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EDITORIAL

AIALS was born on 9th of June 2003 and had the proud privilege of being the first Amity institution to launch a doctoral degree program. PhD degree was offered in a number of legal and socio-legal disciplines.

Next year in 2004 AIALS had launched an LLM (Human Rights) program of two years duration. In the coming years two-year LLM courses were started gradually in another five branches of law – Family Law, Business Law, Constitutional Law, Intellectual Property Law and Criminal Law.

In 2013 all LLM programs were changed to one-year duration after which the number of admissions to various LLM programs had begun gradually swelling. In the academic year 2019-20 it was 234.

During the closure of the campus due to Covid-19 pandemic, taking advantage of online classes many more students took admission to various LLM courses, the most crowded among these being LLM (Criminal Law) program.

The total intake of all specializations together in the academic year 2020-21 was 383. In the current academic year it has further increased and is at present 417. This year all LLM classes were held online till 16 February. From17 February all these are being regularly held on the campus.

The *Amity Law Watch* was launched in 2003 as the institution's house journal. Print editions were brought out until 2017 after which it switched on to electronic format. This is the journal's fifth such issue

--TM

25 February 2022

AIALS UPDATE

Teaching Faculty

The AIALS faculty at present consists of, besides the Chairman, two Professors and two Assistant Professors. The vacancy of the third professor caused by the exit of Professor Asha Verma is yet to be filled. So are the vacancies in the other cadres.

Assistant Professor Ms Ankita Shukla has been awarded PhD degree in law by KR Mangalam University of Gurugram in Haryana for her thesis titled "Sentencing Policy relating to Sexual Offences under the Indian Criminal Justice System." The degree was conferred on her at the university convocation held on 24 December 2021. A brief note her research work appears in this issue of ALW.

Assistant Professor Udai Pratap Singh is registered for PhD at the Dr Ram Manohar Lohia National Law University, Lucknow on "Evaluation of United Nations Charter Principles on Use of Force and State Practices: A Critical Legal Study with special reference to Israel, Russia, and USA." A brief note on his research work in progress is included in this issue of ALW.

Doctoral Degree Program

PhD scholar Bhupal Singh had submitted his thesis in January 2021. An Oral Defence Committee meeting for him was held online on the eve of the University Convocation held on 17-18 December 2021 and degree was duly awarded at the Convocation.

On the suggestion of AIALS Chairman, registration of fourteen PhD students who since the time of joining have their Research

Guides in either of the two Amity Law Schools [Noida and Delhi] was transferred from AIALS to ALS Noida in November 2021. This had to be done in the interest of the scholars and for various administrative reasons.

AIALS has now nine scholars on its PhD rolls. Their names and research topics are as follows:

1. Charu Shahi
   Role and Responsibility of Courts in India in International Commercial Arbitration: A Critical Analysis
2. Meenu Sharma
   Corporate Liability and Judicial Adjudication in India: A Critical Analysis
3. Shruti Maggo
   Corporate Social Responsibility: A Critical Analysis in International Perspective
4. Trisha Kadyan
   Legal Responses to the Problems of Sex Workers in India: A Critical Study in Human Rights Perspective
5. Priyanka Singh
   Trademark in Internet Age – A Critical Study of Liability Regimes
6. Vibhor Gupta
   Legal Conundrums of the Patents Act as to University-Industry Relationships: A Critical Study with Special Reference to the Right to Practice Law
7. Sameer Kumar Swarup
   Industrial Designs and its Overlapping with Other IPRs: An Indian Perspective
8. Smriti Raturi
   Juvenile Justice Act 2015: A Critical Study of Amended and Added Provisions and Their Likely Impact
9. Harish G
   Workers in and from India: Human Trafficking, Social Exploitation and Other Related Issues

Among them, Ms. Trisha Kadyan has the AIALS Chairman and Professor Sachin Rastogi as her Research Guide and Co-Guide respectively. The rest of them are working under the supervision of Professor Sachin Rastogi.

Two PhD scholars, Ms Charu Shahi and Ms Meenu Sharma, have completed all prescribed requirements for submission of their thesis as per the University's Research Degree Regulations. Long Abstracts of their theses nearing completion were approved by the Departmental Research Committee of the Institute on 8 February 2022. They will soon be finally submitting their research work for the award of the PhD degree.

