

VOLUME IX

ISSUE II (Apr – June 2023)



QUEST

A Quarterly Journal of the Students published
by the Indian Institute of Legal Studies



INDIAN INSTITUTE OF LEGAL STUDIES

UG & Post Graduate Advanced Research Studies in Law
Approved under Section 2(f) & 12B of the UGC Act, 1956
Accredited by NAAC

Affiliated to the University of North Bengal
Recognized by the Bar Council of India, New Delhi

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**THE STUDENT JOURNAL
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MESSAGE

FROM FOUNDER CHAIRMAN'S DESK



SHRI JOYJIT CHOUDHURY

**Founder Chairman
Indian Institute of Legal Studies**

It's been quite some time that I have used my prerogative for penning in a few lines under the Caption "From the desk of the Chairman." The pandemic has Pandemic has probably changed the preferred and known rules in education and it is disheartening to see the once buzzing campuses filled with vibrant and youthful energy being bereft of the exuberance that existed.

If we take a look at the history of the Corona Virus, it originated sometime in the middle of December, 2019 in China at a live seafood market and then spread to the Wuhan area. Gradually, it spread to Italy, U.S.A., Europe and other countries of the world. The affected countries

have been called to take immediate steps to detect, treat and reduce the further spread of the virus to save lives of the people. Presently the COVID-19 is no more confined to China, Italy or U.S.A. It has become a global issue. The economic impact has had devastating and cascading effect world- wide with closure of business entities, rampant job loss coupled with non-existent economic activities putting the lives and the livelihood of a large section of the world's population in peril.

The poor vulnerable daily wage earners and migrant workers are the ones who are worst affected. Concrete measures must be adopted by the governments to provide this section of the population with sustainability incomes or else the world shall witness an increase in the pre-existing inequalities. The Governments must strengthen social protection and livelihood, reorient public finance to augment human capabilities, introduce measures to limit bankruptcies and create new sources of job creation.

To my view, the Pandemic has caused a dramatic and perceived change in the socio-economic structure of the entire world. Millions of wage-earners in the United States have been bugged of leaving their current employment and demanding higher wages and they have chosen to be unemployed if wages are not commensurate with their expectations. This is probably the outcome as to how the pandemic has led to increased inequality and unequal income distribution amongst different classes. According to Oxfam's "The inequality virus" report in the Indian context,

India's billionaires increased their wealth by 35 percent while 25 per cent of the population earned just Rs. 3000 as income per month. The unforeseen and unpredictable nature of the mutant waves have caused immense distortions in the labour market which has exposed the migrant labourers to the destitution of low incomes at their native places or starvation at their outstation job sites.

Research based data shall illuminate us about the devastation caused by cyclical mutant waves in the times to come but in the meantime, we have no choice other than to maintain status quo till the pandemic subsides. It is heartening to see that in spite of closure of many educational institutions, the editorial team has put in their honest efforts to publish the journal in such antagonizing and unprecedented times. I sincerely laud and appreciate their endeavors in making this happen. Wish everybody good luck & health.

A handwritten signature in dark ink, appearing to read 'J. Choudhury', with a horizontal line drawn underneath it.

JOYJIT CHOUDHURY

MESSAGE

FROM PRINCIPAL'S DESK



I would like to convey my sincere thanks and congratulate the “Quest Editorial Board” and its contributors for their ethos and time. I believe that this edition will enrich the readers for enhancing their knowledge. In the journey of ‘Quest’ the tireless work of students, teachers and other contributors are appreciated. This edition will focus on the mind of the readers and its reflection spread around the society.

I would also like to thank the students and teachers who have shared their ideas, views, emotions, and expressions for fruitful completion of the journey of “Quest” (this edition), and I hope it will continue in future also. It also serves the purpose of Indian Institute of Legal Studies for which it is meant.



Prof. (Dr.) P. K. Sahoo
Principal,
Indian Institute of Legal Studies

EDITORIAL MESSAGE

FROM EDITOR-IN-CHIEF

Dear readers,

We hope you are doing well!

Albert Szent-Gyorgyi rightly said “*Research is seeing what everybody else has seen and thinking what nobody else has thought*”.

It gives us immense joy and satisfaction to introduce our very own student journal ‘QUEST’.

The objective of this journal is to promote, develop and enhance the research skills of creative minds. We are proud of our contributors who present you with write-ups dealing with various legal issues, and engage other disciplines with law. Further, this journal gives a platform to showcase talent, and also it stokes curiosity and improves the way one expresses.

A lot of effort has gone into the making of this issue. Amidst the hectic schedule of semesters, examinations, assignments, and internships, we tend to lose track of all the simple things we are capable of. Often, we tend to procrastinate and lose grip over things that could make a proud moment for us and give a sense of satisfaction.

We hope you enjoy reading this issue as much as we have enjoyed making it!

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LONG ARTICLE



IRRETRIEVABLE BREAKDOWN OF MARRIAGE

- Megha Usha¹

ABSTRACT

Marriage in our society has considered a societal obligation where a man and a woman are tied to each other till death makes them apart. It is a sacred ceremony that has taken place since time immemorial where both partners take responsibility for each other in order to carry forward the next generation. Every religion has its own rules and regulation for performing it. However, not all marriages which are being performed ceased to exist for a lifetime period and a point comes where they cannot survive together. The purpose of marriage has evolved from time to time and now it not only includes carrying a generation forward but it also includes the exchange of emotions, having a good level of understanding, and also a good relationship not only between the man and the woman but also between the families of each other.

With the changing concept of marriage, laws are supposed to be in harmony. That is why the Law Commission in its 71st and in 217th report came up with the suggestion of making an irretrievable breakdown of

¹ Student of LL. M, Semester II, Indian Institute of Legal Studies, Siliguri, meghausha90@gmail.com.

marriage a ground for divorce in order to lessen the mental agony suffered by the couple during the time-consuming divorce proceedings. The honourable Supreme Court in many cases has talked about and made the irretrievable breakdown of marriage a ground for divorce. The Law Commission as well judiciary demands the inclusion of irretrievable breakdown of marriage as a special ground for divorce under the Hindu marriage act 1955, as it is felt that due to technicalities involved in existing theories of divorce. This paper attempts to put some light on the effects and defects of making an Irretrievable breakdown of marriage a ground for divorce in India.

KEYWORDS: *Marriage, Irretrievable Breakdown, Law Commission, Report, Divorce.*

1. INTRODUCTION

Irretrievable breakdown of marriage is now taking a huge pace in today's world. Irretrievable breakdown of marriage under the Hindu marriage act, of 1955 means a marriage that is completely broken and which cannot be retrieved back to what it was. The parties to marriage feel that there is nothing left between them to continue as a couple. It is known as a 'no-fault divorce since in this none of the parties are at fault. In India, the parties to the marriage must prove that they have not cohabited for a long time in order to claim that their marriage has been irretrievably broken down. The supreme court in the case of Naveen Kohli versus Neelu Kohli recommended the union of India to seriously include irretrievable breakdown of marriage as a ground for divorce for the marriages which cease to exist in substance and reality and no point is left to deny the divorce.

The idea here is that cohabitation should not be considered such an important part of this ground as it can cause frustration among the parties to carry the baggage of their broken marriage just for the sake of proving it in court as irretrievably broken down. The parties to a marriage may know better about their marriage and then only they might have to resort to this ground for divorce with mutual consent so, the more prolonged it is the more it causes frustration and stress to the parties. For example, if the parties

have been living separately for, 2 years and now want to individually move on with someone else in life as a couple so, they cannot move on until their marriage has been dissolved which requires more than 3 years to legally end their marriage according to Hindu law. Therefore, this requirement of 5 years prohibits the parties from marriage to move on in their individual lives the way they want to become a barrier to their right to life and liberty under Article 21 of the constitution.

But the concept of irretrievable breakdown of marriage is a lot more problematic in the context of Indian society because the institution of marriage in India has a lot more sentiment and divinity attached to it. For a society that looks at marriage as a sacrament and has evolved from looking at marriage as eternal love and promise, the idea of divorce wherein partners want dissolution for no particular reason is quite hard to digest.

2. CONCEPT OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The Irretrievable theory of breakdown is the most controversial theory in legal jurisprudence based on the principle that marriage is a union of two people based on love-affection and mutual respect. If all of these are affected by any of the factors (say cruelty, desertion, adultery, insanity, etc), and If the marriage relationship between the spouses reaches such an extent that it is

absolutely irreparable that it is a point where neither of the spouses can live in peace with each other and gain the benefits of marriage relationships, then it is best to break the marriage, because now there is no point in continuing such a dead relationship which only exists in name and not in practice.

In India, marriage according to long-established norms was considered sacramental in its totality. This sacred union was deemed to be inherently indissoluble and undying.² However, this traditional view has been through a sea of change with the enactment of the Hindu Marriage Act, 1955 owing to the law's recognition of neoteric concepts of divorce and judicial separation. Before the Hindu Marriage Act was enacted, divorce was not a recognized means of calling for an end to a marriage, the only exception being where it was recognized by custom, which meant that the rules of dissolution of marriage and monogamy were, to the contrary, subject to a valid custom. This Act has been through various changes while accommodating the different needs of society. It is to be understood in this scope that the concept of the Irretrievable breakdown of a marriage is. Irretrievable dissolution falls under the principle of breakdown theory, which also is a valid ground for divorce, where the marriage is assumed to have reached a point where there is a

² Niyati Singh, *Irretrievable Breakdown of Marriage: A Critical Study*, ISSN 2581-5504 ACCLAIMS 1, 1-2 2021.

complete collapse of the relationship with no room for restoring the previously established bond. The irreparable nature of the situation gives rise to the alternative of offering the couple an option without bitterness and distress to leave each other's company.³

3. HISTORY OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The concept of irretrievable breakdown of marriage was for the first time introduced in New Zealand where it was recognized that it needn't be necessary for there to be some fault or other for a spouse to want to opt out of a marriage and hence the law has to recognize and cater to that requirement. In England, it was the case of *Masarati v. Masarati*, that opened the gate for the theory and the court of appeal held that "today we are perhaps faced with a new situation as regards the weight to be attached to one particular factor that is the breakdown of marriage" and the House of Lords 1943 decision in *Blunt v. Blunt* made it increasingly accepted that no public interest was served by keeping legally in existence a marriage which had in fact broken down. The Muslim Law

³ LAW COMMISSION OF INDIA, Eighth Law Commission | Law Commission of India | India (last visited May. 30, 2023).

too gives both the husband and the wife the right to give Talaq and recognizes the breakdown theory.

