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FOREWORD

Teaching and research should go together. It should be particularly so in legal education in as much as it is a heuristic science demanding consideration of different points of view. Legal studies focussing on text books may not impart legal knowledge. The dynamics of legal studies demand the study of the Rules governing different aspects of human activities. The Rules as stated in the books, when operating to facilitate activities, are evaluated as practical aids. This evaluation is done by way of judgments and research results.

Research is done by way of analysis of the Rules in the context of their operation in the area for which they have been made. The defects/lacking of the Rules are brought forth and remedies suggested by the researchers. These form the data for the courts/authorities to undertake reforms.

Research quote often helps the authorities to make the Rules theoretically sound and practically efficient. Legal systems in common law countries like U.K., U.S.A. and Australia have independent researchers who contribute a lot to the development of law, and their contributions are analysed/appreciated and accepted by the courts. Indeed, their researchers are from the academic segment. In the U.S., the legal academics are drawn from the law clerks of judges. Thus, in practice, there is a healthy combination of the judge and the academic. And, to be sure, the American law depicts the quality in terms of theoretical cohesion and practical efficiency.

In India, academic workings are at a low ebb. Now serious attempts are being made by law schools to change the scenario. Here is an attempt by the NUALS in this direction. I am extremely happy to applaud this effort. The articles in this journal deal with different important issues in the Indian legal system. One may not agree with the authors. But their efforts should be appreciated and encouraged.

The paper dealing with uniform civil code examines the issue in the light of the Constitution and the human rights regime. Probably it is time for us to

rethink in the light of need for protection of women's rights. The article seems to argue well.

The paper on short-form mergers under the Companies Act, 2013 examines the provisions and points out that the purpose of Section 233 has not been achieved. Comparative studies have also been made in the paper. It may help students of company law.

The next article on the debates surrounding Section 498A of the Indian Penal Code may help students to gauge the efficacy of law in dealing with certain crimes. The authors have considered the *Arnesh Kumar* decision also, adding new dimensions to the law.

The difficult task of examining the reasoning of the Apex Court has been efficiently undertaken by Mr. Renjith Thomas and Ms. Devi Jagani in their paper. Perhaps it may throw some light to clean the confusion in the area.

The book review by Prof. Jayadevan is good.

Here, there is no attempt to review or critique the contributions. They are presented with all academic humility.

Dr. K. N. Chandrasekharan Pillai

Kochi,
February 28, 2017

EDITORIAL

'It is now, in this very moment, that I can and must pay for all I have received. The past and its load of debt are balanced against the present. And on the future, I have no claim.

Is not beauty created at every encounter between a man and life, in which he repays his debt by focusing on the living moment all the power which life has given him as an obligation? Beauty- for the one who pays his debt. For others too, perhaps.

- Dag Hammarskjold, 'Markings'

Even if milestones (this being our tenth volume) are considered unimportant, the countless hours that go into editing an academic journal- in first identifying what is to be published and then assisting the authors in bringing into the open the best possible version of their ruminations- compel a certain introspection: what does this achieve? Beyond enriching the curricula vitae of authors and editors, what can be the value of a journal of this kind? Trying to answer this question may be crucial for our growth.

In a YouTube video titled 'The Purpose of Education', Noam Chomsky recounts the ready reply that a highly reputed physicist colleague at the Massachusetts Institute of Technology kept for freshman students asking what the professor would 'cover' in that semester: 'it doesn't matter what we cover; it matters what you *discover*.' If discoveries are the true measure of learning, a good academic journal can contribute quite ably to it. Needless to say, a good piece of research stands proof for the many discoveries that its author made while probing the question in his mind. But the published work offers discoveries for the interested reader too: it is a moment of discovery when you

read an article in the Columbia Law Review, as part your coursework, and learn that Lord Acton's aphorism on power and corruption came in a reply he wrote to a bishop who proposed a presumption that the Pope and King will do no wrong;[1] when, on an otherwise unremarkable afternoon, you stand with curiosity in front of rows of the Harvard Law Review- the earliest volume on the shelf, at the left end on the very top, being the inaugural one from 1887- wonder what was written in 1946, the year after the War, and find an article by Hans Kelsen on the then infant UN Security Council, criticising the veto power's perpetuation of inequality among nations as 'an open contradiction between the political ideology of the United Nations and its legal constitution';[2] so too, when you pull out a Yale Law Journal at random and stumble onto the remembrances written about Chief Justice William H. Rehnquist by his former law clerks, honouring a judge who taught them to 'read carefully, write clearly, think hard, and live well.'[3]

Perhaps, if a journal can encourage and facilitate discoveries- for the author and the reader- that is enough achievement, enough value. For a fledgling, entirely student-run law journal like ours, this standard of discovery places a heavy responsibility on the student editors to attract and identify submissions

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[1] *See* Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. II, 143 (1958), at 147.

[2] Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087 (1946), at 1121.

[3] *See* Richard W. Garnett, *William H. Rehnquist: A Life Lived Greatly, and Well*, 115 YALE L. J. 1847 (2006), at 1848.

that truly carry forward the conversations in their respective fields and would provide readers with knowledge they otherwise may not have come upon. It is with this realisation, and the hope that we will grow in quality and repute in the years to come, that we present this tenth volume of the NUALS Law Journal.

We remain indebted and deeply grateful to everyone who, in these ten years, took an interest in our journal and nurtured it; a special acknowledgment is due to Dr. Anil R. Nair- our faculty advisor- for his approachability, support, and concern for the journal. And, for this volume, we thank Prof. K.N. Chandrasekharan Pillai for his detailed and kind foreword; Prof. V.R. Jayadevan for readily agreeing to review Prof. Shubhankar Dam's book; Dr. Jacob Joseph, Mr. Hari S. Nayar, Dr. Athira P.S. and Mr. Asif E. for helping us in peer-review.

On behalf of the Board of Editors,

Anand Upendran

Kochi,
March 24, 2017

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DISCLAIMER NOTE

The views and opinions expressed in the NUALS Law Journal are strictly those of the authors. All efforts have been taken to ensure that no mistakes or errors creep into this peer-reviewed journal. Discrepancies, if any, are inadvertent.

CONTENTS

Arguing for a Uniform Civil Code in India in the Light of Gender Discriminatory Practices under Muslim Personal Law

- Subhro Bhattacharya* & Akshay Shandilya**

Abstract

Article 44 of the Constitution mandates implementation of uniform civil laws in matters of marriage, divorce, maintenance, inheritance, succession and adoption. But the enactment of this Code is hindered: firstly, by virtue of it being a non-binding Directive Principle of State Policy; secondly, by the zealous resistance of critics who cite the compromise of religious identities of minorities. This leads to overlooking objectivity and pragmatism during fervent deliberations on the Code. To safeguard religious identity, women are denied a variety of rights intrinsic to every individual. Therefore, fact must be extricated from fiction for any purposeful deliberation on the Code. This paper argues that implementation of Article 44 poses no threat to religious identities and practices. Instead, it can be a tool to secure gender equality. This study is undertaken in the light of, and with special reference to, existing gender discriminatory practices under Muslim personal law.

I. Introduction

'I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights.'

— Dr. B.R. Ambedkar[1]

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"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India' is an unequivocal mandate under Article 44 of the Constitution of India…'[2] While more than six decades have passed since the enactment of the Constitution, this particular provision has remained a dead letter. Successive governments have undertaken little or no efforts to guarantee uniform personal laws for all citizens. For a proper understanding of the current scenario in India of a multiplicity of personal laws, revisiting the history of the subcontinent becomes imperative.

Though Hinduism has been the dominant religion for much of India's recorded history, substantive demographic changes were brought in through Muslim invasions, British colonisation, and other influences. On one hand, millions converted to either Islam or Christianity while on the other, persecuted Jews and Zoroastrians also made India their home. Political history shows that during the Mughal rule in India justice was administered by *Qadis*[3]

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[1] CONSTITUENT ASSEMBLY DEBATES 781 (Lok Sabha Secretariat, 3rd reprint, 1999, Vol. VII) ('DEBATES', hereinafter).

[2] Sarla Mudgal v. Union of India, (1995) 3 SCC 635, at para 1. (Emphasis added).

[3] The *Qadi* (also known as *Qazi* or *Kazi*) was a judicial officer responsible for implementing Islamic law. He was appointed by the sultan or the emperor and his jurisdiction was defined by legislation. At times, he would also perform certain administrative duties and his role was not limited to discharging judicial functions. The *Muftis*, on the other hand, were jurists who controlled the law at the level of discourse. *See* Muhammad Khalid Masud et al., *Qadis and their Courts: An Historical Survey*, *in* DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGMENTS 15-16 (Muhammad Khalid Masud et al. eds., Brill, 2006).

who would apply Islamic scriptural laws to Muslims; but there was no such religious figure so far as Hindus were concerned and no institutions that implemented Hindu law. The system continued until 1772 when Warren Hastings, the then Governor General of India, made regulations for the administration of justice in territories under the East India Company's rule. As part of his Plan, he envisaged a judicial system where civil and religious matters were to be decided by company courts in accordance with the laws of the Quran in the case of Muslims and the *Shastra* in case of Hindus.[4] This was reinforced by the regulations in 1781 which allowed reference to be made to civil and religious usages.[5] In this way the system of separate personal laws for different communities received legal sanction. This framework continued until Independence and the Partition which followed. However, Independence brought forth challenges as well as opportunities for the nascent republic. The founding fathers of the nation resolved to purge the country of its archaic traditions and customs which had hindered national integration and social development. The Constitution was structured to act as a potent weapon to deal with such vices. Untouchability was prohibited,[6] communal electorates

[4] Eleanor Newbigin, THE HINDU FAMILY AND THE EMERGENCE OF MODERN INDIA: LAW, CITIZENSHIP AND COMMUNITY 31-32 (Cambridge University Press, 2013).

[5] Herbert Cowell, A SHORT TREATISE ON HINDU LAW: AS ADMINISTERED IN THE COURTS OF BRITISH INDIA 1 (The Lawbook Exchange, 2008).

[6] Article 17 of the Constitution of India abolishes untouchability and prohibits 'its practice in any form'. The practice of untouchability was prevalent in pre-independent India wherein any form of association with *Shudras* (outcastes placed at the lowest level of the caste hierarchy among Hindus) was considered sacrilege.

were done away with[7] and secularism was enshrined.[8] In short, swift strokes of the pen ushered in a social revolution. Article 44 (Article 35 of the Draft Constitution) was another such provision which aimed at national integration and consolidation, vide the enactment of a Uniform Civil Code ('UCC', hereinafter). It is stated that the debate over UCC was among the most heated ones in the Constituent Assembly.[9]

Religion has always been an emotive issue in the subcontinent. It was more so after a separate nation was carved out of India for Muslims. The minorities who remained in India were suspicious of the intentions of the communities enjoying a majority and enactment of UCC was a subject which touched the

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[7] Article 325 of the Constitution of India mandates 'one general electoral roll for every territorial constituency'. *See* M.P. Jain, INDIAN CONSTITUTIONAL LAW 1142-43 (LexisNexis, 7th ed. 2014) (stating separate electorates and communal representation divided the Indian people and retarded the growth of Indian nationalism in the pre-Constitution era).

[8] Efforts by some of the members in the Constituent Assembly to include the term 'secular state' in the draft Constitution had failed. When the Constitution was adopted, it guaranteed freedom of religion via Articles 25 and 26. Article 25 primarily guarantees the right to 'profess, practice and propagate religion', but also authorises the state to regulate 'economic, financial, political or other secular activity which may be associated with religious practice.' Article 26 guarantees 'every religious denomination or any section thereof' the freedom to manage their religious affairs, inter alia (*see infra* note 60). It was only via the forty-second amendment in 1976 that the term 'secular' was inserted in the Preamble of the Constitution. *See* Ronojoy Sinha, *Secularism and Religious Freedom*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 885-86 (Sujit Choudhary ed., Oxford University Press, 2016).

[9] Hannah Lerner, *The Indian Founding: A Comparative Perspective*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 65-66 (Sujit Choudhary ed., Oxford University Press, 2016).

core religious sensibilities of every community. A reading of the annals of the Constituent Assembly debates gives us valuable insight into the minds of its members and the predicaments which guided their discourse. The state of the nation was such that fault lines of religion, language, caste and community were rife. Perhaps the acerbity that accompanied the deliberations on UCC was second only to the one seen during the debates on the issue of national language.[10] While B. Pocker Sahib Bahadur stated that the enactment of UCC was tantamount to the murder of freedom of conscience and religious practices,[11] Hussain Imam termed it as being antagonistic to India's diversity.[12] The end result of such an acrimonious debate was that Article 44- the agenda for UCC-was placed in Part IV of the Constitution under the chapter 'Directive Principles of State Policy', as another non-binding, non-justiciable guideline for the future governance of the country.

The Supreme Court of India has opined that UCC can serve as an instrument for national integration by removing disparate loyalties to law which have conflicting ideologies.[13] However, it can be safely surmised that its absence today has in no way jeopardised the same. Having said that, the continuance of separate personal laws has become indefensible from the point of gender equity. The primary objection of the authors to the continuance of separate personal laws is that it promotes gender inequity in matters such as

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[10] *See* Ramachandra Guha, *Hindi chauvinism*, THE HINDU (Jan. 18, 2004), http://www.thehindu.com/thehindu/mag/2004/01/18/stories/2004011800040300.htm.

[11] DEBATES, *supra* note 1, at 544.

[12] DEBATES, *supra* note 1, at 546.

[13] John Vallamattom v. Union of India, (2003) 6 SCC 611, at para 44.

marriage, divorce, maintenance and succession, in direct contravention to constitutional principles of equality and personal liberty.

II. Gender discriminatory practices under Muslim personal law

Muslim marital law violates right to equality

Separate personal laws have the effect of perpetuating a regime of conflict of private laws. Not only do some of their provisions violate the right to equality,[14] but they also turn out to be a hotbed of several practices uncongenial to social health.

While practicing bigamy is a criminal offence among Hindus, Buddhists, Jains, Sikhs, Parsis and Christians,[15] *Sharia* law allows a Muslim male to solemnize up to four marriages.[16] This right is unfettered and he need not take the consent of his existing wife or wives.[17] At a grassroots level, this sanctioned polygamy in Muslim personal law acts as an open inducement to errant husbands from other communities to desert their wives and children by

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[14] Article 14 of the Constitution of India mandates 'equality before the law' and 'equal protection of the laws' to all persons within India.