Master's Degree Programs

Since the transfer of LLM (Intellectual Property) course to Amity Law School in July 2020, AIALS has LLM programs in five specializations. At the Convocation for the year 2020-21 held on 17-18 December 2021 as many as 275 LLM students of AIALS were awarded degrees in the five specializations as detailed below:

1. LLM (Criminal Law) : 103
2. LLM (Business Law) : 83
3. LLM (Constitutional Law) : 52
4. LLM (Human Rights) : 19
5. LLM (Family Law) : 17

The LLM intake for the academic year 2021-22 has been unprecedented. The total

number of students admitted is 417 with the following break up:

1. LLM (Criminal Law) : 171
2. LLM (Business Law) : 122
3. LLM (Constitutional Law) : 90
4. LLM (Family Law) : 21
5. LLM (Human Rights) : 13

Since 17th February there are no LLM classes in any stream in the online or hybrid mode -- all are being held on the campus.

Due to the very large number of students in LLM (Criminal Law) and LLM (Business Law) classes for these courses are now being held in two separate sections each.

AIALS Faculty Publications

Sachin Rastogi

Principles of Insurance Law (2021)

Professor Sachin Rastogi had joined the AIALS faculty in 2012. Soon after that he had earned LLD degree from Chaudhary Charan Singh University of Meerut.

In 2014 leading law publishers of India LexisNexis had published his doctoral thesis titled as *Insights into E-Contracts in India.* Another book authored by him -- *Insurance Law and Principles* -- was also published the same year by the same publishers. It contained a detailed analysis of the concept of insurance and its legal regulation in India.

This year, in 2021, LexisNexis have brought out another book by Professor Sachin Rastogi in the area of insurance law. Titled *Principles of Insurance Law,* it mainly deals with the concept of and rules of risk management under the insurance law to the optimum benefit of the policy holders.

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Tahir Mahmood

Supreme Court on Muslim Law -- Select Cases of Seventy Years (2022)

AIALS Chairman Professor Tahir Mahmood is a prolific author and has written a large number of books on various branches of law including Family Law and the fast-growing legal discipline of Religion and Law. His last book titled *Finger on the Pulse: Socio-Legal Concerns of 1998-2018* was published by Satyam Law International in 2019.

This year in February 2022 Law and Justice Publications of New Delhi have brought out his new book titled as *Supreme Court on Muslim Law: Select Cases of Seven Decades.* It contains an analysis of, and annotations on, as many as sixty-one decisions on various aspects of Muslim law pronounced by the Supreme Court of India since its inception in 1950 till the end of 2021. The apex court rulings covered in the book relate to Muslim law of marriage, divorce, women's post-divorce rights, legitimacy of children, minority and guardianship, child custody, gifts, deceased person's unpaid debts, wills, inheritance and several other aspects of family relations.

The author's new book is a case law supplement to his several other books on Muslim law which the Supreme Court of India and various High Courts have cited in their judgments in a large number of cases.

AIALS Former Faculty & Alumni

Dr Asha Verma, former Professor of AIALS, is now working as the Dean of the Faculty of Law at the IILM University of Gurugram in the State of Haryana.

Early this year Supreme Court Advocate Dr Saif Mahmood, former Research Scholar of AIALS, was invited by the Bonavero Institute of Human Rights at the Faculty of Law in the historic Oxford University of UK to teach and conduct seminars there as an Honorary Research Fellow. He has joined the prestigious assignment on 8th February 2021. The Fellowship is currently for two semesters and one of the major areas of his work is "Freedom of Speech and Literary and Cultural Dissent in the Medieval and Modern India: Constitutional, Legislative and Judicial Perspectives."

Shobha Bhatti, AIALS student of LLM (IPR Law) of 2018-19 batch is working as an Additional Civil Judge in Agra.

Farhad Islam, AIALS student of LLM (Constitutional Law) of 2019-20 batch has joined as a Civil Judge in Agartala, Tripura.

AIALS Faculty Research Work

Sentencing Policy on Sexual Offences under Criminal Justice System of India

[Note on author's PhD thesis]

Ankita Shukla
Assistant Professor, AIALS

Since time immemorial, law has been considered as one of the core instruments to ensure and establish justice in society and to avenge those who have suffered loss. It can be said that law is the means to attain justice and end number of punitive measures can be identified by a State to attain the same.

That being said, one should not lose sight of the fact that sex and sexual offences are too as old a phenomenon as mankind. The act of sex is one of the reasons for the emergence and sustenance of life on earth. However, as time travelled, the interpretation and myths around sex and consensual cohabitation started spreading its evil fangs all around and thus reduced the act to be a taboo. People started committing sexual offences in order to satisfy their lust or take revenge and there the role of law was perceived to be a propelling factor to maintain order and administration in society.