In India, regarding the Hindu Marriage Act and the Special Marriage Act, the Government of India has attempted to include ‘Irretrievable Breakdown of Marriage’ as a divorce ground, as recommended by the Law Commission of India’s 71st Report.⁴ The 71st report submitted by the Law Commission of India in 1978 deals with the concept of an Irretrievable Marriage Breakdown. The Report is based on the prima facie issue as to the degree and conditions under which the Hindu Marriage Act can provide an Irretrievable Dissolution of Marriage as a basis for divorce. The Law Commission noted in its report that the rule of limiting divorce to matrimonial disability results in discrimination in cases where no party is to blame or the fault is of such a nature that no party wishes to reveal it and yet the marriage has ceased to exist. In other words, the Irretrievable Breakdown of Marriage refers to a situation where emotional bonds, respect, etc. have disappeared, which is the very foundation of a marriage, and there remains only a facade in the name of marriage. The Law Commission mentions that where marriage has ceased to exist in substance as well as in fact,

⁴ *Id.*

divorce must be taken as a remedy to avoid a difficult remedy. The terms of such a divorce should be mainly concerned with getting the parties and the children to recognize the new arrangement and hammer out a suitable framework for managing relationships in the face of changing circumstances, rather than finding faults during the divorce proceedings. In the current scenario of India, In March 2012, the parliament passed the Marriage Laws (Amendment) Bill, 2010 with the introduction of Sections 13C, 13D, and 13E. Section 13C(1) allows for the use of an irretrievable dissolution of marriage as a new basis for divorce in addition to Section 13C(2), which requires the parties to have lived apart for 3 years or more before filing the petition.⁵

The guilt theory of divorce has been found deficient as it recognizes divorce only on certain specified grounds. The consent theory has been found wanting as it either makes divorce too easy or too difficult. The problem that modern law faces is that if a marriage has in fact broken down irretrievably, may be on account of fault of either party or both parties, or on account of fault of neither, is there any sense in continuing such union? Would it not be in the interest

⁵ Samridhi Srivastava, *What Does Irretrievable Breakdown of Marriage Mean*, LAW TIMES JOURNAL (Nov. 7, 2020, 2:50 AM), [What does irretrievable breakdown of marriage mean? - Law Times Journal](#).

of both the individual and society that marriage is dissolved? In such a marriage substance has disappeared, only form has remained.

For such a situation law recognizes the breakdown theory of divorce, it represents the modern theory of divorce. Law Commission on Reform of the Grounds of Divorce said in its report that the objectives of any good divorce law are two, (i) to buttress, rather than undermine, the stability of marriage and (ii) the minimum distress and humiliation. If a marriage has broken down beyond all the repair, then it should be brought to an end, without looking into the causes of the breakdown and without fixing any responsibility on either party.

In our contemporary society, the irretrievable breakdown theory is recognized by the laws of many countries. In modern law, the irretrievable breakdown of marriage theory has found its way in two modes:

- i. The law lays down that if the marriage has been broken beyond any possibility to repair then it should be dissolved. The determination of the question whether in fact, a marriage has broken down or not is left to the courts. In other words, the legislature does not lay down any criterion on which a marriage may be deemed to have broken

down. It leaves it up to the court to decide if the marriage has been broken down or not.

- ii. In its second mode, the legislature laid down the criterion for a breakdown of a marriage and if that is established, the court has no other option but to dissolve the marriage.

4. THEORIES OF DIVORCE

Divorce has, until recently, been based exclusively on the fault of one party. However, with changing societal mores, new theories of divorce have emerged. Marriage is no longer seen as irrevocable and the dominant view is that if spouses do not wish to live with each other and if living with each other becomes torture, they should be legally allowed to part ways. This view has brought in other theories of divorce that do not require the fault of one party in order to obtain a divorce. The theories of divorce can broadly be categorized into the fault theory and the no-fault theory.

4.1 Fault Theory

This is the traditional theory that requires an innocent party to approach the court to file for a divorce due to a fault on the part of the other party. Here, it is possible to distinguish between two kinds of faults: which are directed toward the petitioner and which are not directed

towards the petitioner. The latter may be called a separate theory- “theory of frustration of marital relationship”. Both kinds of faults have been incorporated in the Act as grounds for obtaining a divorce. The following are examples of grounds based on a fault that is directed against the petitioner under the Act: adultery, cruelty, desertion, bigamy, rape, sodomy or bestiality, and failure to pay maintenance. The grounds for divorce on the basis of fault not directed towards the other party are conversion to another religion, insanity, virulent or incurable form of leprosy, venereal disease in a communicable form, renunciation of the world and being missing for seven years or more. Thus, the fault can either be inherent in the person or result from his/her actions; nonetheless, there must be a fault in the person. The Act provides for certain defenses to a petition for divorce. No person in order to get relief can take advantage of his own wrong or disability, can connive, condone or collude with the respondent and unnecessarily delay the filing of the petition. Any of these circumstances would result in denial of the grant of divorce even if the fault is proved. Thus, the theory requires an innocent party in need of relief and a guilty party against whom the relief is granted. If the guilty party is able to show that the party claiming

to be innocent is also guilty, no relief would be granted to the petitioner.⁶

4.2 No-Fault Theory

No-fault theory does not require any one of the parties to be guilty; no-fault needs to be proved. It is also referred to as the “breakdown of marriage”. A divorce based on the no-fault theory can be through mutual consent or without the consent of the opposite party due to an irretrievable breakdown of a marriage. Only the former has been incorporated in the Act by virtue of Section 13 B. The Section allows for divorce to be granted if both parties agree to it provided, they have been living separately for one year or more. Section 13 (1A) which was inserted in 1964 in the Act has been said to be based on the theory of breakdown of marriage. It is actually a hybrid provision-based on a combination of fault theory and no-fault theory. It states that divorce can be sought by either of the parties subsequent to the passing of a decree for restitution of conjugal rights or for judicial separation, provided there has been no cohabitation for one year or more after the decree. This means that even a party at fault can file a petition for divorce. However, the provision is not based

⁶ *Id.*

on the no-fault theory since it requires that a decree of restitution of conjugal rights or judicial separation must have been passed. These decrees are passed only when the respondent is at fault. Hence to be able to file a petition under this Section, the fault is a pre-requisite. Also, the legal position is as follows: Section 23 (1) (a) of the Act is applicable to Section 13 (1A) provided the wrong is a fresh wrong and not merely non-compliance with the decree of restitution of conjugal rights or judicial separation. So far we do not have a provision that allows for a party irrespective of fault to file a petition for divorce on the ground that there has been an irretrievable breakdown of marriage. Bills have been introduced but have not been transformed into Act.

4.1.1. Merits of the Theory

The only merit of the theory as has been propounded by the jurists is that a marriage, which in practice is considered to be a sacramental institution, should be based on the ground on which a sound marriage is based that is tolerance, adjustment and respecting each other. If any of the parties to marriage is not ready to live with the other party the relationship will not be a happy relationship. Stretching such a relationship will do no good, rather will develop hatred and frustration among the

parties for each other. Therefore, to protect the sanctity of marriage, to reduce the number of unhappy marriages. However, here the point to be noted is that the parties to marriage do not get separated out of their own free volition but on the basis of the court coming to the conclusion that marriage is beyond repair or cannot be saved by any means.

4.1.2. Demerits of the theory

The Law Commission of India in chapter 4 of the 71st report has dealt in detail with the demerits of the irretrievable breakdown theory. The two main oppositions discussed in the report are as follows:⁷

- (i) It will make divorce easy. It will allow the spouses or even any one of the spouses to dissolve the marriage out of their own pleasure.
- (ii) It will allow the guilty spouse to take advantage of his own fault by getting separated and dissolving the marriage.

In Hindu law, the breakdown theory has its own version. Under the Hindu Marriage Act 1955, divorce can be obtained by either party: i) if it is shown that a decree for resolution of conjugal rights has not been compiled within a

⁷ *Id.*

period of one year or more, or, ii) if it is shown that cohabitation has not been resumed for a period of one year or more after passing of the decree under the Special Marriage Act. Thus, the breakdown theory was introduced into Indian law by allowing divorce both to the so-called innocent and guilty parties.

Law Commission Recommendations & Its Impact

Law Commission of India in chapter 6 ‘Requirement of Living Apart’ of the 71st report has described the situations from which it can be presumed de facto by the courts that marriage has irretrievably broken down. The situations are as follows:

- (1) Agreement of separation between two married couples.
- (2) ‘Not cohabiting’ should be sufficient proof for the irretrievable breakdown of marriage.
- (3) Separate living of spouses for more than five years should be sufficient proof.
- (4) Continuous separate living of spouses in the prime period of youth, and desire of not coming together in the mind of one is sufficient proof.
- (5) After a continuous separation arising out of the rift and no petition for conjugal rights from either side is filed during the period of one year, “separation” should be a ground for

the irretrievable breakdown of the marriage.

(6) Continuous separation for more than one year, coupled with a suspicion of misconduct from either side, mental or physical cruelty arising out of admission. Discovering either of the spouses regarding adultery covering pre-marital illicit relations renders their living together impossible.

(7) If a case for judicial separation or divorce or restitution for conjugal rights is pending for three years, and no attempt to settle the dispute or to compromise is made by either party.

(8) In some cases, it is even enough to take into account a simple submission of the spouse that he or she cannot live together.

Accordingly, the commission has made the recommendation of introducing section 13C “Divorce on the ground of irretrievable breakdown of marriage” which is as follows;

(9) A petition for dissolution of marriage may be presented to the court by either party to a marriage on the ground that marriage has broken down irretrievably.

(10) The court hearing such a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of the last three years immediately

preceding the presentation of the petition.

(11) If the court is satisfied, on the evidence, as to the fact mentioned in sub-section (2), then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to the provisions of this Act, grant a decree of divorce.

(12) In considering for the purpose of sub-section (2) whether the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding three months in all) during which parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart.

(13) For the purpose of sub-sections (2) & (4), the husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

All the others being the same, from the already available remedies that is: restitution for conjugal rights, judicial separation & Divorce, apart from the facts that:

(i) The period of separation has been raised from one

year to three years &

- (ii) For counting the continuous period of separation for three years, the period during which they lived together (only in case when within these three years they made an attempt to resume their marriage), will not be taken into account. If this attempt failed and they again got separated, then the period after three months, from the date when they again got separated, will be taken into consideration.

5. SUGGESTIONS

In order to incorporate irretrievable breakdown as a ground for divorce in India the Law Commission's report has to amend some loopholes. The researcher believes that when fault and no-fault grounds should be combined. Presently Sections 13 (1) and 13 (2) deal with grounds based on fault and the 2013 Bill seeks to insert a provision providing for the ground of irretrievable breakdown of marriage. The Sections thus segregate grounds based on fault theory and no-fault theory. This scheme is not sound because fault and no-fault theories are not mutually exclusive. A better way to insert the ground of irretrievable breakdown of marriage would be to allow divorce if the marriage has irretrievably broken down. The provision providing this should enumerate the circumstances which would amount to an irretrievable breakdown of a marriage.

These circumstances would be fault-based grounds as well as the no-fault ground that requires a minimum separation of two years. For the purpose of giving a solution to problems where both parties are at fault and the marriage has completely broken down but the parties have not been staying separately, two alternatives are possible. First, a sub-section could be added that empowers the court to grant a divorce even if none of the enumerated circumstances are fulfilled but when the facts and circumstances point towards such an action. In such a case, the court should be obligated to provide reasons as to why it thought that the marriage had irrevocably broken down. The court can grant a divorce on the ground only if any of the conditions given in the provision are fulfilled. These facts are based on the fault theory as well as the no-fault theory of divorce. This paper suggests a similar provision but with an addition that would ensure that the court is empowered to grant divorce in appropriate cases even if the case does not fall within any of the facts mentioned in the provision. The irretrievable breakdown should also be a ground for judicial separation. The Bill introduces the ground of irretrievable breakdown of marriage only for divorce and not for judicial separation. This is an anomaly since under the Act judicial separation can be prayed for on any of the grounds enumerated in Sections 13 (1) and 13 (2) of the Act. Ideally, it should also be possible to ask for judicial separation on the ground of

irretrievable breakdown of marriage. This would increase chances for reconciliation as the parties would get the opportunity to suspend their marriage without dissolving it. In case, they are unable to resolve their problems, they would have the option to approach the court under Section 13 (1A) or Section 13 C.

