

READING MATERIAL

REGIONAL TRAINING PROGRAMME
FOR SENSITIZATION OF FAMILY COURT JUDGES

For the States:

Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Jharkhand, Odisha, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and West Bengal

Date: 21st & 22nd September, 2019

Prepared by:

Jharkhand State Legal Services Authority



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Date: 21st & 22nd September, 2019

Year of Publication: 2019

Compiled By

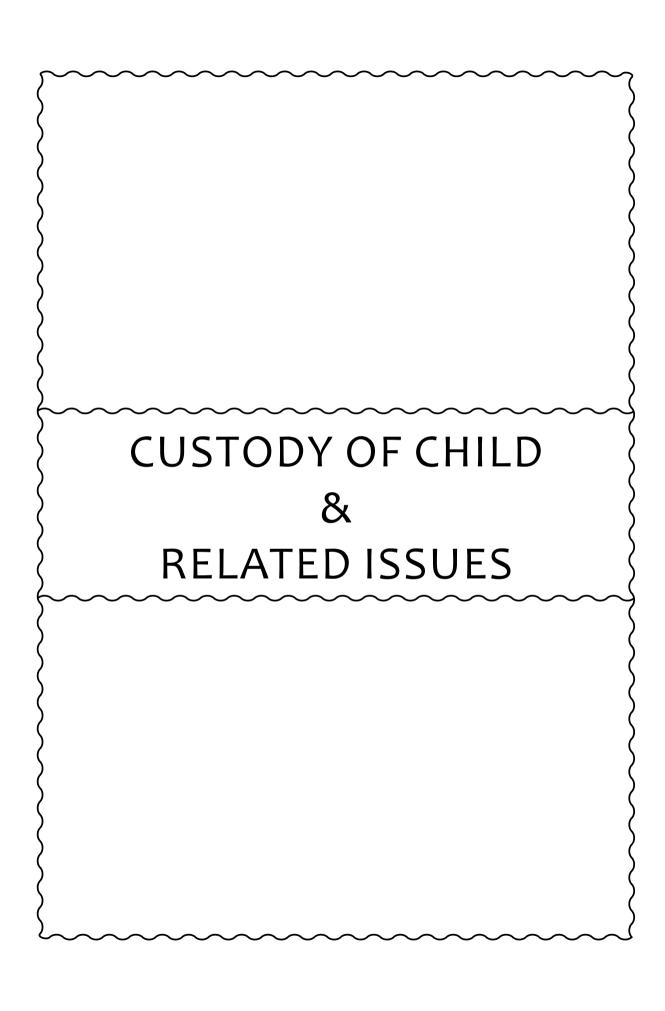
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GAYTRI BAJAJ VERSUS JITEN BHALLA

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice P. Sathasivam and Hon'ble Mr. Justice Ranjan Gogoi

Gaytri Bajaj Appellant Versus Jiten Bhalla Respondent

Civil Appeal Nos. 7232-7233 of 2012

(Arising out of SLP (Civil) 35468-69 of 2009)

Decided on 5 October, 2012

- "3. The facts lies in a short compass and may be usefully recapitulated at this stage. The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as the Act) seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act.
- 4. It appears that without waiting for the period prescribed under Section 13B (2) of the Act, a second Motion was moved by the parties before the learned Court on 26.05.2003 seeking divorce by mutual consent. By order dated 3.6.2003 the learned trial court, after recording its satisfaction in the matter, granted a decree of divorce under the aforesaid provision of the Act. It may be specifically noticed, at this stage, that in the joint petition filed before the learned trial court it was specifically stated that, under the terms of the agreement between the parties, the respondent-husband was to have sole custody of the two minor daughters and the appellant-wife had agreed to forego her rights of visitation keeping in view the best interest and welfare of the children.
- 5. After the expiry of a period of almost three years from the date of decree of the divorce granted by the learned trial court, the appellant- wife instituted a suit seeking a declaration that the decree of divorce dated 3.6.2003 is null and void on the ground that her consent was obtained by acts of fraud and deceit committed by the respondent husband. A further declaration that the marriage between the parties is subsisting and for a decree of perpetual injunction restraining the husband from marrying again was also prayed for in the suit. The respondent-husband filed written statement in the suit denying the statements made and contesting the challenge to the decree of divorce. While the aforesaid suit was pending, the appellant-wife filed an application under Section 151 of the Code of Civil Procedure to recall/set aside the judgment and decree dated 03.06.2003 passed

in the divorce proceeding between the parties. The aforesaid application under section 151 of the Code was filed despite the institution of the separate suit seeking the same/similar reliefs. On the basis of the aforesaid application filed by the appellant-wife the learned trial court by order dated 25.09.2007 recalled the decree of divorce dated 3.6.2003. Aggrieved, an appeal i.e. Matrimonial appeal No. 72/2007, was filed by the respondent-husband in the High Court of Delhi which was allowed by the order dated 08.09.2008. The application seeking review of the aforesaid order dated 08.09.2008 was dismissed by the High Court on 10.07.2009. Both the aforesaid orders dated 08.09.2008 and 10.07.2009 have been assailed before us in the present appeals.

- 6. In so far as the validity of the decree of divorce dated 03.06.2003 is concerned we do not propose and also do not consider it necessary to go into the merits of the said decree inasmuch as the High Court, while setting aside the order of the learned trial court dated 25.09.2007 recalling the decree of divorce, had clearly observed that it is open for the appellant-wife to establish the challenge to the said decree made in the suit already instituted by her. Thus, while taking the view that the order of the learned trial court dated 25.09.2007 recalling the decree of divorce was not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.
- 7. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.
- 8. We have already noticed that in the joint petition filed by the parties seeking a decree of divorce by mutual consent it was clearly and categorically stated that the husband would have custody of the children and the wife will not insist on any visitation rights. It was also stated that the wife had agreed to do so in the interest and welfare of the children.
- 9. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to continue to live with their father and they do not want to go with their mother.

This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children.

However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

- (i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over bo'th of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent- husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.
- (ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.
- 10. What happened thereafter has been stated in an application filed by the respondent-husband before this Court (Interlocutory Application No.4/2012) seeking vacation/modification of the interim arrangement made by the order dated 16.12.2011. In the said application, it has been stated that pursuant to the order dated 16.12.2011 the respondent-father along with both the children had come to the Supreme Court Mediation Centre at about 10 a.m. on 17.12.2011. However, the children refused to go with their mother and the appointed Mediator, inspite of all efforts, did not succeed in persuading the children. At about 1.30 p.m. the respondent, who had left the children in the Mediation Centre, received a call that he should come and take the children back with him. In the aforesaid I.A. it has been further stated that on 30.12.2011 when the children were due to visit the Mediation Centre once again, both the children started behaving abnormally since the morning and had even refused to take any food. After reaching the Mediation Centre, the children once again refused to go with their mother and the mediator had also failed to convince the children.

Eventually, at about 12.00 p.m., the respondent took both the children home. Thereafter, both the children have declined to visit the Mediation Centre any further. Before the next date for appearance in the Mediation Centre, i.e., 14.01.2012 the said fact was informed to the learned counsel for the appellant by the respondent through his counsel by letter dated 13.01.2012.

- 11. Though the above facts stated in the aforesaid I.A. are not mentioned in the report of the Mediator submitted to this Court, what is stated in the aforesaid report dated 14.01.2012 is that on 14.01.2012 the respondent and the children were not present and that a letter dated 13.01.2012 from the counsel for the respondent had been placed before the Mediator wherein it has been stated that though the children had earlier attended the Mediation Centre they are now refusing to come to the Centre and all efforts in this regard made by their father have failed. It will also be significant to note that the statements made in the I.A. have not been controverted by the appellant wife in any manner.
- 12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal[1] the principles of English and American law in this regard were considered by this Court to hold that the

legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved[2]; Rosy Jacob v. Jacob A Chakramakkal[3] and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka[4] this Court eventually concluded in paragraph 50 and 51 that: 50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues.

The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Gangulis case the court has to give due weightage to the childs ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

- 51. The word welfare used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.
- 13. The views expressed in Para 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli[5] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree[6] would also require a special mention.
- 14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.
- 15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory

CUSTODY OF CHILD & RELATED ISSUES

conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court."



SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Madan B. Lokur & Hon'ble Mr. Justice Uday Umesh Lalit

Surya Vadanan ...Appellant Versus State of Tamil Nadu & Ors. ...Respondents

CRIMINAL APPEAL NO. 395 OF 2015

(Arising out of S.L.P. (Crl.) No.3634 of 2014)

- "2. The question before us relates to the refusal by the Madras High Court to issue a writ of habeas corpus for the production of the children of Surya Vadanan and Mayura Vadanan. The appellant sought their production to enable him to take the children with him to the U.K. since they were wards of the court in the U.K. to enable the foreign court to decide the issue of their custody.
- 3. In our opinion, the High Court was in error in declining to issue the writ of habeas corpus.

The facts

- 4. The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India.
- 5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.
- 6. On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age.
- 7. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them.
 - According to Surya, the reason for the purchase of roundtrip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

- 8. Be that as it may, on her arrival in India, Mayura and her daughters went to her parents house in Coimbatore (Tamil Nadu) and have been staying there ever since.
- 9. On 21st August, 2012 Mayura prepared and signed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955¹ seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.
- 10. On or about 23rd August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.
- 11. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.
- 12. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012. We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein.

Proceedings in the U.K.

- 13. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8th November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that perhaps they would not be returning to continue their studies.
- 14. On 13th November, 2012 the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. The relevant extract of the order passed by the foreign court on 13th November, 2012 reads as under:-

"IT IS ORDERED THAT:

^{13.} Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party— (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

⁽i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or [rest of the provision is not relevant]

- 1. The children SNEHA LAKSHMI VADANAN AND KAMINI LAKSHMI VADANAN shall be and remain wards of this Honourable Court during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court.
- 2. The Respondent mother shall:
- a. By no later than 4 p.m. on 20th November 2012 inform the father, through his solicitors (Messrs Dawson Cornwell, 15 Red Lion Square, London, WC1R 4QT. Tel: 0207 242 2556 Ref: SJ/AMH), of the current care arrangements for the children;
- b. By no later than 4 p.m. on 20th November 2012 inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;
- c. Return the children to the jurisdiction of England and Wales by no later than 11.59 p.m. on 27th November 2012;
- d. Attend at the hearing listed pursuant to paragraph 3 herein, together with solicitors and/or counsel if so instructed. A penal notice is attached to this paragraph.
- 3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London on 29th November 2012 at 2 p.m. with a time estimate of 30 minutes.
- 4. The mother shall have leave, if so advised, to file and serve a statement in response to the statement of the Applicant father. Such statement to be filed and served by no later than 12 noon on 29th November 2012.
- 5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the order of the court.
- 6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.
- 7. The Applicant father shall have leave to disclose this order to:
- a. The Foreign and Commonwealth Office;
- b. The British High Commission, New Delhi;
- c. The Indian High Commission, London
- d. Into any proceedings as the mother may have issued of India, including any divorce proceedings.
- 8. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

- 15. In response to the petition filed by Surya, a written statement was filed by Mayura on 20th November, 2012. A rejoinder was filed by Surya on 13th December, 2012.
- 16. Apparently, after taking into consideration the written statement, the foreign court passed another order on 29th November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The relevant extract of the order dated 29th November, 2012 reads as under:-

"IT IS ORDERED THAT:

- 1. The children SNEHA LAKSHMI VADANAN AND KAMINI VADANAN shall be and remain wards of this Hon'ble Court during their minority and until such time as this provision of this Order is varied or alternatively discharged by the further Order of the Court.
- 2. The 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal Grandmother shall:
- a. Forthwith upon serve of this Order upon them inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;²
- b. Return the children to the jurisdiction of England and Wales forthwith upon service of this Order upon them;

A penal notice is attached to this paragraph.