[15] *See Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings* 20-27, Law Commission of India (Aug. 2009). *See also* Venugopal K. v. Union of India, 2015 (1) KLT 838, para 13 (stating that S.494 of the Indian Penal Code- which provides the penalty for bigamy- does not discriminate between Hindu, Muslim or Christian and can be proceeded against any citizen who commits the offence, irrespective of his/her personal law, provided that the ingredients of the provision are made out).

[16] Law Commission of India, *id.,* at 29.

[17] Rajendra K. Sharma, INDIAN SOCIETY: INSTITUTIONS AND CHANGE 135 (Atlantic Publishers, 2004).

simply converting to Islam. The opinion in *A. M. Obadiah*[18] is of great magnitude in this respect. In that case, the plaintiff, originally a Jew, had converted to Islam while the defendant, his spouse, continued to be Jewish. The plaintiff wanted his marriage dissolved under Mohammedan law.[19] However, Justice Lodge found no reason as to why Mohammedan law should be preferred to Jewish law in such a matrimonial dispute as the marriage itself was formalised under the latter. He concluded that a marriage solemnized according to one personal law cannot be dissolved under another personal law simply because one of the two parties had changed his or her religion. In a similar case,[20] the plaintiff who was originally a Zoroastrian had converted to Islam and wanted her marriage dissolved by virtue of her conversion. Frowning upon the chaos factored by the hegemony of personal laws, Justice Bladgen of the Bombay High Court had famously remarked:

'Do then the authorities compel me to hold that one spouse can by changing his or her religious opinions (or purporting to do so) force his or her newly acquired personal law on a party to whom it is entirely alien and who does not want it? In the name of justice, equity and good conscience, or, in more simple language, of common sense, why should this be possible?'[21]

In the case of *Sarla Mudgal,*[22] the primary question before the Apex Court was whether a Hindu husband by converting to Islam can solemnize a second marriage while his previous marriage continued to subsist. The Court held that

[18] A. M. Obadiah v. M. Obadiah, 49 CWN 745.

[19] Muslim personal law is more familiarly known as Mohammedan law.

[20] Robasa Khanum v. Khodadad Bomanji Irani, (1946) 48 Bom LR 864.

[21] As quoted in *supra* note 2 at 642-43.

[22] *Supra* note 2.

the conversion to a different religion would not automatically dissolve the previous marriage of an apostate.[23] Concurring with the majority judgment, Justice Sahai even requested the government to enact a legislation providing that every citizen who changed his religion could not marry another woman unless he divorced his first wife, as a measure keep a check on the 'abuse of religion' in marital affairs.[24]

Marriage is a secular institution;[25] the obligations attached to it should be one and the same in all religions. However, the established framework of separate personal laws in India tempts one to enquire why one particular community should be given blanket immunity from the offence of bigamy which attracts criminal liability for the rest. Irrespective of what judges have held or opined, one must realise that in India access to courts of law remains an option only for the privileged. Unless and until the allowing of polygamy is effaced from Muslim personal law, millions of Indian women will stand the chance of being deserted by their husbands.

Divorce under Muslim law is a travesty of women's rights

The notorious dissemination of gender inequity through separate personal laws does not cease with discriminatory stipulations relating to marriage. The provision of summary divorce, whereby a Muslim man can divorce his wife

[23] *Id*. at para 39.

[24] *Id*. at para 46.

[25] *Id*. at para 33.

by simply stating the word '*talaq'* thrice,[26] not only belies every principle which a progressive society stands for but is also repugnant to human conscience. Today, India is replete with cases where husbands have divorced their legally wedded wives over social networking sites, telephonic conversations or simply through a text message.[27] While the All India Muslim Personal Law Board (AIMPLB)[28] continues to defend it as being ordained by the Quran, its continuance in a secular, progressive republic is an anachronism which a reasonable mind cannot defend. Furthermore, *Sharia* law ordains that one cannot remarry his divorced spouse until and unless she has married and divorced another man. This stricture begets the worst form of trauma and indignation for a woman. Often triple *talaq* is spelled over the course of petty domestic spats. While soon after the squabble the bickering couple might reconcile, the summarily divorced woman is required to establish conjugal relations with another person before cohabiting with her former spouse and children. This practice known as '*halala'* is regrettably continued even today.[29]

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[26] 'Triple talaq' or '*talaq-al-bid'at'*, literally means 'the divorce of the wrong innovation'. It is the most popular form of divorce practiced in India among Muslims. It allows a person to divorce his wife by simply stating the word *'talaq'* thrice. *See* Mathias Rohe, ISLAMIC LAW IN PAST AND PRESENT 379-81 (Brill, 2014).

[27] *See 10 days after marriage, NRI sends Talaq message to wife on WhatsApp*, THE INDIAN EXPRESS (Oct. 8, 2015).

[28] AIMPLB is a non-governmental association formed in 1973 whose primary objective is to ensure continued application of Muslim personal law for Muslims in India.

[29] Manjari Mishra, *Another name for Rape*, TIMES OF INDIA: THE CREST EDITION (Dec. 3, 2011).

Maintenance under Muslim law eludes statutory liabilities

After being summarily divorced, the misery of Muslim women is perpetuated by the provisions relating to maintenance under Muslim personal law. The judgment in the case of *Shah Bano Begum*[30] was a watershed moment for the rights of Muslim women under Mohammedan law and the discrimination meted out to them therein. In this matter, the question before the Supreme Court was whether a Muslim man was liable to maintain his divorced wife beyond the period of *iddat*.[31]

In 1932, Shah Bano, a Muslim woman, was married to Mohammed Ahmad Khan, an affluent and well-known advocate, and had five children from the marriage. After fourteen years, her husband took a younger woman as his second wife. Subsequent to living with both wives for a considerable period of time, he refused to maintain Shah Bano, then aged sixty-two. Shah Bano then filed a petition in a local court against her husband under S.125 of the Code of Criminal Procedure ('CrPC' hereinafter),[32] demanding statutory maintenance for herself and her children. During pendency of her plea her husband gave her an irrevocable *talaq*. He took the defense that Bano had ceased to be his wife and therefore he was under no obligation to maintain her

[30] Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

[31] In Mohammedan law, '*iddah'* or '*iddat'* is the period immediately after divorce or the death of one's spouse, when a woman is forbidden from marrying another man. Its purpose is to ascertain the paternity of a child born after divorce or the death of one's spouse.

[32] The provision, inter alia, imposes a statutory liability on a person to maintain his divorced wife until she remarries or is able to maintain herself.

as except prescribed under Mohammedan law, which imposed on him such an obligation only during the period of *iddat*.

The Apex Court held that the 'secular' character of the provision under CrPC imposed an obligation on all husbands to maintain their divorced wives until they remarried or were able to maintain themselves and was thus applicable across all religions.[33] It was also held that this statutory clause prevailed over all personal laws.[34] The *obiter* of this judgment enraged the fundamentalist factions of the Muslim community who questioned the *locus standi* of the Supreme Court to interpret matters relating to Muslim law. The government of the day, in a bid to appease them, passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 which substantially diluted the *obiter* of the aforementioned judgment. Not only was the liability of Muslim men to maintain their divorced wives restricted by making it applicable only during the period of *iddat*, it also passed the liability of maintenance onto the relatives of the divorced woman- who would inherit her property- and the Wakf Board.[35]

The constitutionality of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged in the matter of *Danial Latifi*.[36] The petitioners submitted that S.125 of CrPC reflected the moral stance of the law

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[33] *Supra* note 30 at para 7.

[34] *Id*. at para 11.

[35] '*Wakf*' is an endowment of movable or immovable property for religious, pious or charitable purposes under Muslim law. Such properties are administered by Wakf Boards at the State level under the supervision of the Central Wakf Council, a statutory body established by the Central Government.

[36] Danial Latifi v. Union of India, (2001) 7 SCC 740.

and ought not to have been entangled with religion and religion-based personal laws. A further contention was that the 1986 statute was violative of Articles 14, 15 and 21.[37] The Supreme Court held that, prima facie, the *iddat* restriction and shifting of burden of maintenance discriminated against Muslim women. According to the Court, '[s]uch deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law...'[38] However, the Court proceeded to maintain a balancing act, and construed the Act in such a manner that it did not violate the fundamental rights guaranteed under the aforementioned provisions of the Constitution. The authors submit that striking down a law which was prima facie violative of such basic rights would have been the better alternative.

Adoption under Muslim law precludes parenthood

The inequity served through separate personal laws often encompasses both the genders; adoption under personal laws being an example. Till recently, a Jew, Muslim or Christian in India did not have the right to adopt, owing to the restrictions imposed by their personal laws. They only had the power of guardianship in which one possesses only a legal right over the child until he or she becomes an adult. The biological parents reserved the right to

[37] Article 15 of the Constitution of India prohibits discrimination on 'grounds only of', inter alia, religion. Article 21 protects the right to life and personal liberty and includes the right to live with dignity. *See generally* Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (declaring that Article 21 assures the right to live with human dignity, free from exploitation).

[38] *Supra* note 36 at para 33.

intervene during that period. Notably, Muslim law does not recognize adoption but it does refer to a marginally similar doctrine known as 'acknowledgment of paternity'.[39] In India, 'Muslims have vehemently opposed the application of law of adoption.'[40] But it is surprising to know that they are still adopting children. In such situations, one cannot ascertain what kind of law is applied in case of disputes because the issue does not reach the courts and is resolved via mutual understanding.[41]

In 2014, the Supreme Court sought to clarify the position of adoption and its interplay with personal laws. In the matter of *Shabhnam Hashmi*,[42] the Supreme Court held that one could adopt under the Juvenile Justice (Care and Protection of Children) Act, 2000, irrespective of the restrictions imposed by one's personal laws. It further pointed out that a person was always free to abide by the dictates of his religion which he deems fit and applicable to him.[43] However, it also opined that optional and secular legislation cannot be

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[39] K.B. Agrawal, FAMILY LAW IN INDIA 184 (Kluwer Law International, 2010) (stating 'acknowledgement of paternity takes place: (a) where the paternity of a child is not known or established beyond a doubt ; (b) it is not proved that the claimant is the offspring of intercourse ; and (c) the circumstances are such that they do not rebut the presumption of paternity and an acknowledgment of paternity by the father is possible and effective'). *See also* Habibur Rahman v. Altaf Ali, (1921) 48 IA, at 114 (conditions of a valid acknowledgment).

[40] Agrawal, *id.,* at 185.

[41] *Id*.

[42] Shabhnam Hashmi v. Union of India & Ors., (2014) 4 SCC 1.

[43] *Id*. at para 13.

'stultified' by the provisions of personal law.[44] In its *obiter*, the Court described UCC as 'a goal yet to be fully reached'.[45]

'Piecemeal attempts of courts to bridge the gap between personal laws' by liberal interpretation of statutes cannot take the place of UCC, for '[j]ustice to all is a far more satisfactory way of dispensing justice than justice from case to case.'[46] However, the issue does not cease here. The secular legislations made within the last six decades in India often seem to be aimed at ensuring the continuance of hegemony of personal laws. An illustration of this is the Special Marriage Act, 1954. Its objective is to provide a secular legislation under which individuals from two separate communities can solemnize their marriage, thus liberating people from the traditional coercive requirements of marriage under separate personal laws. S.5 of the Act mandates public notification of the intended marriage at the office of the district Marriage Officer in which the marriage is supposed to be solemnized, at least thirty days before the intended marriage. This provision is often counterproductive and acts as an open incentive for harassment of willing couples by those who object to their marriage. S.19 of this Act is clearly punitive in character. It warrants automatic severance of any Hindu, Sikh or Jain solemnizing his marriage under this Act from his family if it happens to be an undivided family.[47] Recently, a High Level Committee appointed by the Central

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[44] *Id.*

[45] *Id*. at para 16.

[46] *Supra* note 30 at para 32.

[47] A 'Hindu Undivided Family' (HUF) is not defined in any of the Indian statutes. However, it is treated as a separate taxable entity for the purpose of assessment both under the Income

Government recommended reforms in the Act and personal laws citing the aforementioned lacunae. The Committee, inter alia, has sought an overhaul of family laws by recommending a ban on the practice of 'oral, unilateral and triple divorce' and polygamy.[48]

Sharia courts dispense 'justice' in a secular republic

In the midst of a neighborhood reeling under the yoke of fundamentalism and religious intolerance, India has continued to be a beacon of light for its secular polity and rule of law. However, the recent spurt in *Sharia* courts,[49] and the Taliban-like fatwas meted out by its clerics, seem to repudiate all the progressive reforms achieved in the more than six decades of India's Independence. The Supreme Court took cognizance of the issue in *Viswa Lochan Madan*.[50] The Court, while dismissing the legal sanctity of *Sharia*

Tax Act, 1961 [S. 2(31)] and the Wealth Tax Act, 1957 (S. 3). An HUF is understood to consist of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. However, this position has changed since the Hindu Succession (Amendment) Act, 2005 (S. 6), whereby, a daughter (married or unmarried) is given an equal right to share in the HUF property by deeming her to be a coparcener. *See* Prakash and Ors. v. Phulvathi and Ors., 2015 (11) SCALE 643, at para 17 (stating that the amending Act is prospective in nature).

[48] *Report of the High Level Committee on the Status of Women in India* 205-6, Ministry of Women and Child Development, Government of India (Jun. 2015).

[49] Arun Janardhanan, *Madras High Court bans 'Sharia courts' in Tamil Nadu*, THE INDIAN EXPRESS (Dec. 20, 2016). *Sharia* courts are informal judicial tribunals among Muslims which aim to settle disputes amicably. The courts are presided by *Qadis* and justice is dispensed according to the *Shariat*.

[50] Viswa Lochan Madan v. Union of India and Ors., (2014) 7 SCC 707, at para 1.

courts, took particular note of the 'Imrana incident'. Imrana, a 28-year-old Muslim woman and mother of five children, was allegedly raped by her father-in-law. The question arose about her marital status and those of her children born out of wedlock. The Darul-ul-Uloom, a *Shariat* court, took suo-moto cognizance of the incident and passed a fatwa, dissolving the marriage perpetually and restraining the husband and wife from living together, though neither of them ever approached it. The social ills of the *Sharia* courts call for a separate and extensive deliberation; however, the authors feel it is pertinent here to state their opinion that the overwhelming majority of Muslims of the subcontinent, who chose India as their homeland, did not do so to be governed by Quran or *Qadis*. They chose to reside in a secular state where justice is not prejudiced by religious strictures and edicts. UCC may very well be the means to that end.