6. CONCLUSION

As the socio-economic condition of the spouse improved with the advancement of society, they also grew to be more self-reliant and independent. They are willing and ready to live apart rather than being tied and living together while being dissatisfied with their marital relationship. Furthermore, with the steady progress of education, communication technology, and rising levels of understanding, the societal stigma of divorce is rapidly fading in the current day. Divorce rules have been noticeably liberalized in line with this shift, particularly under the Hindu Marriage Act of 1955. The idea here is that cohabitation should not be considered such an important part of this ground as it can cause frustration among the parties to carry the baggage of their broken marriage just for the sake of proving it in court as irretrievably broken down. The parties to a marriage may know better about their marriage and then only they might have to resort to this ground for divorce with mutual consent so, the more prolonged it is the more it causes frustration and stress to the parties. For

example, if the parties have been living separately for, 2 years and now want to individually move on with someone else in life as a couple so, they cannot move on until their marriage has been dissolved which requires more than 3 years to legally end their marriage according to Hindu law. Therefore, this requirement of 5 years prohibits the parties from marriage to move on in their individual lives the way they want to become a barrier to their right to life and liberty under Article 21 of the constitution.

Divorce should not be seen as a mere tool for breaking the sacrament ties rather it should be considered as a solution to move out of an unbearable situation created due to high levels of tensions and uncertainty in marriage, making it impossible to stay in it. Such a divorce does not concern itself with the wrongs of the past, but rather with bringing the parties and children to grips with the new situation and development by working out the most satisfactory basis on which to regulate their relationship in the changed circumstances

A large number of the developed nations have perceived “irretrievable breakdown of marriage” as a separate ground for divorce proceedings. Thus, the unmistakable dissolving of marital ties has remained under strict scrutiny and evolution in every one of the overall sets of laws of the world. Divorce laws have been changed over the period of time so that wedded couples who wish for the dissolution of their matrimonial relations have

fewer lawful difficulties and get fast legal remedies.

Therefore, it is now high time to evaluate and amend the Hindu Marriage Act of 1955 and the Special Marriage Act, of 1954, and to take immediate steps to include the “irretrievable breakdown of marriage” as one of the grounds for dissolving the marriage between the two parties.

PREAMBLE: THE MIRROR OF INDIAN CONSTITUTION

- Tousif Khan & Pratham Aggarwal⁸

ABSTRACT

The Preamble of the Indian Constitution is an introductory statement that outlines the purpose upon which the Constitution is based. The Preamble serves as a touchstone for interpreting and understanding the Constitution and is often referred to in legal and constitutional discussions to emphasize the core values and goals of the Indian nation. It succinctly encapsulates the essence of the Basic Structure Doctrine and provides a guiding framework for the governance of the state. The Indian judiciary has played a pivotal role in maintaining the rule of law of the preamble and adapt to the changing needs of society while upholding the principles laid out in the Constitution.

KEYWORDS: *Interpretation, Basic Structure Doctrine, Guiding Frame Work, Purpose, Indian Judiciary.*

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1. INTRODUCTION

The basic philosophy of the Constitution of India is to be found in essence in the Preamble itself — P.B. Gajendragadkar J

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC
REPUBLIC]

and to secure to all its citizens:

JUSTICE social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the
[unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.⁹

The Preamble to the Indian Constitution was finalized after a long discussion and was adopted at the end so that it may embody the fundamentals underlying the structure of the Constitution. It serves as the statement of the purpose for which the Indian Constitution was enacted.

⁹ INDIA CONST. Preamble.

It is a “key” to open the mind of Constitution makers.¹⁰ The Preamble bring into the open the eminent rights and freedoms which the people of India proposed to secure to all citizens and the basic type of government and polity which was to be established.¹¹ As stated by P.B. Gajendragadkar CJ:

In lucid, expressive words, it emphatically brings out the socio-economic content of political freedom and gives inspiring picture of the future of India which was then beginning its career as a welfare state India is committed to the ideal of the welfare state and must establish, socio-economic justice. India is committed to democracy and respects individual liberty; and India wants to give to all its citizens equality of status and opportunity thereby attempting to create a mighty brotherhood of Indian citizenship, which would assist the sovereign, democratic Republic of India, in reaching its proclaimed objective. That, in substance, is the message of the Preamble. ¹²

About Preamble, M. Hidayatullah, former CJ, observed:¹³

Preamble resembles the Declaration of Independence of the United States of America, but it is more than a declaration. It is the soul of our Constitution which lays down the pattern of our political society which it states as Sovereign, Democratic Republic. It contains a solemn resolve

¹⁰ Berubari Union and Exchange of Enclaves, re, AIR 1960 SC 845: (1960) 3 SCR 250.

¹¹ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

¹² P.B. Gajendragadkar CJ, Constitution of India.

¹³ Democracy in India and the Judicial Process, 51.

which nothing but a revolution can alter.

In appreciation of Preamble, Dr M.V. Pylee writes:

The Preamble of the Constitution of India is one of the best of the kind ever drafted. A glance over the Preambles of the Constitutions all the world over will show that both in ideas and ideals and in expression, ours is unrivalled. It embodies the enthusiasm of the Constitution, the fortitude of the Indian people to consolidate themselves in a common feat of escalating a new socialist, secular nation which will ensure the joy of justice, liberty, equality and fraternity.¹⁴

2. PURPOSE OF THE PREAMBLE

The Preamble proclaim India to be a sovereign, socialist, secular, democratic republic. It is affirmed that the Constitution has been obsessed by the “people” to themselves. It affirms a determination to secure the liberty of thought, expression, belief, faith, worship and equality of status and opportunity. It also endeavours to promote amongst the people, a feeling of fraternity, protecting the dignity of the individual and unity of the nation.

In the historic case of ***K.S. Puttaswamy (Privacy-9J.) v. Union of India***¹⁵, it was held by the Supreme Court that the Preamble emphasises the need to secure to all its citizens justice, liberty, equality

¹⁴ Constitutional Government in India, 73.

¹⁵ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

and fraternity. Together they constitute the founding faith or blueprint of values embodied with a sense of permanence in the constitutional document. The constitutional vision seeks the realisation of justice, liberty, equality and fraternity. The individual lies at the core of the constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found contemplation in the radical document of authoritarian reign in other parts of the world. What categorize India is the adoption of a democratic way of life, established on the rule of law.

The Preamble of the Indian Constitution serves as an introductory statement that outlines the fundamental values, objectives, and principles upon which the Constitution is based. It provides a guiding philosophy and sets the tone for the entire Constitution. The purpose of the Indian Preamble can be understood in the following key aspects:

- **Source of Authority:** The Preamble declares that the Constitution evolve its jurisdiction from the society of India. It signifies that the power of the government emanates from the citizens, emphasizing the democratic nature of the Indian polity.
- **Sovereignty:** The Preamble asserts the sovereignty of the Indian people, highlighting their supreme and independent status. It emphasizes that the people have the ultimate power to govern

themselves and make decisions that affect their lives.

- **Social Objectives:** The Preamble outlines the social objectives that the Indian Constitution seeks to achieve. It includes securing justice, liberty, equality, and fraternity for all citizens. These principles reflect the ideals of a just, inclusive, and egalitarian society.
- **Democratic Principles:** The Preamble emphasizes the principles of democracy, which include ensuring the political, economic, and social rights of individuals. It underscores the importance of ensuring justice, freedom, and dignity for every citizen.
- **Unity and Integrity:** The Preamble expresses the commitment to maintaining the unity and integrity of the nation. It seeks to foster a sense of national unity and integration among the diverse population of India.
- **Secularism:** The Preamble declares India as a secular country, where the state is neutral in matters of religion. It affirms the principle of religious freedom and the coexistence of different faiths within the Indian society.
- **Fundamental Rights and Directive Principles:** The Preamble acts as a moral compass for interpreting and implementing the fundamental rights and directive principles enshrined in the Constitution. It sets the overall context and intent for the protection of individual rights and the pursuit of social welfare.

Overall, the purpose of the Indian Preamble is to articulate the

aspirations, values, and goals of the Indian Constitution. It provides a vision for the nation and serves as a guiding document for the interpretation and application of the constitutional provisions.

3. PREAMBLE AND INTERPRETATION OF THE CONSTITUTION

The value of the Preamble in respect of the interpretation of the Constitution is considerably more than that of a Preamble to any other statute. In early cases, however, the Supreme Court did not attach much significance to it during its interpretation. Thus, in *A.K. Gopalan v. State of Madras*¹⁶, it rejected the contention based on the Preamble that any law made under Article 21 should be declared void if it is contrary to the principles of natural justice. In the *Berubari Union case*¹⁷, the court opined that the Preamble by itself is not a source of power and cannot be relied upon to cut down the power of sovereign states. The right and power of the Union of India to cede its territory to foreign power under a treaty cannot be taken away by the general wording of the Preamble. However, the court recognised the general significance of the Preamble as “a key to open the mind of the makers” to resolve ambiguities in the provisions of the Constitution. This initial doubt about the exact place of Preamble in the Constitution and its juridical status was dispelled with the changes in the Preamble through the 42nd Amendment of the Constitution in 1976. The Indian

¹⁶ A.K. Gopalan v. State of Madras, (1950) SCC 228: AIR 1950 SC 27.

¹⁷ Berubari Union and Exchange of Enclaves, re, AIR 1960 SC 845.

Supreme Court, while recognising it as part of the basic structure in *Kesavananda Bharati*, set at rest controversy about its importance for the Constitution of India.

In *Kesavananda Bharati v. State of Kerala*,¹⁸ Sikri CJ observed, “It sounds to me that the Preamble is of extreme attention and it should be interpreted and appreciated in the light of the dignified and noble vision conveyed in the Preamble.” He noted that along with all the other provisions of the Constitution, when even the Preamble of the Constitution was put to vote, it formally became an integral part of the Constitution. Like any other provision, the Preamble can also undergo change, as illustrated by the changes brought out in it by the 42nd Constitutional Amendment.

In more recent cases like *Sabarimala*¹⁹ and *Navtej*²⁰, the Supreme Court has attached extraordinary weight to the language of the Preamble to give concrete meaning to the values underlying the Constitution of India like dignity, liberty, equality, etc. so as to bring forth its transformative role with the recognition of the right to privacy, temple entry of women and sexuality. In many cases, courts take note of Preamble to determine the vires of the legislation and to examine the reasonableness of the restrictions placed on Fundamental

¹⁸ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

¹⁹ *Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1.

²⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

Rights. Prof. Upendra Bakshi, while expounding the value of Preamble, has gone to the extent of observing that the entire Constitution of India is a footnote to the Preamble.

3.1. The interpretational value of the Preamble can be studied in 3 dimensions:

- (1) Preamble ancillary the interpretation of provisions of the Constitution itself;
- (2) Preamble as a source of interpretation of statutes mounted under the Constitution; and
- (3) the words in the Preamble as judicially interpreted and finding reflection in judicial thinking process.

3.2. Preamble as interpreter of the Constitution: -

J.M. Shelat and A.N. Grover, JJ. jointly recorded their opinion in *Kesavananda Bharati case*²¹. According to them, the Preamble to the Constitution of India embodies the great aims, objectives and the policy elemental its provisions apart from the basic aspect of the State which was to come into existence i.e., a sovereign democratic republic. Parts III and IV which embody the Fundamental Rights and Directive Principles of State Policy are the conscience of the Constitution²². In addition to the historical backdrop and the plan of the Constitution, the use of the Preamble has always been made and is bearable if the word “amendment” has more than one meaning. The

²¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²² *Id.* at 486.

Constitution-makers gave to the Preamble the delight of place. It embodied in a earnest form all the ideals and aspirations for which the country had struggled during the British administration and a constitution was sought to be enacted in accordance with the inventiveness of the Indian people.

It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is emulated in the Preamble which could and can be made revered. It is not without significance that the Preamble was confirmed only after draft articles of the Constitution had been adopted with such alterations were passed by the Constituent Assembly. The Preamble was, therefore, meant to be embodied in a very few and well-defined words the key to the understanding of the Constitution.