- 3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London within 72 hours of the return of the children or alternatively upon application to the Court for a further hearing.
- 4. The father shall have leave, if so advised, to file and serve a statement of the mother. Such statement to be filed and served by no later than 12 noon on 13th December 2012.
- 5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the Order of the Court.

There is no paragraph 2(c) in the text of the order supplied to this court.

- 6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this Order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.
- 7. The Applicant father shall have leave to disclose this order to:
- a. The Foreign and Commonwealth Office;
- b. The British High Commission, New Delhi;
- c. The Indian High Commission, London;
- d. Into any proceedings as the mother may have issued in the jurisdiction of India, including any divorce proceedings.
- 8. The maternal grandparents Dr. Srinivasan Muralidharan and Mrs. Rajkumari Murlidharan shall be joined as Respondents to this application as the 2nd and 3rd Respondents respectively.
- 9. The mother shall make the children available for skype or alternatively telephone contact each Sunday and each Wednesday at 5.30 p.m. Indian time.
- 10. Liberty to the 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal grandmother to apply to vary and/or discharge this order (or any part of it) upon reasonable notice to the Court and to the solicitors for the father.
- 11. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

17. We are told that no further effective or substantial orders have been passed by the foreign court thereafter.

Proceedings in the High Court

- 18. Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.
- 19. After completion of pleadings, the petition filed by Surya was heard by the Madras High Court and by a judgment and order dated 4th November, 2013 the writ petition was effectively dismissed.

- 20. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the High Court was of opinion that since the children were in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of habeas corpus.
- 21. Feeling aggrieved, Surya has preferred the present appeal on or about 9th April, 2014. Important decisions of this court
- 22. There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are: (1) Sarita Sharma v. Sushil Sharma³, (2) Shilpa Aggarwal v. Aviral Mittal & Anr.⁴, (3) V. Ravi Chandran v. Union of India⁵, (4) Ruchi Majoo v. Sanjeev Majoo⁶, and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao.¹ These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma
- 23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.
- 24. Subsequently on 12th June, 1997 Sushil Sharma obtained a divorce decree from the foreign court and also an order that the sole custody of the children shall be with him. Armed with this, he moved the Delhi High Court on 9th September, 1997 for a writ of habeas corpus seeking custody of the children. The High Court allowed the writ petition and ordered that the passports of the children be handed over to Sushil Sharma and it was declared that he could take the children to USA without any hindrance. Feeling aggrieved, Sarita Sharma preferred an appeal in this court.
- 25. This court noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. It also noted that Sarita Sharma's conduct was not "very satisfactory" but that before she came to India, she was in lawful custody of the children but "she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission."
- 26. This court noted the following principles regarding custody of the minor children of the couple:

^{3 (2000) 3} SCC 14

^{4 (2010) 1} SCC 591

^{5 (2010) 1} SCC 174

^{6 (2011) 6} SCC 479

^{7 (2013) 15} SCC 790

- (1) The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.⁸
- (2) Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.⁹
- (3) The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.¹⁰

On the merits of the case, this Court observed:

"Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held."

- 27. Notwithstanding this, neither was the matter remanded to the High Court for issuing such a direction to Sushil Sharma to approach the appropriate court for conducting a "full and thorough" inquiry nor was such a direction issued by this court. The order of the Delhi High Court was simply set aside and the writ petition filed by Sushil Sharma was dismissed.
- 28. We may note that significantly, this court did not make any reference at all to the principle of comity of courts nor give any importance (apart from its mention) to the passage quoted from Surinder Kaur Sandhu to the effect that:

"The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."

- (2) Shilpa Aggarwal v. Aviral Mittal & Anr.
- 29. Shilpa Aggarwal and her husband Aviral Mittal were both British citizens of Indian origin. They had a minor child (also a foreign national) from their marriage. They had matrimonial differences and as a result, Shilpa Aggarwal came to India from the U.K. with their minor child. She was expected to return to the U.K. but cancelled their return

⁸ Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698

⁹ Surinder Kaur Sandhu v. Harbax Singh Sandhu

Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 which in turn referred to McKee v. McKee, 1951 AC 352: (1951) 1 All ER 942 (PC)

tickets and chose to stay on in India. Aviral Mittal thereupon initiated proceedings before the High Court of Justice, Family Division, U.K. and on 26th November, 2008 the foreign court directed Shilpa Aggarwal, inter alia, to return the minor child to the jurisdiction of that foreign court. Incidentally, the order passed by the foreign court is strikingly similar to the order passed by the foreign court subject matter of the present appeal.

- 30. Soon thereafter, Shilpa Aggarwal's father filed a writ petition in the Delhi High Court seeking protection of the child and for a direction that the custody of the child be handed over to him. The High Court effectively dismissed the writ petition and granted time to Shilpa Aggarwal to take the child on her own to the U.K. and participate in the proceedings in the foreign court failing which the child be handed over to Aviral Mittal to be taken to the U.K. as a measure of interim custody, leaving it for the foreign court to determine which parent would be best suited to have the custody of the child.
- 31. Feeling aggrieved, Shilpa Aggarwal preferred an appeal before this court which noted and observed that the following principles were applicable for deciding a case of this nature:
 - (1) There are two contrasting principles of law, namely, comity of courts and welfare of the child.
 - (2) In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.¹¹ Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.¹²
- 32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact¹³ with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.
 - (3) V. Ravi Chandran v. Union of India
- 33. The mother (Vijayasree Voora) had removed her minor child (a foreign national) from the U.S.A. in violation of a custody order dated 18th June, 2007 passed by the Family Court of the State of New York. The custody order was passed with her consent and with the consent of the child's father (Ravi Chandran, also a foreign national).
- 34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed to immediately turn over the minor child and his passport to Ravi Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

¹¹ Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.

¹² Sarita Sharma v. Sushil Sharma

¹³ Surinder Kaur Sandhu v. Harbax Singh Sandhu

- 35. On these broad facts, Ravi Chandran moved a petition for a writ of habeas corpus in this court for the production of the child and for his custody. The child was produced in this court and the question for consideration was: "What should be the order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national."
- 36. This court referred to a large number of decisions and accepted the following observations, conclusions and principles:
 - (1) The comity of nations does not require a court to blindly follow an order made by a foreign court.¹⁴
 - (2) Due weight should be given to the views formed by the courts of a foreign country of which the child is a national. The comity of courts demands not the enforcement of an order of a foreign court but its grave consideration. The weight and persuasive effect of a foreign judgment must depend on the facts and circumstances of each case. 16
 - (3) The welfare of the child is the first and paramount consideration,¹⁷ whatever orders may have been passed by the foreign court.¹⁸
 - (4) The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other.¹⁹
 - (5) One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country.²⁰
 - (6) While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custody of the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances.²¹ An order that the child should be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.²²

¹⁴ B's Settlement, In re. B. v. B., 1940 Ch 54: (1951) 1 All ER 949 and McKee v. McKee

¹⁵ McKee v. McKee

¹⁶ McKee v. McKee

¹⁷ McKee v. McKee

¹⁸ B's Settlement, In re

¹⁹ Kernot v. Kernot, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 All ER 339

²⁰ H. (Infants), In re, (1966) 1 WLR 381 (Ch & CA): (1966) 1 All ER 886 (CA)

²¹ L. (Minors), In re, (1974) 1 WLR 250: (1974) 1 All ER 913 (CA)

²² L. (Minors), In re,

- (7) The modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.²³
- 37. On the facts of the case, it was held that an elaborate inquiry was not required to be conducted. It was also observed that there was nothing on record which could remotely suggest that it would be harmful for the child to return to his native country. Consequently, this court directed the repatriation of the child to the jurisdiction of the foreign court subject to certain directions given in the judgment.
- 38. This court also quoted a passage from Sarita Sharma to the effect that a decree passed by a foreign court cannot override the consideration of welfare of a child.
 - (4) Ruchi Majoo v. Sanjeev Majoo
- 39. Ruchi Majoo (wife) had come to India with her child consequent to matrimonial differences between her and her husband (Sanjeev Majoo). All three that is Ruchi Majoo, Sanjeev Majoo and their child were foreign nationals.
- 40. Soon after Ruchi Majoo came to India, Sanjeev Majoo approached the Superior Court of California, County of Ventura in the USA seeking a divorce from Ruchi Majoo and obtained a protective custody warrant order on 9th September, 2008 which required Ruchi Majoo to appear before the foreign court. She did not obey the order of the foreign court perhaps because she had initiated proceedings before the Guardian Court at Delhi on 28th August, 2008. In any event, the Guardian Court passed an ex-parte ad interim order on 16th September, 2008 (after the protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.
- 41. Aggrieved by this order, Rajiv Majoo challenged it through a petition under Article 227 of the Constitution filed in the Delhi High Court. The order of 16th September, 2008 was set aside by the High Court on the ground that the Guardian Court had no jurisdiction to entertain the proceedings since the child was not ordinarily resident in Delhi. It was also held that the issue of the child's custody ought to be decided by the foreign court for the reason that it had already passed the protective custody warrant order and also because the child and his parents were American citizens.
- 42. On these broad facts, this court framed three questions for determination. These questions are as follows:-
 - (i) Whether the High Court was justified in dismissing the petition for custody of the child on the ground that the court at Delhi had no jurisdiction to entertain it;
 - (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts; and
 - (iii) Whether the order granting interim custody of the child to Ruchi Majoo calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.
- 23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

- 43. We are not concerned with the first and the third question. As far as the second question is concerned, this court was of the view that there were four reasons for answering the question in the negative. Be that as it may, the following principles were accepted and adopted by this court:
 - (1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.²⁴
 - (2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.²⁵
 - (3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.²⁶
 - (4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.²⁷
 - (5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.²⁸
 - (6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."
- 44. On the facts of the case, this court held that "repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage." Accordingly, it was held that the "Interest of the

²⁴ Dhanwanti Joshi v. Madhav Unde

²⁵ Dhanwanti Joshi v. Madhav Unde

²⁶ Sarita Sharma v. Sushil Sharma

²⁷ V. Ravi Chandran and Aviral Mittal

²⁸ Dhanwanti Joshi referring to Elizabeth Dinshaw v. Arvand M. Dinshaw

minor shall be better served if he continued to be in the custody of his mother [Ruchi Majoo]."

