marriages, in Native American, African, and Asian cultures, evidence which is especially striking prior to those cultures' domination by Western Europe. As before, my sources include traditional historical records, such as contemporary accounts, artefacts', myths, and stories, though the best evidence tends to be the work of social anthropologists and ethnographers, who, through their fieldwork in non-Western cultures, have been able to retrieve much of these cultures' pre-Western traditions and institutions. Among the most frequently recurring of these institutions is same-sex marriage.

Loving v. Virginia,[4] the principal case establishing the due process right to marry, also provides the best analogy for gaylaw's view that the practice of excluding lesbian and gay couples from state-sanctioned marriage should be abruptly rather than gradually ended. Social constructionism provides a different account of Loving than does traditional theory, an account that makes Loving a more favourable analogy for those questioning state laws prohibiting samesex marriage.

(iii) In Asian Cultures :

Institutionalized same-sex unions historically existed throughout Asian cultures in one or more of the forms already described: the berdache tradition of transgenderal same-sex marriage, companionate same-sex marriage, and the transgenerational tradition of boy wives. In some cultures, including Chinese society, all three of these types of same-sex relationships have flourished.'[5] In Vietnam, India, Korea, Nepal, the Austral Islands, New Zealand, and the Cook Islands, a similarly strong berdache tradition endured, with Chinese society countenancing a weaker convention practiced by eunuchs.

Transgenderal Unions In India :

Probably the best documented example of transgenderal marriage in Asia takes place among the hijras of India,"[6] impotent or emasculated men who take on female garb and demeanour. The hijras earn their living by collecting alms and performing for currency at weddings, births, and festivals. Interviews by Serena Nanda confirm many earlier studies indicating that the hijras culture is one of institutionalized homosexuality, with marriage's cultural and linguistic trappings adopted by most of its participants. Quoting from the hijras, Nanda describes their sexual relationships: There are two modes of sexual relations among hijras. One is casual prostitution, the exchange of sexual favours with different men for a fixed sum of money, and the other is "having a husband."... Shakuntala clearly expressed a feminine gender identity and was, in fact, the person who came closest to what would be called in the west a transsexual that is, experiencing himself as a "female trapped in a male body."..... She is currently involved in a long-term, monogamous relationship with a young man who lives in her neighborhood and whom she hopes will "marry" her ... Having a husband is the preferred alternative for those hijras who engage in sexual relations. Many of my informants have, or recently had, a relatively permanent attachment to one man whom they referred to as their husband. They maintain warm and affectionate, as well as sexually satisfying and economically reciprocal, relationships with these men, with whom they live, sometimes alone, or sometimes with several other hijras.[7]

Thus one can see that nothing is new in the concept of same-sex marriage as it has always been there in all cultures since ages. Every person has the right to live their life the way want, and decide what gives them happiness, and what does not. Article 21 of the Constitution of India entitles every citizen of with the right to life and personal liberty which includes the right to privacy and dignity. Choosing one's life partner is a private subject, and it is a choice that an adult is entitled to make for himself. What is the problem then, if a man wants to marry another man, or a woman finds her soul mate in another woman?

Conclusion :

Many people take the pretext of religion to call same sex relationships as immoral. However, no religion teaches you to hate someone because he is different from you, or publicly humiliate and discriminate another person. Every religion teaches that love is the greatest of all emotions. It is an expression of divinity, and the purest feeling. So how can a man loving another man commit a sin? Why is it that, as a

culture, we are more comfortable seeing two men holding guns than holding hands? Emotions and pressure must not be considered while deciding this issue. Today, homosexuality is recognised across the globe, with the Netherlands being the first country to permit same sex marriage. Yet, India remains untouched though literature drawn from Hindu, Buddhist, Muslim, and modern fiction testify to the presence of same-sex love in various forms. India, with its overt emphasis on reproduction, has made same-sex love taboo. But with society becoming permissive about homosexuals, the law must be in step with the times. Mainstream culture and law should also be attentive to counterhistory. When a group like gay men and lesbians recognizes the injustice of its exclusion and mobilizes against it, the smart thing for mainstream society to do is accommodate the group. Admittedly, the process of accommodation suppresses the interests of those for whom the exclusion of some helps constitute their vision of a good society. As to them, I would say that a mature constitution is one that depends on commitment and cooperation, and not exclusion and persecution.