III. Criticisms against UCC and their cogency

Before proceeding further into this ad infinitum debate on the need for implementation of UCC and the constraints and obstacles preventing its implementation, the objections put forward by its opponents and the cogency of such challenges must be examined. Right from the conception of the idea of UCC, when it was vociferously debated by the members of the Constituent Assembly, countless objections have been made against it which have now assumed more definitive forms.

The most radical stand against Article 44 is that it should be repealed or effaced from the Constitution because it is opposed to the *Shariat* and any form of tinkering with its inviolable laws would be a direct challenge to Islam

itself.[51] However, the only way to change the Constitution is to resort to the special procedure prescribed for it in Article 368(2), which requires special majority.[52] An abrogation of Article 44 seems highly unlikely anytime soon and is definitely an insurmountable task in the long run.

With regard to the argument of inviolability of the *Shariat* vis-à-vis personal laws, the report of the Commission on Marriage and Family Laws which was appointed by the Government of Pakistan in 1956 is pertinent.[53] Along with the fact that this Commission negated the claim that the *Shariat* is insusceptible to change, the argument is also belied by the progressive reforms achieved by several Muslim states in their application of the *Shariat*. An illustration to this effect is the absolute prohibition of polygamy in Tunisia and Turkey.[54] It is possible in other countries such as Indonesia, Iraq, Somalia, Syria, Bangladesh and Pakistan only if authorized by the state or some

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[51] *See* Zia Haq, *Modi has triggered internal war over uniform civil code: Muslim law board*, HINDUSTAN TIMES (Oct. 13, 2016).

[52] Durga Das Basu, COMMENTARY ON THE CONSTITUTION OF INDIA 4139 (LexisNexis, 8th ed. 2008).

[53] *The Report of the Commission on Marriage and Family Laws* (1956), reprinted in STUDIES IN THE FAMILY OF ISLAM 39 (Khurshid Ahmed ed., 1959). The government of Pakistan appointed this Commission to suggest suitable reforms in family law. It was headed by Mr. Justice Abdul Rashid, former Chief Justice of Pakistan. The Commission submitted its report in 1958 and its recommendations were incorporated through the Muslim Family Laws Ordinance, 1961. *See* Preamble, Muslim Family Laws Ordinance, 1961.

[54] *See* E. Ann Black et al., MODERN PERSPECTIVES ON ISLAMIC LAW 123 (Edward Elgar, 2013).

prescribed authority.[55] Also, the bizarre scheme of *talaq-ul-bid'at* has been statutorily abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq.[56] In Pakistan and Bangladesh, any form of extra-judicial *talaq* would not be valid unless confirmed by an arbitration council.[57] Thus, AIMPLB's contention that the *Shariat* is inert and incapable of any reform or change fails the test of experience. As Allama Iqbal observed, 'the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution- a question which will require great intellectual effort, and is sure to be answered in the affirmative.'[58]

The second and most frequent argument against Article 44 is that it would jeopardise the existence of Muslim identity. This is nothing but a relic of the two-nation theory.[59] There should not be any apprehension of identity loss by virtue of implementation of a provision in the Constitution as it is the same fundamental document which guarantees the maintenance of institutions

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[55] Justice Tulzapukkar, *Uniform Civil Code*, A.I.R. 1987 JOURNAL 17. *See also* N. Kanakaraj, *Uniform Civil Code – A Challenge to Minority Rights*, [1991] C.U.L.R.198, 204.

[56] Basu, *supra* note 52, at 4145.

[57] *Id*.

[58] As quoted in *supra* note 30 at para 34.

[59] Basu, *supra* note 52, at 4140.

essential to the religion, language and culture of minorities vide Articles 26,[60] 29,[61] 30(1),[62] 30(1A).[63]

The third contention against Article 44 is that it should not be adopted unless Muslims come forward to adopt it. This is only a diluted plea for the abrogation of Article 44 because the provision may virtually be effaced if the minorities never come forward with their consent.[64] None of the directives in Part IV of the Constitution lay down that they shall be implemented only if its opponents consent. The contention is fallacious since it is tantamount to saying that just because ignorant parents may not be desirous of their children going to school, demanding instead that the children help them in agriculture or

[60] Article 26 of the Constitution of India provides 'every religious denomination or any section thereof' the right to 'establish and maintain' religious institutions, 'manage' its own religious affairs, and own, acquire and administer property. All these freedoms are subject to restrictions in the interest of 'public order, morality and health'.

[61] Article 29 of the Constitution of India provides that minorities shall have the 'right to conserve' their 'distinct language, script or culture', and educational institutions maintained or aided by the state shall not deny admission to any citizen on the basis only of his or her religion, race, caste or language.

[62] Article 30(1) of the Constitution of India provides, 'All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.'

[63] Article 30(1A) of the Constitution of India provides, 'In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.'

[64] Basu, *supra* note 52, at 4141.

earning money in factories, the implementation of Article 45[65] should have been affected by the objection of such parents.[66] Consequently, governments have attributed the non-implementation of UCC to the lack of uniformity of views among different sections of citizens regarding it[67] and have been ambiguous in the Parliament whenever it encounters the issue in the Question Hour. Archives from the past 30 years are a testament to successive governments' belief that it would not interfere in the personal laws of minority communities unless the initiatives for such changes are undertaken by a sizeable cross section of the minority communities themselves. This implies that the impediment is social acceptability, in addition to complexity, as the evolution of UCC would require changes in personal laws as well. Therefore, governments have deemed it advisable to secure such uniformity 'slowly and steadily' in consonance with public momentum.[68] They have maintained this stance, calling it the 'consistent policy of the government' from as early as

[65] Article 45 of the Constitution of India is a Directive Principle of State Policy which originally mandated the state to provide 'free and compulsory education' to every child till the age of 14 years within ten years from the commencement of the Constitution. However, vide the 86th Amendment to the Constitution in 2002, education was made a fundamental right (Article 21A). Subsequently, the Right of Children to Free and Compulsory Education Act, 2009, was enacted to give effect to Article 21A. The amending Act also altered Article 45 of the Constitution which now requires the state to 'provide early childhood care and education' to children below six years of age.

[66] Basu, *supra* note 52, at 4142.

[67] Question No. 315*, Rajya Sabha (Aug. 4, 1969).

[68] Question No. 4902, Rajya Sabha (May 13, 2002).

1953 to 2011.[69] Be that as it may, there is no proposal to amend or delete Article 44 of the Constitution.[70]

It is contended that Article 44 of the Constitution is a mandatory provision.[71] As was observed in *Shah Bano,*[72] even if the belief has become popular that 'it is for the Muslim community to take a lead in the matter of reforms of their personal law… it is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.'[73] The controversy arising out of that decision has clearly shown that only a section of the Muslim community refuses to accept the implementation of UCC, with strong voices within the community vociferously demanding the contrary. According to Dr. Tahir Mahmood:

'In pursuance of the goal of secularism, the State must stop administering religion- based personal laws… Instead of wasting their energies in exerting theological and political pressure in order to secure an 'immunity' for their traditional personal law from the state's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws,

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[69] Question No. 705*, Rajya Sabha (May 13, 1953); Question No. 1988, Rajya Sabha (Mar. 17, 1986); Question No. 3829, Lok Sabha (Aug. 17, 2000); Question No. 611, Lok Sabha (Jul. 9, 2004); Question No. 1423, Lok Sabha (Aug. 4, 2006); Question No. 2471, Lok Sabha (Mar. 10, 2011).

[70] Question No. 2379, Rajya Sabha (Aug. 24, 1995).

[71] Basu, *supra* note 52, at 4142.

[72] *Supra* note 30.

[73] *Id.* at para 32.

purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India.'[74]

This calls for an earnest reflection about why the reformative voices in the Muslim community have not been given their due place in the debate for UCC.

IV. Rationale behind UCC

In *Harvinder Kaur*,[75] Justice Rohatgi had famously remarked:

Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art.21 nor Art.14 have [*sic*] any place.'[76]

However, it is difficult to recognise how a set of secular laws which would regulate secular matters like marriage, divorce, adoption and inheritance could be a threat to family life. The authors fail to fathom how privacy could be a defense for perpetuating gender discrimination. There appears to be two schools of thought with respect to introduction of UCC. While one favours the introduction of an *optional* Code to which citizens would willingly submit themselves, the other favours the introduction of a *mandatory* Code for all citizens. While the prospect of an optional Code seems to be the less radical

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[74] Dr. Tahir Mahmood, MUSLIM PERSONAL LAW: ROLE OF STATE IN THE SUBCONTINENT 200-2 (Vikas Publishing House, 2nd ed. 1977), as quoted in *supra* note 30 at para 33.

[75] Harvinder Kaur v. Harmander Singh Choudhry, A.I.R. 1984 DELHI 66 (affirming the validity of an archaic provision for restitution of conjugal rights under the Hindu marriage law which was challenged on the ground that it defied the provision of equality under Article 14 and right to personal liberty under Article 21 of the Constitution of India).

[76] *Id*. at para 45.

approach, the ground reality is that it shall never succeed for the simple reason that the deep-seated orthodoxy entrenched in the religious ideologies of India will ensure that submission to a secular Code is construed as abnegation of one's religion and an act of blasphemy. Hence, introduction of a mandatory UCC remains the only alternative to achieve the objective of gender justice.

In a recent case, while giving a Christian unwed mother the right to natural guardianship over her child, the Apex Court, while stressing the need to distance religion from law, described the UCC as 'an unaddressed constitutional expectation'.[77] The sheer fact that a childless Muslim couple, until recently, did not have the power to adopt, or a Christian did not have the power to will away his property, speaks volumes about the need to reform our laws.[78]

The General Assembly of the United Nations adopted the Declaration on the Right to Development on December 4, 1986.[79] India is said to have played a crusading role for its adoption and has ratified the same.[80] Its preamble recognises that 'all human rights and fundamental freedoms are indivisible and interdependent'. Article 6(1) obliges the states parties to secure 'all human

[77] ABC v. The State (NCT of Delhi), A.I.R. 2015 S.C. 2569, at para 11.

[78] Till recently, an Indian Christian did not have the power to will away his property in death bed as per S.118 of the Indian Succession Act, 1925. However, in John Vallamattom, (2003) 6 SCC 611, the Supreme Court held the provision to be discriminatory and violative of Articles 14, 15, 25 and 26 of the Constitution of India.

[79] United Nations, Declaration on the Right to Development, A/RES/41/128 (Dec. 4, 1986), http://www.un.org/documents/ga/res/41/a41r128.htm.

[80] Mihir Desai, *Flip-flop on personal laws*, 3(4) COMBAT LAW (Nov.-Dec. 2004), http://indiatogether.org/combatlaw/vol3/issue4/flipflop.htm.

rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.' Article 8(1), while casting a duty on states parties to undertake 'all necessary measures for the realization of the right to development' and ensure 'equality of opportunity for all in their access to basic resources...', also seeks reforms for the eradication of 'all social injustices'. The Supreme Court noted the significance of the UN Declaration in the case of *Masilamani Mudaliar*[81] and interpreted the rights of women as an 'inalienable, integral and indivisible part of universal human rights.'[82] It identified '[a]ll forms of discrimination on grounds of gender' as 'violative of fundamental freedoms and human rights.'[83]

India also acceded to the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW', hereinafter) on August 8, 1993.[84] In respect of this development the Court in *Masilamani Mudaliar*[85] stated, '[b]y operation of Article 2(f) and other related Articles of CEDAW, the state should take all appropriate measures including legislation to modify or abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.'[86] Thus, the

[81] Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, (1996) 8 SCC 525, at para 18.

[82] *Id*. at para 18.

[83] *Id*.

[84] The preamble of CEDAW reiterates that 'discrimination against women violates the principles of equality of rights and respect for human dignity.'

[85] *Supra* note 81.

[86] *Id*. at para 21.

international treaty obligations of India require it to frame gender-neutral laws which would not unfairly discriminate against women. Enactment of UCC could be the way for India to uphold its international obligations in this regard.

The persistence of these inequalities has often been defended on the ground of custom. However, as K.M. Munshi remarked in the Constituent Assembly, '…we are an advancing society.'[87] We must strive to evolve with time and, if needed, purge ourselves of certain customs if they become anachronistic and start acting as tools for oppression. While we must try to do so without interfering with religious practices wherever possible, 'religious practices in the past have been so construed as to cover the whole field of life', and 'we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation.'[88] Whenever any society has attempted to break away from age-old traditions, it has met with resistance. But does that mean we should shy away from reforms?

Whenever this specter of 'customs being immutable' is put forward we should ask ourselves how our society would have been if the custom of sati had been allowed to prevail just because it was considered to be ordained by scriptures or tradition.[89] In this regard it would be apt to quote a British General who was confronted by a group of Hindu priests from the province of

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[87] DEBATES, *supra* note 1, at 547.

[88] *Id.*

[89] Sati refers to a custom which was practiced in the Indian subcontinent whereby a widow immolated herself on her husband's funeral pyre, often forcefully. The practice was outlawed by the British in 1829. The Commission of Sati (Prevention) Act, 1987, further criminalises any type of aiding, abetting, or even the glorifying of the practice.

Sindh where the abolition of sati was vigorously implemented. Protesting against what they considered to be an interference with their customary law, they called on the British army's commander-in-chief in India, Sir Charles James Napier. The General responded:

'Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation also has a custom. When men burn women, we hang them and confiscate all their property. My carpenters shall therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs!'[90]

Perhaps those objectors from Sindh were right when they said that abolition of sati was an interference with their custom, but in hindsight we cannot be more grateful to the British General for showing such steely resolve in the face of open hostilities. It is this resolve to reform- to correct and get rid of archaic and worn out customs which are an open travesty to all that our society claims to stand for- that is lacking in our current brand of lawmakers.

The implementation of UCC would not necessarily mean doing away with age-old customs. The Code would not require a Muslim to perform *saptapadhi*[91] or a Hindu to baptize his child, but rather secure a set of laws which would guarantee basic human rights without being prejudiced towards

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[90] Sir William Francis Patrick Napier, THE HISTORY OF GENERAL SIR CHARLES NAPIER'S ADMINISTRATION OF SCINDE, AND CAMPAIGN IN THE CUTCHEE HILLS 35 (Charles Westerton, 3rd ed. 1858). *See also* Fali. S. Nariman, THE STATE OF THE NATION 44 (Hay House, 2013).