The learned Judges noticed the explanation offered by the President of the Constituent Assembly for putting the Preamble last. It was done to see that the Preamble was in obedience with the Constitution as acknowledged. Various amendments suggested in the draft text of the Constitution were jilted. One of the amendments proposed was to insert into it the words "In the name of God." That was rejected on the ground that it was inconsistent with the power of belief which was not only agreed in the Preamble itself but was also guaranteed as a

fundamental right²³.

3.3. Preamble as an aid to interpretation of other statutes:

The Preamble to the Indian Constitution is a brief introductory statement of the fundamental values and objectives of the Constitution. It is not enforceable in court, but it can be used as an aid to the interpretation of other statutes.

That the Preamble acts as beacon light guiding the interpretation of other laws is a rule recognized in *Kesavananda Bharati case*²⁴.

According to Kelsen: *“Preamble serves to give a constitution a greater dignity and efficacy.”*²⁵ Initially the Preamble was utilized by courts in interpreting social legislations. And later, the net widened.

In *Ajaib Singh v. Sir hind Coop. Marketing-cum-Processing Service Society Ltd*²⁶, the Court has said that the provisions of the Industrial Disputes Act are to be interpreted in accordance with the goal of social justice as is outlined in the Preamble to the Constitution. The validity of the Kerala Fishermen Welfare Fund Act, 1985 was upheld in *Koluthara Exports Ltd. v. State of Kerala*²⁷ on the grounds that the aim of the law was to provide social security and welfare to the Kerala fishermen and that this was justified as it was in conformity with the

²³ *Id.* at 511.

²⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²⁵ *Theory of Law and State*, (1946), p. 261.

²⁶ *Ajaib Singh v. Sir hind Coop. Marketing-cum-Processing Service Society Ltd*, (1999) 6 SCC 82.

²⁷ *Koluthara Exports Ltd. v. State of Kerala*, (2002) 2 SCC 459.

purpose to hold in the Preamble.

In this case *Kesavananda Bharati v. State of Kerala*²⁸ the Supreme Court held that the Preamble is a part of the Constitution and it can be used to interpret other provisions of the Constitution. The Court also held that the power of Parliament to amend the Constitution is not unlimited and it cannot be used to alter the basic structure of the Constitution.

In this case *Maneka Gandhi v. Union of India*²⁹ the Supreme Court held that the Preamble embodies the basic values and principles of the Constitution and it can be used to interpret other provisions of the Constitution. The Court also held that the right to life and liberty guaranteed by Article 21 of the Constitution includes the right to fair procedure.

In this case, *State of West Bengal v. Anwar Ali*³⁰ the Supreme Court held that the Preamble can be used to interpret a statute if the language of the statute is ambiguous or unclear. In this case, the Court held that the West Bengal Special Courts Act, 1950, which authorized the state government to select cases for trial by special courts, was not violative of Article 14 of the Constitution because it was consistent with the Preamble's goal of ensuring justice to all.

In this case *Global Energy Ltd. v. Central Electricity Regulatory*

²⁸ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

²⁹ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

³⁰ State of West Bengal v. Anwar Ali, AIR 1952 SC 75.

Commission³¹ the Supreme Court held that the Preamble can be used to interpret a statute to resolve a conflict between two statutes. In this case, the Court held that the Electricity Act, 2003, which promotes competition in the electricity sector, was consistent with the Preamble's goal of establishing a socialist economy.

In this case ***Kashi Prasad v. State***³² the Supreme Court held that the Preamble cannot be used to defeat the enacting clauses of a statute. In this case, the Court held that the Bihar Land Reforms Act, 1950, which provided for the compulsory acquisition of land, was not violative of Article 31(2) of the Constitution because it was consistent with the Preamble's goal of establishing a socialistic society.

In this case ***Bangalore Water Supply and Sewerage Board v. A. Rajappa***³³ the Supreme Court held that the Preamble can be used to interpret a statute to promote the fundamental rights guaranteed by the Constitution. In this case, the Court held that the Karnataka Irrigation Act, 1965, which authorized the government to acquire land for irrigation purposes, was consistent with the Preamble's goal of ensuring social justice because it would benefit the poor and marginalized sections of society.

In this case, ***Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State***

³¹ Global Energy Ltd. v. Central Electricity Regulatory Commission, 2011 SCC 607.

³² Kashi Prasad v. State, AIR 1950 SC 118.

³³ Bangalore Water Supply and Sewerage Board v. A. Rajappa, AIR 1978 SC 548.

*of Madhya Pradesh*³⁴ the Supreme Court held that the Preamble cannot be used to create new rights or obligations. In this case, the Court held that the Maharishi Mahesh Yogi Vedic Vishwavidyalaya Act, 2006, which established a university for the study of Vedic knowledge, did not create any fundamental rights for the students of the university.

In this case *Ratan Singh v. State of Punjab*³⁵ the Supreme Court held that the Preamble can be used to interpret a statute to ensure that it is consistent with the international law. In this case, the Court held that the Armed Forces Special Powers Act, 1958, which gives the armed forces sweeping powers to deal with insurgency, was consistent with the international law on human rights because it was necessary to protect the security of the state.

3.4. International instruments/pact as aid to interpretation of the Preamble

International documents and treaties can be used as an aid to interpretation of the Preamble of India. The Supreme Court of India has held that the Preamble embodies the basic values and principles of the Constitution, and that these values and principles are also reflected in international law. Therefore, international documents and treaties can be used to shed light on the meaning of the Preamble and to ensure

³⁴ Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of Madhya Pradesh, AIR 2013 SC 1526.

³⁵ Ratan Singh v. State of Punjab, 2019 SCC Online SC 1209.

that it is interpreted in a way that is consistent with international law. For example, the Preamble states that India is a sovereign, socialist, secular, democratic republic. These values are also reflected in the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948. The Universal Declaration of Human Rights guarantees the right to life, liberty, and security of person; the right to freedom of thought, conscience, and religion; and the right to equal protection of the law. These rights are also guaranteed by the Constitution of India.

In the case of *Francis Coralie Mullin v. Union of India*³⁶ the Supreme Court held that the Preamble can be used to interpret the right to life guaranteed by Article 21 of the Constitution. The Court held that the right to life includes the right to live with dignity, and that this right can be limited only in accordance with the law and only to the extent that is necessary in the interests of the general public. The Court also held that the right to life can be interpreted in light of the Universal Declaration of Human Rights, which guarantees the right to freedom from torture and cruel, inhuman, or degrading treatment or punishment.

In the case of *Mohd. Ahmed Khan v. Shah Bano Begum*³⁷ the Supreme Court held that the Preamble can be used to interpret the right to equality guaranteed by Article 14 of the Constitution. The Court

³⁶ Francis Coralie Mullin v. Union of India, AIR 1981 SC 746.

³⁷ Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

held that the right to equality includes the right to be free from discrimination on the basis of sex, and that this right can be limited only in accordance with the law and only to the extent that is necessary in the interests of the general public. The Court also held that the right to equality can be interpreted in light of the Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted by the United Nations in 1979.

K.S. Puttaswamy v. Union of India³⁸ In this case, the Supreme Court upheld the constitutional validity of the Aadhaar scheme, but it placed certain restrictions on the use of Aadhaar data. The Court held that the Aadhaar scheme must be used in a way that is consistent with the right to privacy that is implicit in the Preamble. The Court also held that the Aadhaar scheme must be used in a way that is consistent with the International Covenant on Civil and Political Rights, which guarantees the right to non-discrimination on the basis of personal data.

Navtej Singh Johar v. Union of India³⁹ In this case, the Supreme Court held that Section 377 of the Indian Penal Code, which criminalized same-sex sexual activity, was unconstitutional. The Court held that Section 377 violated the right to equality guaranteed by Article 14 of the Constitution and the right to privacy that is implicit in the Preamble. The Court also held that Section 377 violated the International Covenant on Civil and Political Rights, which guarantees

³⁸ K.S. Puttaswamy v. Union of India, 2019 SCC OnLine SC 476.

³⁹ Navtej Singh Johar v. Union of India, 2018 SCC OnLine SC 1675.

the right to non-discrimination on the basis of sexual orientation.

The use of international documents and treaties as an aid to interpretation of the Preamble is a valuable tool for the Supreme Court. It allows the Court to interpret the Preamble in a way that is consistent with the basic values and principles of the Constitution and with international law. This is important because the Constitution is a living document that must be interpreted in light of the changing needs of society.

However, it is important to note that the use of international documents and treaties as an aid to interpretation of the Preamble is not without its limitations. The Court must be careful not to use international law to override the clear language of the Constitution. The Court must also be careful not to use international law to create new rights or obligations that are not already guaranteed by the Constitution.

4. SIGNIFICANCE OF MENSTRUAL HEALTH

Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a judge must be a man of high integrity, honesty and is required to have moral vigour, ethical firmness and be impervious to corrupt or venial influences. He is required to keep most exigent standards of propriety in judicial conduct. Any conduct which tends to weaken public confidence in the honesty and impartiality of the court would be destructive to the efficacy of

judicial process. Society, therefore, expects higher standards of conduct and morality from a judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as a wholesome standard of conduct which would generate public aplomb, accord status to the judicial office and enhance public image, not only of the judge but the court itself. It is, therefore, a basic requirement that a judge's official and personal conduct be free from goof; the same must be in tune with the highest standard of propriety and probity. The usual of conventional is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of morality and correctness, higher than those deemed acceptable for others. Therefore, the judge can ill-afford to seek shelter from the fallen standards in the society.

In *Krishna Swami v. Union of India*⁴⁰ K. Ramaswamy, J. held that the holder of office of the judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial act, both on and off the bench, are basically high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions are the guidelines for judicial conduct. Conduct that tends

⁴⁰ Krishna Swami v. Union of India, (1992) 4 SCC 605, pp. 750, 751.

to undermine the public confidence in the character, integrity and impartiality of the judge must be eschewed. It is expected of him to freely set forth pure standards of conduct to acknowledge fitness to higher responsibilities.

A Judge on appointment to the Supreme Court or a High Court swears in the name of God or solemnly affirms to bear true faith and allegiance to the Constitution of India, to uphold the sovereignty and integrity of India and to perform, to the best of his ability, knowledge and judgment, the duties of his office and to uphold the Constitution and the laws. The form of oath or the affirmation as included in the Third Schedule expressly speaks of sovereignty and integrity of India casting there upholding as an obligation of the judge. To uphold the Constitution implies an obligation cast on the judges to so conduct themselves and act as: -

- i. to see that India continues to be a sovereign socialist secular democratic republic, as constituted by the Constitution of India, and
- ii. justice, liberty, equality and fraternity, as referred to and added in the Preamble are secured to all the citizens of India.

To keep the stream of justice clean and tidy, the judge must be equipped with sterling character, immaculate integrity and upright behaviour. Destruction thereof would undermine the adequacy of the rule of law and the working of the Constitution itself. The judges of

higher ranks, therefore, should not be mere men of clay with all the frailties and infirmity, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure; economic, political or of any sort. The actual as well as the possible independence of the judiciary would be transparent only when the office-holders endow those qualities which would operate as an impregnable fortress against furtive attempts to erode the independence of the judiciary. In short, the behaviour of the judge is the stronghold for the people to reap the fruits of democracy, liberty and justice and the contrary rocks the bottom of the rule of law.⁴¹

It is true that freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution is one of the most precious liberties in any democracy. But equally important is the maintenance of respect for judicial independence which alone would protect the life, liberty and reputation of the citizen. So, the Nation's interest requires that criticism of the judiciary must be measured, strictly rational, sober and proceed from the highest motives without being coloured by a partisan spirit or pressure tactics or an intimidatory attitude. The court must, therefore, harmonise constitutional values of free criticism and the need for a fearless curial process and its presiding functionary, the judge. If freedom of expression subserves public interest in

⁴¹ C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, (1995) 5 SCC 457, 473, paras 21, 22 and 23.

reasonable measure, public justice cannot gag it or manacle it; but if the court considered the attack on the judge or judges scurrilous, offensive, intimidatory or malicious, beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of the law by fouling its source and stream. The power to punish the contemner is, therefore, granted to the court not because the citizens need an impartial and strong judiciary.