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(2) *Sherryl E. Michaelson, Note, Religion and Morality Legislation: A Re examination of Establishment Clause Analysis, 59 N.Y.U. L. Rev. 301, 307-11 (1984).*

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Promissory Estoppel : A contractual Obligations in Modern Indian Scenario

Justice at least is done by the social welfare state in this way in the shape of equalization the breach of the idea of abstract and uniform equality is serving to level sharp points of social differences by social welfare legislation touching contractual obligations such a Minimum Wages act 1948, Commodities act 1955, Industrial Disputes act, The Children Pledging of Labour act, Rent control act the legislator is doing a work of equalization which is aimed at to improve the lot and prospects of the less fortunate classes which at times in certain directions curtail some of the individuals contractual freedom in the larger social interest the state in social interest.

DR. VIKAS MISHRA

Introduction and Evolution :

Group living into being two social processes co-operation and competition. Endowed with the same kind of original nature men went the same things. Often they attempt to obtain those by co-operation especially if they cannot get them singly sometimes they compete with one another for the same objective or objectives. In other words within the process of co-operation it is to be found one of the roots of social welfare programmes whereas in the process of competition is to be found socially harmful tendencies of contractual liberty. The other roots of social welfare programmes is to be found in the sentiments of mutual aid sympathy love and in the notion of curving the socially harmful tendencies of contractual liberty wherever necessary through the legislative measures.

It is not all certain when the phrase social welfare state or even a welfare state first came to be used but by the 1950 it was certain that in India we had at last arrived at a position where we were entitled to talk about our welfare state. By that time in India one could not conspicuous emergence from police state, to welfare state where as other countries particularly New Zealand, Sweden and Norway had of course attained this status long before and early in the 20th century. Yet even now in the 1980s there seems to be no real consensus of option as to what a social welfare state is and what are precisely the principles and practices of a state which entitles it to be given this label. Certainly in

India it would seem that most of the people believe that we have a social welfare state because we have wide range of social legislation regulating socio-economic relations and providing social services yet if one ask the man in the street to define what he means by social service he would probably find great difficulty in giving an adequate definition. Equally no politician in this county has yet given an adequate description despite the fact that almost all political parties claim to be committed to achieve the objectives of social welfare state. It appears that for most of the citizens and the politicians a social welfare state is the one in which attempts are made to ensure reasonable standard of living for all. Surely not so there must be more to it than the mere physical well -being.

Limiting welfare to the attainment of reasonable physical standard of living is understandable in India where the state has most clearly revealed its changing nature and functions through its attempts to deal with the problems of working class poverty and great economic inequalities. Obviously in a modern complex industrialized society based on division of labour and individual standard of living depends on his ability to buy goods and services which in turn depends usually on his income.

Prevention of Poverty and Bargaining Power :

Attempts by the state to relieve poverty have been made for over three decades through various social welfare legislation. But it is doubtful that we have obtained the desired optimum results. The standard of life that could be attained on the assistance granted by social welfare legislation is low. Poverty is not confined to the work-sky, the feckless, the criminals or other undesirable elements in our society but the real poverty is still found among hard-working men and women whose wages after working long hours under intolerable conditions are insufficient to provide for a reasonable standard of life and of course it is quite impossible for them to save in order to protect themselves in sickness, unemployment, old-age, or widowhood.

Department of Law, University of Rajasthan, Jaipur (Rajasthan)

The main concern of most of the social legislations have been to ensure prevention of poverty arising out of sickness differential bargaining power and widowhood. More recently in some of the Indian states some legislative measures are being made to ensure subsistence grants for unemployment and old age. Before independence the raising of income levels in employment had been left in the main to the bargaining of the employers and the employees or its trade Unions. But after independence employment agreements remained no more a private affair as the state has made various inroads in the same through various socio-economic legislative measures aimed at ensuring some minimum level of income to the employees.

Application of the principles contained in this Part the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.[1]

State to secure a social order for the promotion of welfare of the people :

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[2]

Certain principles of policy to be followed by the State : The State shall, in particular, direct its policy towards securing

(a) That the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

(c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) That there is equal pay for equal work for both men and women;

(e) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) That children are given opportunities and facilities 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.[3]

Essential Marks of Social Services :

The idea that the social services are primarily a means of redistributing income from the rich to the poor is still commonly held and it has been strongly argued that the essential marks of social services are :

(a) That it is rendered by or on behalf of the community to an individual or to a family or at most to a section of society appropriated to his or its exclusive use.