[91] '*Saptapadhi'*, which translates as 'seven steps', is one of the most important rites of a Hindu marriage ceremony wherein the bride and groom take seven steps around the holy fire, exchanging vows to remain faithful to each other.

one religion. The Code shall be a secular legislation which shall regulate secular matters like marriage, adoption and inheritance without any unfair gender discrimination.[92] As Dr. B.R. Ambedkar pointed out in the Constituent Assembly, while 'we have in this country a uniform code of laws covering almost every aspect of human relationship', [93]what is lacking is a uniform civil law that deals with marriage, divorce, maintenance, inheritance, adoption and succession.[94] Therefore, the argument whether we should attempt to legislate a uniform code for such matters seems to be 'somewhat misplaced'.[95] Another important fact which is always ignored in the clamour of reactionaries against UCC is that there already exists a State in this Union which has such a Code: the State of Goa.[96] If Goa can have UCC, then why not the rest of the country? Are the people of Goa any less Indian than the rest are, or do they have any less reverence for their customs or religions? Why should such a paradox exist in a single country?

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[92] Mohammedan law is highly skewed in favour of men in the matter of inheritance, with female successors getting only half of the share of their male counterparts. This is in stark contrast to progressive reforms brought under the Hindu personal law where a woman is now entitled to an equal share in the property of her husband or parents who die intestate.

[93] *See*, DEBATES, *supra* note 1 at 550.

[94] *Id.*

[95] *Id*. at 551.

[96] Goa is India's smallest state by area and located on the western coastline. It was a Portuguese colony annexed by India in 1961. However, Portuguese civil laws continue to be in force there.

V. Conclusion

In our discourse on Article 44, we must not forget that the Prophet himself was one of the first feminists. The Quran itself promotes gender equity; and Islam was a reformist movement which gave women the right to divorce, remarry and work. UCC, instead of threatening the identity of Muslims in India, shall be an enactment in consonance with the spirit of the Quran. It would bring hundreds of thousands of desolate Muslim women at par with similarly placed divorcees in their own country. It would take away the need to knock on the doors of the courts of law to secure, inter alia, the right to maintenance, inheritance, adoption, and the right to will away property, which are nothing but grants of the state that every citizen should be entitled to on equal terms. Just as it is the duty of the state to ensure the free flow of religious discourse in a nation, it is also its duty to protect its citizens from the tyranny of religion when it threatens their humane existence and encroaches upon their fundamental rights.

The Parliament, right from the days of the Constituent Assembly when Article 35 of the Draft Constitution was vigorously debated, has been unequivocal in declaring that it does not intend to interfere with the numerous personal laws unless minority communities lead the way. This policy has been consistent for well over six decades. The 2014 general elections in India gave the Bhartiya Janata Party (BJP) an overwhelming majority in the lower house of the Indian Parliament. It is pertinent to note that the BJP has been one of

the most ardent supporters of UCC and it formally demonstrated its support for the same through its election manifesto.[97]

In 1997, the Supreme Court maintained that making changes in discriminatory personal laws was the prerogative of the legislature and not the judiciary.[98] Consequent to that decision, the matter was thought to have been put to rest for about two decades before it was revived in 2016 by another litigant. This new petition in the Supreme Court reemphasized the gender discriminatory practices in Muslim personal law and reignited the debate on UCC in the country. During the proceedings, the Union Government submitted an affidavit urging the Court to abolish triple *talaq*.[99] A bare reading of the affidavit suggests that the Centre's thought process concurs with the arguments in this paper. But the petition itself does not seek an order on implementation of UCC. Subsequent to the development in the case, the Law Commission of India floated a 'Questionnaire on Uniform Civil Code' soliciting public comments with an objective 'to address discrimination

[97] BJP Election Manifesto 41 (2014) (noting that there cannot be gender equality in India until such time as UCC is adopted).

[98] Ahmedabad Women's Action Group (AWAG) and Ors. V. Union of India, (1997) 3 SCC 573, at para 14 (the petitioners sought a declaration by the Court that polygamy and triple *talaq* permitted by Muslim personal law violated the fundamental right to gender equality guaranteed by the Constitution of India and asked the Court, inter alia, for a direction for enactment of UCC). *See* Vrinda Narain, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 115 (University of Toronto Press, 2008).

[99] Shayara Bano v. Union of India and Ors., W.P. (C) No. 118 of 2016 (the petition was filed seeking an order banning triple *talaq* in the country).

against vulnerable groups and harmonise the various cultural practices.'[100] It is difficult to predict the course of future events but one thing is for certain: the ruling party would want the Supreme Court to issue an order banning triple *talaq,* since its abolition by the Apex Court will certainly prove to be a shot in the arm for the Union Government if it decides to fulfill its promise of enacting UCC.

[100] *Questionnaire on Uniform Civil Code*, Law Commission of India (Oct. 7, 2016), http://lawcommissionofindia.nic.in/questionnaire.pdf.

Short-Form Mergers under the Companies Act, 2013: A Comparative Analysis with Singapore and Delaware

- Sanjana Ramkumar*

Abstract

The Companies Act, 2013 has introduced the concept of short-form mergers in India. Under the erstwhile Companies Act, 1956 a merger between companies, irrespective of their nature or relationship, was subject to the procedure in Sections 391 and 394. Section 233 of the 2013 Act allows mergers between 'small companies'; 'a holding company and its wholly-owned subsidiary'; and 'such other class or classes of companies as may be prescribed' by the Central Government, without following the procedure under Ss. 230 and 232 (corresponding to Ss. 391 and 394 of the 1956 Act), subject to certain conditions. Based on a comparative examination of the process under S. 233 with similar provisions in Singapore and the State of Delaware, U.S.A., this paper argues that the short-form merger mechanism under the 2013 Act does not offer any respite to companies from the traditional process of merging and arguably contradicts its intended purpose. The paper proposes certain changes to the existing law that can enable more efficient mergers and thereby serve its purpose.

I. Introduction

In 2015, India witnessed a flurry of corporate restructuring activities.[1] Companies have increasingly begun opting for inorganic restructuring[2] to

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[1] Mergermarket, *Global and Regional M&A: First Quarter 2015*, LEGAL ADVISOR (Apr. 15, 2015).

[2] K. R. Sampath, LAW AND PROCEDURE FOR MERGERS, AMALGAMATIONS, TAKEOVERS AND CORPORATE RESTRUCTURE 138 (Snow White Publishing House Pvt. Ltd., 8th ed. 2013):'Modification of the structure of the corporate entity by restructuring its capital or

achieve greater economies of scale and lower administrative costs. Mergers have become tools of business strategy to not only gain strength and expand customer base but also to cut competition, reduce tax liabilities, and to set off the accumulated losses of one entity against the profits of another.[3] However, mergers in India are a court-driven and long-drawn-out process. Prior to the setting up of the National Company Law Tribunal ('NCLT', hereinafter) under the National Company Law Tribunal Rules, 2016, the process of mergers in India was to be carried out with the sanction of the High Court of competent jurisdiction. This further contributed to the slow pace at which mergers took place in India as High Courts have a wide jurisdiction burdened with all matters covered in its scope, as opposed to the NCLT which is purported to be a specialised body for adjudication of matters under company law. However, it is yet uncertain if the NCLT will dispose of matters faster than the High Courts.

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business or taking rationalization steps within the organization is termed as organic restructuring, while modification that affects the entity externally by way of acquiring new enterprises and/or amalgamating or merging with another corporate entity or sale of the whole of an undertaking is called non-organic restructuring.'

[3] *Report of the Expert Committee on Company Law*, Ministry of Corporate Affairs, Government of India (Feb. 2016), http://www.mca.gov.in/MinistryV2/mergers+and+acquisitions.html.

To increase the efficiency of mergers/amalgamations[4] between 'small companies';[5] 'a holding company and its wholly-owned subsidiary'; and such other companies as the Central Government may prescribe ('Classified Companies', hereinafter), the Companies Act, 2013 ('the New Act', hereinafter) sought to simplify the procedure for mergers between such companies. In this connection, S. 233 of the New Act[6] introduced the concept of short-form or fast-track mergers between Classified Companies. This provision allows mergers between Classified Companies to take place without having to follow the default lengthy tribunal/court-driven procedure for mergers detailed under Ss.230 and 232 of the New Act. It is pertinent to note that these default merger provisions of the New Act correspond to Ss. 391 and 394 of the Companies Act, 1956 ('the Old Act', hereinafter) which was

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[4] The Companies Act, 2013 does not draw a distinction between a 'merger' and an 'amalgamation'. The two terms are used interchangeably as their legal meanings overlap.

[5] Companies Act, 2013, S.2(85): '"small company" means a company, other than a public company,-

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to-

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act.'

[6] The provision came into force on Dec. 15, 2016. *See The Gazette of India*, Ministry of Corporate Affairs, Government of India (Dec. 7, 2016), http://www.mca.gov.in/Ministry/pdf/commencementnotif_08122016.pdf.

repealed by the New Act.[7] However, given the loopholes, the existing short-form merger provisions may render the concept counterproductive.

II. Position in India

In order to make a short-form merger as per S.233, the New Act mandates that firstly, notice of the proposed scheme, inviting objections and suggestions, should be issued by the transferor and transferee companies to the Registrar and Official Liquidator.[8] Secondly, the scheme should be approved by the respective members or classes of members holding at least ninety per cent of the total number of shares in the general meeting[9] and by a majority representation nine-tenths in value of the creditors or class of creditors of the respective companies in a meeting convened by the company.[10] Thirdly, each of the companies involved in the merger will have to file a declaration of solvency with the Registrar at the place where the company is situated.[11] Pursuant to the above, the short-form merger can take place subject to approvals, or rather no-objections, from the Central Government, Registrar of Companies ('RoC', hereinafter) and the Official Liquidator. Once the three conditions are complied with, the scheme would come into effect.

It is imperative to note here that the success of a short-form merger with its above conditions hinges on the RoC and Central Government not having any

[7] Companies Act, 2013, S.465.

[8] *Id*., S.233 (1) (a).

[9] *Id*., S.233 (1) (b).

[10] *Id*., S.233 (1) (d).

[11] *Id*., S.233 (1) (c).

objections to the merger or the scheme thereof. However, in case the Central Government, based on objections from the RoC, has any objections to the merger based on public interest, the process is referred to the NCLT, thereby changing the process to the court-monitored default merger process.[12] Furthermore, S.233 (6) provides that the NCLT may, on application by the Central Government or *any person,*[13] direct that the scheme should mandatorily pass through the merger procedure envisaged under S.232 of the New Act- with the result that the companies, despite being Classified Companies, will not reap any of the time or cost advantages they otherwise would have been eligible to receive.

Rule 24(3) of the draft Companies (Compromises, Amalgamations and Arrangements) Rules, 2016 lays down the procedure to effect a short-form merger. It mandates that the companies involved in such a merger would be required to file a declaration of solvency in the scheme of compromise or arrangement in the specified form, along with a fee stipulated in the Schedule of Fees, before convening the meeting of members and creditors for the approval of the scheme. Rule 24(5) further mandates that the transferee company shall file a copy of the approved scheme with the Central Government, RoC and the Official Liquidator within seven days of the conclusion of members.

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[12] *Id*., S.233 (5).

[13] Any person affected by a scheme of arrangement has the right to approach the NCLT to ask for the scheme to follow the procedure under S.232 of the New Act. The term 'any person' provides a wide ambit that is not restricted merely to creditors or particular classes of creditors. This increases the possibility of delay before the scheme is allowed to be brought into effect.

The fundamental objective of short-form mergers is to allow *faster mergers* between Classified Companies and provide insulation from the slow process which often delays corporate restructuring. There are a number of reasons that contribute to the slow pace at which court-driven mergers take place and one of the primary reasons is the overarching duty of the NCLT to ensure that no creditor, member, or class of creditors or members are prejudiced because of the scheme of compromise or arrangement. The NCLT, while sanctioning the scheme, has to consider the pros and cons of the scheme with a view to find out whether the scheme is fair, just, reasonable, and in line with provisions of law and public policy.[14] While the provision for approaching the NCLT under S.233 may have behind it the benign intention of protecting the members and creditors of companies, this inevitably takes the Indian version of short-form mergers back to the courts and does not always provide for faster mergers between companies.

III. Positions in Delaware and Singapore

Internationally, while the concept and philosophy of short-form mergers remain the same, different jurisdictions have envisaged different procedures for it which throw some light on short- form mergers in general.

Delaware

Under S.253 of the Delaware General Corporation Law ('Delaware statute', hereinafter), a short-form merger occurs when a parent corporation combines with a ninety percent-owned subsidiary. In other words, a parent

[14] A Ramaiya, GUIDE TO THE COMPANIES ACT 2013 3744 (3 LexisNexis Butterworths, Wadhwa, 18th ed. 2015).

corporation which owns at least ninety percent of the outstanding shares of each class of a subsidiary corporation's stock may merge the subsidiary corporation into itself or, alternatively, merge both itself and the subsidiary corporation into a third corporation.[15] The purpose of S.253 'is to provide a parent corporation a means to eliminate unilaterally the minority stockholders' interests in the enterprise.'[16]

The procedure to effect a short-form merger under the Delaware statute is simpler when compared to the process in India. The first step involves a public tender offer to the shareholders of the target company by the buyer/parent corporation. After acquiring the required number of shares through the tender offer, the Board of Directors of the parent corporation adopts a resolution stating their intention to perform the merger.[17] Then, the parent corporation files a 'certificate of ownership and merger' with the Delaware Secretary of State stating that the parent corporation owns at least ninety percent of the outstanding shares of the subsidiary corporation.[18] Once the certificate is filed, the merger is effective and shareholders who did not tender their shares receive compensation for them when the merger is conducted.[19]

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[15] Richard T. Hossfeld, *Short-Form Mergers After Glassman v. Unocal Exploration Corp.: Time to Reform Appraisal,* 53 DUKE L.J. 1337, 1337-38 (2004).

[16] Christopher Iacono, *Tender Offers and Short-Form Mergers by Controlling Shareholders Under Delaware Law: The '800-Pound Gorilla' Continues Unimpeded – In re Pure Resources Inc., Shareholders Litigation*, 28 DEL. J. CORP. L. 645, 652 (2003).

[17] *Id.*

[18] *Id.*

[19] *Id.*

It is pertinent to note that in a S.253-merger shareholders do not have the right to approach the court in case the compensation offered to them is felt inadequate. In *Stauffer* v. *Standard Brands, Inc.,* [20] the plaintiffs claimed that the Board had breached its fiduciary duties to the minority stockholders by setting an inadequate and unfair price for their stock. The Delaware Supreme Court held that 'the unilateral right given to a parent by Section 253 meant that, absent inequitable action constituting 'fraud or illegality' that renders the merger itself subject to attack, a minority stockholder's complaint in a short-form merger relates only to the value- which issue can be adequately addressed in an appraisal proceeding.'[21] Appraisal under S.262 of the Delaware statute is the "only recourse' for a stockholder who believes he or she was unfairly cashed out in a short-form merger.'[22]

Lastly, S.251 does not require that the shareholders of either corporation-parent or subsidiary- should approve the merger; therefore, the parent corporation encounters no resistance in completing the merger.[23] As a short-form merger does not require approval from shareholders of either corporation, the question of whether such a merger is *fair* to the shareholders often arises. The Delaware Supreme Court held in *Weinberger* v. *UOP, Inc*.[24] that any transaction or deal is subject to an 'entire fairness' review. 'Entire

[20] Stauffer v. Standard Brands Inc., Del. Supr., 187 A. 2d 79 (1962).