It is enough if all of us take this in mind while compelling opinions on courts and judges. But the question that still remains is when the Bar of the court, in which the judge occupies the seat of office, honestly believes that the conduct of the judge or of the Bench fouls the reservoir of justice, or erode or tends to undermine the dignity expected of a judge and the people are tending to disbelieve the impartiality or integrity of the judge, who should bear the duty and responsibility to have it/them corrected so as to restore the respect for the judiciary.⁴²

The Founding Fathers have assigned the judiciary a place of pride in the Constitution and insulated it against any interference so as to protect its independence. A judge is not answerable to anyone accepting the Constitution and his own conscience. Is it a euphemism to say that the Preamble is justly the conscience of a judge.

⁴² C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, (1995) 5 SCC 457, 478, para 31, 32.

5. MENSTRUAL HEALTH AND HYGIENE

CHALLENGES IN INDIA

Deriving inspiration from the Preamble and the whole scheme of the Constitution, Sikri, C.J. held in *Kesavananda Bharati case*⁴³ that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic formation may be said to consist of the following features:

1. Supremacy of the Constitution;
2. Republican and democratic form of government;
3. Secular character of the Constitution;
4. Segregation of powers between the legislature, the executive and the judiciary;
5. Federal character of the Constitution.

Such structure of the Constitution of India rests on the basic foundation, that is, the dignity and freedom of the individual. This is of supreme importance. This cannot be demolished by any sort of amendment.⁴⁴

Although the Preamble gives a predominant place to securing the objective of social, economic and political justice to the citizen, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a

⁴³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁴⁴ *Id. at*, 291-94.

matter of fact, no clause or indication in the Preamble which stands in the way of abridgement or right to property for securing social, economic and political justice. Certainly, the dignity of the individual upon which also the Preamble has laid stress, can only be settled by securing the objective of social, economic and political justice. The words “basic structure or framework”, indicate the broad outlines of the Constitution while the right to property is a matter of detail. H.R. Khanna, J. clearly opined in *Kesavananda Bharati case* that right to property cannot be said to pertain to the basic structure or framework of the Constitution.⁴⁵

According to J.M. Shelat and A.N. Grover, JJ. In *Kesavananda Bharati case* the sovereign democratic republic has been constituted to secure to all the citizens the objectives set out. The fulfilment of those objectives forms the texture of and permeates the whole scheme of the Constitution. While most admired freedoms and rights have been guaranteed, the government has been laid under a dignified duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be fair and paired — then alone the dignity of the individual can be achieved. It was to give effect to the main manifesto in the Preamble that Parts III and IV were enacted. The three main organs of government, legislature, executive and judiciary and the entire mechanics of their functioning were fashioned in the light of the objectives in the Preamble, the nature of polity mentioned therein and the grand perception of a

⁴⁵ *Id.* at 1483.

united and free India in which every individual, high or low, will partake of all that is capable of achievement.⁴⁶

Referring to the Objectives Resolution, the learned Judges observed that the same could be taken into account as a historical fact which moulded the nature and character of the Constitution. Since the accent of the Preamble was taken from the Settlement itself the attestation in the Preamble that India would be a sovereign democratic republic which would secure to all its citizens justice, liberty and equality was furnished in Parts III and IV and other provisions of the Constitution. These formed not only the essential features of the Constitution but also the fundamental conditions upon and the basis on which the various society and interests adopted the Constitution as the Preamble proposed to create one consolidated integrated community⁴⁷.

Keeping in view the historical background, the Preamble and the entire scheme of the Constitution, the learned Judges held that the basic elements of the constitutional structure can be illustrated but not catalogued as:

- (1) The supremacy of the Constitution.
- (2) Representative and autonomous form of government and sovereignty of the country.
- (3) Secular and federal nature of the Constitution.

⁴⁶ *Id.* at 533.

⁴⁷ *Id.* at 535A.

- (4) Demarcation of power between the three organs of the Government.
- (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
- (6) The peace and the integrity of the Nation⁴⁸.

In the opinion of the learned Judges, it hardly makes any substantial difference whether the Preamble is a part of the Constitution or not.

According to Jaganmohan Reddy, J. the Preamble indicates the elements of the basic structure of the Constitution and translated in the various provisions thereof. The use of the words the “sovereign democratic republic” in the Preamble is a strong pointer to the theory that the Fundamental Rights in Part III and Directive Principles in Part IV, which constitute the essential elements of the basic structure of our Constitution cannot be totally abrogated. There will be no Government if it does not ensure political, economic or social justice and entails abolition of Fundamental Rights or Directive Principles.⁴⁹

The basic structure doctrine or the doctrine of basic features of the Constitution as evolved by the SC is exclusive in constitutional jurisprudence. The seeds of the approach are to be found in the Preamble to the Constitution. Landmark pronouncements of the Supreme Court

⁴⁸ *Id.* at 582.

⁴⁹ *Id.* at 1159.

in *Kesavananda Bharati Case*, *Indira Nehru Gandhi v. Raj Narain*⁵⁰ and *Minerva Mills*⁵¹ bear testimony to this truism. Any amendment of the Constitution is open to judicial review and liable to be interfered with by the Court on the ground that it affects one or the other of the basic features of the Constitution. So wide and far-reaching is the sweep and impact of the doctrine that it is impossible for those responsible for amending the Constitution to guess what surprise lies in store for them before the Supreme Court because the claim of any particular feature of the Constitution to be a basic feature would be determined by the Court. A multitude of features have been acknowledged as “basic” in judicial pronouncements by different Judges individually though it can be said that consensus as regards each of them is yet to be achieved. The features are:⁵²

- (a) Supremacy of the Constitution.
- (b) Rule of law.
- (c) The principle of separation of powers.
- (d) The objectives specified in the Preamble to the Constitution
- (e) Judicial review; Article 32; Articles 226/227.
- (f) Federalism.
- (g) Secularism.

⁵⁰ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

⁵¹ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

⁵² D.D. Basu, *Shorter Constitution of India* 1651-52 (2005).

- (h) The sovereign, democratic, republican structure.
- (i) Freedom and dignity of the individual.
- (j) Unity and integrity of the Nation.
- (k) The principle of equality & the quintessence of equal justice.
- (l) The “essence” of other Fundamental Rights in Part III.
- (m) The concept of social and economic justice — to build a welfare State; Part IV *in toto*.
- (n) The equity between Fundamental Rights and Directive Principles.
- (o) The parliamentary system of government.
- (p) Limitations upon the amending power conferred by Article 368
- (q) Independence of the judiciary; but within the four corners of the Constitution and not beyond that.
- (r) Powers of the Supreme Court under Articles 32, 136, 141, 142.
- (s) Effective access to justice.

6. CONCLUSION

Preamble is considered to be the mirror of the Indian Constitution because it is a brief introductory statement that sets out the guiding purpose and principles of the Constitution, and it indicates the source from which the document derives its authority.

The Preamble of the Indian Constitution begins with the words "We, the people of India". This statement affirms that the Constitution is the supreme law of the land and that it derives its authority from the

people. The Preamble then goes on to declare India to be a sovereign, socialist, secular, democratic republic. These terms are all important to the Indian Constitution and they reflect the values and ideals that the founding fathers of the Constitution wanted to uphold.

The Preamble is a brief document, but it contains a lot of important information about the Indian Constitution. It is the mirror of the Constitution as it reflects the core values and principles that the Constitution is based on. The Preamble continues to be a source of inspiration and guidance for all Indians as they strive to build a just, free, and equal society.



SHORT ARTICLE



YOUTH EMPOWERMENT IN INDIA THROUGH SELFLESS SOCIAL SERVICE

- Amanjit Singh⁵³

ABSTRACT

In a welfare society the wealthy have the responsibility to serve the underprivileged through acts of selfless social service.

India is a developing nation, making progress in all areas. If its youth is guided in the right direction and given opportunities, the future of the country can be left to them. Young people with education can use their position and talents to raise public awareness against social ills. Instead of wasting their intelligence and skills, their potential must be harnessed and directed in the right direction. Exaggerated actions are not necessary; instead, all that is required is for each person to play their modest part. The need of the hour is to ensure the engagement and contribution of the Indian Youth on social issues on a Pan India level thus, making this country proud again.

KEYWORDS: *Social Service, Youth, Social Work, Participation.*

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1. INTRODUCTION

Social service is the essence of humanity and humanity is what distinguishes man from animals. The scriptures of almost every faith advocates selfless social service.

Social service has always been focused on meeting human needs and developing human capabilities. The ideals of social service are founded on equality, worth, and dignity of all individuals, stemming from humanitarian and democratic beliefs. Mother Teresa, Florence Nightingale and Henry Dunant, the founder of the Red Cross Society, are some excellent examples of devoted social workers, social service, also called welfare service or social work, any of numerous publicly or privately provided services intended to aid disadvantaged, distressed, or vulnerable persons or groups. The term social service also denotes the profession engaged in rendering such services. The social services have flourished in the 20th century as ideas of social responsibility have developed and spread. The basic concerns of social welfare—poverty, disability and disease, the dependent young and elderly—are as old as society itself. The laws of survival once severely limited the means by which these concerns could be addressed; to share another's burden meant to weaken one's own standing in the fierce struggle of daily existence.

2. CONTRIBUTIONS OF THE SOCIAL WORKERS

Professionals in social service also known as social workers, work with families and institutions to help provide for and advance the following social impacts:

- a) Unemployment Insurance
- b) Civil Rights
- c) Worker's Compensation Insurance
- d) Disability Pay
- e) Minimize the stigma attached to mental illness
- f) Medical Assistance Programs (Medicaid and Medicare)
- g) Preventing Child Abuse and Neglect.

Social workers are specialists who help vulnerable sections of society satisfy their fundamental and diverse needs to improve their overall well-being. Social workers deal with a wide range of individuals and organizations, focusing on those who are marginalized, oppressed, or living in poverty. A social worker may be requested to engage in legislative procedures that typically conclude in social policy formulation, depending on their profession, job title, and place of employment. ⁵⁴To carry

⁵⁴ LEGAL SERVICE INDIA, <https://legalserviceindia.com/legal/article-8832-importance-of-social-work-in-india-being-a-torch-bearer.html> (last visited May. 5, 2023).

out their work, they rely on social work ideals and principles and academic research. Societal workers have been educated and taught to confront social inequity and challenges to the well-being of their challenges faced by disadvantaged strata of society.

For social service workers there are three primary stages of intervention:⁵⁵

- i. Macro - The first is "macro" social work, which involves the entire society or community. Policy formation and lobbying on a national or global scale will require this type of social work practice.
- ii. Mezzo - "Mezzo" social work practice is the second stage of intervention. This level will include collaboration with agencies, small associations, and other small groupings. This activity may be required for the establishment of policy within a social work department or for community planning services.
- iii. Micro – "Micro" is the highest level, which includes serving individuals and families.

3. PARTICIPATION OF YOUTH IN SOCIAL WORK

⁵⁵ SOCIAL WORK GUIDE, <https://www.socialworkguide.org/resources/micro-vs-mezzo-vs-macro-social-work/> (last visited May. 1, 2023).