This research works aims to focus on Sentencing policy which is opined to be a reflection of the measure of the judgment and the rationale, the society has for a particular crime. It is a primary justification guiding the criminal justice delivery system of any country. As Indian substantive and procedural laws have encapsulated provisions regarding punishing of sexual offences so the present study is aimed to examine whether those laws are sufficient or deficient to effectively counter the sexual offences occurring in almost every nine minutes in the country.

Sentencing is a criminal justice system phase, where the court determines the convict's final sentence. It follows the stage of conviction, and the final purpose of any justice system is to pronounce this sentence levied on the prisoner. Once claimed,

sentencing needs no further clarification to explain how much focus has to be paid to this level. This stage represents the amount of condemnation that society has for a specific offence. By looking at the form of punishment offered for particular offences, every criminal justice execution procedure's fundamental justification can be calculated.

The most significant aspect of sentencing highlight is judicial determination which shows that sentencing involves the exercise by a judge of the discretion and wisdom regarding criminal justice arrangement and punishing the person whose guilt is proved without doubt.

It is not fair to assume that all of them should respond in the same manner to a single act of crime in a system, with so many players involved besides the suspect and the victim. The perpetrator, for example, can express more sentiments than a judge who is an unknown party to an opposition side, similarly he may assume that his action was right, rendering the surrounding conditions more prominent. In India, crimes such as rape adjudication have always been influenced by pre-conceived ideas, misconceptions and assumptions about the crime and rape survivors.

The fact that retribution is an equally significant move may be extracted via provisions from s. 235(2) and according to Section 248(2) of the CrPC which states that sentenced party must be heard on conviction and that the punishment given must comply with the law.

In the case of *Santa Singh v State of Punjab* -- 1976 (4) SCC 190 – the Supreme Court had held as follows:

(i) "Sentencing is an important stage in the process of administration of criminal justice as important as the adjudication of guilt, and it should not be consigned to a subsidiary position as if it were a matter of not many consequences."

(ii) "Sentencing is an important task in the matter of crime. One of the criminal law's prime objectives is an imposition of appropriate, adequate, just and proportionate sentences commensurate with the nature and gravity of the crime and how it is committing. There is no straitjacket formula for sentencing an accused on proof of the crime. The courts have evolved certain principles, like rarest of the rare principle. Nevertheless, the twin objectives of the sentencing policy are deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

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Principles of United Nations Charter on the Use of Force and State Practices

[Note on research in progress for PhD degree]

Udai Pratap Singh
Assistant Professor, AIALS

This doctoral research work is titled "Evaluation of United Nations Charter Principles on Use of Force and State Practices: A Critical Legal Study with special reference to Israel, Russia, and USA". The thesis in progress provides a critical assessment of the legality of use of force under International Law. The research

work highlights the current legal regime on the use of force and seeks to analyze the recent developments and their influence on the legality of use of force by states. It tries to find an answer to what are the boundaries for 'use of force' under the UN Charter, and how states have been pushing this boundary beyond the prescribed limits.

The right of self-defence which is well recognized under international law is studied together with the principle of non-use of force enshrined under Article 2(4) of the UN Charter. The research analyses the interpretations attached to concepts like 'use of force' under international law, 'enforcement action' of Security Council in case of aggression, 'sanctions' imposed like complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The study also throws light on the emerging challenges to the doctrine of use of force like the attacks by non-state actors-terrorists, use of nuclear weapons and cyber-attacks. Further, the research also analyses the role played by International Court of Justice (ICJ) in interpreting the law relating to use of force.

Finally, the state practices of Israel, USA, and Russia in using force have been analyzed. Some of the most important instances of use of force since the UN Charter came into existence have been highlighted like the Suez Canal Crises, Six Day War, Israel Palestine Issue, and Cuban Missile Crises.

Academic Articles

Religious Autonomy under International Human Rights Instruments

Gerhard Robbers
Emeritus Professor of Public Law
University of Trier, Germany

[Extracted from Jaspal Singh (ed): *Religion-State Relations and Family Rights* (2021)]

Introduction

Religious autonomy is an important and widespread concept in freedom of religion or belief. It is guaranteed by many constitutions and international instruments. Usually, religious autonomy is linked with religious institutions like faith communities, churches or other religious bodies. It is thus attached to the institutional side of freedom of religion or belief. Religious autonomy is guaranteed to all religious and ideological communities regardless of their religious or else creed. It is not restricted to certain preferred religions.