[21] John F. Grossbauer & Janine M. Salomone, *Entire Fairness Standard of Review Does Not Apply in Short-Form Mergers*, 9:6 THE CORPORATE GOVERNANCE ADVISOR 1 (2001).

[22] *Id.*

[23] *Id*.

[24] Weinberger v. UOP, Inc., 457 A. 2d 701, 710 (Del. 1983).

fairness' is a standard that involves two components- fair dealing and fair price-[25] requiring majority shareholders to establish that they dealt fairly with the minority shareholders and paid a fair price for the minority shares.[26] While *Weinberger*[27] spoke of 'entire fairness' and the requirement of fair dealing in the specific context of a freeze-out merger, there was ambiguity regarding whether the same test would apply to short-form mergers as well. S.253 of the Delaware statute does not provide a requirement for approval by shareholders and thus appeared to be contrary to the standard of 'entire fairness' that is applicable to other merger transactions. In the *Glassman case*,[28] the Delaware Supreme Court resolved 'the long-standing debate as to the appropriate standard of review to be applied in challenges to short-form mergers'[29] effected pursuant to S.253 by stating that in a S.253- merger the parent corporation has no obligation to establish 'entire fairness'.[30] The Court held that since S.253 was established for a purpose inconsistent with fair dealing and was a 'simple, fast and inexpensive' way to accomplish a merger, an entire fairness review would 'foil its intent'.[31] The provision was interpreted in light of the legislative intent with which it was introduced.

It is abundantly clear that Delaware's short-form merger procedure provides a faster alternative to the traditional merger process. S.253 of the

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[25] Hossfeld, *supra* note 15, at 1343.

[26] *Id*.

[27] *Supra* note 24.

[28] Glassman v. Unocal Exploration Corp., 777 A. 2d 242 (Del. 2001).

[29] Grossbauer & Salomone, *supra* note 21.

[30] *Id.*

[31] Iacono, *supra* note 16, at 659.

Delaware statute, unlike S.233 of the New Act, provides no scope for any party to approach any court to object to the merger. The procedure laid out is fairly simple and requires intimation to only one authority before effecting the merger. This is in contrast to the requirement of intimation to the RoC, Official Liquidator and Central Government under the Indian provision. The exemption from the doctrine of entire fairness further allows mergers between parent and subsidiary corporations to take place at an extremely quick pace.

Therefore, it can be concluded that short-form mergers envisaged under the Delaware statute provide, in letter and spirit, a procedure for quicker mergers, thereby enhancing the ease of doing business in Delaware and the pace at which parent corporations can opt for inorganic restructuring.

Singapore

The Singapore Companies (Amendment) Act, 2005 inserted into the Companies Act, 1967 (Chapter 50, 2006 Revised Edition) ('Singapore Companies Act', hereinafter) S.215D, which introduced a new method of amalgamation into Singapore law known as 'short form amalgamation'. This provision sought to prescribe a simplified procedure for amalgamation between two or more companies.

Under this provision, a 'short form amalgamation' may either be between a company and one or more of its wholly-owned subsidiaries ('vertical amalgamation') [32]- similar to what is envisaged under S.233 of the New Act- or between two or more wholly-owned subsidiaries of the same corporation

[32] Companies Act, Chapter 50, 2006 Rev. Ed. (Singapore), S. 215(D) (1).

('horizontal amalgamation').[33] Also, '[t]he amalgamating companies may, upon amalgamation, continue as one company, which may be one of the amalgamating companies or a new company.'[34]

S.215D of the Singapore Companies Act prescribes the procedure to effect a 'short form amalgamation': firstly, the directors of each amalgamating company are to give written notice of the proposed amalgamation to every secured creditor of the amalgamating company.[35] Secondly, the directors are required to make a solvency statement with regard to the amalgamated company in accordance with S.215J. Every director who votes in favour of making the solvency statement is required to sign a declaration stating that, in his opinion, the solvency tests are satisfied and must provide grounds to support that opinion. *Thirdly,* the members of each amalgamating company, by special resolution at the general meeting, must resolve to approve the amalgamation of the companies. There is no requirement of preparation of a proposal of amalgamation,[36] and approving the same in accordance with Ss.215B and 215C, if the members of each amalgamating company, by special

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[33] *Id.*, S. 215(D) (2). It is pertinent to note that in India horizontal amalgamations are outside the purview of S.233 of the New Act and such mergers will have to follow the regular amalgamation routes under Ss. 230 and 232.

[34] Christopher Ong et al., *Short Form Amalgamations under the Singapore Companies Act*, *in* MERGERS, ACQUISITIONS & JOINT VENTURES: DIGITAL GUIDE 309 (Oliver Hargreaves ed., Executive View Media Limited, 2010), http://www.allenandgledhill.com/Lists/Published Articles/Attachments/47/Short%20form%20amalgamations%20under%20Singapore%20 Companies%20Act.pdf.

[35] Companies Act, Chapter 50, 2006 Rev. Ed. (Singapore), S. 215(D) (3).

[36] Wee Meng Seng, *Amalgamation – New Method to Merge and Take-over Companies,* (2008) 20 S. AC. L. J. 135, 140 (2008).

resolution, resolve to approve the amalgamation on the grounds specified under sub-clauses (a) to (d) of S.215D(1). An approved 'short form amalgamation' will become effective after a notice of amalgamation is issued by the Accounting and Corporate Regulatory Authority of Singapore ('ACRA', hereinafter).[37]

The Singapore Companies Act offers a much simpler and faster procedure to specified companies for amalgamation in the short-form manner. Unlike its Indian counterpart, S.215D requires approval only from one authority, i.e., the ACRA. Furthermore, the provision makes no reference to any judicial/quasi-judicial body that dissenting members, creditors or other persons can approach to oppose the scheme of amalgamation. This keeps the procedure of 'short form amalgamation' out of judicial purview and ensures that once statutory requirements have been complied with, amalgamation of companies takes place with little to no resistance.

IV. Proposals

S.233 of the New Act falters in its goal of ensuring faster mergers between Classified Companies to increase the ease of doing business in India. Upon comparison with the provisions governing the same in Delaware and Singapore, the Indian provision- by allowing the Central Government, dissenting members, creditors and any other person who is affected by the scheme to approach the NCLT to oppose the scheme; and by requiring permission from a number of public authorities before the scheme of merger

[37] Christopher Ong et al., *supra* note 34.

can be deemed to be effective- offers no respite to Classified Companies from the traditional process of merging under Ss.230 and 232.

Further, unlike under the Singapore Companies Act, a 'horizontal amalgamation' would be outside the purview of S.233. Such a merger would have to follow the traditional route under Ss.230 and 232. This, again, poses a problem for companies that wish to consolidate their wholly-owned subsidiaries into a single corporate body. There seems to be no reason to keep such mergers outside the purview of S.233, as the subsidiaries in question are controlled by the same parent corporation.

To ensure that companies reap the full benefit of short-form mergers, it is necessary for the Central Government to consider amending S.233 to disallow persons from approaching the NCLT in case of dissatisfaction or dispute, and relax the requirements providing for the obtaining of permission from multiple public authorities. In the absence of these requisite amendments, the provision for short-form mergers under the New Act will prove to be contradictory to its original purpose, counterproductive in its results, and will not increase the ease of doing business in India.

Revisiting Section 498A of IPC: Examining the Supreme Court's approach in *Arnesh Kumar*

- Preeti Pratishruti Dash*

Abstract

The debate surrounding Section 498A of IPC has raged in the realm of criminal law for far too long. Fundamentally, this debate centers around one focal area: is there a blatant misuse of S.498A? Has it outlived its utility? Are there certain safeguards that are required to be built into S.498A to introduce necessary checks and balances? Despite elaborate deliberations stretching for over a decade, scholars and courts have remained divided over the issue. The Supreme Court, in Arnesh Kumar *v.* State of Bihar, *has rekindled the controversy by highlighting an urgent need to take suitable steps to prevent misuse of the provision while also trying to lay down some guidelines and safeguards. This paper critiques the approach followed by the Court in the judgment vis-à-vis the legislative intent surrounding S.498A, and is an attempt at resolving this conflict by providing possible principle-based answers.*

I. Introduction

In March 2015, the then Union Minister of State for Home Affairs Mr. Haribhai Chaudhury stirred up a controversy when he said that his Ministry had proposed an amendment to S.498A of the Indian Penal Code ('IPC',

hereinafter)[1] to make it a compoundable offence.[2] Stating that the provision was being grossly misused, the Minister of State claimed that an amendment to S.498A was the need of the hour. The Supreme Court too, a little before that, in the case of *Arnesh Kumar* v. *State of Bihar*[3] ('*Arnesh Kumar*', hereinafter), had held that S.498A is being used more as a sword and less as a shield. Ever since the division bench decision in *Preeti Gupta* v. *State of Jharkhand*[4]-wherein the Supreme Court, speaking through Justice Dalveer Bhandari, pertinently observed that 'a serious relook of the entire provision'[5]

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[1] S.498A: 'Husband or relative of husband of a woman subjecting her to cruelty.-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.- For the purposes of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.'

[2] Prafulla Marapakwar, *Anti-dowry law likely to be amended soon*, TIMES OF INDIA (Apr. 19, 2015), http://timesofindia.indiatimes.com/india/Anti-dowry-law-likely-to-be-amended soon/articleshow/46973943.cms.

[3] (2014) 8 SCC 273.

[4] (2010) 7 SCC 667.

[5] *Id*. at 677.

was warranted- the debate surrounding S.498A has been a raging and continuous one.

This paper is yet another attempt towards resolving this debate. To do justice to the question involved, the author believes that there is a need to understand the ambit of S.498A from scratch, explore the rationale behind its existence, and examine whether it has outlived its need. The paper then moves on to find possible principle-based answers. In doing so, it focuses on the debate surrounding the proposal of the Home Ministry to amend the provision to make the offence compoundable. Critiquing the aforesaid proposal, certain possible implications of such an amendment are discussed. Further, the decision in *Arnesh Kumar*[6] is critically examined. It is argued that the judgment, while making extraneous statements about the veracity of complaints under S.498A, renders much of itself as *obiter dicta*, thereby failing to add any novel dimension to the existing jurisprudence surrounding the provision.

II. Legislative history of S.498A

The roots of S.498A lie in the disturbing rise in the number of deaths of married women in the late 1970s and early 1980s, the causes of which initially seemed untraceable and undetectable. When no cause could be attributed to these unnatural deaths, they came to be termed 'stove-burst deaths', rendering kitchen accidents as the culprits.[7] These deaths were routinely and mechanically recorded by the police as 'accidental'. Following numerous

[6] *Supra* note 3.

[7] Indira Jaising, *Concern for the Dead, Condemnation for the Living,* [2014] XLIX (30) EPW 1.

such incidents, women's organisations across the country raised their voices and urged the then government and the Criminal Law Amendment Committee of 1982 to acknowledge the reality of domestic violence- related in good measure to demand for dowry- and provide legislative protection to women by carving out a specific provision in the IPC.[8]

Consequently, the Criminal Law (Second Amendment) Act, 1983 was enacted. The Statement of Objects and Reasons of this Act, while acknowledging the rising number of dowry deaths, stated that since out of the total number of cases of torture due to dowry demand only a small fraction culminates in death, it is imperative to make cruelty a punishable offence per se. Thus, it inserted S.498A into the IPC as an offence punishable with up to three years of imprisonment with or without fine. The offence was made non-bailable and cognizable if the information relating to its commission was given to an officer in charge of a police station by the woman herself or by any person related to her by blood, marriage or adoption. Thus, the legislative intent behind S.498A is to provide protection to a married woman subjected to cruelty at the hands of her husband and/or his relatives.

III. Judicial discourse on S.498A

The constitutionality of S.498A was impugned for the first time before the Supreme Court in the case of *Sushil Kumar Sharma* v. *Union of India*[9] on the ground of gross misuse and it was argued that a large number of false and

[8] Lotika Sarkar, *Women's Movement and the Legal Process*, CWDS Occasional Paper No. 24, Centre for Women's Development Studies (Dec. 20, 2014).

[9] (2005) 6 SCC 281.

frivolous complaints were being made which rendered the intent behind the provision otiose. It was contended by the petitioner that the provision was used to victimise innocent men and their families and thus, served as nothing short of a tool of legal terrorism.[10] The Supreme Court, however, upheld its constitutionality by relying on its observation in an earlier decision that that the mere possibility of abuse of a provision which is otherwise valid does not impart to it any element of invalidity.[11] While acknowledging that the provision was meant to be used as a 'shield' and not as an 'assassin's weapon', the Court ruled that the same had been enacted in order to keep the menace of dowry harassment at bay, and that in every case investigating agencies and courts should strive to ensure that the guilty are punished and the innocent are not. Therefore, sweeping generalised presumptions could not be drawn as to its implementation and misuse. However, the Court made some pertinent observations regarding the concerns surrounding the provision:

'The object of the provision is prevention of the dowry menace. But … many instances have come to light where the complaints are not bona fide and have been filed with oblique motive [*sic*]. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and intra vires, [*sic*] does not give a licence to unscrupulous persons to wreak personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with.'[12]

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[10] *Id.* at 284.

[11] *Id.* at 286, citing Collector of Customs v. Nathella Sampathu Chetty, (1962) 3 SCR 786.

[12] *Id*. at 287.

It has been over a decade since eyebrows have been raised on the issue surrounding the proper usage of S. 498A.

In the subsequent landmark case of *Preeti Gupta,*[13] the complainant's husband's sister who lived in another city had been named an accused under S. 498A. Here, the Apex Court criticised the common tendency in cases of prosecution under S. 498A to implicate the 'husband and all his immediate relations'[14] whether or not they were guilty of the offence and observed that, in the instant case, permitting the complainant to pursue the complaint would be an abuse of due process of law. The Court observed that 'exaggerated versions'[15] of incidents were reflected in most of the complaints and that it is imperative for the legislature to take into account relevant considerations and make suitable amendments to the existing law so as to avoid gross misuse of the provision.[16]

The High Courts of the country too have rendered their share of decisions on this issue. The Delhi High Court, in *Chandrabhan* v. *State,*[17] noted that 'most of the complaints are filed in the heat of the moment'[18] and made an attempt at mitigating the harmful impact of such cases on children who, according to the court, are 'the worst victims'.[19] It did so by laying down

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[13] *Supra* note 4.