- (5) Arathi Bandi v. Bandi Jagadrakshaka Rao
- 45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.
- 46. In violation of an order passed by the foreign court, Arathi Bandi brought the child to India on 17th July, 2008. Since she did not return with the child to the jurisdiction of the foreign court bailable warrants were issued for her arrest by the foreign court.
- 47. On or about 20th November, 2009 Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25th January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this court.
- 48. This court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this court was of the view that given her conduct, no relief could be granted to Arathi Bandi.
- 49. This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:
 - (1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.²⁹
 - (2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.³⁰
 - (3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.³¹

Discussion of the law

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were

²⁹ Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw

³⁰ V. Ravi Chandran v. Union of India

³¹ V. Ravi Chandran v. Union of India

to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.

- 51. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved it is not the beginning of the exercise but the end.
- 52. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"³² but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.
- 53. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.
- 54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure. In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been

³² Shilpa Aggarwal v. Aviral Mittal

^{13.} When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

⁽a) where it has not been pronounced by a Court of competent jurisdiction;

⁽b) where it has not been given on the merits of the case;

⁽c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

⁽d) where the proceedings in which the judgment was obtained are opposed to natural justice;

⁽e) where it has been obtained by fraud;

⁽f) where it sustains a claim founded on a breach of any law in force in India.

so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

55. If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child.

This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

- 56. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).
- There may be a case, as has happened in the present appeal, where one parent invokes 57. the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

- As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed 58. by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here - merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.
- 59. Finally, this court has accepted the view³⁴ that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.
- 60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:
 - (a) The nature and effect of the interim or interlocutory order passed by the foreign
 - (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
 - (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign

- country.³⁵ In such cases, the domestic court is also obliged to ensure the physical safety of the parent.
- (d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Discussion on facts

- 61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different from the education system in India. The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.
- 62. Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.
- 63. Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.
- 64. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that

³⁵ Arathi Bandi

In our order dated 9th July, 2014 we have noted that according to Mayura the children are attending some extra classes. This is perhaps to enable them to adjust to the education system and curriculum in India.

court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

- 65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.
- 66. The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the children should be with Mayura in India.
- 67. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare.
- 68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the

- above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.
- 69. We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances, it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.
- 70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits.
- 71. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in L. (Minors) this elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children.
- 72. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court.
- 73. Accordingly, we direct as follows:-
 - (1) Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.
 - (2) Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India.

- He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.
- (3) Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).
- (4) Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.
- (5) In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan."



RELOCATION AND PARENTAL ABDUCTION

The abduction of a child is a tragedy. No one can fully understand or appreciate what a parent goes through at such a time, unless they have faced a similar tragedy. Every parent responds differently. Each parent copes with this nightmare in the best way he or she knows how.~ John Walsh, US television personality, criminal investigator, human and victim rights advocate and the host, as well as creator, of America's Most Wanted.

Relocation disputes between parents are frequently in our courts. Where both parents have guardianship, it necessarily follows that consent will be needed when one decides to relocate with a minor child. It is important to note that there is no section in the Children's Act that deals specifically with relocation. The closest the Act gets to relocation is a section that deals with the jurisdiction of the court in matters where a child is removed from South Africa.

It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstruct their lives. Typically, a relocation dispute will arise when one parent, normally the parent of primary residence and with whom the child usually resides, decides to move town/province/country. Often, the parent who is to be left behind will refuse to give consent for the relocation. The primary caregiver can then approach the High Court for an order dispensing with the other parent's consent. It must be noted that it is not a given that the court will automatically give its consent. Because the Act does not set criteria, our courts have to consider various facts and case law before they can grant an order allowing relocation.

Factors a court will rely on in cases of relocation

The court will only grant permission based on the best interests of the child. An important factor that the court will take into consideration is whether the decision by the parent to relocate is reasonable and bona fide. Our courts take a pragmatic approach to such cases, and although the move may be detrimental to the other parent who will have less contact with the child, life must go on. That is not to say that the courts don't consider the impact of the relocation of the left-behind parent, but our courts are compelled to respect the freedom of movement and family life of relocating parents. In looking at what is in the best interests of the child, the court will also consider whether relocation will be compatible with the child's welfare.

Examples of relocation court cases

- The court rejected a mother's application to relocate with her daughter despite finding that the decision to leave was bona fide. What the court found was that the practicalities of her decision to move were ill-researched and outweighed by the child's need to not be separated from either parent.
- The court rejected a father's application to relocate with his daughter. The relationship between the parents was acrimonious and, at the time of divorce, the father alleged that the mother had sexually abused their daughter. Based on this and various other factors, the court awarded care to the father. After several years, the father sought to relocate to Israel. Although the mother initially gave her consent because she was led to believe she would be allowed contact with her child, she later withdrew it when she realised that her

belief was false. The court refused the relocation based on the fact that the father could not provide sufficient information about when and where he would be employed, where the child would be going to school and how she would be assisted to learn Hebrew. The court also found the father to be thwarting attempts by the mother to rebuild her relationship with her daughter. The court emphasised the fact that it was important for the mother and child to re-establish their relationship, and criticised the experts (psychologists) who had recommended the relocation for not considering all the facts.

The court rejected a mother's application to relocate with her four children, aged eleven and eight (triplets). The parents had been awarded joint care in the divorce settlement agreement, the intention being that the children would spend an equal amount of time with each parent. Three years after the divorce, the wife filed an urgent application in the High Court for variation of the care order: she sought an order declaring her the primary caregiver and granting her the authority to relocate the children from South Africa to Dubai to live with a new man whom she planned to marry. A social worker and a clinical psychologist commissioned by the mother recommended that she be granted primary care and permission to relocate. Experts not commissioned by her held a different view, finding that relocation would not be in the best interests of the children as they would miss their father, school friends and the city to which they were accustomed. The court found that the mother's experts' recommendations were based too heavily on financial issues and did not sufficiently take into account the bond that existed between the children and their father. The court relied, ultimately, on the children's views, having found that they were of an age and maturity to make informed decisions. The mother's application was dismissed as the court found that it was not in the children's best interests.

International Child abduction

The Hague Convention on Civil Aspects of International Child Abduction

South Africa is a party state of the Hague Convention on Civil Aspects of International Child Abduction, an international treaty aimed at preventing the removal of a child from the jurisdiction in which he/she normally resides by a parent or caregiver without the consent of the other parent or caregiver and to facilitate the return of the child wrongfully removed. South Africa ratified the Convention in 1996 and it came into operation on 1 October 1997.

The purpose of the Convention is to secure the prompt return of any child wrongfully removed to or retained in a contracting state. The Convention binds member states to assist the parent or person left behind. By providing a simplified procedure and additional remedies to those seeking the return of a child who has been wrongfully removed or retained, the convention aims to curb international abductions of children.

The purpose of a speedy return is to place the child in the jurisdiction of a court that is better appraised to deal with the merits of the parental dispute. A child removed from one parent and taken to another country is subjected to the concentrated influence of the custodial parent; time favours the abductor. Unless firm steps are taken to ensure the prompt implementation of the Convention procedures, in a prolonged separation, the 'absent' parent's influence on the child will wane. In addition, this parent will be at a considerable disadvantage in litigating a contested claim for custody and access in the courts of a country other than those of the place of habitual residence (the country from which the child has been removed). Few people can readily afford

litigation in their own jurisdiction, let alone in foreign courts, where the legal system may be different, laws and even language unfamiliar, costs substantial, and facilities for legal assistance difficult to obtain or non-existent.

Most European and Commonwealth countries, as well as the US, are members. On the African continent, only South Africa, Mauritius and Zimbabwe subscribe to the Convention. When a child is removed to a country that is not a party state to the Convention, the South African High Court, as the upper guardian of minor children, will have jurisdiction and the application should be made to such a court for the return of the child.

The Convention only applies to wrongful removals/retentions occurring after the treaty became effective between the involved countries.

Wrongful removal or retention of a child

The removal or retention of a child is to be considered wrongful:

- where it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- where, at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned above may arise in particular by operation of law, by reason of judicial or administrative order, or by reason of an agreement having legal effect under the law of that state. The Convention applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights.

Where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the child's immediate return.

In practice, applications are generally heard on an urgent or semi-urgent basis by way of notice of motion proceedings. Inevitably, the overriding principle that our courts refer to is the best interest of the child principle (see page 00). In South African law, the right to consent to or refuse the removal of a child from South Africa is entrenched in the concept of guardianship. In terms of the Children's Act, 38 of 2005, a person who has parental responsibilities and rights in respect of a child has the right to act as guardian of the child, and a guardian must consent to the child's departure or removal from South Africa. Where more than one person has guardianship over a child, all must consent before the child can be removed.

The role of the Central Authority

A contracting state is bound to set up an administrative body known as a Central Authority, whose duty it is to trace the child and take steps to secure the child's return. In South Africa, the Chief Family Advocate is designated as Central Authority.

The Central Authority assists in both 'outgoing' cases (when a child has been wrongfully taken from South Africa to a foreign country or retained in a foreign country), and 'incoming' cases (when a child has been wrongfully brought to, or retained in, South Africa).

An application for the return of or access to a child must be submitted to the Central Authority.

Habitual residence

This concept of 'habitual residence' is not defined by the Convention itself. This is to avoid the development of restrictive rules as to the meaning of habitual residence, so that the facts and circumstances of each case can be assessed free of suppositions and presumptions. This means that close attention must be paid to subjective intent when evaluating an individual's habitual residence.

When a child is removed from its habitual environment, the implication is that it has been removed from the family and social environment in which it developed. The word 'habitual' implies a stable territorial link, which may be achieved through length of stay, or through a particularly close tie between the child and the place. A number of foreign judgements have established that a possible prerequisite for habitual residence is some 'degree of settled purpose or intention'. A settled purpose or settled intention will clearly not be temporary.

Procedures

The Office of the Chief Family Advocate divides the applications into incoming and outgoing applications. Courts and administrative authorities should act quickly when applications are brought before them, but if a decision has not been made within six weeks from the date proceedings commenced, the applicant or the Central Authority of the requested state may officially request a reason for the delay.