Instead of autonomy, often the term self-determination is used. In general legal dogmatics the term autonomy in some jurisdictions is being restricted to a specific range of free decision-making competencies which are transferred to the autonomous institution by the state. Autonomy in this sense, for example, is enjoyed by public universities, local communities or public broadcasting entities. It is a sort of freedom which is given by the grace of the state, in order to constitute for state institutions some distance to government decisions and in order to structure the exercise of freedom. This kind of autonomy often would not be

acceptable to many faith communities. They have their self-stand, independent from the state. Their freedom is acknowledged and guaranteed, not transferred to by the state. It is original freedom, not a special stand inside government and state organisation.

Religious Autonomy under ICPR

One of the predominant and most relevant provisions of international law protecting the right of freedom of religion or belief is the International Covenant on Civil and Political Right of 1966. Article 18 of the Covenant says :

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

OSCE Commitments

The Concluding Document of the Vienna Conference organized by the Organization on Security and Cooperation in Europe has important implications for the autonomy of religious organizations. Principle 16.4 of the Document provides that participating States will respect the right of these religious communities:

(a) to establish and maintain freely accessible places of worship or assembly,

(b) organize themselves according to their own hierarchical and institutional structure,

(c) select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,

(d) solicit and receive voluntary financial and other contributions.

European Human Rights Law

Of foremost importance for the protection of autonomy of religions in Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 9 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which contains the Convention's key substantive provision on freedom of religion or belief, reads:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Union Law

Religious autonomy is respected in European Union Law by various provisions and developments. According to Declaration No. 11 of the Final Act to the Treaty of Amsterdam the European Union respects and does not prejudice the status of faith communities held under membership law. As far as churches enjoy autonomy, European Union Law has to respect this position and must not prejudice it.

The declaration has influenced the framing of the European Charter of Fundamental Rights. According to Article 22 of this Charter the European Union respects the variety of cultures, religions and languages. The official reasoning to this provision explicitly refers to Declaration 11 of Treaty, thus giving ground for the interpretation of also guaranteeing religious autonomy. The draft amendment of the Treaty of the European Community provides in its Article 16C:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations'.

The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework to treatment in employment and occupation is a direct consequence of the process of growing awareness of the needs of church autonomy in the European Union. Accordingly, Article 4 of the Directive provides for far reaching exemptions from the range of requirements for churches. Article 4 reads as follows:

"Member States may have or maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public and private organisations the ethos of which is based on religion or belief, difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature these activities or of the context in which they are carried out person's religion or belief constitute a genuine, legitimate and justified occupational requirement having regard to the organisation's ethos. This difference of treatment shall be implemented taking account that Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. This Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos in which is based on religion or belief to require individuals working for them to

act in good faith and with loyalty to the organisation's ethos."

From this follows that religious autonomy is also respected in European Union Law. There is a growing awareness of the specific needs of religious existence also in this law which has to be deepened and strengthened.

Limits of Religious Autonomy

Religious autonomy or self-determination follows from state neutrality towards religions. Neutrality also means non-intervention into the internal affairs of religious organizations. Thus all religious organizations regardless of their organisational status enjoy very broad self-determination, or autonomy. Within the limits established by constitutional law or international instruments they can decide freely about their own affairs. Religious freedom also means to be able to live according to one's own beliefs.

As a practical example of case law, a medical doctor was legally dismissed by a catholic hospital in Germany when he in a national newspaper and on TV propagated far-reaching freedom of abortion by particularly pointing at his position in the Catholic hospital. Loyalty obligations can be determined by the religiously engaged employer quite freely in order to protect their image in public life, always balancing them with the freedom of expression of the employee.

Limitations to religious self-determination are only those prescribed by "the law that applies to all". There is some debate about the correct meaning of the limitation phrase. Only those general laws can limit religious autonomy which are necessary to guarantee "compelling requirements" of a peaceful coexistence in a society which is religiously neutral and respectful to the freedom of religious organizations. Colliding interests of religious organizations and state (or society) have to be brought to a considerate and careful balance, leading if ever possible to an optimum for both of them.

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India's Hybrid Law on Domestic Relations: Past and Present

[Extracts from t Introduction in author's new book *Supreme Court on Muslim Law* : 2022]

Tahir Mahmood
Professor of Eminence & Chairman, AIALS

Religious Laws & Custom

Modern India is maintaining a hybrid system of family law. It is a conglomeration of general laws on family affairs which are applicable to all irrespective of religious beliefs and practices and special laws that are applicable to particular religious communities. The latter are generally known as personal laws. To comprehend the attributes of this rather complicated system we have to briefly look into the annals of the country's legal history of the past several hundred years.