[14] *Id*. at 677.

[15] *Id.*

[16] *Id.*

[17] Bail Appln. No. 1627/2008, High Court of Delhi (Aug. 4, 2008).

[18] *See infra* note 23 at 4.

[19] *Id*.

guidelines for the police authorities for arrest and other proceedings under S.498A. These guidelines include, inter alia, scrutinising complaints before registering FIR and efforts towards reconciliation before registering FIR.[20] The Madras High Court also has laid down guidelines for cases under S.498A, in *Tr. Ramaiah* v. *State.*[21] These require permission of the Dowry Prohibition Officer to be taken before making arrests unless a case of dowry death or suicide or other grave offences are involved; nomination of experienced social workers or mediators who will be housed along with Dowry Prohibition Officers in the premises of all-women police stations; and that not all station house officers could arrest the aged, infirm or minors.[22]

The aforementioned judgments clearly indicate that the courts of this country have, time and again, lamented the misuse of S.498A.

Consequent to such widespread concerns, the Law Commission of India was urged to suggest suitable amendments to the provision. The Law Commission, keeping in view the representations received from various quarters and observations made by the Supreme Court and the High Courts in various judgments, revisited the provision by looking at the arguments for and against its retention in the existing form.[23] After detailed deliberations on the various judicial precedents in this regard and the guidelines laid down therein, the Commission observed that the stipulations and conditions rendered therein

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[20] *Id*. at 4-5.

[21] Crl. O. P. No. 10896 of 2008, High Court of Madras (Aug. 4, 2008).

[22] *See infra* note 23 at 6-7.

[23] *Section 498A IPC*, Law Commission of India (Report No. 243, Aug. 2012).

made the offence 'practically bailable'.[24] Furthermore, it questioned the legality of certain guidelines laid down in some of these rulings such as deferring registration of FIR till initial investigation and proceedings, arresting only after the final report of the Magistrate, etc. as such procedures are not part of the criminal jurisprudence of the country and might result in diluting the rigour of the same.[25] The Commission conclusively opined that it was wrong to altogether dismiss the provision by labeling it as 'an instrument of oppression and counter-harassment'[26] or on the basis of allegations that it had become 'a tool of indiscreet and arbitrary actions on the part of the Police.'[27] It also observed that it would be wrong if the police did not appreciate the grievance of the complainant and refused to register the FIR. The Commission stated in its Report that a re-evaluation of S.498A merely on the ground of abuse was not warranted.[28] It also observed that while courts are confronted, sometimes very visibly, with abusive dimensions in S.498A prosecutions, the large number of cases which go unprosecuted for different reasons cannot be ignored.[29]

***Arnesh Kumar*- an aggressive attempt at silencing women or a weak call for procedural propriety?**

[24] *Id.* at 7.

[25] *Id.* at 15.

[26] *Id*. at 14.

[27] *Id.*

[28] *Id.*

[29] *Id.*

The factual matrix of *Arnesh Kumar*[30] revolved around a special leave petition seeking anticipatory bail apprehending arrest under S.498A read with S. 4 of the Dowry Prohibition Act, 1961. While granting leave to the petitioner, the Court came down heavily on women who misuse S.498A for personal vendetta. However, what drew the maximum wrath of the Court is the practice of the police of conducting arrests arbitrarily without adhering to the applicable procedural safeguards.

Some pertinent questions arise at this juncture: How far can the judiciary go while debating the core issues involved in a case without usurping the jurisdiction of the legislature? Most importantly, what are the long-term outcomes of this development? The Supreme Court is well-empowered to declare an authoritative law for the land under Article 141[31] of the Constitution. Why has the Court abstained from doing so for S.498A, unlike in the past?[32] Apparently, the decision appears to be an attempt at exercising the power of issuing guidelines under Article 141. Has it succeeded in doing so?

Firstly, the Court opined that over the years since its enactment, S.498A has come to be used by 'disgruntled wives' who, according to the Court, find

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[30] *Supra* note 3.

[31] Article 141: 'Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India.'

[32] *See* D.K. Basu v. State of West Bengal, A.I.R. 1997 S.C. 610; Visakha v. State of Rajasthan, A.I.R. 1997 S.C. 3011.These are clear instances where, in the absence of any legislative enactment/ bye-laws, the Supreme Court laid down guidelines to be followed which were eventually used by the Parliament for carving out the law in the subject areas of arrest and sexual harassment respectively.

this provision the 'simplest way' to harass the husband and his relatives, by getting them arrested under it. While these women may be 'disgruntled' for a variety of reasons, the Court has completely overlooked the fact that some of this disgruntlement may actually carve out offences under the provision.

The Supreme Court has clearly laid down that there cannot be a fixed definition of 'cruelty', holding that what is cruelty in one case may not amount to cruelty in another.[33] In fact, '[t]he concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.'[34] It is pertinent to mention here that in cases of divorce, various instances such as denial to have sex or children[35] or even using abusive words against the parents of one's spouse[36] have been held to constitute cruelty, thereby fulfilling a condition for grant of divorce.

However, S.498A being a provision of penal law, the standard for determination of cruelty has to be higher. This is because the kind of cruelty which would penalise a person would be graver than that which could lead to grant of divorce. It is for this reason that S.498A itself provides a safeguard by criminalising only such cruelty which is 'wilful' and 'of such nature as is likely to drive a woman to commit suicide...' Thus, for prosecution under

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[33] Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.

[34] *Id.* at 545.

[35] Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558.

[36] *Vishwanath* Agrawal *v. Sarla Vishwanath* Agrawal, (2012) 7 SCC 288.

S.498A, not only must the act of cruelty be wilful, but it must also be so grave that it must drive the woman to commit suicide. This in-built safeguard in the provision acts as a filter as most cases of cruelty which would qualify as grounds of divorce would not be adequate for prosecution under S.498A.[37] Thus, it can be inferred that it was incorrect of the Supreme Court in *Arnesh Kumar*[38] to say that prosecution under the provision is indiscriminate, as there already exists an in-built safeguard within the provision to filter out cases wherein the cruelty inflicted is not so grave as to attract penal action under it. Further, the Court clearly lost sight of the fact that one of the rationale behind insertion of S.498A was the need to ensure that the married life of a woman does not become 'disgruntled' due to acts of her husband and/ or his family.

Secondly, it was opined that the main problem pertaining to the implementation S.498A is the manner in which arrests are made under the provision.[39] Citing statistics of the National Crime Records Bureau of the Ministry of Home Affairs, Government of India, which show that the 'rate of charge-sheeting in cases under S.498A is as high as 93.6% , while the conviction rate is only 15%', the Court suggests that most of the cases under this provision are false charges.[40] The Court also noted with much disapproval that female and aged relatives of the husband are arrested liberally. In its understanding, however, the Court has overlooked two very vital points. Firstly, the low rate of conviction does not necessarily indicate that the

[37] *Supra* note 7 at 1.

[38] *Supra* note 3.

[39] *Id.* at 276-77.

[40] *Id.* at 277.

remaining 85% cases are false. A fundamental principle of criminal jurisprudence is that an accused is innocent until proven guilty beyond reasonable doubt. The burden of proof is always upon the prosecution. Since the offence under S.498A is committed behind the closed doors of a house it becomes very difficult to prove it beyond reasonable doubt in a court of law. Further, 85% of cases which do not result in conviction also include under-trial cases. The data relied upon by the Court regarding low rate of conviction doesn't depict the true state of facts and the inference drawn relying on this data does not appear to be correct.

Thirdly, a plain reading of S.498A shows that the ambit of the provision was never designed to exclude female and/or aged relatives of the husband. In fact, female and/or aged relatives such as grandparents of the husband are fully capable of inflicting mental cruelty upon the daughter-in-law through, for instance, the demand for a male heir for the family.[41] The Apex Court should have taken these factors into consideration.

Finally, the most important point discussed by the Apex Court in the present case is the practice of the police of conducting arrests mechanically. Noting that the power to arrest has become 'a handy tool' for the police to harass the public and extort bribes, the Court goes on to analyse the nature of the offence under S.498A. In doing so, the Court rightly observes that the offence under S.498A, being punishable with imprisonment of less than or equal to three years, would be covered under S.41 (1) (b) of the Code of

[41] *Supra* note 7 at 2.

Criminal Procedure, 1973 ('CrPC', hereinafter).[42] Hence, before making any arrest under S.498A, the police officer must have a prima facie belief that the accused has committed the offence and must also be satisfied that such arrest is necessary for one or more of the purposes envisaged under S.41(1)(b)(ii) of CrPC. Simultaneously, the Court also observed that, under S.41A of CrPC, when the police officer feels that arrest is not necessary, a notice has to be served upon the accused demanding his/her presence before the officer as and

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[42] S.41: 'When police may arrest without warrant.- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) ...

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing.'

when prescribed in the notice.[43] The Court feels that indiscriminate arrests made in cases under S.498A are unfortunate as arrest 'brings humiliation, curtails freedom and casts scars forever.'[44] However, in spite of such observations, all that the Court has done in the present case is to reiterate the position of law on the issue. It has not gone beyond stating that S.41 (1) (b) of CrPC is applicable in cases under S.498A. Unlike the aforementioned judgments on this issue, the Court, in this case, has not laid down any new guideline which is to be followed by the police, thus adding nothing new to the jurisprudence on S.498A.

Perhaps the only new dimension that this particular judgment has added is to make non-compliance of the law by police officers liable for departmental

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[43] S. 41A. 'Notice of appearance before police officer. - (1) The police officer may, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court.'

[44] *Supra* note 3 at 277.

action, very ambiguously, without going into details of the same. However, even while doing so, the Court has overlooked the practical difficulties faced by Indian women while approaching the police before registration of an FIR. More often than not, they are not taken seriously unless there is visible proof of cruelty. Before the FIR is registered, the police try and get the woman to reconcile with her family rather than pursue the complaint. Only if she persists does the question of arrest even arise.[45] In overlooking such practical problems, the Court in *Arnesh Kumar*[46] has turned a blind eye to the rights of these women who turn to the formal legal system of the country for the redressal of their grievances.

Thus, in *Arnesh Kumar*,[47] although the Court has earnestly tried to regularize the procedure with regard to arrests, it has done so by way of overlooking several practical socio-legal problems faced by a largely victimised section of the society. It is an established rule of interpretation of statutes that in order to arrive at the real meaning of a legislation, it is necessary to look at it as a whole with regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature such as the history of the legislation and purposes thereof, the mischief which it intends to suppress, etc.[48] In *Arnesh Kumar*,[49] the Supreme Court has erred by failing to appreciate the purpose for which S.498A became part of the IPC, namely,

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[45] Editorial, *Why Women Need 498A*, [2014] XLIX (30) EPW.

[46] *Supr*a note 3.

[47] *Id.*

[48] Heydon′s case (1584) 76 E.R. 637; The Bengal Immunity Co. Ltd. v. State of Bihar (1955) 2 S.C.R. 603; R.M.D. Chamarbaugwala v. Union of India, A.I.R. 1957 S.C. 628.

[49] *Supra* note 3.

the protection of women. Further, while reiterating the law on the issue, the Court has failed to lay down any new guideline which would help curb frivolous arrests in an efficacious manner. What could have been done instead of merely branding complainants as 'disgruntled' was to lay down guidelines in problematic areas such as arrests of the aged and infirm, and restricting, in a judicious manner, the issue of arrest warrants against out-station relatives of the husband.

IV. The conundrum surrounding compoundability of S. 498A

The proposal of the Home Ministry to make the offence under S.498A compoundable[50] is backed by the Law Commission which, in its 243rd Report, has elaborately discussed the possibility of making the offence under S.498A compoundable.[51]

The Law Commission in its 243rd Report has drawn heavily from its 237th Report,[52] which had dealt with the issue of compoundability of several offences and opined that the offence under S.498A should be made compoundable with the permission of the court.[53] According to the 237th Report, in cases of cruelty and torture due to demand for dowry, 'if the wife is prepared to condone the ill-treatment and harassment meted out to her either by reason of change in the attitude or repentance on the part of the husband or reparation for the injury caused to her, the law should not stand in the way of

[50] *Supra* note 2.

[51] *Supra* note 23 at 16-19.

[52] *Compounding of (IPC) Offences*, Law Commission of India (Report No. 237, Dec. 2011).

[53] *Id.* at 24.

terminating the criminal proceedings.'[54] The Commission was of the view that although S.498A covers a social offence and was aimed at the protection of women, making it arguable that 'social consciousness and the societal interest demands that such offences should be kept outside the domain of out-of-court settlement',[55] it should be remembered that 'society is equally interested in promoting marital harmony and the welfare of the aggrieved women.'[56] The Commission opined that '[i]f a wife who suffered in the hands of the husband is prepared to forget the past and agreeable to living amicably with the husband or separate honourably without rancor or revenge, society would seldom condemn such a move nor can it be said that the legal recognition of amicable settlement in such cases would encourage the forbidden evil i.e. the dowry.'[57] The Commission also dismissed the argument against compoundability that 'the permission to compound would amount to legal recognition of violence against women'[58] by opining that the reconciliation cannot be equated to legal condoning of the violence, and that making S.498A non-compoundable 'would imply that the priority of law should be to take the criminal proceedings to their logical end and to inflict punishment on the husband irrespective of the mutual desire to patch up the differences.'[59] The Commission stated, '[i]n matters of this nature, the law should not come in the

[54] *Id*. at 16.

[55] *Id*.

[56] *Id*. at 17.

[57] *Id*.

[58] *Id*. at 18.

[59] *Id.*

way of genuine reconciliation or revival of harmonious relations between the husband and estranged wife.'[60]

Prior to its aforesaid 237th Report, the Law Commission of India had, in its 154th Report, recommended inclusion of S.498A to S. 320(2) of CrPC so that it can be compounded with the permission of the court.[61] The same proposition was reiterated in 2001 in the 177th Report of the Law Commission wherein it noted that over the years, it had received a number of representations from individuals and organisations to make the said offence compoundable.[62] The Justice Malimath Committee Report too strongly supported the plea to make S.498A a compoundable offence on the ground that 'legal obstacles' will impede reconciliation even when a woman wishes for it.[63]

The courts of this country have also frequently endorsed the view that the offence under S.498A should be made compoundable with the permission of the court. In *B. S. Joshi* v. *State of Haryana,*[64] the Supreme Court ruled that the inherent powers of the High Court under S.482 of CrPC could be invoked to compound the offence under S.498A in a case where an affidavit was filed by the complainant wife that the disputes were finally settled and the accused

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[60] *Id*.