The Convention aims to ensure that a competent court in the country of habitual residence decides on the merits of custody, access and even permanent removal to another country. This is based on the premise that courts in the country of habitual residence are better apprised to obtain all relevant evidence regarding the merits of custody, care and contact, and are in a better position to grant an order that will be in the best interests of and/or least detrimental to the welfare of the child. For this reason, the Convention is consistent with our applicable laws and Constitution, through affording the best interests of the child paramount importance



ART OF BEING GOOD JUDGE

HOW TO BE A GOOD JUDGE — ADVICE TO NEW JUDGES*

by Justice R.V. Raveendran[†]

How can you become a good Judge? Is it by serving as a Judge for a long period with a clean record? Is it by promptly and regularly deciding the monthly quota of cases? Is it by writing erudite judgments? Is it by being honest" all through your career? Is it by being considerate and courteous to the litigants?

A Judge's duty is to render justice. Rendering justice, in a larger sense, means giving every person, his or her due. All those entrusted with power— power to govern, power to legislate, power to adjudicate and power to punish or reward—in a sense, render justice. In the context of Judges, rendering justice, means speedy, effective and competent adjudication of disputes and complaints in a fair and impartial manner, in accordance with law, tempered by equity, equality and compassion wherever required and permissible, after due hearing.

A Judge, by his conduct, by his fairness in hearing and by his just and equitable decisions, should earn for himself and the judiciary, the trust and respect of the public and the members of the Bar.

The "Restatement of Values of Judicial Life" and the "Bangalore Principles of Judicial Conduct, 2002" establish the Standards for Ethical Conduct of Judges and provide guidance for proper conduct of Judges.

Article 14(1) of the "International Covenant on Civil and Political Rights" adopted by the UN General Assembly, to which India is a signatory, states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (emphasis supplied) Though the said Article is not. about the qualities of a Judge, it precisely sets out the qualities of a good Judge: (i) that he should be competent, independent and impartial, (ii) that he should give a fair and public hearing; and (iii) that he should treat all persons equal. To achieve these, a Judge has to develop certain judicial skills, certain administrative skills, and more importantly, scrupulously follow certain judicial ethical standards.

Judicial skills

You require five judicial skills to effectively discharge your functions as a Judge — as an adjudicator presiding over a public judicial forum.

Thorough knowledge of procedures

You should have a thorough knowledge of the procedural laws, that is, Codes of Civil Procedure and Criminal Procedure, statutes dealing with evidence, limitation, court fees and stamps, and

^{*} Based on several lectures given to newly appointed Judges at National Judicial Academy, Bhopal and State Judicial Academies of Karnataka, Madhya Pradesh, Delhi, Tamil Nadu, Andhra Pradesh, Uttar Pradesh, Chandigarh.

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¹ Code of Conduct adopted in the Chief Justices' Conference, New Delhi on 3-12-1999 and 4-12-1999.

Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

³ Multilateral treaty adopted by UN General Assembly, New York on 16-12-1966.

forensic and police procedures. This will enable you to have control over the trial and avoid procedural irregularities. Most of the appeals and revisions against interim orders, relate to errors in procedure. When you have mastery over procedure, cases also get decided quickly and effectively.

Broad acquaintance with substantive laws

You should know broadly, all frequently used substantive laws and fundamental constitutional and legal principles. I am using the words "know broadly" and not the words "know thoroughly" as it is not possible to master all laws before becoming a Judge, and in fact even after becoming a Judge. Each provision of law has its own nuances which you will be able to appreciate and understand in the context of specific cases, when issues relating to such laws are argued before you and the lawyers analyse and interpret them in the context of the particular case. If procedural laws help you to control the conduct of the trial, knowledge of substantive laws helps you to render proper and just decisions and prevent injustice.

Art of giving proper hearing

You have to develop the skill of giving a due hearing. If you think about it, you will realise that the entire Codes of Civil and Criminal Procedure are about giving a due hearing, giving effect to the first principle of natural justice — audi alteram partem ("hear both sides" or "no one should be condemned unheard"). Due hearing is due opportunity to put forth one's case. It involves hearing the parties, considering their grievances, complaints, pleas, defences, facts and legal contentions and thereafter reaching a decision, all with an open mind. This is in fact the main function of a Judge. Many Judges, unfortunately, do not cultivate the art of giving a fair and due hearing — they do not follow the case, do not absorb the evidence and do not hear the arguments with an open mind. Instead of controlling the evidence and arguments by effective interventions, or keeping the lawyers on course by steering and guiding them, they either become impatient and refuse to hear relevant submissions or become disinterested «in the proceedings and allow their mind to wander and get distracted. This results in recording of irrelevant evidence and hearing of long arguments and the Judge failing to follow or understand the case. If you have heard the case properly—by reading the pleadings, following the evidence and arguments and making proper notes—reaching a correct decision and writing the judgment becomes easy and simple. In fact, if you record the evidence and hear arguments continuously on day-to-day basis, there would be no need for you to spend much time in reading the files for preparing the judgment.

Some Judges frequently complain that lawyers do not render proper assistance. Over the course of time, such Judges tend to become impatient with lawyers generally. They do not allow lawyers to complete their submissions and cut short the arguments by observing "Yes. Yes. That is all, is it? I have understood the point. Heard. Reserved." This is wrong. It is not possible for a Judge to fully study all the facts and research on all legal issues in all" cases and then write judgments. If a Judge tries to do so, in no° time the cases reserved for judgment will pile up. When the Judge ultimately takes up the file for dictating judgments, he is bound to miss on facts or law and will not be able to render justice. The proper course is to persuade, encourage and motivate the lawyers, even mildly scold and cajole them, to read, to research and prepare well, so that they can effectively assist you; and then hear them fully ensuring that they do not beat around the

bush or mislead you. This way, you will be giving a proper hearing, you will be able to turn out a good quantity of quality work and at the same time improve the standards of the Bar.

Marshalling facts and writing good judgments

You have to learn the skill of marshalling facts and arriving at proper findings, applying the law to those factual findings to arrive at the decision, and putting the facts, reasons and conclusions in a lucid,, logical, precise and coherent manner, in the form of an order/judgment. The litigants, the lawyers and the appellate/revisional courts should be in a position to follow what you have decided. You should have clarity in about what you intend to say. Every judgment need not showcase your erudition. That takes a long time.

Handling interim prayers and requests for adjournments

You have to acquire the skills of considering and disposing of interim prayers, interlocutory applications and requests for adjournments, effectively and firmly. The notorious "delays" associated with Indian judicial system is, to a large extent, on account of ineffective and inefficient handling of these matters. You should keep under check, any unwarranted sympathy while considering requests for adjournments and prayers for interim relief. You should also keep in check the temptation to be a populist Judge. You should be adept at clearing all obstructions, diversions, deviations and camouflages adopted by some litigants and lawyers to delay the progress of cases. You should focus your attention upon deciding the main case. I am not saying that you should not entertain or decide interlocutory applications. Some may be relevant and urgent. All that I am saying is that you should not allow them to bog down the main case. I am not saying that you should deny all requests for adjournments and interim prayers. I am saying that you should be strict in handling them.

The shorter the pendency of a case, lesser the number of interlocutory applications. The stricter you are in granting adjournments, the lesser will be the requests for adjournments. Statistics show that out of the total judicial time spent on each* case from beginning till the end, on an average about one-third of the time is spent on preliminaries, adjournment motions and interlocutory matters. If you can curtail the same to the minimum, your disposals will increase, the period of pendency will be reduced and the proverbial delay could be effectively tackled.

If you acquire a thorough knowledge of the procedural laws and a broad knowledge of legal principles and substantive laws, and develop the skills of giving a proper hearing, marshalling facts and writing cogent judgments/orders, and disposing interlocutory applications and controlling adjournments, you can be said to have acquired necessary judicial skills.

Administrative skills

Side by side with the five judicial skills, you have to develop five administrative skills. Let me describe them briefly.

Time management

You have about 250 working days (that is about 1250 court hours) in a year. This may, of course, vary from State to State. You should plan and allot the judicial time at your disposal, for preliminary work, for recording evidence, for hearing interlocutory applications and for hearing final arguments. You must visualise the entire day, as different units, to manage your time. This

will help you to plan the number of cases you can hear and decide and then gradually increase your output.

For every five to six hours of work in court, you have to spend a couple of hours in chambers on administrative work and four to five hours at home for reading files and writing/dictating/correcting orders and judgments. Please do not forget to provide time slots for your physical and mental well-being (exercise, yoga, meditation) and time for your family.

Board management

On an average, each of you may have anything between 1000 to 3000 cases pending on your board. You should know how to manage your board. If you post a large number of cases every day, then most of the judicial time will be spent in non-productive preliminary hearing. You should assess the number of evidence cases and the number of argument cases that you can realistically handle (providing some margin for the fact that some cases would get adjourned) and standardise your board. You should not list too many cases for evidence and arguments. There is no point in listing, say twenty cases for evidence or twenty cases for arguments. You should apply case management and case-flow management tools effectively. You should also pursuade parties to have recourse to alternative dispute resolution processes. The board management and time management go hand in and will together reduce the pendency and improve efficiency.

Whenever a case is listed for evidence, the litigant is expected to be present and be ready to lead evidence. Imagine the time and energy wasted by a litigant in repeatedly getting ready and attending court for evidence. Same is the position regarding listing too many cases for arguments. Each time a case is listed for arguments, the advocate is required to read the file and get ready. If a case gets adjourned repeatedly, parties and lawyers will stop getting ready on the assumption that the case is not likely to be taken up. When ultimately the case is taken up, many a time, the parties and advocates are unprepared, and the result is a request for adjournment or an ineffective or defective presentation of the case, requiring subsequent "repair" by either recalling witnesses or rehearing arguments. Lesser the number of hearings in a case, speedier will be the disposal of the case and lesser the hassles and harassment for the litigant.

Registry management

You have to exercise control and supervision over your court officers, stenographers, typists, clerical and attendant staff, to ensure that they do their work properly and assist you effectively. Particular attention should be bestowed upon bailiffs/process servers (to ensure prompt service of notices, summons, effecting attachments/sales, etc.), Record Room staff (for proper maintenance of records), and the Materials Room staff (to ensure that material objects and evidence are properly catalogued and stored safe and secure). You should also ensure that the court staff are public-friendly and show patience and courtesy to lawyers and litigants. Please remember that if the staff are not efficient, or lack in integrity or courtesy, that will reflect upon the functioning of the court.

Bar management

Lawyers are officers of the court. Unless you have their cooperation, you cannot expeditiously or effectively dispose of cases. You should show uniform courtesy to the members of the Bar and litigants. You should at the same time be firm and diplomatic in dealing with them. You should earn their respect by your commitment, conduct and behaviour. You should be able to carry

the Bar with you and extract work from them, without making them hostile. You should not be overly rigid. Genuine requests for adjournments should be accommodated. Frivolous and casual requests for adjournments and dilatory tactics should be firmly dealt with. If you grant adjournments merely for the asking, you cannot expect the lawyers and the litigants to be ready. You should dispose of applications for interim relief and bail expeditiously. Nor should you try to be a populist by granting interim relief merely for the asking. You should build a reputation of being a "no-nonsense Judge" — a Judge who will not permit unnecessary evidence, lengthy arguments, frivolous submissions, misrepresentations, of dilatory tactics.