In the 17th century when the British came to India and gradually became the rulers of various regions here, family rights and relations in the countries of both the rulers and the ruled were governed by the locally prevailing religions. In Britain these were part and parcel of the rules of canon law,

and in the multi-religious India a basic constituent of each community's respective religious edicts. The early statutes of administration proclaimed by the British rulers for India declared that family affairs of the two major communities here – the Hindus and the Muslims – would be governed by what they called laws of the *Shaster* and the *Koran* [Dharmashastras and Quran].

In the famous *Ramnad* case of 1868 the Privy Council held that "under the Hindu system of law clear proof of usage would outweigh written text of the law." Presuming that the same would be the case under Muslim law, priority of custom over religious laws for both communities was established under various laws on judicial administration enacted by the central legislature. Section 5 of the Punjab Laws Act 1872, for instance, declared:

> 5. *Decisions in certain cases to be according to Native law*.– In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be –
>
> (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;
>
> (b) the Mohammedan law in cases where the parties are Mohammedans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

There were identical provisions in the Madras Civil Courts Act of 1873, Central Provinces Laws Act 1875, Oudh Laws Act of 1876, and similar laws meant for some other territories under British rule.

Neither the Hindu nor the Muslim law was a uniform system. Hindu law had two broad versions – Mitakshara and Dayabhaga – and the former had four internal divisions [later called the Bombay, Madras, Banaras and Mithila schools].

Similarly, there were Sunni and Shia versions of Muslim law and both had their multiple *mazahib* [schools of law] four of which were followed in India [Hanafi and Shafei among the Sunnis, Ithna Ashari and Ismaili among the Shias]. The expressions Hindu law and Mohammedan law in the laws of judicial administration referred to above were to be accordingly understood and applied by the courts.

For Muslim law the Privy Council [then the highest court of appeal for India] had already held in an old case between Shia litigants that "If each sect has its own rule according to Mohammedan law that rule should be followed with reference to the litigants of that sect" [*Rajah Deedar Hossein* 1841].

This dictum accorded protection to and perpetuated the Sunni-Shia difference in respect of Muslim family law.

Legislation on Family Issues

Under the laws referred to above no sanctity was accorded to either custom or religious laws. Both were, as in Britain, kept within the social reform jurisdiction of the legislature and other competent authorities. When in mid- 19th century the British Parliament began enacting laws on family matters for England, a similar exercise was gradually undertaken by the central legislature here for the so-called British India. In the course of time came on the statute book several laws relating to family relations, applicable either in general to all communities or to particular religious groups. The first law of general application among these was the Caste Disabilities Removal Act of 1850 and the first community-specific law the Hindu Widows Remarriage Act of 1856. In the coming years were enacted several other laws of both categories.

Among the family laws of general application enacted after 1850 were the Special Marriage Act 1872, the Indian Majority Act 1875, the Guardians and Wards Act 1890, and the Child Marriage Restraint Act 1929.

The series of special laws enacted for the Hindus after 1856 began with the Hindu Wills Act 1870 and ended with the Hindu Women's Right to Property Act 1937. For the Muslims it began with the Kazis Act 1880 and ended with the Dissolution of Muslim Marriages Act 1939.

Judiciary & Personal Laws

The British rulers had inherited from the Mughals a two-tier system of civil and criminal courts known as the *diwani* and *faujdari adalats* [civil and criminal courts] working at the *mufassil* and *sadar* [lower and higher] levels. They retained the system in force and appointed their own men as judges. As the English judges were not conversant with Indian languages and religion-based laws, to assist them they appointed "native law officers" – *pandits* and *kazis* – to expound the religious law applicable in any given case. The conduct and performance of these expounders of native laws had, however, attracted severe strictures from some eminent lawyers and judges of the time. Charles Hamilton said that the native law officers "were sometimes themselves too ill-informed to be capable of judging and were generally open to corruption." William Jones wrote: "a single obscure test as explained by themselves might be quoted as express authority though perhaps in the very book from which it was selected it might be differently explained." He also said that the native law officers "dole out law as they please and can make it at reasonable rates when they cannot find it ready made" [MP Jain, *Indian Legal History,* 3rd ed. 1972].

In these circumstances the authenticity of the British-Indian courts' decisions on the points of Hindu and Muslim laws was anybody's guess. Though Hindu law was no exception, Muslim law consequently got too much distorted. To make things worse, the Privy Council expressly barred the courts in India from looking into the original sources

of Muslim law to ascertain if a provision as popularly understood in fact conformed to the dictates of those sources [*Aga Mahomed Jafar*, 1897; *Baqar Ali*, 1902]. These rulings greatly restricted the role of the courts in discovering the true Muslim law and prevented them from removing distortions resulting from the judicially recognized opinions of the so-called native law officers.