(b) That it contains an element of re-distributions that the majority of the individuals or families or sections of society who avail them of it are receiving more than they give. It would be extremely difficult to prove that majority receives more than they give. The definition of social welfare state in term of social services has to be accepted subject to the merits of the propriety of the terms social services till it is replaced by some other suitable terms.

Abraham defines social welfare states as a community where state power is deliberately used to modify the normal play of economic forces so as to obtain a more equal distribution of income for every citizen a basic minimum irrespective of the market value of his work and his property.[4] This definition is narrow and restricted in view and looks at the matter from purely economic point of view. Hobman describe the welfare state in his book the welfare state as a compromise between communism on the one side and unbridled individualism on the other. As such he believes that in spit of all its imperfections the welfare state sets a pattern for any human society. According to him the welfare state guarantees minimum standard of subsistence without removing the incentives of income by means of graduated high taxation. Yet it does not pretend to establish economic equality among its citizen. All are assured of adequate health in case of need whether the need is due to illness old-age unemployment or any other cause. In its general sense the welfare state is different from laissez faire state in the sense that the latter confined itself to the performance of what is called police functions defense law and order protection of property and enforcement of contracts. The key functions of a welfare state were in addition to police responsibilities promotion of economic development of all though at times curbing the freedom of contract for that purpose through socioeconomic legislations and to promote social welfare by providing full employment equal opportunity social standard of living for those down most of the social ladder. It is the application of collectivist methods of socioeconomic controls for the individualistic aims of laissez faire.

Ideal Social Order Normative :

In every society there is a kind of consensus on the normative basis of a social order which has its basis in many historical, cultural, political philosophical and economical sources and comprises of particular and universal values. The progressive codification of these norms in order to operationalise the ideal social order constitutes the major body of social welfare legislation. This legal corpus focuses directly and primarily on the question of social welfare, social justice and human dignity.

Contractual Obligations and Legislative Measures :

Some of the major social welfare legislations touching contractual obligations Minimum Wages Act, Essential Commodities Act, Payment of Wages Act, The Children

Pledging of Labour Act, Industrial Dispute Act, Bonded Labour System Abolition Act, Contract Labour (Regulation & Abolition) Act, The Usurious Loans Act and Himachal Pradesh Urban Rent Control Act.

The areas of contractual activity controlled or regulated by these legislations is as such. The Essential Commodities Act and various control Orders notified there under regulate the price consideration of the sale or purchase or of the agreement to sell or agreement to purchase certain essential commodities to be notified by the central government. The following classes of the commodities have been notified to be the essential commodities.[5]

(1) Cattle fodder including oil cakes and other concentrates. **(2)** Coal including coke and its other derivatives. **(3)** Component Parts and accessories of automobiles. **(4)** Cotton and woolen textiles. **(5)** Drugs. **(6)** Food-stuffs including edible oil-seeds and oil.**(7)** Iron and steel including manufactured products of iron & steel. **(8)** Paper including newsprint, paper-board and straw-board. **(9)** Petroleum and petroleum products. **(10)** Raw cotton, whether ginned or unginned cotton seeds. **(11)** Raw jute and **(12)** Any other class of commodity which the central government may

By a notification declare to be an essential commodity with respect to which the parliament has power to make laws by virtue of entry 33 in list III in the Seventh Schedule of the Constitution of India.