Self-management

This refers to the need for self-discipline, punctuality, commitment, positive attitude and hard work. This refers to maintaining good health and good habits. This refers to being properly and neatly attired.

You should hold court on time. If you are late to court, you cannot expect the lawyers and staff to be punctual. You should be on the seat for the entire court working hours. If you retire to chambers frequently during court hours, you cannot expect the lawyers and litigants to be in court when the cases are taken up. You should be prompt in delivering judgments and orders. You should avoid taking unnecessary leave, as for example, taking leave at the end of the year merely because there is some unutilised casual leave.

You should have good health. Unless you have good health, you cannot function effectively. Having regard to the nature of your work, you are glued to a chair for more than 12 hours each day. Such chair-bound but stressful lifestyle, is an invitation to blood-pressure, diabetes, lower back ache, spondylitis, varicose veins and other ailments. It also makes you tired and irritable in court. Physical exercise, yoga, proper diet are therefore absolutely necessary, if you want to maintain good health and work effectively and efficiently.

You should be comfortable with technology. You should have a working knowledge of computers and information technology. It will help you write and correct orders/judgments, research on case law and articles, maintain statistics and prepare reports. It will broaden your general knowledge and also update you in regard to areas like human rights, forensic science, ADR mechanisms and court management techniques. The days of paperless e-courts, and presentation of evidence and arguments through video conferencing are not far away. Get ready to manage and cope up with technology.

The aforesaid administrative skills will make you efficient. The following guidelines under the caption "competence and diligence" in the "Bangalore Principles of Judicial Conduct (2002)⁴ underline the importance of developing judicial and administrative skills side by side:

- 6.1. The judicial duties of a Judge take precedence over all other activities.
- 6.2. A Judge shall devote the Judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.
- 6.3. A Judge shall' take reasonable steps to maintain and enhance the Judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking

Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

advantage for this purpose of the training and other facilities which should be made available, under judicial control, to Judges.

* *

- 6.5. A Judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.
- 6.6. A Judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courtedus in relation to litigants, jurors, witnesses, lawyers and others with whom the Judge deals in an official capacity. The Judge shall require similar conduct of legal representatives, court staff and others subject to the Judge's influence, direction or control.
- 6.7. A Judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Judicial ethics

Let us assume that you are competent having necessary judicial and administrative skills. Will that make you a good Judge? This question brings us to your conduct as a Judge. This brings us to judicial ethics. What are the ethical standards to be followed and practised by a Judge? How should he behave? What should be his demeanour? What do people expect of him?

To be a good Judge, you have to cultivate and maintain five ethical principles — honesty and integrity, judicial aloofness and detachment, judicial independence, judicial temperament and humility, and impartiality. All of you, as Judges, are aware of these standards of judicial conduct. The difficulty is in scrupulously and constantly following them. Let us discuss the principles.

Integrity and honesty

When anyone compliments a Judge as a man of integrity, I feel amused and irritated. In a Judge, honesty and integrity are neither special qualities, nor achievements to be appreciated. They are the fundamental prerequisites for a Judge. They are the non-negotiable eligibility criteria. A Judge is required to be upright and expected to be a man of integrity. If a Judge is not honest or lacks integrity, he has no business to be a Judge. There cannot be a strong and vibrant judiciary unless the Judges are known for their integrity.

We have around fifteen thousand Judges in the country. Even if there are only a few aberrations among them, the public and media tend to tar the entire judiciary as corrupt. When a Judge does something improper, it is not only the erring Judge, but the entire judiciary that will be seen in a bad light. Every improper act and every misbehaviour of a' Judge is likely to be magnified and distorted, thereby reducing the faith and trust of the common man in the judiciary. Having regard to the nature and functions of their office, Judges command a very high respect when compared to servants of other wings of the Government. Correspondingly, public also expect very high standards of probity and integrity from Judges. Judges should therefore be doubly careful in their conduct and behaviour, so as to maintain the high reputation of the judiciary.

Many accused are rich, powerful and resourceful. Many civil litigants indulge in litigation out of ego, greed and jealousy. These litigants—both criminal and civil—would go to any length to succeed, which unfortunately would include attempts to influence the Judges. No other profession or calling requires higher standards of honesty and integrity or provide greater

temptations and opportunities to become corrupt. You should be forever on guard against such temptations. You are the last bastion in the fight against corruption and you should not become a fence that eats the crop.

John Marshall said: "The power of judiciary lies, not in deciding cases, nor in imposing sentences, nor in punishing for contempt, but in the trust, faith and confidence of the common man." If judiciary loses the trust, faith and confidence of the common man, that will be the end of the Rule of Law and democracy.

Some Judges tend to relate corruption to taking a bribe or illegal gratification to decide a case. They assume that taking a favour from a lawyer or politician or businessman, if unrelated to any case pending before them, is not objectionable and will not affect their integrity. But integrity, or corruption which is its antithesis, has several facets. For example, let us assume that a Judge borrows a lawyer's luxury car/SUV for going on a vacation tour; or accepts costly gifts from lawyers, during a family function like marriages, birthday celebrations, etc. Neither of the above two benefits taken by a Judge has anything to do with any case to be decided or judgment to be rendered by him. But any conduct which is likely to affect the Judge's integrity in future or which is likely to affect the credibility of the judiciary in general or the Judge in particular, is objectionable behaviour, even though there may be no specific quid pro quo for the benefit received by the Judge. Receiving any discretionary benefit by a Judge, which is not offered or extended generally to all other Judges, is an objectionable behaviour. Please remember, favours normally come with strings attached. Whenever a concession or favour is shown to a Judge, the person showing it will consider it as an investment for the future and would, when the occasion arises, demand, or at least expect, a return of the favour in some form or the other. The best way to maintain your integrity is not to accept any favour, gift or benefit which may "reasonably be perceived as intended to influence the Judge in the performance of his judicial duties".

You should not only be honest, but seen to be honest. You have to be careful how you deal with others in your private life. You would be wrong to assume: "I am honest. My conscience is clear. Therefore I can freely mix with anyone." You may be honest. But, unfortunately, the litigants and the public do not assume that you are honest. A cynical world, which has seen dishonesty and corruption everywhere, would not hesitate to assume corrupt motives, if your conduct give room for it, even though you may be honest. If they see you in the company of any lawyer or a litigant in a club or a restaurant, they will always assume that some "deal" is going on. They will never think that you are having dinner with friends. If you want to ensure that improper motives are not attributed to you, and to ensure that your good name and the good name of judiciary are not sullied, keep a distance.

The following guidelines in the "Bangalore Principles of Judicial Conduct (2002)" are relevant:

- 3.1. A Judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
- 3.2. The behaviour and conduct of a Judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

....

Quoted in Rajesh Kumar Singh v. High Court of Judicature of M.P., (2007) 14 SCC 126, 137, para 21.

⁶ Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

- 4.14. A Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties.
- 4.15. A Judge shall not knowingly permit court staff or others subject to the Judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
- 4.16. Subject to law and to any legal requirements of public disclosure, a Judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the Judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Judicial aloofness and detachment

Judicial aloofness is conditioning your mind to be aloof, maintaining detachment from the arena of contest and rendering justice unmindful of the consequences. You have to dispassionately decide who is right and who is wrong in accordance with law. Lord Birkett explained a facet of aloofness thus:

The duty of the Judge to keep complete control of the proceedings before him is an essential part of the administration of justice in all our courts. He has a duty to intervene by way of question or otherwise at any time that he deems it necessary to do so. He may wish to make obscurities in the evidence clear and intelligible; he may wish to probe a little further into matters that he deems important; and in a score of ways his interventions may be both desirable and beneficial. But it is safe to "say that all his interventions must be governed by the supreme duty to see that a fair trial is enjoyed by the parties. His interventions must be interventions and not a complete usurpation of the functions of the counsel. But the Judge best serves the administration of justice by preserving the judicial calm and the judicial demeanour, aloof and detached from the arena of contention.⁷ (emphasis supplied)

Of course, there are cases {public interest litigation, for example) where a Judge pursuing judicial activism, will have to be mindful of the consequences of his orders and actions. This exception is dealt with in my article "Rendering Judgements — Sonie Basics." 8

Judicial aloofness is not living in ivory towers. It does not mean that you should not be alive to the problems of the society or that you can ignore the day-to-day realities of life. Judges should be able to understand the needs of the society and "connect" to the problems and difficulties of the weaker sections and provide access to justice to the poor and downtrodden. The rich, the powerful, the unscrupulous and the crooked can protest loudly about violation of their fundamental rights, human rights or property rights and are" capable of protecting their rights by engaging competent lawyers. But for every "capable" who can protect their rights, there are hundreds of "incapable" belonging to weaker sections who cannot protest against injustices, nor engage lawyers and protect their rights. You are the protector of all those who cannot protect themselves. You have special responsibilities when dealing with the rights of not only minors, mentally challenged, religious and charitable institutions, but also women, aged, infirm, poor

⁷ Harford Montgomery Hyde, Norman Birkett (Reprint Society Ltd., London 1965) 547.

^{8 (2009) 10} SCC J-1.

and downtrodden. When you are in the protection mode, aloofness and detachment can take the back seat for a while.

Judicial aloofness not only refers to a state of mind, but also refers to maintaining a physical "distance". "Restatement of Values of Judicial Life", states: "A Judge should practice a degree of aloofness consistent with the dignity of his office; close association with individual members of the Bar, particularly those who practise in the same court, shall be eschewed". You should avoid mixing with members of the Bar, politicians or litigant public, except at public functions or at open private events like marriages and deaths. Your smile at a lawyer or a litigant inside a court, your chat with a lawyer or litigant outside the court, your sharing a joke with a politician at a public function, are all likely to be misunderstood and misinterpreted by the public or even members of the Bar. If you meet or mix with them in private, either in your house or their house or places like hotels, restaurants, clubs, you are inviting trouble. Tongues will wag. Unfortunately, we live in a world full of suspicion. More so, in the case of Judges. Therefore, the need for maintaining distance. Let us hope that when Judges and judiciary get an unshakable reputation for integrity and impartiality, the need to keep a distance will disappear.

Whenever I give this advice about maintaining physical "distance", I invariably evoke the following response from an audience of Judges:

You ask us to maintain "distance". But the State Legal Services Authorities require us to hold legal awareness programmes where we have to mix with the public, including lawyers and litigants. We have to seek the cooperation of the district administration, police officers, elected representatives and members of the Bar for organising these functions. How can you expect us to maintain distance and independence?

The issue is no doubt rather delicate. You have two distinct roles. One is that of a Judge, where you are not supposed to mix with lawyers, litigants or take favours from any one. Your other role is that of an authority implementing the provisions of the Legal Services Authorities Act, 1987, where you are required to interact with lawyers/litigants/officials/elected representatives. If you are seen talking to someone at a public function relating to a legal awareness programme, no one is going to question your integrity or independence. But if someone sees you with a lawyer or with a litigant in a private discussion, it will give room for adverse comments. If you keep in mind the distinction between your judicial role and your legal service role, you will be able to avoid embarrassing situations.