In a post-independence Kerala High Court case relating to an issue of Muslim law Justice VR Krishna Iyer observed:

> "Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia" [*A. Yousuf Rawther* 1971].

Post-Constitution Years

The hybrid system of family law, consisting of community-specific religious laws and customs subjected to sporadic legislative reform, was prevailing in India at the time of the advent of independence. The system was covered by the provision of Article 372 (1) of the Constitution declaring that all the pre-Constitution laws were to remain in force "until altered or repealed or amended by a competent legislature or other competent authority." The Constitution, clearly, did not protect the personal law of any community for all times to come. On the contrary, the Concurrent List in Schedule VII of the Constitution placed within the jurisdiction of both the Union and the States:

> "Marriage and divorce; infants and minors; adoption; wills, intestacy and succession, joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law" [List III, Concurrent List, Entry 5].

Article 25 of the Constitution relating to people's religious freedom also did not protect any personal law. It was a qualified right subjected to considerations of public order, morality and health – with an additional clarification that it would not prevent the State from making laws for "regulating or restricting any economic, financial, political or other secular activity associated with religious practice" or for the purpose of "social welfare and reform." These restrictive provisions and clarifications were to apply alike to all citizens irrespective of religion; and the courts later ruled in several cases that only those practices, of whichever denomination or sect, as are its essential features could be protected under Article 25.

After the enforcement of the Constitution the conventional duality in the family law domain was, however, maintained. The first two family law Acts of independent India enacted during 1954-55 were the Special Marriage Act [general law of an optional nature available to all irrespective of religion] and the Hindu Marriage Act [compulsorily applicable to the Hindus, Buddhists, Jains and Sikhs]. As regards the Muslims, rulers of the day were more concerned about the management of

wakfs [religious endowments]. During those very years [1954-55] they put on the statute book a general Wakf Act and a special Act for the Ajmer Dargah. The Hindu Marriage Act of 1955 was quickly followed by another three Acts of a similar nature covering the rules of minority, guardianship, adoption, maintenance and succession. No such law was ever enacted for the Muslims. The rulers endlessly kept waiting for "initiative to come from the community" – meaning by "community" religious circles to the exclusion of saner voices coming from enlightened sections.

The traditional Muslim law on marriage and divorce which is believed by the common Muslims in India to be sacrosanct is at great variance with its amended versions now applicable in many Muslim-dominated countries of West Asia, North Africa, South Asia and Southeast Asia. The major reform areas there have been polygamy, unilateral divorce by men, and women's divorce and post-divorce rights. Eminent judge of his time Mohammad Hidayatullah who had begun editing DF Mulla's *Principles of Mahommedan Law* in 1966 added a lucid Introduction to the book, ending with these optimistic words:

> "If the injunctions of the Quran and Hadith are not lost sight of it is possible to make changes by legislation in a widening area. The latter day writers like Ameer Ali, Iqbal and reformers like Muhammad Abduh maintained the possibility of reform. The lead is coming from Muslim countries and it is hoped that in course of time the same measures will be introduced in India also." [16th edition 1968]

His pious hope, however, remained unfulfilled. Till this day Parliament has enacted for the Muslims only two brief laws – Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women (Protection of Rights on Marriage) Act 2019 – the former on vehement demand of religious leaders and the latter despite their strict resentment.

Uniform Civil Code

Article 44 in Part IV of the Constitution containing Directive Principles of State Policy – all of which are non-justiceable as per Article 37 – said that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." The civil code here meant family law since in the other civil matters all communities were already governed by uniform laws. The directive, notably, was not to enact such a code straight away but to make efforts to gradually "secure" uniformity in this legal discipline as well.

In a number of cases decided till date, mostly under the personal laws of the Muslims and Christians – beginning with *Shah Bano* and *Jorden Diengdeh*, both of 1985 – some judges of the Supreme Court have reminded the rulers of the country of this provision under the Constitution. They have, however, respected its non-justeable nature and refrained from issuing any binding directions in this regard. In one such case [*Sarla Mudgal*, 1995] Kuldip Singh, J had said "We further direct the Government of India" to file an affidavit indicating "the steps taken and efforts made" towards securing a uniform civil code. In a later case

[*Lily Thomas*, 2000], however, both the judges on a Division Bench [R. Sethi and Saghir Ahmad] clarified that what was said by Kuldip Singh, J in *Sarla Mudgal* was not a direction but a reminder. The other learned judge on the *Sarla Mudgal* Bench, RM Sahai, had observed:

> "The desirability of uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society. Statesmen amongst leaders who instead of gaining personal mileage must rise above and awaken the masses to accept the change."