Though essential commodities include not only food-stuffs but such articles as paper, petroleum and petroleum products and other articles but there is no indications as to the criterion which determines what an essential commodity is. Therefore there seems to be no reason to interpret the word edible in other than its ordinary dictionary sense eatable or fit to be used as food. There is no reason that lin-seed oil seed should not be regarded as edible oil seeds.[6] Food-stuffs include with in its ambit adjuncts to nutritive food, including condiments pickles, James[7], Sugar cane[8] and ghee[9] has also been held to be food stuff Rice is an essential commodity as well as food stuff where as paddy is a stage in the production of rice and one cannot be food without the other being food as well. Thus paddy is also foodstuff within the meaning of expression as used in the Act.[10] Turmeric falls within the wider meaning of food and foodstuffs. It is as much a foodstuff in its winder meaning as sausage, baking powder and tea. It was considered an essential commodity and not merely a luxury which at the time of austerity could be dispensed with.[11] The primary meaning of the word food is something that nourishes and it may be solid or liquid. Milk is therefore food and will come within the term food-stuffs used in the Act. Thus the Essential Commodities Act covers a wide range of commodities the freedom in the determination of dimensions of the consideration in the contractual transaction involving sale or purchase of them has been regulated through various price control orders.

The payment of Wages Act taking its clue from the British Truck Act which derives its name from the term trucking which means a practice where employers used to pay their employees in kind of required them to expand their wages in goods brought from the employer shop. The British Truck Act 1931 inter alia prohibited in the labour agreement the payment of wage in the from other than in the current coin of the realm. In India the Royal Commisssion on Labour was appointed in 1929 which Enquired into the existing conditions of act. The Children Pledging the Labour Act 1933 keeping in view the welfare of the under-privileged children prohibits taking and giving in consideration in an agreement the labour of a child if it is detrimental to the interest of the child and has been made in be paid for his services and the same is terminable not less than detriment to the child interest and has not been made in consideration of any benefit other than the reasonable wages week's notice the agreement it shall be void and the parties to it may be exposed even to penalties.

Conclusion :

Justice at least is done by the social welfare state in this way in the shape of equalization the breach of the idea of abstract and uniform equality is serving to level sharp points of social differences by social welfare legislation touching contractual obligations such a Minimum Wages act 1948, Commodities act 1955, Industrial Disputes act, The Children Pledging of Labour act, Rent control act the legislator is doing a work of equalization which is aimed at to improve the lot and prospects of the less fortunate classes which at times in certain directions curtail some of the individuals contractual freedom in the larger social interest the state in social interest. The Indian social welfare state has given ample evidence of such regulatory legislation touching contractual obligation such as Minimum Wages act 1948, Commodities act 1955, Industrial Disputes act, The Children Pledging of Labour act, Rent control act which are the measures intended to better the economy of the weaker sections of our society which do mean interference which the freedom of contract and freedom of action but it is necessary that this would be so in the interest of social welfare since it would not be good in a social welfare state to bring into existence a small body of reach persons while the rest of them remain poor.

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Thalaikoothal : A Ritual of Silent Killing of The Elderly

In today's materialistic society elderly are treated like a burden by their children and relatives. But are we really that busy with our own works and lives that the lives of those who are the source of our lives have become such a big burden that we won't hesitate to kill our responsibilities. "Thalaikoothal" is the traditional practice of senicide (killing of the elderly), by their own family members, observed in some parts of southern districts of Tamil Nadu state in India. In this proposed paper, an analysis of various methods of thalaikoothal, legality of such kind of acts and root cause of it, is made to be discussed so as to come up with some possible suggestions to terminate this demonic practice.

NEHA BHARTI

Introduction :

In present scenario of our society, since everyone in the household is employed; taking care of the elderly has become a burden on their children or relatives. This leads us to wonder; are we really that busy with our own works and lives that the lives of those who gave us our lives have become such a big burden that we won't hesitate to kill our responsibilities. Under the disguise of mercy, Do we really have that right to kill someone? It was very shocking for me when I came to know about the custom of "Thalaikoothal". "Thalaikoothal" is the traditional practice of senicide (killing of the elderly) or involuntary euthanasia, by their own family members, observed in some parts of southern districts of Tamil Nadu state in India. It is very unfortunate that, although thalaikoothal is illegal in India, but the practice of it continue and also got social acceptance as a form of ritual of mercy killing, and cases are also rarely reported. It is a well planned death ritual provoked by poverty and abetted by custom. Reason whatever behind this horrifying and barbaric custom, but it can be submitted here that such kind of cruel practice is not appreciable anyway in country like India, which is very well known for it's high moral values, rich tradition and culture.