[61] *Report on the Code of Criminal Procedure, 1973*, Law Commission of India (Report No. 154, Vol. 1, Aug. 1996), at 48.

[62] *Law Relating to Arrest*, Law Commission of India (Report No. 177, Dec. 2001), at 112.

[63] *The Report of the Committee on Reforms of Criminal Justice System* , Ministry of Home Affairs, Government of India (Vol. 1, Mar. 2003), at 191.

[64] (2003) 4 SCC 675.

and the victim prayed for quashing the FIR. Even before *B. S. Joshi,*[65] the Bombay High Court, in *Suresh Nathmal Rathi* v. *State of Maharashtra,*[66] had permitted compounding of the offence under S.498A as the husband and wife had resolved their differences, were staying in the same house and had even submitted an affidavit before the magistrate for compounding the said offence. In *Ramgopal* v. *State of Madhya Pradesh,*[67] the Supreme Court too was of the view that S.498A should be made compoundable subject to the permission of the court. In *Preeti Gupta,*[68] although the Court did not discuss the issue of compounding the offence under S.498A, it lamented the rising number of matrimonial disputes across the country and stated that there was a duty on members of the Bar to first try and amicably resolve the dispute instead of instigating a woman to file a complaint under S.498A.[69]

In its 243rd Report, the Law Commission referred to and drew from all of the above. It can thus be inferred that the recent statement from the Home Ministry[70] is not isolated but echoes sentiments which form part of a larger debate concerning compounding of the offence under S.498A.

However, what has been overlooked by the Home Ministry is the fact that after the pronouncement in *B.S.Joshi,*[71] reconciliation for an offence under S.498A is already permissible if and when both parties are agreeable to the

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[65] *Id.*

[66] 1992 Cri. L.J. 2106.

[67] S.L.P. (Crl.) No. 6494 of 2010, Supreme Court of India.

[68] *Supra* note 4.

[69] *Id*. at 676.

[70] *Supra* note 2.

[71] *Supra* note 64.

same. Such a situation is advantageous to both groups, i.e., couples who wish to reconcile their differences as well as women who wish to prosecute their husbands and in-laws for cruelty inflicted upon them. However, in the event that S.498A is made a compoundable offence, not only would it mean that offences against women are not taken seriously by the state, but it would also lead to many women, especially from poor backgrounds, being coerced by their in-laws to compound such cases for various reasons. The Ministry should fathom that if a solution for the problem already exists, it is not necessary to make the situation doubly difficult for women who anyway undergo a lot many hurdles before approaching the state machinery for redressal of their grievances.

V. Conclusion

Recently, the Madras High Court judgment in *V.Mohan* v. *State*[72] suggesting mediation in a rape case received a huge amount of criticism from various quarters that it had to be ultimately recalled and the interim bail granted to the accused had to be rejected. The Supreme Court, soon after the controversial Madras High Court ruling, pronounced its judgment in *State of Madhya Pradesh* v. *Madanlal*[73] in which it said that dignity is a part of a woman's 'non-perishable and immortal self'[74] and courts should not fall for the subterfuge of a rapist to corner the traumatised victim into a compromise, or even worse, enter into wedlock with him. This judgment of the Apex Court

[72] M.P. No. 2 of 2014 in Crl. A. No. 402 of 2014, High Court of Madras.

[73] A.I.R. 2015 S.C. 3003.

[74] *Id.* at 3008.

was much lauded by all. Here, the approach of the judiciary and the state machinery can be seen as one which is intolerant of crimes against women and eager to uphold their dignity at any cost.

However, when it comes to recognition of marital rape as a crime, we see the state machinery shirking from the task. The Home Ministry has in fact gone on record to say that since marriage in India is perceived as a 'sacrament', marital rape cannot be brought within the purview of rape in India.[75] It is the same Ministry which is proposing amending the law to make S. 498A compoundable with the permission of the court.

The aforesaid developments, when read together, imply that the safety and security of married women is not a matter of concern for the state so long as the institution of marriage remains intact. So deeply embedded is the idea of preserving the sanctity of holy matrimony that on one hand several state-sponsored funds are allocated to women's safety and the government launches numerous schemes aimed at protecting the welfare of the girl-child in India, and yet, on the other, there is a refusal to even acknowledge the ugly face of domestic violence and its impact on women in India.

In a country where hypergamy is the norm, it is the husband and his family who have a higher financial and social status and thus, greater access to state functionaries such as the judiciary and police. To add to this, a large number of women are victims of domestic violence in the country. In such a situation,

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[75] *India not to criminalise marital rape*, THE HINDU (Apr. 29, 2015), http://www.thehindu.com/news/national/concept-of-marital-rape-cannot-be-applied-in-india/article7154671.ece.

the aforesaid moves further weaken the position of married women in India and thus, call for serious reconsideration.

Tejram Patil : Is the Juxtaposition of Sections 32 (1) & 6 of the Evidence Act Justified?

- Renjith Thomas[*] & Devi Jagani[**]

Abstract

The interesting, controversial, and problematic reasoning adopted by the Supreme Court of India in the case of Tejram Patil *v.* State of Maharashtra *opened a Pandora's box in relation to the appreciation of evidence in cases where two deaths occur in the same transaction and whether the dying declaration of one such person is admissible in proving the death of the other. Adding to the existing state of ambiguity in this area of law, the Court juxtaposed dying declarations with* res gestae*, interpreting the former in the spirit of the latter. The authors in this case comment try to analyse the flaws in the judgment through the use of judicial precedents.*

I. Introduction

The Supreme Court decision in *Tejram Patil* v. *State of Maharashtra*[1] ('*Tejram Patil*', hereinafter) raises an important question of law relating to the relevance of the statement made by a deceased person to prove the cause of death of another person when both deaths occurred during the same transaction. In addition to this, the Court interpreted the term 'transaction' in the phrase '*Facts which … form part of the same transaction*' under Section

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[1] 2015 (2) SCJ 710.

6[2] of the Indian Evidence Act, 1872 ('Evidence Act', hereinafter) as well as in the phrase '*circumstances of the transaction which resulted in his death*' under Section 32 (1)[3] of the Evidence Act to mean situations where the application of the two provisions was juxtaposed in the same fact situation.[4] In this comment, the authors begin by explaining the settled position of law prior to the decision in *Tejram Patil*[5] and then move on to critically analyse the interpretation in those precedents in the light of the present judgment. It will be argued that the reasoning of the Supreme Court in this case is problematic

[2] S.6. 'Relevancy of facts forming part of same transaction.- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.'

[3] S.32. 'Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. — Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

1. When it relates to cause of death. —When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.'

[4] Dr. V. Nageswara Rao, THE INDIAN EVIDENCE ACT – A CRITICAL COMMENTARY 356 (LexisNexis, 2nd ed. 2015).

[5] *Supra* note 1.

and leads to major concerns relating to the interpretation and application of dying declaration and *res gestae*.

II. Backdrop, contentions and appreciation

In *Tejram Patil,*[6] the accused husband, Tejram, returned home in a drunken state on the day of the incident (28th March, 1999) and, agitated by the presence of his mother-in-law Prabhabai (the second deceased), entered into a verbal altercation with his wife Savita (the first deceased) and abused both women. Shortly afterwards he poured kerosene on his wife and set her on fire, in trying to save whom Prabhabai and the landlady Vimalbai sustained burn injuries. All the three women were admitted to the hospital. Before their deaths, Savita made a dying declaration to a police officer; her mother made two dying declarations, one to a police officer and the other to a Special Judicial Magistrate.

In the trial court, the prosecution relied on the dying declarations made by Savita and Prabhabai. However, the trial court relied only on Prabhabai's dying declarations because Savita's dying declaration faced infirmities as it did not have her signature or thumbmark and there was no mention of the fitness of the declarant.

On appeal to the High Court, the admissibility of Prabhabai's dying declaration was questioned. The High Court upheld the conviction of the accused - but on a different ground - and held, through a strict interpretation of S.32 (1), that the dying declaration delivered by Prabhabai is inadmissible as it is relevant only in determining the cause of her death. However, the High

[6] *Id.*

Court relied on the dying declaration furnished by Savita owing to the peculiar facts of the case, without any specific legal justification for the same.

The Supreme Court, on appeal, refused to rely on Savita's dying declaration and relied instead on Prabhabai's dying declaration, ruling that when the death of the declarant is proximately intertwined with the death of another, the dying declaration as to the circumstances that resulted in the declarant's death is admissible to prove the death of such other person;[7] thereby opening a new vista in interpreting the phrase '*circumstances of the transaction which resulted in his death*' under S.32(1) by bringing in the spirit of S.6 (*res gestae*). As the dying declaration of Prabhabai is the central piece of evidence under scrutiny in this analysis, the contents of the statement made before the Special Judicial Magistrate are produced below:

'I had gone to the house of my daughter Savita casually. The incident had taken place at 8.30 p.m. The husband of Savita (Tejram) … returned to the house drunk. Tejram picked up quarrel with Savita. Then Tejram poured kerosene on the person of Savita and ignited matchstick and set her ablaze. I and landlady Vimalbai (P.W. 1) rushed to save Savita. However, fire flared up. I tried to catch Savita but got burnt. The neighbor took us to the hospital.'[8]

In this case analysis, the authors seek to evaluate the correctness of the approach taken by the Supreme Court by analysing the catena of judicial precedents on the relevance of dying declarations and by specifically focusing on whether the death of Prabhabai is in question in the present case. The authors then explore the concept of *res gestae* and conclude that given the

[7] *Id.* at para 25.

[8] *Id.* at para 5.

difficulties in accepting the statement of Prabhabai as a dying declaration, the only possible manner in which her statement may be relevant and admissible in the given circumstances is under S.6.

III. Interpreting S.32 (1): Judicial activism or overenthusiasm?

Under the Evidence Act, there are two provisions which make the statements made by a dead person admissible as evidence.[9] Among these two, S.32 (1) makes relevant statements of a dead person as regards the cause of his/her death. According to the authors, the provision has two essential ingredients:

1. The statement, written or oral, must pertain to either the '*cause of his death*' or to the '*circumstances of the transaction which resulted in his death*'; and
2. Such statements are relevant in proceedings where the cause of the death of the declarant '*comes into question*', irrespective of the nature of such proceedings.

The judiciary has interpreted that the phrase '*circumstances of the transaction which resulted in his death*' is wider and more comprehensive than the phrase '*cause of his death*', since it includes all the acts or omissions which have a proximate and direct bearing on the death of the declarant.[10] It is clear that what '*resulted in his death*' and the '*cause of his death*' both convey two different things – the latter has a direct reference to the manner and method by

[9] *See* Ss. 32 and 33, Indian Evidence Act, 1872.

[10] Ratanlal and Dhirajlal, THE LAW OF EVIDENCE 267 (LexisNexis, 25th ed. 2014).

which the injury that led to the death was caused,[11] whereas the former has a broader ambit as noted above.

On a perusal of the precedents dealing with the interpretation of S.32(1), there are a series of cases which deal with the peculiar situation where two deaths occur in the same transaction and courts were required to determine whether the statement of one person can be used to prove the death of the other. A divide in judicial approach can be observed here.

In *Kunwarpal Singh* v. *Emperor*,[12] S.32 (1) was interpreted by the Allahabad High Court in a strict manner observing that the statement of the deceased is relevant under the provision only when the question before the court pertains to the declarant's death and not to the death of any other person- notwithstanding the fact that the two deaths occurred in the same transaction- especially when the declarant did not directly witness the death of the other. The Supreme Court in another case[13] tried to analyse the above issue and held that when the death of the declarant and the other person does not occur in the same transaction, the declarant's statement as to the cause of death of the other is not relevant as a dying declaration.

From a study of judicial interpretations on dying declarations, it is possible to identify certain circumstances in which the statement of the declarant as regards the death of another in the same transaction has been considered relevant. The best example for such an approach is seen in the case of *Lukka*

[11] Sharad Birdichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.

[12] A.I.R. 1948 All. 170.

[13] Ratan Gond v. State of Bihar, A.I.R. 1959 S.C. 18.

Ulahannan v. *Travancore-Cochin State*[14] where the Kerala High Court held that when the declarant's death is in question the statement made by him as to the cause of death of himself and another, or as to any of the circumstances of the transaction which resulted in the death of himself and the other, are relevant where the two deaths occurred in course of the same transaction. The rationale for such an interpretation was that it is in sync with the natural meaning of the words used in S.32(1), for if the legislature intended to import restrictions of any sort it would have expressly provided for it as in the case of S.27.[15]

Adding further clarity to the position adopted by the Kerala High Court in the *Lukka Ulahannan,*[16] the Bombay High Court held[17] that the use of the declarant's statement as evidence to determine the death of another person which occurred in the same transaction will depend upon the following four factors:

1. Whether the statement made reflects the culmination of the incident that resulted in the death of the declarant and the narration so made in the statement has a direct link with the said incident; and,

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[14] A.I.R. 1955 Trav. Cochin 104.

[15] S.27. 'How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

[16] *Supra* note 14.

[17] Kashinath Tukaram Jadhav v. State of Maharashtra, 1984 Cri. L.J. 1447.

2. Whether the declarant's death is directly connected with an event that took place in his sight, presence or hearing where such other person died; and,
3. Whether the said event has some proximate connection with the final occurrence; and,
4. Whether the statement of the declarant would become unintelligible or distorted if such details of the narration as regards the death of the other are excluded therefrom.

By scrutinising all of these judgments, it is evident that the circumstances in which courts rely on the declarant's statement for determining the cause of death of another is mainly connected with the facts and circumstances of the case; but there is no judicial pronouncement that settles the law in this regard which may apply universally. After realising the ambiguity and confusion created by these judicial decisions, the Law Commission addressed and elaborately discussed these aspects in its 69th Report and recommended that 'a suitable Explanation'[18]- stating '*[t]he circumstances of the transaction which resulted in the death may include facts relating to the death of another person*'- [19] should be added to S.32 (1), making the position clear. However, they did not recommend removing the second essential criterion of S.32 (1), which needs the death of the declarant to be in question before the court.

In this context, we must see that the Supreme Court in *Tejram Patil*[20] referred to all the above judgments but failed to identify one of the main

[18] Law Commission of India (Report No. 69, May 1997), at 237.