The youth can participate in the social service at two levels:⁵⁶

- 1) Practice-based Professional level.
- 2) Personal level/Volunteering.

Practice-based professional level: It is quite remarkable on part of young individuals who choose social work as their discipline of research/research and practical engagement because in such a case, such person becomes directly involved in social work practices and is recognized as a social services provider and supporter.

As a social service researcher, one might directly focus on the planning, strategy planning, analysis, and diagnosis of challenges and elements that are specifically related to the growth of society and the welfare of its people.⁵⁷

Some social workers work as intermediators, providing services to agencies and groups whose focus is on individual well-being in the social context.⁵⁸ Other social workers' work includes a variety of services such as social and community organizing, case management, providing counselling, psychotherapy, rehabilitation to people with disabilities, developing communication between national and international agencies,

⁵⁶ INDEED, <https://www.indeed.com/career-advice/career-development/why-volunteering-is-important> (last visited May. 4, 2023).

⁵⁷ NATIONAL ASSOCIATION FOR SOCIAL WORKERS, <https://www.socialworkers.org/News/Facts/Types-of-Social-Work>, (last visited May. 5, 2023).

⁵⁸ *Id.*

promoting social justice, and creating awareness of social issues.

Personal Level or Volunteering: Doing social service as a personal choice or as a volunteer is a truly honest and humble deed. As citizens of the society, we should all participate in the process of its growth and progress, and nothing can replace a single humble act done gladly for the wellbeing of the people. And this is where the real job begins; conducting social work as a professional activity is apparent, but doing it with the purpose of bringing about a larger change and without regard for the return is a priceless decision.

Society needs innovation and growth and it wishes that the young generation should come forward to contribute and participate in this way thus the youth need to be encouraged at the foundation level where they have to deal with the people in a very realistic way, at their home front, school, college, peer group, communities, locality; they should be made aware about the very basic and fundamental issues by their parents, elders and educators. They themselves should also look at the issues that the people are facing at the local level. Youth has got a lot of stamina, intelligence and courage and they can very easily understand, sympathize and implement some solutions and can also provide voluntary help and support to the people and the society.

At schools and colleges, students should be required to participate in at least one social service programme or to be affiliated with an NGO; similarly, parents should encourage their children to volunteer in social and community development programmes.

Social work is not a foreign phenomenon; it should become a part of our everyday lives. Just as we earn and work to make a good living, we should all contribute to social work in order to have a good social life in the community and society. Society can never work for itself because it is from and for us, thus, we must work for it within it.

4. SOCIAL SERVICE AS A PROFESSIONAL IN INDIA

India continues to lack essential services, particularly those mandated by law, such as education, health care, etc. The relatively limited coverage of sanitary facilities, child mortality and malnutrition are disconcerting and one of the lowest in all of Asia. India has failed to provide essential public services, such as education, health, nutrition, water, and sanitation while spending significant public funds on them. This has serious social and political consequences for individuals who are marginalized.

In recent decades, social service/work in the world has grown to become one of the most in-demand professions.⁵⁹ A person holding a Bachelor's degree in Social Work (BSW) is considered a professional social worker in India.⁶⁰ Qualified social workers can be found in administrative,

⁵⁹ Rory Truett, *Social Work is Booming World Wide because it's Proven to Work*, THE GUARDIAN, (May 1, 2023, 9:30 PM), <https://www.theguardian.com/society/2018/jul/02/social-work-booming-worldwide-costa-rica>.

⁶⁰ NATIONAL ASSOCIATION FOR SOCIAL WORKERS, <https://www.socialworkers.org/Careers/Career-Center/ExploreSocialWork/TypesofSocialWorkDegrees#:~:text=To%20be%20a%20social%20worker,or%20PhD%20in%20Social%20Work> (last visited May. 2, 2023).

management, and policy planning positions in various government and non-governmental organizations (NGOs) and government ministries in India. Both the government and non-governmental organizations (NGOs) have a lot to offer if one is willing to work hard and under any circumstances.

5. PROBLEMS FACED BY YOUTH IN PROVIDING SOCIAL SERVICE

5.1. Lack of Guidance:

The youth are often not trained in the field of social service. They need guidance. In a self centric world like ours where social service is often side-lined as charity, it is very difficult to find proper guidance to engage in social service work.

5.2. Lack of Time:

Some times people engage in social service but at a later stage, they cannot take out time for it due to other pressing issues of life such as Studies, job etc. In such circumstances social service is the first to be sacrificed as it is seen as a Co-curricular activity to make ones CV impressive.

5.3. Lack of Support:

Job security is the first thing that everyone strives for in today's date and time, social service as the name suggests is a welfare activity, it's not in line with the kinds of occupations that provide job security

to people, therefore it is difficult to find support from parents and the society at large to pursue social services work as an occupation.

5.4.Lack of Funds:

For social work, money is required. Social workers often need to travel from one place to another, such travels cost money. Most of the people of our country belong to middle-class families who find it difficult to arrange such money for social work.

6. CONCLUSION AND RECOMMENDATIONS

In conclusion a country's overall development is entirely dependent on its youth and it can therefore aid a country by putting its abilities to good use.

Social service not only gives the youth a bigger grip on reality but also teaches them that even the slightest bit of their time can change someone else's life; it also gives underprivileged children a sense of belonging. Through community service, students gain real-world experience and practice important habits like leadership, problem-solving, and time-management. It can help a child make deep connections with other children from very different backgrounds. Doing volunteer work can help teenagers improve their mental health. This is proven by a 2018 study on volunteerism and health that found that participants experienced an 8.5% increase in mental health and a 4.3% decrease in depression after volunteering

regularly.⁶¹When social workers are active in a community, it tends to have a positive impact on crime rates, health statistics, school attendance and employment. At its core social work aims to heal and empower the people that make up these communities.

Just as big companies are required to perform corporate social responsibility and expend funds for such projects, the government should implement programmes to strengthen school systems and incorporate social work and volunteering as a mandatory part of study curriculum to build empathetic and sensible youth. This will promote inclusivity and growth in the society and help it advance. Social media these days should especially, be used positively to easily communicate one's opinions for the improvement of society and connecting people in need to people who can help meet those needs, instead of committing crimes such as cyber bullying, phishing etc.

⁶¹ Jerf W. K. Yeung, Zhuoni Zhang and Tae Yeun Kim, Volunteering and Health Benefits in General Adults: Cumulative Effects and Forms, BMC PUBLIC HEALTH, (May. 4, 2023, 11:24 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5504679/>.

LEGAL GUARDIANSHIP AND CUSTODY OF ADULTS WITH MENTAL DISABILITIES

- Prabesh Sharma Baral⁶²

ABSTRACT

Section 14⁶³ provides for limited guardianship of persons with disabilities where they require additional support or assistance. The statute also mandates that persons with disabilities should have legal capacity on par with others. In India, children above the age of eighteen years are considered major and custody laws do not apply to them. People have to assume the care and protection of the person for whom they are appointed as a guardian. It provides that the Government must undertake suitable measures to enable persons with disabilities to enter into financial contracts and own property in their name without any discrimination. The court found nothing that would allow the subject to be removed from the care of her parents, considering her state of mind. The limited guardian is expected to act based on mutual trust and

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⁶³ The Rights of Persons with Disabilities Act, 2016, § 14, No. 49, Acts of Parliament, 2016 (India).

decisions with the consent of the persons with disabilities who appoint them. The guardian takes all legal decisions on behalf of the person concerned. In the case of Kailas Natarajan v. District Police Chief,⁶⁴ the Court finally reiterated how the petitioner had breached the trust of the parents who consulted him for psychiatric help for their daughter. The constitutional courts may also act as parents patriae so as to meet the ends of justice. The RPD Act⁶⁵ clearly recognizes the legal capacity of people with disabilities. Therefore, they may require someone to represent their interests in the legal areas throughout their lives.

KEYWORDS: *Disability, Guardian, Mental health, Children, Legal guardianship.*

⁶⁴ Kailas Natarajan v. District Police Chief, WP (Crl.) no. 309 of 2020.

⁶⁵ The Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016 (India).

1. MENTAL DISABILITIES

"Mental disability" is defined as the inability to access information at the rate at which an ordinary human being is expected to learn it. Mental health disorders are becoming more widely accepted due to technological advancements. Mental impairments were previously referred to as 'insanity,' but now referred to as a 'psychiatric condition.' The world recognizes such people's predicament, so specific guardianship guidelines have been established to assist them. In this article, the author will examine guardianship legislation in India and abroad, focusing on people suffering from mental illnesses. The National Trust Act, 1999, in India, makes specific provisions for the care of mentally challenged individuals.

2. LEGAL GUARDIANSHIP

Children over the age of eighteen in India are considered majors, and custody laws do not apply to them. Though it is not required to apply for legal guardianship of a disabled person, because the National Trust Act of 1999 provides for such appointments, it is always advantageous to apply for legal guardianship under the provisions of the said Act. Such an occasion may arise when a person with a disability has to deal with issues concerning himself, his interests, and his property, and because he/she may not always be able to make appropriate decisions in those matters,

it would be in his/her best interests to be represented in such matters by a legal guardian.⁶⁶

There are numerous ways to assist someone suffering from a mental illness. A person who is unable to make financial decisions, for example, may prefer a representative payee. A power of attorney is another way to assist someone in managing their finances. Another option is Supported Decision Making. A person chooses people to be on their "team" in Supported Decision Making. Family, caregivers, and other important people can be part of the team. The team assists the individual in making decisions without the use of a court. Instead of guardianship⁶⁷, you can use an advanced healthcare directive or an advanced psychiatric directive.

People with autism, cerebral palsy, and mental disabilities are in a unique position because, even after reaching the age of 18, they may not always be capable of managing their own lives or making legal decisions for their own benefit. As a result, they may require someone to represent their interests in legal matters for the rest of their lives. However, in cases of cerebral palsy and multiple disabilities, limited guardianship may be required due to the

⁶⁶ VIKASPEDIA, <https://vikaspedia.in/education/parents-corner/guidelines-for-parents-of-children-with-disabilities/guardianship> (last visited Nov. 27, 2022).

⁶⁷ THE NATIONAL TRUST,

<https://www.thenationaltrust.gov.in/content/innerpage/guardianship.php> (last visited Nov. 27, 2022).

availability of enabling mechanisms and/or scientific facilitations that allow such people to function with varying degrees of independence.

3. CONCEPT OF GUARDIANSHIP

Section 14 of the National Trust Act, 1999⁶⁸ specifies the requirements for the custody of a mentally ill person. Under this section, a local and state-level committee may appoint guardians for mentally incapacitated people. A formal guardianship application must be filed with the district collector, who will then name the parent or guardian if the request is granted. Legal custody and visitation applications can be filed locally with the local committee or online at the official website.

3.1. VOLUNTARY

According to Section 14 of the National Trust Act of 1999,⁶⁹ a parent, family, or organization may voluntarily petition for custody with a regional committee formed under statute. The guardian is required by this clause to look after both the mentally impaired individual and his possessions. Any individual who is related to the handicapped person by blood,

⁶⁸ The National Trust Act, 1999, § 14, No. 44, Acts of Parliament, 1999 (India).

⁶⁹ *Id.*

marriage, or adoption is considered trivial under Chapter VI of the National Trust Act, 1999.

3.2. INVOLUNTARY

The Rights of Persons with Disabilities Act of 2016 addresses involuntary guardianship. If the regional collector believes that a mentally impaired person is unable to look for himself, he may appoint a parent or guardian on behalf of such person under Section 13 of the Act⁷⁰. The guardian appointed under this provision may be granted plenary guardianship, which gives the guardian complete control over the mentally ill person's choices, or restricted guardianship, which gives both the guardians and the mentally ill person joint authority over overall activities.