Methods :

When a family is unable to bear the burden of an elderly they kill them off. Although they give it name of a tradition and celebrate it like any marriage ceremony or something, but the fact is that practice of killing one's elderly in a ritual is not more than leading a lamb to slaughter. Typically, the elderly person is given an extensive oil-bath early in the morning and subsequently made to drink glasses of tender coconut water followed by tulsi juice and then milk (a customary pre-death drink), with the relatives standing around chanting, 'kasi', 'kasi' which results in renal failure, high fever, fits, and death within one to two days. In some cases, even hard pieces of murukku (a savoury) are forced down a resistant individual's throat, causing them to choke to death. In fact, mud mixed with water is also used, with hopes that the watery Hemlock would cause indigestion - brutally fatal to an already compromised body. This technique may also involve a head massage with cold water, which may lower body temperature sufficiently to cause heart failure. It can even cause an electrolyte imbalance, creating havoc in the body's metabolism. In fact, it may also lead to a cardiac arrest. Alternative methods involve force feeding cow's milk while plugging the nose, causing breathing difficulties (the "milk therapy") or use of poisons. During the practice of thalaikoothal, families actually start arranging for the funeral anyway. Unfortunately, the victim's 'consent' isn't an issue as they are either terminally ill or almost unconscious and the community takes the decision on their behalf. Even though the truth behind these deaths cannot be brought to the limelight without the better investigation, they are almost always signed off by certifying doctor (most of the time bribed) as death due to natural causes.

Legal Status in India :

When we talking about the legality of such acts, as for as the Indian Laws is concern, the question came for the very first time for the consideration before the High Court of Bombay in State of Maharashtra v. Maruti Sripati Dubal. In this case Court held that the right to life guaranteed under Article 21 of the Indian Constitution includes right to die,

Research Scholar (Department of Law), University of Allahabad, Allahabad (Uttar Pradesh)

and stuck down section 309 IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. In P. Rathinam v. Union of India a division bench of Supreme Court also supported the decision of the Bombay High Court. But in Gian Kaur v. State of Punjab, a five judges constitutional bench of Supreme Court overruled the judgment of P. Rthinam's case and held that "Right to Life" under Article 21 does not include "Right to Kill" and there is no ground to hold section 309 IPC unconstitutional. True meaning of the word "life" in Article 21 means life with human dignity. Euthnesia (mercy killing) is illegal in India though Passive Euthnesia is legal in India under exceptional circumstances. On 7'th march 2011 the Supreme Court of India in Aruna Shanbaug Case, legalised passive euthanasia by means of withdrawal of life support to patients in a permanent vegetative state. There was no law in India that allows euthanasia directly or passively before guidelines given by the Court through this judgment.

Root Cause of This Heinous Tradition :

Although the practice is ethically and legally unpardonable, it is sustained in the society till now due to economic backwardness. Apart from economical constraints, the lack of palliative care in these regions is also a serious concern. Even sometimes, the elderly themselves consent to thalaikoothal, and no one is arrested for this crime is because no one complaints, since society accepts it as normal. Local Government with the help of Central Government and some activists, are trying to do some effective work to cure the basic reasons behind practice of such heinous tradition, by improving basic education level and medical facilities of these backward regions.

Suggestion and Conclusion :

One of the ways to improve the situation would be if the seniors received a higher, more regular pension, in order to meet their needs. Government of Tamil Nadu claims that, they are doing their best for palliative care and also have made some provisions for the pension to senior citizens. But these provisions are not seems to be sufficient enough to solve this problem or may be these provisions are not properly implemented. Government should support the NGO's too, who are trying to end such kind of barbaric traditions through indirect way of educating the masses about how to care better for the elderly. After knowing the tradition of Thalaikoothal and the people who practice it, we are forced to say that those who put their parents in old age homes are at the very least humans. In between today's fast track life style, we should slow down for a while to think about our families and loved ones along with degradation of social-moral values taking place in our society. Without moral values any society or Nation, no matter how much economically developed, it will be just like a money making factory.