Talking of a uniform civil code in the *Shabnam Hashmi* case of 2014 Justice Ranjan Gagoi said:

> "The same can only happen by the collective decision of the generations to come to sink conflicting faiths and beliefs that are still active as on date."

In 2016 a reference was made by the government of the day to the Law Commission of India to examine all issues relating to uniform civil code. In the report submitted two years later former Supreme Court judge BS Chauhan chairing the Commission had, however, observed that a uniform civil code "is neither necessary nor desirable at this stage" [*Consultation Paper*, 2018].

Notably, the central family and personal law Acts do not apply until now in those parts of India which were in the past governed by European powers other than Britain. The Portuguese laws in force in Goa, Daman and Diu and the French laws in Pondicherry at the time of their liberation were protected by Parliamentary legislation and are being religiously enforced till date by the courts. In a recent case Goa was even admired for being "a shining example of an Indian State which has a uniform civil code applicable to all" [Justice Deepak Gupta in *Jose Paulo,* 2019]. What was called a local "uniform civil code" is, notably, over a century old foreign law replete with archaic provisions which have long been abandoned even in the country of its birth.

Retention of old foreign laws in certain regions of the country is *prima facie* contrary to the "throughout the territory of India" clause in Article 44 of the Constitution. The need to do away with these regional diversities based on outdated foreign laws, however, remains eclipsed by the curiosity to achieve uniformity in family laws in force in general in the rest of the country. As regards the Muslims, they are given in practice a choice between accepting a uniform civil code [whose contents are anybody's guess] or sticking to their anti-Islamic traditional law. The via media of giving them a modern Muslim family law statute [as in many foreign countries] is practically ruled out.

In the *Sarla Mudgal* case of 1995, while one judge on the Bench had passionately pleaded for a uniform civil code, the other had advised the rulers to entrust the issue of minorities' personal law reform jointly to the Law Commission of India and the National Minorities Commission. The very sensible advice was, however, never accepted. No issue of Muslim law has in fact ever been referred to either of these Commissions, right from their inception in 1955 and 1978 respectively till this date. An organization called the All India Muslim

Personal Law Board, set up in 1973 with the declared object of protecting in the country the traditional understanding of Muslim law, has been dead opposed to its legislative or judicial reform to any extent. Seemingly, both the State and its parastatal bodies have been unduly cognizant of Board's moves.

In mid-1980s during the agitation against the *Shah Bano* decision an unsolicited advice given to the rulers by the then Minorities Commission Chairman Justice MH Beg – "we have to try to lead religious leaders out of darkness into light and not allow them to lead us into darkness" – was paid no heed. And in 2009 Chairman of the 18th Law Commission Justice AR Lakshmanan had refrained from endorsing a member's report suggesting an overhaul of the old and outdated Shariat Act of 1937 regulating the scope and application of Muslim law.

Apex Court's Role

In these circumstances the apex court of the country has to play, unavoidably, the role of a social reformer. Its decision in several cases that the right to religious freedom under the Constitution protects only essential practices of religion has to be vigorously applied to cases under Muslim law. Notably, it very well fits in the Islamic classification of human actions into two broad categories – *farz* or *wajib* [mandatory in the first and second degrees] and *jaaez* or *mubah* [not specifically prohibited and hence permissible].

The constitutionally mandated job of providing for social welfare and reform is, of course, to be performed by the executive organ of the State through its legislative counterpart. The endless inaction on their part, however, makes it unavoidable for the judiciary to act. Talking of a three-pillar democratic polity, former Chief Justice RC Lahoti had once said:

> "An obligation is cast on one pillar to be ready to additionally bear the weight and burden if another pillar becomes weak or for some reason or the other is unable to bear the weight or is in the danger of crumbling." [Lecture on Judicial Activism, 8 November 2004]

It is gratifying that the nation's apex court is now bearing such "weight and burden" in respect of the need for removing the distortions from Muslim family law and applying its principles in the correct perspective.

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The Issue of Child Adoption by Same-Sex Couples in India : An Overview

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India has a LGBTQIA population of 2.5 million according to government estimates. Even though the strength of the community is huge in number, it has always been a victim of social stigma and discrimination. The decriminalization of the draconian Section 377 in 2018 was widely celebrated and perceived as a ray of hope for uplifting the condition of the community in Indian society. But even after two years, the community struggles for basic rights such as marriage and adoption. In 2019 a review plea seeking marriage, adoption and surrogacy rights of the community was dismissed by the Supreme Court. While there is no bar on adoption by the single

people of the community, the law of the land is not conducive to adoption by same-sex couples. Even though one of the two partners of the same-sex couple can adopt as a single parent under existing laws, this deprives the other partner of any legal right over the child.