[19] *Id*. at 238.

[20] *Supra* note 1.

intricacies involved in the case, i.e. whether Prabhabai's death was in question before the Court. From the cumulative reading of the High Court and Supreme Court decisions in the case, it is clear that the accused was charged only with the death of Savita. The issue that becomes more apparent in this light is whether a charge is essential with respect to the death of Prabhabai to conclude that her death was in question before the Court.

The law is silent on this aspect as to what constitutes the declarant's death being in question. However, if we look into the judicial treatment of similar cases for clarity, we realise that for the first time in the case of *Fakir* v. *Empress*,[21] the Privy Council decided as follows:

'A dying declaration is admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration, but the statement of a deceased person (who did not himself charge the accused with having wounded him) to the effect that another person who had died was stabbed by the accused, is inadmissible under the provisions of s. 32(1).'[22]

In subsequent case of *In Re: Periachelliah Nadar*,[23] the High Court of Madras held that if the death of the declarant is not coming into question before the court, her statement is not admissible under S.32 (1).

The High Court of Patna got the opportunity to answer this question in *The State* v. *Ramprasad Singh and Anr.*,[24] but it did not delve into the issue of

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[21] 17 PR 1901 Cr.

[22] *See* Sir John Woodroffe and Syed Amir Ali, LAW OF EVIDENCE 1925 (Kesava Rao ed., 18th ed. 2009, Vol. 2).

[23] A.I.R. 1942 Mad. 450.

[24] A.I.R. 1953 Pat. 354.

whether a charge is essential for fulfilling the criteria of the death of the declarant being in question before the court as there was sufficient evidence to secure conviction apart from the dying declaration. In this case, there was also a procedural error whereby the committing Magistrate failed to frame charge relating to the death of the declarant but, as the facts evidently raised a question as to the involvement of the accused in causing the death of the declarant, the important question as to requirement of charge was subsumed. The court also said that it does not matter as to what the final decision in the case is, but what is of importance is the death of the declarant being in question.

All these judicial precedents, in addition to the bare text of S.32 (1), lead to the conclusion that the primary ingredient necessary to make relevant a statement under the provision is that the death of the declarant should come into question before the court; and as is implicit from the judicial trend, a charge with respect to the declarant's death is a must for fulfilling this criteria. The case of *Tejram Patil,*[25] however, presented a novel issue before the Supreme Court wherein it is highly doubtful whether Prabhabai's statement can be admitted at all as a dying declaration as there was no charge with respect to her death.

Moreover, this anomaly becomes apparent in the judgment where, despite identifying the requirement of the death of the declarant being the question,

[25] *Supra* note 1.

the Court avoids discussion on that aspect.[26] Assuming the death of Prabhabai to be in question, it considers the further aspect of the relevance of her dying declaration to ascertain the culpability of the accused as regards the death of Savita. This is done by relying on the decisions discussed above, which were all decided in a different context as in all those cases the accused had been charged for causing the death of both people in the same transaction. The ambiguity created by this silence of the Supreme Court has far reaching consequences in the interpretation of S.32 (1) and its basic essentials.

Also, if we approach the issue theoretically, it is apparent that normally the decision of any court of law would be only as regards the fact-in-issue which, in a criminal case, are the charges framed against the accused. In this case therefore, the fact-in-issue being whether the accused was responsible for causing the death of Savita, Prabhabai's death was not in question. This makes her statement irrelevant under S.32 (1). However, this aspect was completely ignored by the Court.

From the above analysis, it becomes apparent that the admission of Prabhabai's statement as a dying declaration by the Court is problematic in itself. Whether the interpretation of S.32 (1) in light of S.6 is permissible is an issue of secondary importance, and is considered below.

IV. ***Res gestae* vis-à-vis dying declaration: a flawed interpretation**

The word 'transaction' as used in the phrase '*Facts which … form part of the same transaction*' under S.6 is a broader concept as compared to its use in

[26] '…In other words, when charge is of murder of Savita, whether cause of death of Prabhabai which is [*sic*] integral part of the incident can also be held to be in question.' *See supra* note 1 at para 18.

the phrase '*circumstances of the transaction which resulted in his death*' under S.32 (1) since when a court deals with the term under S.6, it is intended to cover all the facts which constitute the transaction.[27] However, as is apparent from the construction of S.32 (1), the 'transaction' referred to in it must result in death of the declarant. It was observed in *Kameshwar Prasad* v. *Rex*[28] that *res gestae* could be defined as being inclusive of those circumstances which are the natural and reflexive incidents of a particular contested fact and which are made admissible under S.6 as being illustrative and explanatory of those facts. Hence, from the above discussion, it can be made out- as also pointed out by Woodroffe and Amir Ali-[29] that S.32 (1) only covers statements which constitute the *res gestae* of the cause of death, making it a special category of *res gestae*. It can be deduced that S.6 is wider than S.32 (1) and will cover statements that do not satisfy the criteria of S.32 (1) but, in some manner, explain, elucidate or illustrate the fact-in-issue.

The logical fallacy inherent in *Tejram Patil*[30] is that it assumes that the phrase '*circumstances of the transaction which resulted in his death*' as used in S.32 (1), which is narrower than the phrase '*Facts which … form part of the same transaction*' as used in S.6, can be interpreted by taking the spirit of the latter. This is deeply problematic as all dying declarations are *res gestae* but not vice versa, making the interpretation by the Court erroneous.

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[27] *Supra* note 4 at 81.

[28] 1951 ALJ 149.

[29] *See* Ratan Gond v. State of Bihar, A.I.R. 1959 S.C. 18, as mentioned in *supra* note 1 at para 24.

[30] *Supr*a note 1.

As noted above, the statement made by Prabhabai cannot be made admissible as a dying declaration as her death is nowhere in question before the Court, thereby not satisfying an essential ingredient of S.32(1).

Res gestae is 'an exception to the general rule that hearsay is not admissible.'[31] The rationale behind making a certain statement or fact admissible under this concept, which is embodied under S.6, is that the spontaneity and immediacy of a statement can preclude any possibility of its manipulation or fabrication.[32] However, for such a spontaneous and contemporaneous statement to be made relevant under S.6, such statement must form part of the same transaction as the fact-in-issue.[33] The authors feel that Prabhabai's statement could have been taken as relevant by the Court as forming part of the same transaction as discussed under S.6 since all the criteria for making a fact relevant under the said provision are successfully fulfilled by her statement.

The Supreme Court seems to have shown overenthusiasm in admitting Prabhabai's statement as a dying declaration and, in the opinion of the authors, has failed to appreciate the evidence in a proper manner, as required by the settled position of law, which demands the statement of the declarant to be treated as *res gestae*.

V. Conclusion

The appreciation of evidence in the present case raises several academic and practical issues. The authors are not advocating the restrictive

[31] Gentela Vijayavardhan Rao And Anr. v. State of Andhra Pradesh, (1996) 6 SCC 241.

[32] *Id.*

[33] *Id.*

interpretation of S.32 (1), but are only attempting to reason that as per the prevailing interpretation it is difficult to accept the said declaration of Prabhabai as a dying declaration. To believe otherwise, we need further clarity on the issues raised in this case.

At the same time, the authors are also struggling to find the reason for the Supreme Court not discussing the essential ingredient of S.32 (1) as to whether Prabhabai's death was in question in the present case, thereby creating ambiguity in the appreciation of evidence which creates confusion regarding the legal position as to the relevance of a dying declaration. Moreover, it remains a mystery that the Court did not discuss the application of *res gestae* and treated what should be *res gestae* as a dying declaration, especially when the statement is not fulfilling the ingredients of S.32 (1).

Book Review

Presidential Legislation in India: The Law and Practice of Ordinances, by Shubhankar Dam, (Cambridge University Press, 2014), xviii+259 pp., paperback, Rs. 495, ISBN-13: 978-1-107-44434-8.

- V.R. Jayadevan*

The book under review deals with a topic of importance in Indian constitutional law which, as the author himself admits, has not been given due importance. The power of the head of the executive to promulgate ordinance is unique to the Indian Constitution.[1] Undemocratic as it is, conferment of such a power in the executive in a Constitution that envisages a parliamentary form of government has been controversial even from the times before the formation of our Constitution.

The book examines the subject in its historical background and goes into the constitutional aspect of conferring such a power in the executive head. Divided into two parts, the book examines the subject in five chapters in all, excluding the introduction and the conclusion. The introduction explains the relation between legislation and ordinance in a parliamentary form of government. It looks into executive legislation in a comparative perspective. The author discovers that however important be the power of promulgation of ordinance in constitutional law, there is a notable dearth of literature on the

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[1] The Constitution of India, Articles 123 & 213.

subject – extensive or intensive –that provides a systematic account of ordinances or their interpretation at the national or state level.[2]

Part I, with two chapters, deals with the origins and practice of promulgating ordinances in India while Part II, in three chapters, deals with the 'law' in them and their interpretation. In chapter one, after examining the concept of ordinance in the English legal system and its application in feudal England during the medieval times, the author gives a fairly good idea of the legacy of ordinance in India that dates back to the Charter Act, 1600. The author has been successful in explaining how ordinance as a legal instrument was introduced to protect British interest in India by subsequent legislations like the Indian Councils Act, 1861. It is further explained how the 'ordinance raj' under the Government of India Act, 1915 and the Government of India Act, 1935 enabled the Governor General to be autocratic. He notes the 'constitutional irony' in the national leaders' promulgation of ordinances after independence, while they had opposed it as despotic during the struggle for freedom.[3] The book briefly narrates the debate in the Constituent Assembly over the ordinance-making power and appraises the apprehensions of many members of the Constituent Assembly in this regard.

Chapter two, titled 'Legislative Surrogacy: Cabinets and Ordinances, 1952-2009', discusses the operation of ordinances in independent India. Statistically analysing, the author explains how 'ordinances grew dramatically, and with

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[2] Shubhankar Dam, PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES (Cambridge University Press, 2014), at 17-18.

[3] *Id*. at 52.

time, became a cynical- and an incorrigible – feature of India's parliamentary democracy.'[4] He extensively examines how the practice of ordinance-making has increased by leaps and bounds over the decades, topically and numerically. Nehru, who was an arch critic of the ordinance power of the Governor General, was the architect of this tradition[5] which was callously followed by Indira Gandhi whose term was stricken by promulgation of ordinances for nationalisation of industrial and commercial institutions including banks. One is shocked to note the extensive areas covered by the 'ordinance raj' which include areas of administration, crimes, finance, labour relations, property, and regulation of institutions and religious affairs.[6]

Constitutionally, the life span of an ordinance is over six months. What happens to the ordinance after this constitutionally accepted term? This issue was judicially examined in *D.C. Wadhwa.*[7] The book critically analyses this poignant issue. The author criticises that hasty ordinance-making, a feature of the Indian legal system, has led to substantive and procedural insufficiencies. The author takes the reader through the constitutional conundrums of *ordinance versus parliamentary sessions* leaving the vacuum for cabinet excesses in this respect.[8] He concludes the chapter with the observation supported by rueful experience that ordinance 'has become a parallel arrangement, and often, the preferred legislative arrangement' as a

[4] *Id*. at 68.

[5] *Id*. at 73.

[6] *Id*. at 72.

[7] A.I.R. 1987 S.C. 579.

[8] Shubhankar Dam, *supra* note 2, at 95.

comfortable alternative to transparency and scrutiny as they require no debate, discussion or vote.[9]

Chapter three, 'Negotiating the Text: Ordinances, Article 123 and the Interpretative Deficit', examines the legality of ordinances. In this chapter are examined the questions around the text of ordinances and their judicial interpretation. Comparing ordinance with enactment, the author explains that in spite of many similarities between them, dissimilarities are implicated in the constitutional structure of powers of President, legislative powers of Parliament and executive powers of Cabinet. The author laments that the Supreme Court failed to take note of the dissimilarities born out of *context* including that of scope, effect, commencement and lapsing.[10]

In chapter four, 'Reading Minds: Presidential Satisfaction and Judicial Review of Ordinance', chiefly devoted to judicial review of presidential satisfaction, the author argues that despite the perennial differences between parliamentary enactment and presidential ordinance in terms of democracy, the Supreme Court, carried away by the pre-constitutional notions of interpretation, held that motive of ordinance was not subject to judicial review,[11] which he calls 'the negative approach to judicial review'.[12] The Court has accepted that there cannot be judicial examination of legislative bona fides, which is an adaptation from English law. He draws a conclusion

[9] *Id*. at 117.

[10] *Id*. at 165.

[11] *Id*. at 179.

[12] *Id*. at 181.

that the concept of complete immunity to presidential ordinance, coupled with the exception to judicial review carved out by *Wadhwa*,[13] had a paradigm shift in the post-*SR Bommai*[14] decision of *Krishna Singh* v. *Bihar*[15] in which the Supreme Court invalidated certain ordinances on the ground that they were primarily designed to circumvent the usual legislative process.

Chapter five, 'The Power of No: Presidents, Cabinets and the Making of Ordinances', examines the practical significance of the differences between legislative enactments and ordinances. One of the issues the author analyses is whether presidential assent under Article 111 of the Constitution is a pre-requisite for ordinances promulgated under Article 123. He argues that ordinance-making being an intermediary legislative power is in essence different from law-making and hence need not be subject to presidential assent under Article 111. The concluding chapter, "Edwardian' Reading of Ordinances', examines the practice of ordinance promulgation in India with that in Latin America and Europe where, unlike in India, ordinance promulgation was controlled over the years. The chapter criticises the executive in India for promulgating ordinances for trivial and unimportant matters, and the judiciary for wrongly interpreting them. In short, the book reveals that there is need for executive prudence and judicial wisdom for meaningful 'ordinance governance'.

The contents and arrangement of the topics in the book evince the extensive research work done by the author in the subject- spanning from England of the

[13] *Supra* note 7.

[14] (1994) 3 SCC 1.

[15] A.I.R. 1998 S.C. 2288.

Middle Ages to post-independence India - and stands testimony to his analytical skill. The author has taken pains to gather the statistics of the ordinances, cataloguing them dec

ade/century-wise as required. The work undertaken by him is commendable, especially in view of lack of studies in the area. The work undoubtedly will be a necessary addition to any library, particularly a library of any institution that specialises on constitutional and administrative laws or political science. The fact that the book does not go into the aspects and issues of ordinances at the state level cannot be considered as a shortcoming as it is humanly impossible to include them in a book of this size; nor is that warranted, as the issues of ordinances at the union and state level are more or less the same.