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लोकतंत्र के लिए प्रेस की स्वतंत्रता की आवश्यकता

प्रस्तुत शोधपत्र में लोकतंत्र के लिए प्रेस की स्वतंत्रता की आवश्यकता पर अध्ययन किया गया है। प्रेस की स्वतंत्रता समाज की नींव है। समाज में व्याप्त भ्रष्टाचार से लड़ने में स्वतंत्र प्रेस की बड़ी अहम भूमिका है। इसके बावजूद यदि भारतीय प्रेस निर्भय होकर अपनी रचनात्मक भूमिका नहीं निभाता है, तो यह उसकी विफलता होगी। स्वतंत्र और निडर होकर अपने विचारों को अभिव्यक्त करने की स्वतंत्रता लोकतंत्र की आधारशिला है। उन लोगों के लिए जो जनहित में अभिव्यक्ति करना चाहते हैं। प्रेस की स्वतंत्रता अत्यंत उपयोगी है। अभिव्यक्ति की स्वतंत्रता एक मौलिक अधिकार है। मीडिया को उत्तरदायी पत्रकारिता के अंतर्गत अपने उत्तरदायित्व का निर्वहन करना चाहिए। कुल मिलाकर लोकतंत्र के लिए प्रेस की स्वतंत्रता आवश्यक है।

डॉ.स्वराज कुमार जैन

संसदीय लोकतंत्र में समाचार पत्रों की महत्वपूर्ण भूमिका है। जनता को यह बताने के लिए कि क्या हो रहा है, मुख्य माध्यम समाचार पत्र ही है। समाचार पत्रों से नागरिकों को उन विभिन्न नीतियों और कार्यक्रमों के बारे में अपनी राय बनाने में सहायता मिलती है, जो विभिन्न राजनीतिक दलों द्वारा उनके सामने रखे जाते हैं।

प्रेस की स्वतंत्रता की परिभाषा इस प्रकार की गयी है, कि यह किसी सरकारी अधिकारी के हस्तक्षेप के बिना जानकारी प्राप्त करने तथा दूसरों को जानकारी देने की स्वतंत्रता है। परन्तु, स्वतंत्रता के साथ कुछ जिम्मेदारियाँ भी आती हैं और यह स्वतंत्रता किसी भी लोकतंत्र और किसी संगठित मानव समाज में निरपेक्ष रूप से नहीं होती, जैसा कि प्रेस की स्वतंत्रता के विषय में ब्लेकस्टोन ने अपने विचार व्यक्त किये हैं कि प्रेस की स्वतंत्रता इस बात में निहित है कि प्रकाशन पर पहले से कोई प्रतिबंध न हो और इसमें नहीं कि जब प्रकाशन से कोई फौजदारी मामला उठता हो तो समाचार पत्र की आलोचना न की जाये।

जैसा कि स्वतंत्रता के संबंध में प्रधानमंत्री जवाहरलाल नेहरू ने कहा था, ''अन्य सभी बातों की तरह, और सब बातों से अधिक स्वतंत्रता के साथ कुछ जिम्मेदारियाँ और दायित्व भी आते हैं और यदि वे जिम्मेदारियाँ और दायित्व और अनुशासन न हो, तो स्वतंत्रता हो ही नहीं सकती। चाहे वह स्वतंत्रता किसी व्यक्ति की हो या किसी समूह की, किसी समाचार पत्र की या किसी और की।''

संविधान में यद्यपि स्पष्ट शब्दों में व किसी विशिष्ट उपबंध में प्रेस की स्वतंत्रता अलग से समाविष्ट नहीं की गयी है, परन्तु उच्चतम न्यायालय ने अपने विभिन्न निर्णयों में यह अभिनिर्धारित प्रदान किया है कि वाक् एवं अभिव्यक्ति की स्वतंत्रता में प्रेस की स्वतंत्रता भी सम्मिलित है।

अमेरिका के प्रेस कमीशन ने प्रेस की स्वतंत्रता के महत्व के बारे में निम्नलिखित विचार व्यक्त किए हैं :

''प्रेस की स्वतंत्रता राजनैतिक स्वतंत्रता के लिए आवश्यक है। जिस समाज में मनुष्य को अपने विचारों को एक दूसरे तक पहुँचाने की स्वतंत्रता नहीं है, वहाँ अन्य स्वतंत्रताएँ भी सुरक्षित नहीं रह सकती हैं। वस्तुतः जहां वाक् स्वतंत्र है वहीं स्वतंत्र समाज का प्रारंभ होता है और स्वतंत्रता को बनाये रखने के सभी साधन मौजूद रहते हैं, इसीलिए वाक् स्वतंत्र को स्वतंत्रताओं में एक अनोखा स्थान प्राप्त है।'' भारतीय प्रेस कमीशन में भी इस तरह के विचार व्यक्त किये हैं :