Guardianship was established by the National Trust Act of 1999. Despite the fact that it has already been mentioned, the National Trust Act, or more specifically, the 'National Trust for the Welfare of Individuals with Autism Spectrum Disorder, Intellectual Disabilities, Neurological Dysfunction, and Multiple Disorders,' is in charge of the care of people with Down syndrome, autism, and other mental disabilities. When an

⁷⁰ The Right of Person with Disabilities Act, 2016, § 13, No. 49, Acts of Parliament, 2016 (India).

application is submitted under Section 14⁷¹ of the Act, a local committee will make a decision.

4. SPECIAL SITUATION OF PERSONS WITH INTELLECTUAL DISABILITIES, MENTAL RETARDATION AND DISABILITIES

People with intellectual disabilities and mixed disabilities are in a unique situation because, even at the age of 18, they may not always be in control of their lives or make legal decisions in their best interests. Therefore, they might require someone to represent their interests in legal matters for the rest of their lives. However, limited guardianship may be necessary for multiple disabilities because there are enabling mechanisms and or scientific aids that allow such individuals to function with varying degrees of independence.

5. LEGAL CAPACITY OF PEOPLE WITH DISABILITIES

Section 13⁷² of the Rights of Persons with Disabilities Act 2016 (RPD Act) recognizes that people with disabilities have legal capacity in matters such as finances, inheritance, and so on. It states that the government must take appropriate steps to allow people with disabilities to enter into financial contracts and own property

⁷¹ *supra* note 7.

⁷² *supra* note 9.

in their own names without discrimination. The statute also requires that people with disabilities have the same legal capacity as everyone else. Section 14⁷³ allows for limited guardianship of people with disabilities who need extra support or assistance. The limited guardian is expected to act on mutual trust and make decisions with the consent of the disabled people who appoint them.

The RPD Act expressly recognizes people with disabilities' legal capacity. This is consistent with Article 12⁷⁴ of the United Nations Convention on the Rights of Persons with Disabilities,⁷⁵ which recognizes legal capacity and calls on member states to protect people with disabilities. While all guardians appointed prior to April 2017 (when the RPD Act went into effect) would be limited guardians, the RPD Act does not clarify the status of guardians appointed after its enactment. This is especially important because it does not include any procedure for appointing guardians.

In the case of *Kailas Natarajan v. District Police Chief*,⁷⁶ the Kerala

⁷³ The Rights of Persons with Disabilities Act, 2016, § 14, No. 14, Acts of Parliament, 2016 (India).

⁷⁴ The Rights of Persons with Disabilities Act, 2016, No. 12, Acts of Parliament, 2016 (India).

⁷⁵ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS DISABILITY, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html#:~:text=1.,in%20all%20aspects%20of%20life> (last visited Nov. 27, 2022).

⁷⁶ *Kailas Natarajan v. District Police Chief*, WP (crl.) no. 309 of 2020.

High Court dismissed the petitioner's Habeas Corpus writ petition seeking the release of his 21-year-old partner and 'yoga student' from her parents' alleged forceful detention or illegal custody. He had relied on the Supreme Court's decision in *Shafin Jahan v. Asokan K.M.*,⁷⁷ which held that an adult is capable of making their own life decisions without interference.

5.1. BACKGROUND OF THE CASE

The girl's parents, on the other hand, claimed that their daughter was depressed and that they were only trying to get her psychiatric help. They sought treatment for their daughter from the petitioner, a spiritual teacher/guru, but he insisted on solitary sessions with the girl, following which she developed an obsessive attachment to the petitioner. Her parents believed that her obsessive thoughts were abnormal and that she needed to be treated.

In this case, the alleged detainee was living with her parents. The petitioner, who was 52 years old, claimed that her own parents illegally detained the subject because he has been in a live-in relationship with her for the past two and a half years. It is worth noting that, despite the assertion of a live-in relationship, there is no claim that the subject ever lived with him and was illegally

⁷⁷ *Shafin Jahan v. Asokan K.M.*, AIR 2018 SC 1933.

removed by her parents. The petitioner was already married and had two children from a previous marriage.

5.2. FINDINGS OF THE HIGH COURT

The Court determined that the alleged detente in the case was unable to make her own decisions and ordered that she be retained with her parents at her parental home. Given the subject's mental state, the Court found no reason to remove her from her parents' custody. The Court also emphasized that the parents in this case were in no way incapable or ineligible to retain custody of their daughter, who, despite being a major, was exhibiting signs of mental disturbance. The parents were also looking into ways and means to get their daughter treatment. The girl in question was in a vulnerable state as a result of a mental disturbance, so the Court declined to invoke the extraordinary remedy available under Article 226⁷⁸ of the Constitution since the girl was in safe custody of her parents.⁷⁹

Finally, the Court emphasized how the petitioner had violated the trust of the parents who had consulted him for psychiatric help for their daughter. Their faith in him as a doctor and therapist was violated to the point where the petitioner declared his patient to be a live-in partner despite the fact that he was already married

⁷⁸ INDIA CONST. art. 226.

⁷⁹ State of Maharashtra v. Digambar, 1995 SCC (4) 683.

with two children.

5.3. COURT'S PARENS PATRIAE JURISDICTION

In matters of child custody, constitutional courts in this country exercise parens patriae jurisdiction, with the welfare of the child as the primary concern. The parens patriae principle may be invoked by the court in certain circumstances, but only in exceptional circumstances. For example, if a mentally ill person is brought before the court in a writ of habeas corpus, the court may invoke the aforementioned doctrine. Under Article 226⁸⁰ of the Indian Constitution, High Courts can apply the parens patriae doctrine. To achieve the ends of justice, constitutional courts may also act as parens patriae. However, the exercise of power is not without limitations. The courts cannot use this in every case.

6. CONCLUSION

It is our responsibility to look after our 'specially-abled individuals.' By enacting guardianship legislation, the government ensured that they were properly cared for. Through the concepts of voluntary and involuntary guardianship, the judiciary has ensured that each mentally impaired person lives with dignity. International community isn't far behind, we must all work together to ensure that "We Rise by Lifting Others and Offering Support."

⁸⁰ *supra* note 17.

Until children have their own legal representation in marriage disputes, counselors appointed in Family Courts under the Family Courts Act should be trained to determine what is in the best interests of the child. Furthermore, one must hear the perspectives of people who have been marginalized by previous practices, denied access to information, denied participation, and marginalized by policies (because they do not vote). Whether the topic is the child's "needs," "welfare," or "best interests," courts frequently take a paternalistic stance. Adults are in charge of interpreting this. Children's voices must be heard and understood in the Courts.

INCREASE IN CYBER CRIME AGAINST WOMEN IN THE ERA OF SOCIAL MEDIA “CRITICAL STUDY

- Puja Shah⁸¹

ABSTRACT

In the era of internet and social media our life is open book. Technology has connected us to the world at large but at the same time it has made us more vulnerable to cyber crime. “Cyber crime is a crime that involves a computer or a computer network”. Information and technology are a vast and growing sector in India. the 21st Century marked an ardent internet revolution in India. Within two decades more than 63.5% of people are using the internet in their day-to-day activity from online banking etc. Though there are different types of cyber fraud, in this paper the author will focus on cyber crime against women. There are various kinds of cyber crime like cyber defamation that have been used to harass women. In the recent past the rate of cyber crime against women has increased. IT Act (2000) also has provisions to control crime against women. The paper will further discuss the lesson for the increase and provide some possible solutions to the problem.

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KEYWORDS – *Cyber Crime, IT Act, IPC, Internet, Social Media.*

LITRATURE REVIEW

1. Dr. S.I. According to the author, Due to various types of cyber crimes against women there are many challenges faced by the respondents. Easy accessibility of the Internet, attraction of surfing the Internet without having proper knowledge are some of the major responsible factors in increasing cyber crimes against women. Majority of the women victims faced the problems like, mentally disturbance, obstacles in marital life and also arrangement of marriage. Lack of specification pertaining to cybercrimes against women and children is the major deficiency in the Indian IT Act 2000 and 2008. Apart from these factors, defamation, fear, mistakes committed by the women victims are also some of the major responsible factors.
2. Dr. Bindu Dogra, the author discussed the reasons for the growth of these cybercrimes. Various cybercrimes like pornography, morphing etc. have become commercial activities over the internet and bring financial gains for the offenders and therefore are on an upward trend. Socio-cultural reasons - Nurturing practices in the Indian families as well as the patriarchal system of Indian society are the major reasons why females become victims and are not very open about their victimization.

A woman abstains from complaining even if she is mistreated because once the crime is reported it is flashed through media or internet, and then it becomes more difficult for the woman to live in the society (Halder & Jaishankar, 2011)

3. Sanjeev Kumar and Priyanka (2019), According to them, “The police, judiciary and the investigative agencies need to stay abreast with the latest developments in web-based applications so that they can quickly identify the actual perpetrator”. It is the job of the legal system and regulatory agencies to keep pace with the Technological developments and ensure that newer technologies do not become tools of exploitation and harassment.

1. INTRODUCTION

Cybercrime is a crime which is done with the help of the internet. In short, it also means “misuse of the internet”. Nowadays, a day’s internet is used to commit the crime. It may harm someone’s personal security or finances. Cybercrime is mainly committed to harm anyone for self-pleasure or self-benefit. Cybercrime is us of the internet as a weapon for committing crimes against women.

Cybercrimes are penalized under the Information Technology Act 2000 and the Indian penal code. The IT Act deals with cybercrime against women. To commit cybercrime people must

have knowledge about the latest technology (specialized in technology). The cybercrime trend is increasing day by day.

Cybercrime is committed against women to experience aggressive behaviors. Mostly women are the victims/targeted to commit this type of crime because women are the big competition and soft target for the criminals. Women are excellent in every sector. Women are breaking the men to men marking so, this cybercrime is committed against women because of all these reasons. There are more reasons like ego, jealousy etc. Some psychopath who misused the picture and video for their self-pleasure and they also uploaded the picture and video in the porn site to take revenge. The Oxford Dictionary defines the term cybercrime as “criminal activities carried out by means of computers or the internet.

Cybercrime against women includes gender-based and sexual remarks and activities performed through a computer network or mobile phones, affecting the dignity of women and causing emotional distress. So, cybercrime against women is the major problem of India which is increasing rapidly. Society is developing day by day likewise crime against women is also increasing frequently from back year internet use. So, misuse of the internet is increasing. Any illegal activities in which any kind of technology, internet, laptop, computer, mobile phones etc., is used will be cybercrime. Cybercrime can be done against any

individual, property and government but cyber crime usually occurs with women. Women are suffering from cyber crime like cyber stalking, voyeurism, morphing, cyber pornography, cyber defamation. Cyber harassment like threatening, intimidating, bullying, defaming etc.