I agree that Judges should under no circumstances be put in a position where they feel obliged to lawyers or police officers or officers of the district administration or for that matter, anyone else, whether it is a connection with legal service functions, or visits of any dignitary, or otherwise. If Judges have to seek and get favours for conducting such functions, the next stage would be for them to return the favours in some manner, which means compromising judicial detachment and independence, which in some cases may even lead to losing integrity. My advice therefore is to avoid big and ostentatious functions. Judges are not expected to conduct political size meetings or functions. Small gatherings, select target audiences, and meaningful dialogues are what is needed to spread legal awareness. Please have the courage to organise legal service and other court related functions in a simple and Spartan manner within the sanctioned budgets.

⁹ Code of Conduct adopted in the Chief Justices' Conference, New Delhi on 3-12-1999 and 4-12-1999.

I may take this opportunity to give an unsolicited word of advice to the Chairpersons of the Legal Services Authorities. Please ensure that in requiring Judges to organise or conduct legal services programmes, their independence is not compromised. In fact it would be better if the legal services activities (other than ADR programmes) are organised by the employees of the Legal Services Authorities, who are not judicial officers and Judges attend such functions only as guests or speakers. Personally, I am of the view that spreading legal awareness and providing access to justice are executive function. I learn that in no other country, spreading legal awareness and extending legal aid are the functions of the judiciary. But, if our Parliament, in its wisdom, has chosen the judiciary to take this burden, Judges have to discharge it sincerely.

The following guidelines given under the caption "propriety" in the "Bangalore Principles of Judicial Conduct (2002)" are relevant:

- 4.1. A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities.
- 4.2. As a subject of constant public scrutiny, a Judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a Judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.
- 4.3. A Judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

Judicial independence

Judicial independence refers to the independence of judiciary as an institution as also the independence of individual Judge in performing his judicial functions. We are concerned here with the independence of individual Judges, which refers to the freedom from any influence or pressure and freedom from any interference from the executive or legislature in the judicial process. You have the right to decide cases in the manner which you consider to be in accordance with law. You have absolute immunity against any actions or reprisals or personal criticism, in respect of your judicial actions and decisions. You have such immunity even when you act without jurisdiction or decide wrongly (that is, when your decision is held to be wrong by a higher forum), provided you have acted in good faith.

When the Constitution of India uses the expression "subordinate judiciary" to describe the Judges other than those belonging to the Supreme Court or the High Courts, it is not with the intention of putting any fetters on their judicial independence. The word "subordinate" literally means someone in a lower position than someone else. The Constitution uses the expression merely to describe Judges who hold a lower position than the Judges of the High Court, in the judicial hierarchy. But of late, the word "subordinate" unfortunately is understood by some Judges, as referring to someone who is subservient. Let us be clear. The higher courts have power to correct you after you render your judgment, but none can direct you as to how you should decide in the first instance or what you should decide. Your independence to decide in accordance with law is not subject to any restrictions or control (except on an appeal or revision, after you decide by a judicial order). In the exercise of your judicial functions you are independent and not

Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

subordinate to anyone. The difference between the members of the subordinate judiciary and members of the higher judiciary is only in jurisdiction.

Judicial independence is not freedom to. do what you like or what you consider as just and equitable. Judicial independence does not mean you can exercise your discretion as per your whims and fancies. Even when you are exercising "discretion", for which there are no statutory guidelines or precedents, you are required to act justly and fairly and not arbitrarily. You are required to render justice in accordance with law, and not justice as per your convictions or what you consider as just. Justice Cardozo warned:

... The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of]?is own ideal of fairness and justice. He has to draw his inspiration from well-consecrated principles. He is not to yield to spasmatic sentiments, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated in the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.¹¹

Judicial independence, it is said, is not a privilege enjoyed by Judges, but is the reflection of the privilege of the people to the Rule of Law in a democracy. It is a safeguard for the protection of the people against the vagaries of the legislature and the executive. It comes with the responsibility to be sincere and conscientious in performing your duties. In Union of India v. Madras Bar Assn.¹², the Supreme Court observed:

46. ... Independence is not the freedom of Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial.¹³

The "Bangalore Principles of Judicial Conduct (2002)"¹⁴ clarifies that judicial independence is a prerequisite to the Rule of Law and a fundamental guarantee of a fair trial, and that a Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. The following guidelines are given in application of the principle:

- 1.1. A Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 1.2. A Judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the Judge has to adjudicate.
- 1.3. A Judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of Government, but must also appear to a reasonable observer to be free therefrom.

¹¹ Benjamin Cardozo, The Nature of the Judicial Process (1921).

^{12 (2010) 11} SCC 1.

¹³ Ibid., 35, para 46.

¹⁴ Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

- 1.4. In performing judicial duties, a Judge shall be independent of judicial colleagues in respect of decisions which the Judge is obliged to make independently.
- 1.5. A Judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
- 1.6. A Judge shall exhibit and promote high standards of. judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Judicial temperament and humility

Everyday, everyone, inside and outside the court, address Judges as "My Lord" or "Your Honour". Everyone bows, greets and salutes them and shows them respect and deference. Day after day, they decide the fate of litigants, by granting and rejecting submissions, arguments, complaints, requests and prayers. They can send people to jail. They can declare people to be paupers. They can decide who is right and who is wrong. They have captive audiences in their courts, who give appreciative nods and approving smiles at every witticism and remark. It is but natural that after some time, some Judges start thinking that they are the personification of wisdom, knowledge, and intelligence; and more importantly, their word is law and their wish a command. Humility gradually fades from their mind and demeanour. Harold R. Medina therefore warned:

A Judge is surrounded by his subordinates, lawyers and litigants who keep telling him what a noble, wonderful, wise and knowledgeable person he is. The moment he starts believing them, he becomes a lost soul, ending up the opposite of all that a Judge should be.

Humility is the quality which makes a Judge realise, that he is neither infallible nor omnipotent, that he should hear the lawyers who have studied the facts and researched on the law, and that he should decide all issues by keeping an open mind. Without humility, a Judge becomes arrogant and opinionated, perverse with a closed mind, and starts believing that the lawyers do not know much, that he knows better and that his decisions are always just and right. He tends to showcase his cleverness, knowledge and erudition in his judgments and orders, relegating justice to the back seat. In short, he ceases to be a "Judge" in the true sense.

You should be more concerned about rendering justice rather than trying to exhibit your erudition, intelligence or power, which inevitably leads to injustice. Justice Frankfurter described "Judicial humility" as having a mind that respects law, that can change its thinking, that can accept that another view is possible, that can be persuaded by reason, that which is detached and aloof, that quests for truth and that puts passion behind its judgment and not in front of it.

You should avoid the temptation of jumping to conclusions or taking a "view" and then refusing to budge from it. If you first decide what should be the result without hearing or without hearing fully and properly, and want to stubbornly stick to it, then you will be searching for the law and facts to fit your decision, rather than basing your decision on the facts and law. You will also try to ignore or overlook the law and the facts that are inconvenient or contrary to your view. Choosing the facts and law to support a predetermined view, and ignoring other relevant facts and law is judicial perversity. It is said that many successful and brilliant lawyers fail to transform themselves into good Judges, if they are obsessed with showcasing their intelligence and knowledge in every decision, rather than rendering justice.

You should be careful and balanced in what you say inside and outside the court. The "Bangalore Principles of Judicial Conduct (2002)"¹⁵ gives you the following advice:

46. A Judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a Judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

You should not try to force a compromise or settlement. You should not become peeved or upset when your suggestions for settlement, which you may consider to be reasonable, are not accepted by one of the parties. In fact, without knowing the full facts, you should not even suggest a compromise. Let me clarify. You can always suggest that the parties should settle. In fact, Section 89 CPC requires Judges to encourage settlements. What you should not try to do is to impose your views as to what the terms of settlement should be, at a premature stage. When you suggest a compromise and also the terms which you consider to be fair, in many cases, the party whose case is weak will be eager to agree, while the party with a strong case or a just cause may be reluctant to agree. Having suggested the compromise, you may feel irritated with the party who is not agreeing with your suggestion. When you thereafter hear the matter, your resentment against the party who refused to compromise may make you hostile to the party who did not listen to your suggestions, and emotions may blur your judicial vision. Of course, that is not likely to happen when you develop judicial maturity and experience. A Judge who genuinely feels that a settlement is appropriate in a case and pursues his suggestions with the parties, should recuse himself from hearing it, if the settlement does not materialise.

You should not be perturbed or worried about the comments of the media or adverse reactions of any particular group, in regard to your decisions. Neither your judgment nor your actions should be populist. You are not running for a public office. You are not seeking publicity. If Judges should decide in a manner which will please the majority, no justice can be rendered to the minority. If Judges should go by the views of the rich and powerful, justice cannot be rendered to the poor and downtrodden. If Judges should go by the views of the vociferous groups, justice cannot be rendered to the voiceless majority. The decisions should be based on the merits of the case and not on your emotions and preferences.

A common complaint against Judges is that they live in ivory towers and that they do not understand the ground realities. Do not be worried by such remarks. Judges deal with the problems, concerns and difficulties of the common man everyday. They read newspapers and magazines and watch television. They have access to internet. They have their feet firmly on the ground. In fact, many a times, the worry is that their decisions, particularly in sensational criminal cases, may be influenced by the opinion of the media and the pressure of public opinion.

Another frequent complaint is that some court orders are impractical. The complaint is meaningless. Judges do not make the laws, but only decide in accordance with law. The legislature makes the laws. The grant of relief is circumscribed by the provisions of law, the prayers made and the case made out. Only where the issue is not covered by the provisions of law or precedents of higher courts, a Judge can think of invoking principles of equity to would the relief. If there is any rigidity or impracticality in any judgment, it is the requirement of law.

¹⁵ Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

Impartiality (freedom from prejudice and bias)

We now come to the most crucial and special among the qualities of a Judge — impartiality. In fact, to achieve impartiality, you should have all the other four qualities mentioned above—honesty and integrity, judicial aloofness, independence, humility—and something more, that is freedom from bias and prejudice. You may have honesty and integrity, but may still suffer from bias and prejudice. Bias and prejudice in a Judge may be of two kinds — external and internal.

External bias and prejudice

When a lawyer of your caste or community appears, the case should not swing in his favour by reason of his caste. If there is a dispute between persons belonging to your caste/community and a person belonging to a rival caste, you should not lean towards the litigant belonging to your caste/community. That will be bias. When a lawyer or litigant appearing before you, belongs to a caste/community which is known to be a traditional rival of your caste/community, you should not, by reason of his caste/community, be harsh or overly strict or hostile. Judges should guard themselves against any prejudice and bias based on caste/community.