''प्रजातंत्र केवल विधानमण्डल के सचेत देखभाल में ही नहीं, वरन लोकमत की देखभाल और मार्गदर्शन के अन्तर्गत भी फलता–फूलता है। प्रेस की ही यह सबसे बड़ी विशिष्टता है कि उसके ही माध्यम से लोकमत स्पष्ट होता है।

अमेरिकन संविधान की भांति भारतीय संविधान में प्रेस की स्वतंत्रता के लिए कोई स्पष्ट उपबंध नहीं है। डॉ. अम्बेडकर ने संविधान सभा में इसके कारणों पर प्रकाश डालते हुए कहा था कि, प्रेस को कोई ऐसे विशिष्ट अधिकार प्राप्त नहीं हैं, जो एक साधारण नागरिक को प्रदान नहीं किए जा सकते हैं। इसलिए इसके लिए संविधान में विशेष उपबंध की कोई आवश्यकता नहीं है।

ब्रजभूषण वनाम् रोमेश थापर के वाद में उच्चतम न्यायालय ने यह अभिनिर्धारित किया है कि पत्रिका का पूर्व सेंसर असंवैधानिक है, क्योंकि इससे वाक् व अभिव्यक्ति की स्वतंत्रता प्रभावित होती है। इस निर्णय के परिणाम स्वरूप संविधान (प्रथम संशोधन) अधिनियम 1951 द्वारा अनुच्छेद 19 में 'युक्तियुक्त' शब्द जोड़ा गया था। इस संशोधन के परिणाम स्वरूप युद्ध व शांति के समय 'युक्तियुक्त' निर्बन्धन के साथ पूर्व सेंसर लागू कर दिया गया है। इसी के कारण चलचित्र पर

विधि व्याख्याता, शासकीय विधि महाविद्यालय, अशोकनगर (मध्यप्रदेश)

भी पूर्व सेंसर का औचित्य मान्य किया गया है। इसी प्रकार एक्सप्रेस न्यूजपेपर्स बनाम् भारत संघ के मामले में उच्चतम न्यायालय ने यह अभिनिर्धारित किया है, कि ऐसी कोई विधि जो समाचार पत्रों पर पूर्व अवरोध का प्रावधान करती है या उनके परिचालन को कम करती है या उनके आरंभ किये जाने को रोकती है या उनके चालू रहने के लिए सहायता को आवश्यक बना देती है। वह अनुच्छेद – 19(1)(क) में प्रदत्त स्वतंत्रता के लिए उतनी ही आवश्यक है, जितनी की प्रकाशन की स्वतंत्रता। निःसंदेह बिना परिचालन की स्वतंत्रता के प्रकाशन की स्वतंत्रता को कोई महत्व नहीं है। इसी आधार पर उच्चतम न्यायालय ने अपने एक विनिश्चय में उस विधि को अवैध घोषित कर दिया है, जिसके द्वारा राज्य में एक दैनिक समाचार पत्र के परिचालन पर रोक लगा दी गयी थी।

इसी प्रकार लोक हित के महत्व की बातों का प्रकाशन करने का समाचार पत्रों को अधिकार है और इसमें पूर्व अवरोध नहीं लगाया जा सकता। इस संबंध में रिलायंस पेट्रोकेमीकल्स लिमिटेड वनाम प्रोप्राइटर्स आफ इंडियन्स एक्सप्रेस न्यूजपेपर बाम्बे प्राईवेट लिमिटेड के वाद में अभिनिर्धारित किया गया कि लोक हित के महत्व की बातों का प्रकाशन करने का समाचार पत्रों को पूर्ण अधिकार है, और उस पर पूर्व अवरोध नहीं लगाया जा सकता। नागरिकों को जानने का अधिकार एक मूल अधिकार है। इस परवर्तमान और आसन्न खतरे के आधार पर निर्वन्धन लगाये जा सकते हैं। ऐसी बातों के प्रकाशन पर पूर्व अवरोध से देश की स्वतंत्रता का अतिक्रमण होता है और असंवैधानिक है।