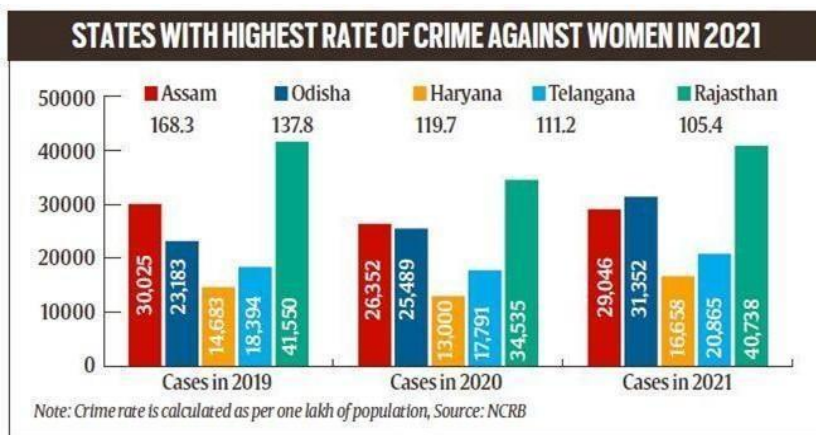
2. OBJECTIVES

- To find out the causes of rising and the nature of cyber crime against women.
- To know the behavior of the accused and victim.
- To find the psychological reason behind it.
- To know about the inadequacy in the IT Act 2000 and 2008.
- To focus on the causes of unreported and the factors responsible for increasing cyber crimes against women.

“A cybercrime is a crime that involves a computer or a computer network”. These crimes have become a threat to an individual's privacy where confidential data, individual's identity or photos and videos etc. is stolen or intercepted by the attacker. It can also be defined as an illegal activity done via the Internet. Crimes are either cybercrime or cyber-related crime. Cybercrime is the most common crime which plays a very terrific role in the modern world. Cybercrime is not a rare crime; this is a very common crime which is increasing day by day. Exploits the broken/hackable software. The use of the internet and computers is becoming habitual in day-to-day life therefore, cybercrime is

also increasing. Smart worlds and smart gadgets are becoming the reason behind this type of crime. Soft and easy targets are women. Data showed that 10,730 incidents or 20.2% of the 52,974 incidents registered in 2021 were reported as crimes against women. In 2021, Karnataka had the largest share of instances (2,243), followed by Maharashtra (1697) and Uttar Pradesh (958).⁸²

Table 1 – States with the highest rate of crime against women in 2021⁸³



⁸² REDIFF, <https://www.rediff.com/business/report/cybercrime-against-women-up-28-since-2019-karnatakas-share-highest/20220831.htm> (last visited Jun. 3, 2023).

⁸³ HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/assam-records-highest-rate-of-crime-against-women-delhi-tops-ut-list-details-101661839909730.html> (last visited Jun. 5, 2023).

Table 2 – State wise cyber crimes recorded in India⁸⁴

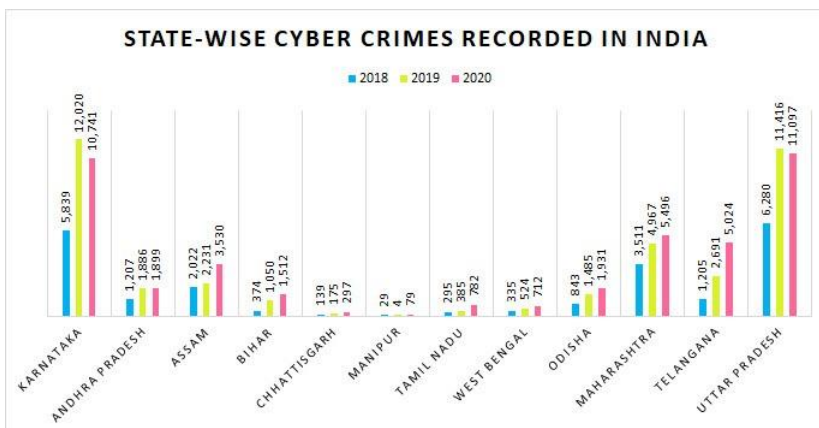
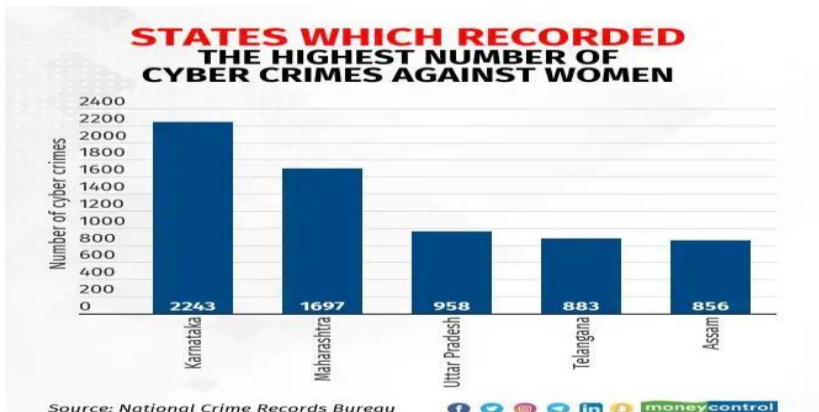


Table 3 – States which recorded the highest number of cybercrimes against women⁸⁵



⁸⁴ NATIONAL CRIME RECORDS BUREAU, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%209A.1_1.pdf (last visited Jun. 6, 2023).

⁸⁵ BUSINESS STANDARD, https://www.business-standard.com/article/current-affairs/cybercrime-against-women-up-28-since-2019-national-crime-records-bureau-122083001139_1.html (last visited Jun. 10, 2023).

3. TYPES OF CYBER CRIME

3.1. Cyber stalking:

The repeated use of electronic communications to harass or frighten someone for example by sending threatening emails. Types of cyber stalking are cat fishing and hijacking webcam.

- Section 354D of the IPC – It is punishable with imprisonment up to 3yrs and fine It is a cognizable and bailable offence
- Under section 67 of the Act – When a stalker sends or posts any obscene content to the victim via electronic media then they will be liable to punishment with 5 years of jail and Rs 1 .0 lac fine.
- Section 500 of IPC (Defamation) – Imprisonment of 2 years.

3.2. Voyeurism

It is the most prevalent and potentially illegal sexual conduct. It is the practice of watching other people's sexual activities without their consent. In this type of offense, physical contact is not there, even if it is a sexual crime in nature.

- Under the IT Act, section 66E – Voyeurism is a crime irrespective of gender. Such Act can be punished with imprisonment which may extend up to 3 years and the person may be liable to pay a fine of up to Rs 2.0 lac.
- Under Section 354C of the IPC - The punishment under this section for the offense of voyeurism can range from 3 to 7 years and a fine.

3.3. Morphing

It is misusing the pictures of women to promote sex chats and pornographic materials. It is a special effect in motion pictures and animations that changes one image or shape into another through a seamless transition. Traditionally such a depiction would be achieved through dissolving techniques on film.

- It Act Section 67 – Publishing and transmitting obscene material in electronic form. imprisonment of 3 years and fine upto Rs 5.0 lacs rupees. Incase PF repetition of crime imprisonment may extend to 5 years and fine upto 10 lacs.

- IPC, 1860 – Section 292 publicly exhibits, distributes etc of obscene material. Imprisonment up to 2 years and fine up to 2 thousand rupees.
- IPC – Section 509 - word, gesture or act to insult modesty of women.
- Defamation – Section 500 - imprisonment up to 2 years and or fine.

3.4. Cyber pornography

Publication and Transmission of pornography material is illegal. Cyber pornography can be defined as pornographic material designed, published or distributed using cyberspace as a medium.

- Section 292 of IPC – The selling and distribution of pornographic material is illegal in India. Imprisonment up to 2 years and fine up to 2 thousand rupees.
- IT Act, Section 67 – The distribution, sale or circulation of obscene materials through electronic medium, imprisonment upto 3 years and fine upto 5 lacs.
- Defamation – Section 500 - imprisonment upto 2 years and or fine.

- There is one case in which viewing cyber pornography is punishable with imprisonment upto 5 years and fine upto 10 lacs where the content contains children engaging with one another or with adults in sexually explicit acts.
- Child pornography is illegal and strictly prohibited across the country under section 67B of the IT ACT, 2000.

3.5. Cyber defamation

It means injuring the reputation of a person on the internet by using social media email etc. Generally, a defamatory statement has to be published over the internet to fall under the category of cyber defamation.

- Section 500 of IPC - Any person held liable under section 499 will be punishable with imprisonment of 2 years or fine or both.
- Section 469 of IPC – Deals with forgery. If anyone creates a false document or fake account by which it hardly the reputation of a person. The punishment of this offense can extend upto 3 years and fine.

- Section 503 of IPC – It deals with the offense of criminal intimidation by use of electronic means to damage one's reputation in society.

4. LANDMARK CASES ON CYBER CRIME AGAINST WOMEN

4.1. Shreya Singhal v. Union of India⁸⁶

In the instant case, the validity of Section 66A of the IT Act was challenged before the Supreme Court

Facts

Two women were arrested under Section 66A of the IT Act after they posted allegedly offensive and objectionable comments on Facebook concerning the complete shutdown of Mumbai after the demise of a political leader. Section 66A of the IT Act provides punishment if any person uses a computer resource or communication, such information which is offensive, false, or causes annoyance, inconvenience, danger, insult, hatred, injury, or ill will.

The women, in response to the arrest, filed a petition challenging the constitutionality of

⁸⁶ Shreya Singhal v. UOI, AIR 2015 SC 1523.

Section 66A of the IT Act on the ground that it is violative of the freedom of speech and expression.

Decision

The Supreme Court based its decision on three concepts namely: discussion, advocacy, and incitement. It observed that mere discussion or even advocacy of a cause, no matter how unpopular, is at the heart of the freedom of speech and expression. It was found that Section 66A was capable of restricting all forms of communication and it contained no distinction between mere advocacy or discussion on a particular cause which is offensive to some and incitement by such words leading to a causal connection to public disorder, security, health, and so on.

4.2. State of Tamil Nadu v. Suhas Katti⁸⁷

The instant case is a landmark case in the Cyber Law regime for its efficient handling made the conviction possible within 7 months from the date of filing the FIR.

Facts

⁸⁷ State of Tamil Nadu v. Suhas Katti, CC No. 4680 of 2004.

The accused was a family friend of the victim and wanted to marry her but she married another man which resulted in a Divorce. After her divorce, the accused persuaded her again and, on her reluctance, to marry him, he took the course of harassment through the Internet. The accused opened a false e-mail account in the name of the victim and posted defamatory, obscene, and annoying information about the victim.

A charge-sheet was filed against the accused person under Section 67 of the IT Act and Section 469 and 509 of the Indian Penal Code, 1860.

Decision

The Additional Chief Metropolitan Magistrate, Egmore convicted the accused person under Section 469 and 509 of the Indian Penal Code, 1860 and Section 67 of the IT Act. The accused was subjected to the Rigorous Imprisonment of 2 years along with a fine of Rs. 500 under Section 469 of the IPC, Simple Imprisonment of 1 year along with a fine of Rs. 500 under Section 509 of the IPC, and Rigorous Imprisonment of 2 years along with a fine of Rs. 4,000 under Section 67 of the IT Act.

5. CONCLUSION

The country is moving towards the 'DIGITAL INDIA' movement, the cyber crimes are evolving constantly and new kinds of cyber crimes enter the cyber law regime each day. Though not all people are victims to cyber crimes, they are still at risk. Women are sexually exploited, sexually abused, bullied, harassed, cyber talked, and extorted online by people in various parts of the world.

Data plays an integral role in the commission of many cybercrimes and vulnerabilities to cybercrime. Appropriate legal and technical measures are needed at the national, rational, and international levels to counter, combat, respond to, and prevent these interpersonal cybercrimes.

6. SUGGESTION

- Any person who is a victim of cybercrime can lodge a complaint with the cybercrime cell of the city they are in.
- Cybercrime complaints can be registered with any of the cyber cells in India irrespective of the place where it was originally committed.
- If you do not have access to any of the cyber cells in India you can file a FIR at the local police station.
- It is mandatory under section 154, code of criminal procedure for every police officer to record the information/complaint of an

offense, irrespective of the jurisdiction in which the crime was committed.