Sometimes, a friend or distant relative or even a mentor (or a person who is a leader or member of the political party of which you may be an admirer or follower) may appear before you, as a lawyer or litigant. When that happens, you should curb any inclination or tendency to decide in their favour or to exercise judicial discretion in their favour. If you exercise your discretion in their favour, by granting ex parte interim orders, on the specious justification that when the other side enters appearance, you will modify the orders, you would clearly be guilty of nepotism.

Some Judges think that they should encourage junior members of the Bar and the proper way of doing it is by granting interim orders sought by them. This is on a total misconception of what constitutes encouragement. You "encourage" juniors by giving them a patient hearing, by not being harsh with them, by allowing them to get over their inhibitions, stutters and stumbles, and by permitting them to prepare and argue on another day. In short you "encourage" them by putting them at ease and giving them some latitude. Giving interim orders in undeserving cases, merely because juniors appeared and sought interim relief, is not encouragement of juniors, but abuse of judicial power which causes prejudice to the other party. It is clearly unwarranted bias.

Let me refer to some other instances of bias and prejudice. There are lawyers who are very respectful towards the court, who are always very courteous, who always bow to the Judge when they enter and when they leave a court hall. They sit in the front row and smile appreciatively at all jokes and witticisms of the Judge, howsoever foolish or pedestrian they are, and nod approvingly when the Judge expounds some legal principle, even if it is erroneous or absurd. When this happens, the Judge starts thinking: "Oh, this lawyer is intelligent and good" and starts having "positive vibes" towards such lawyer. On the other hand, there are some lawyers who always sit in the court with a dour face. Whenever the Judge makes a "witty" remark or enunciates some legal principle, they look away disinterestedly or wear an expression of boredom implying that they consider the Judge to be shallow or ignorant. The Judge therefore thinks: "This lawyer cannot appreciate or understand my wit, knowledge or wisdom" and starts developing "negative or hostile vibes" towards such lawyers. After sometime, there is every likelihood of the "pleasant" lawyers having a better chance of winning a march over the "dour" lawyers, in getting discretionary interim orders. This kind of bias and prejudice in action, should be avoided.

There is another version of "good" and "bad" lawyers. Some lawyers are very reasonable in their submissions. They are precise, respectful and brief. Some others are "cantankerous", who will beat around the bush, refuse to come to the point, disagree with the Judge and go on arguing and arguing, testing the patience of the Judge. After some time, whenever the "reasonable" lawyer appears, the Judge will mentally lean forward and whenever the "cantankerous" lawyer appears, he will mentally lean backwards. As a result, when the reasonable lawyer has a bad case, and the cantankerous lawyer has a good case, there is a very good chance of the "good" lawyer with a bad case getting some relief and the "bad" lawyer with a good case not getting adequate relief. Such emotional reactions on the part of the Judge, are nothing but bias and prejudice in action. You should always guard against it. You should neither lean forward nor backward, but always be "upright" and "straight".

Your dislikes and likes for any lawyer or litigant, or your feelings towards or against any particular caste, community, religion, race or region, your kinships, friendships, loyalties to any person or persons, should not have any bearing on your decision or the decision-making process. Every one of these external factors/considerations should be kept away. A case should be decided on its merit, and not on the merit or reputation or status or attitude of the lawyer or the litigant.

Internal bias and prejudice

Let me next refer to "internal bias and prejudice". Every Judge has his own perception about what is right and what is wrong, what is just and what is unjust, and what is fair and unfair, which will have a bearing on his decision. It is said that such perceptions of a Judge, could be based on his personal philosophies developed upon traditional customs and beliefs, acquired convictions and prejudices,0 deeply rooted in his psyche moulded by what he heard, what he read, what he felt and what he experienced (including childhood experiences and mental scars). Over a period of time, these perceptions lead Judges to become typecast in their decision making.

For example, the experiences of a Judge may make him view all police action with suspicion and consequently lead him to believe that most of the accused are framed or falsely accused of offences, and that third-degree methods would have been employed to get tailored false confessions, and that therefore there is a need to give the benefit of doubt to the accused in most cases. He therefore tends to acquit in most of the cases and is therefore identified as an "acquitting Judge". Another Judge may feel that when the police investigate and file a charge-sheet and place evidence supporting the charge, they should not be disbelieved and that the discrepancies in the evidence of the witnesses should be ignored as they are usually due to human "error" 'and defective memory. He therefore tends to convict and is identified as a "convicting Judge". Every defence lawyer would avoid hearing of his case by a "convicting Judge". The very same defence lawyer will always be ready to conduct their cases before an "acquitting Judge". You should be careful to be a neutral Judge deciding cases purely on merit, without being branded as either an acquitting Judge or a convicting Judge.

Let me give another example. Let us say that there are two similar claims for compensation pending before two different Claims Tribunals, where the age, income and number of dependants of the deceased are the same. One Tribunal awards Rs 4 lakhs as compensation, while the other Tribunal awards Rs 6 lakhs. Both the Tribunals may be presided by honest men with utmost integrity. Nevertheless, their personal philosophies enter into their judgments, leading to award of different quantum on similar or same facts. This results in the former being referred to as a

"tight-fisted Judge" and the latter being referred to as a "liberal Judge". Another example: before a particular Judge, 90% of eviction cases may succeed, while before another Judge, 90% of eviction cases may fail. The former will be branded as a "landlord Judge." and the latter as a "tenant Judge". Similarly, in regard to labour cases, some Judges will be called as "pro-management Judges" and some as "pro-labour Judges", depending upon their philosophical preferences.

We cannot afford to have one Judge deciding one way and another Judge deciding another way and a third Judge a third way, on the basis of their personal philosophies. It is true that Judges are not robots or computers to give identical judgments and so long as Judges are human, their personal philosophies will, to a certain extent, mould their decisions. But a litigant, adversely affected by a judgment, will be perplexed as to why he should be the sufferer on account of his case coming up before a particular Judge, when in another identical case which came up before another Judge relief was granted. It is to avoid the ill-effects of personal philosophies and prejudices and to ensure uniformity and consistency in decisions, the Indian courts follow the "precedent" doctrine. I will not elaborate upon precedents now, as it is a subject which requires a separate article.

You should be careful to ensure that your personal philosophy does not gain upper hand when precedents are available. The litigants are not bothered about the length of the judgment or about the erudition of the Judge. He is concerned only with the result — the relief which the Judge grants or does not grant. Therefore, there should be an effort to achieve consistency and uniformity in decision making. I am not saying that you should give up your judicial independence. Nor can I say that your personal convictions and views cannot at all play a part in the decision making. All that I say is that when there are precedents, you are bound to follow them.

You may be from any background, from any religion, from any caste or community. You may have any political conviction. You may be a friend or kin of many and you may be obliged to many — your teachers, mentors and seniors. Whatever may be your background or antecedents, whatever may be your personal philosophies, beliefs or convictions, when you become a Judge, your allegiance should only be to law and justice, and not to your friends and relatives who might have helped you, or the teachers and mentors who moulded you, or the Judges who selected you, or the leaders of the political party whose ideologies have impressed you. Friendship, loyalty, gratitude are great qualities by themselves, but they should always yield to your allegiance to integrity, impartiality and justice. You shall truly and faithfully perform the duties of your office without fear or favour, affection or ill-will. Thomas Fuller said:

When a Judge puts on his judicial robes, he puts off his relationships and friendships, and becomes a person without a relative, without a friend, without an acquaintance. In short, he becomes impartial.

The "Bangalore Principles of Judicial Conduct (2002)"¹⁶ states that the quality of impartiality is essential to the proper discharge of the judicial office, and that it applies not only to the decisions, but also to the process by which the decision is made. They enumerate the standards to achieve impartiality thus:

2.1. A Judge shall perform his or her judicial duties without favour, bias or prejudice.

¹⁶ Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-11-2002 and 26-11-2002.

- 2.2. A Judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the Judge and of the judiciary.
- 2.3. A Judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the Judge to be disqualified from hearing or deciding cases.
- 2.4. A Judge shall not knowingly, while a proceeding is before, or could come before, the Judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the Judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
- 2.5. A Judge shall disqualify himself 6r herself from participating in any proceedings in which the Judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where—
 - 2.5.1. the Judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
 - 2.5.2. the Judge previously served as a lawyer or was a material witness in the matter of controversy; or
 - 2.5.3. the Judge, or a member of the Judge's family, has an economic interest in the outcome of the matter in controversy:

* * *

- 5.1. A Judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").
- 5.2. A Judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
- 5.3. A Judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

Conclusion

You are not legislators; you are not administrators; and you are not experts in fields other than law. You do not make laws. You do not govern the country. But you are the interpreters of law. You are the seekers of truth. You are the Tenderers of justice. You are the guardians of the Rule of Law.

You are the protectors .'and providers of level playing fields for the downtrodden and the weaker sections. You have to remind yourself everyday about the onerous nature of your powers and the limitations on your powers. You should remember that every case that comes up before you will decide the fate of a person relating to his right to livelihood, his right to life, his right to liberty or his right of property. You should remember that every time you fail to do justice, people will

READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS

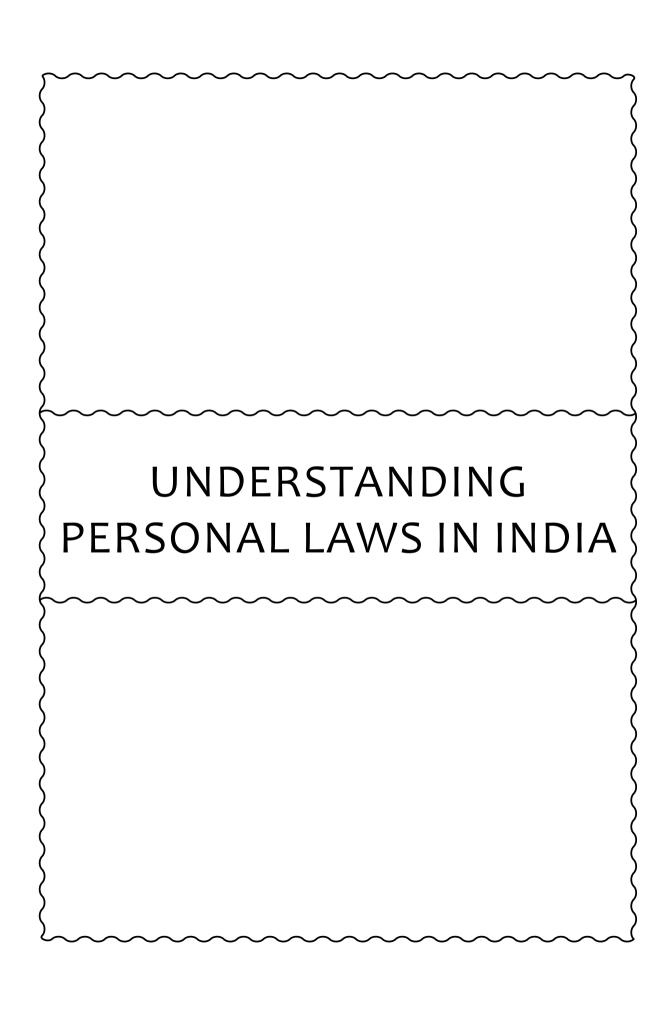
perceive it as an injustice. Pray Almighty everyday to give you the courage and conviction to do justice with humility, wisdom and compassion.,

Knowing the principles of judicial ethics is not sufficient. Practice the ethical principles constantly and vigilantly. Take inspiration from the writings and simple and humble lifestyles of great Judges and leaders. Be good Judges and bring glory and credibility for your great institution.