According to a study by UNICEF, there are 29.6 million orphaned and abandoned children in India which is a country with a disconcertingly low adoption rate. However, the willing same-sex couples are still deprived of their adoption rights in the country. This article aims to discuss the need for granting adoption rights to the same-sex couples in India.

Hindu Law of Adoption

Adoption among the Hindus, Buddhists, Jains and Sikhs is governed by the Hindu Adoptions and Maintenance Act of 1956. Under this Act adoption can be undertaken by Hindus, Buddhists, Jains, Sikhs and other religions governed by Hindu Law. While stating the capacity for adoption, Sections 7 & 8 of the Act use the words "husband" and "wife" which implies that the act does not recognize adoption by same-sex couples. Moreover, capacity for adoption is stated for Hindu males and Hindu females and, therefore, there is a grey area regarding application of such laws to third-gender couples.

Juvenile Justice Act

The Juvenile Justice (Protection and Care of Children Act 2015 opens the option of adoption to any person regardless of their religion, with the criteria being through the Central Adoption Resource Authority (CARA). The CARA is the apex controlling body in adoption matters under the Ministry of Women and Child Development and has framed the Adoption Regulations of 2017 which lays down the rules and guidelines for adoption programs in the country. The eligibility of Prospective Adoptive Parents (PAPs) is laid down under Section 57 of the Act and Regulation 5 of the Adoption Regulations. One of the requirements states that "no child shall be given in adoption to a couple unless they have at least two years of stable marital relationship". Since same-sex marriages are yet to be recognized in India, it is not possible for same-sex couples to establish two years of stable marital relationship and this renders them ineligible to be PAPs. Moreover, the societal stigma involved with such kind of relationships further discourages the authorities from granting adoption to such couples.

Constitutional Perspective

The abovementioned acts are violative of Articles 14, 15 and 21 of the Constitution of India. Article 14 guarantees the right to equality before law and equal protection of law to every Indian citizen. It is fundamental right which is a part of the basic structure of the Constitution. Article 14 aims to strike arbitrariness in state action because any arbitrary actions must necessarily involve negation of equality. The discrimination between the married and unmarried couples for the purpose of adoption does not pass the classification test and is arbitrary as classification is unjust, unfair and unreasonable in nature. Moreover, there is no rational nexus which can be achieved by discrimination between different-sex and same-sex couples on the basis of their sexual

orientation as there is no evidence to show that same-sex couples are in any way inferior in parenting as compared to different-sex couples. Research shows that having LBTQIA parents does not affect a child at all and in fact, children brought up by same-sex parents perform better during both their primary as well as secondary education.

Article 15 prohibits discrimination on the basis of "sex" which includes discrimination on grounds of sexual orientation as laid down in the case of National Legal Services Authority v. Union of India. Therefore, the right of adoption of the same-sex couples is protected under Article 15 as no discrimination can be made against them because of their sexual orientation and they must be granted adoption rights like different-sex couples.

Judicial Trends

Article 21 protects life and individual liberty which includes the right to live with dignity as laid down in *K.S Puttaswamy v Union of India* (2017) 10 SCC 1.

In the case of *Navtej Singh Johar v Union of India* AIR 2018 SC 431 the court referred to a Canadian case which stated that human dignity is harmed when unfair treatment is meted out based on personal traits or circumstances which do not relate to individual needs, capacities, or merits.

It was also held in this case that the LGBT community has the same human, fundamental and constitutional rights as other citizens do as these rights are inherent natural and human rights and the people of community should not be given step-motherly treatment on the pretext of social morality. The disentitlement of adoption by same-sex couples harms the dignity of the people from the community as it is based on their sexual orientation which does not relate to their capacity or merit as prospective parent.

Conclusion

Adoption by same-sex couples is already allowed in countries like Spain, Belgium, Spain, etc. India is a country which has decriminalized homosexuality in 2018 and the rights of the LGBTQIA have been recognized only recently. It has to be noted that both the acts governing adoption came into force at a time when homosexuality was criminalized. Since the position has been legally changed now, there is a requirement for realization of the rights of the community and a treatment which is equal to that of the heterosexual section of the society. Sensitization programs must be encouraged by the governments to eradicate the myths and the societal stigma revolving around the lifestyle and relationships of the people from the community.

The *Navtej Singh Johar* judgment of 2018was a major step towards upliftment of the position of the community in the society but still a lot is required to be done by both the judiciary and the legislature. The state should not only legalize the same-sex marriages, but it should also amend the existing laws to provide legal recognition to adoption by same-sex couples.

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