लोक हित में समाचार पत्र में सत्य प्रकाशित कथन से प्रेस की स्वतंत्रता का अतिक्रमण नहीं होता और यह मानहानि नहीं है। इस संबंध में दैनिक भास्कर और एक अन्य बनाम् मधुसूदन भार्गव और एक अन्य के वाद में समाचार पत्र में यह समाचार प्रकाशित हुआ कि कथित स्टूडियो का मालिक अर्थात् अभियुक्त लड़कियों के अश्लील (नंगे) फोटो लेने का और उन्हें ब्लेकमेल करने का अवैध क्रियाकलाप कर रहा है और पुलिस द्वारा उसके विरूद्ध की गयी कार्यवाही का जनता ने समर्थन किया है। समाचार पत्र में प्रकाशित उक्त वक्तव्य एक वर्ग विशेष के ऐसे क्रिया कलाप के निन्दा करने के लिए लोक हित में व्यक्त किए गए दृष्टिकोण की कोटि में आता है और इससे अनुच्छेद 9(2) के अधीन गारंटीकृत (प्रत्याभूत) प्रेस स्वतंत्र का अतिक्रमण नहीं होता।

आटोशंकर का मामला– अपने ऐतिहासिक महत्व के निर्णय रामगोपाल वनाम् तमिलनाडु राज्य में उच्चतम न्यायालय ने प्रेस की स्वतंत्रता के संदर्भ में यह अभिर्निधारित किया है कि सरकार को ऐसी सामग्री के प्रकाशन को रोकने के लिए, पूर्व अवरोध लगाने की विधिक शक्ति नहीं है; जिससे उसके अधिकारियों को बदनाम होने की आशंका हो। लोक–अधिकारीगण जिन्हें आशंका है कि वे या उनके सहयोगी की बदनामी होगी और वे ऐसी सामग्री के प्रकाशन को रोक नहीं सके है, वे प्रकाशन के पश्चात् नुकसानी और मानहानि की कार्यवाही कर सकते हैं, यह साबित करके कि प्रकाशन झूठे तथ्यों पर आधारित थे, न्यायालय ने कहा कि यदि प्रकाशन अदालत के अभिलेख समेत किसी भी लोक अभिलेख (public records) पर आधारित है, तो प्रेस के विरूद्ध कोई कार्यवाही नहीं की जा सकती है।

प्रेस की स्वतंत्रता समाज की नींव है। समाज में व्याप्त भ्रष्टाचार से लड़ने में स्वतंत्र प्रेस की बड़ी प्रमुख भूमिका है। इसके बावजूद यदि भारतीय प्रेस निर्भय होकर अपनी रचनात्मक भूमिका नहीं निभाता है, तो यह उसकी विफलता होगी।

अभिव्यक्ति की स्वतंत्रता के संबंध में इन्टरनेट पर विचारों को प्रस्तुत करना दूसरों से वार्तालाप करने का एक तेज तथा क्षमतावान तरीका होता है। वेबसाइट अपनी सेवाओं द्वारा जैसे चार्टस रूम तथा बुलेटिन वोर्डस इन्टरनेट का प्रयोग करने वालों को इस बात की अनुमति देते हैं कि वे जो विषय चाहें उन पर वाद विवाद अथवा चर्चा कर सकते हैं और यदि कोई व्यक्ति ऐसी कोई बेवसाइट नहीं पाता है, तो वह स्वयं बेवसाइट का निर्माण करने हेतु स्वतंत्र है। प्रकाशन की स्वतंत्रता के साथ बिना किसी सहमति अथवा पूर्व अनुमति के सामग्री ऑन लाइन पर मुद्रित की जा सकती है।

निष्कर्ष :

स्वतंत्र और निडर होकर अपने विचारों को अभिव्यक्त करने की स्वतंत्रता लोकतंत्र की आधारशिला है। उन लोगों के लिए जो जनहित में अभिव्यक्ति करना चाहते हैं। प्रेस की स्वंतत्रता अत्यंत उपयोगी है। अभिव्यक्ति की स्वंतत्रता एक मौलिक अधिकार है। मीडिया को उत्तरदायी पत्रकारिता के अंर्तगत अपने उत्तरदायित्व का निर्वहन करना चाहिए। इस प्रकार लोकतंत्र के लिए प्रेस की स्वंतत्रता आवश्यक है।

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