Dear young Judges, I wish you all a meaningful and fruitful judicial career with courage, commitment, hard work arid ethical behaviour. I also wish you peace, happiness, and contentment in life.

[Note.—Many of you may have different views as to how to practise and maintain judicial ethical standards. Some of you may feel that some parts of my advice regarding ethical standards are homilies which are impractical, unrealistic and ignore ground realities; or that some of my apprehensions are exaggerated. May be. May be not. Recurring aberrations in the judiciary underline the need for strong ethical standards. Let there be no compromise in regard to the adherence to the fundamentals of judicial ethics.]





The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs, i.e., marriage, divorce, succession, etc.

Marriage

Law relating to marriage and/or divorce has been codified in different enactments applicable to people of different religions. These are:

- The Converts' Marriage Dissolution Act, 1866
- The Indian Divorce Act, 1869
- The Indian Christian Marriage Act, 1872
- The Kazis Act, 1880
- The Anand Marriage Act, 1909
- The Indian Succession Act, 1925
- The Child Marriage Restraint Act, 1929
- The Parsi Marriage and Divorce Act, 1936
- The Dissolution of Muslim Marriage Act, 1939
- The Special Marriage Act, 1954
- The Hindu Marriage Act, 1955
- The Foreign Marriage Act, 1969 and
- The Muslim Women (Protection of Rights on Divorce) Act, 1986.

The Special Marriage Act, 1954 extends to the whole of India except the State of Jammu and Kashmir, but also applies to the citizens of India domiciled in Jammu and Kashmir. Persons governed by this Act can specifically register marriage under the said Act even though they are of different religious faiths. The Act also provides that the marriage celebrated under any other form can also be registered under the Special Marriage Act, if it satisfies the requirements of the Act. The section 4(b) (iii) of the Act was amended to omit the words "or epilepsy." Sections 36 and 38 have been amended to provide that an application for alimony pendente lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the respondent.

An attempt has been made to codify customary law which is prevalent among Hindus by enacting the Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955, which extends to the whole of India, except the State of Jammu and Kashmir, applies also to Hindus domiciled in territories to which the Act extends and those who are outside the said territories. It applies to Hindus (in any of its forms or development) and also to Buddhists, Sikhs, Jains and also those who are not Muslims, Christians, Parsis or Jews by religion. However, the Act does not apply to members of any scheduled tribes unless the Central Government by notification in the official Gazette otherwise directs.

Provisions in regard to divorce are contained in section 13 of the Hindu Marriage Act and section 27 of the Special Marriage Act. Common ground on which divorce can be sought by a husband or a wife under these Acts fall under these broad heads: Adultery, desertion, cruelty, unsoundness of mind, venereal disease, leprosy, mutual consent and being not heard of as alive for seven years.

As regards the Christian community, provisions relating to marriage and divorce are contained in the Indian Christian Marriage Act, 1872 and in section 10 of the Indian Divorce Act, 1869 respectively. Under that section the husband can seek divorce on grounds of adultery on the part of his wife and the wife can seek divorce on the ground that the husband has converted to another religion and has gone through marriage with another woman or has been guilty of:

- Incestuous adultery
- Bigamy with adultery
- Marriage with another woman with adultery
- rape, sodomy or bestiality
- Adultery coupled with such cruelty as without adultery would have entitled her to a divorce, a mensa etoro (a system of divorce created by the Roman Catholic Church equivalent to judicial separation on grounds of adultery, perverse practices, cruelty, heresy and apostasy) and
- Adultery coupled with desertion without reasonable excuse for two years or more.

In the Indian Divorce Act, 1869 comprehensive Amendments were made through the Indian Divorce (Amendment) Act, 2001 (No. 51 of 2001) to remove discriminatory provisions against women in the matter of Divorce. Further, sections 36 and 41 of the Act were amended by the Marriage Laws (Amendment) Act, 2001 to provide that an application for alimony pendente lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the respondent.

As regards Muslims, marriages are governed by the Mohammedan Law prevalent in the country. As regards divorce, i.e., Talaq, a Muslim wife has a much restricted right to dissolve her marriage. Unwritten and traditional law tried to ameliorate her position by permitting her to see dissolution under the following forms:

- Talaq-I-Tafwid: This is a form of delegated divorce. According to this, the husband delegates his right to divorce in a marriage contract which may stipulate, inter alia, on his taking another wife, the first wife has a right to divorce him
- **Khula:** this is a dissolution of agreement between the parties to marriage on the wife's giving some consideration to the husband for her release from marriage ties. Terms are a matter of bargain and usually take the form of the wife giving up her mehr or a portion of it, and
- **Mubarat**: this is divorce by mutual consent.

Further, by the Dissolution of Muslim Marriage Act, 1939, a Muslim wife has been given the right to seek dissolution of her marriage on these grounds:

• Whereabouts of the husband have not been known for a period of four years

- Husband is not maintaining her for a period of two years
- Imprisonment of husband for a period of seven years or more
- Failure on the part of husband to perform his marital obligations, without a reasonable cause, for a period of three years
- Impotency of husband
- Two-year long insanity
- Suffering from leprosy or virulent venereal disease'
- Marriage took place before she attained the age of 15 years and not consummated and
- Cruelty.

The Parsi Marriage and Divorce Act, 1936 governs the matrimonial relations of Parsis. The word 'Parsi' is defined in the Act as a Parsi Zoroastrian. A Zoroastrian is a person who professes the Zoroastrian religion. It has a racial significance. Every marriage as well as divorce under this Act is required to be registered in accordance with the procedure prescribed in the Act. However, failure to fulfil requirements on that behalf does not make marriage invalid. The Act provides only for monogamy. By the Parsi Marriage and Divorce (Amendment) Act, 1988, scope of certain provisions of the Parsi Marriage and Divorce Act, 1936 have been enlarged so as to bring them in line with the Hindu Marriage Act, 1955. Recently, sections 39 and 49 of the Parsi Marriage and Divorce Act, 1936 were amended by the Marriage Laws (Amendment) Act, 2001 to provide that an application for alimony pendent lite or the maintenance and education of minor children be disposed of within 60 days from the date of service of notice on the wife or the husband as the case may be.

As for the matrimonial laws of Jews, there is no codified law in India. Even today, they are governed by their religious laws. Jews do not regard marriage as a civil contract, but as a relation between two persons involving very sacred duties. Marriage can be dissolved through courts on grounds of adultery or cruelty. Marriages are monogamous.

Child Marriage

The Child Marriage Restraint Act, 1929, from 1 October 1978, provides that marriage age for males will be 21 years and for females 18 years.

Adoption

Although there is no general law of adoption, it is permitted by the Hindu Adoption and Maintenance Act, 1956 amongst Hindus and by custom amongst a few numerically insignificant categories of persons. Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and have to approach the court under the Guardians and Wards Act, 1890. Muslims, Christians and Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all this connections. Besides, such a child does not have the legal right of inheritance. Foreigners, who want to adopt Indian children, have to approach the court under the aforesaid Act.

Hindu law relating to adoption has been amended and codified into the Hindu Adoptions and Maintenance Act, 1956, under which a male or female Hindu having legal capacity, can take a son or daughter in adoption. In dealing with the question of guardianship of a minor child, as in other spheres of family law, there is no uniform law. Hindu Law, Muslim Law and the Guardians and Wards Act, 1890 are three distinct legal systems which are prevalent. A guardian may be a natural guardian, testamentary guardian or a guardian appointed by the court. In deciding the question of guardianship two distinct things have to be taken into account-person of the minor and his property. Often the same person is not entrusted with both.

The Hindu Minority and Guardianship Act, 1956 has codified laws of Hindus relating to minority and guardianship. As in the case of uncodified law, it has upheld the superior right of father. It lays down that a child is a minor till the age of 18 years. Natural guardian for both boys and unmarried girls is first the father and then the mother. Prior right of mother is recognised only for the custody of children below five. In case of illegitimate children, the mother has a better claim than the putative father. The act makes no distinction between the person of the minor and his property and therefore guardianship implies control over both.

Under the Muslim Law, the father enjoys a dominant position. It also makes a distinction between guardianship and custody. For guardianship, which has usually reference to guardianship of property, according to Sunnis, the father is preferred and in his absence his executor. If not executor has been appointed by the father, the guardianship passes on to the paternal grandfather to take over responsibility and not that of the executor. Both schools, however, agree that father while alive is the sole guardian. Mother is not recognised as a natural guardian even after the death of the father.

As regards rights of a natural guardian, there is no doubt that father's right extends both to property and person. Even when mother has the custody of minor child. Father's general right of supervision and control remains. Father can, however, appoint mother as a testamentary guardian. Thus, though mother may not be recognised as natural guardian, there is no objection to her being appointed under the father's will.

Muslim law recognises that mother's right to custody of minor children (Hizanat) is an absolute right. Even the father cannot deprive her of it. Misconduct is the only condition which can deprive the mother of this right. As regards the age at which the right of mother to custody terminates, the Shia school holds that mother's right to the Hizanat is only during the period of rearing which ends when the child completes the age of two, whereas Hanafi school extends the period till the minor son has reached the age of seven. In case of girls, Shia law upholds mother's right till the girl reaches the age of seven and Hanafi school till she attains puberty.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.

Maintenance

Obligation of a husband to maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law.

Under the Code of Criminal Procedure, 1973, (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claims of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs. 500 per month. But, this limit was removed by the Code of Criminal Procedure (Amendment) Act, 2001 (No. 50 of 2001). Inclusion of the right of maintenance under the Code of Criminal Procedure has the advantage of making the remedy both speedy and cheap. However, divorced wives who have received money payable under the customary personal law are not entitled to claim maintenance under the Code of Criminal Procedure.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. But she loses her right if she deviates from the path of chastity. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956. In assessing the amount of maintenance, the court takes into account various factors like position and liabilities of the husband. It also judges whether the wife is justified in living apart from husband. Justifiable reasons are spelt out in the Act. Maintenance pendente lite (pending the suit) and even expenses of a matrimonial suit will be borne by either, husband or wife, if the other spouse has no independent income for his or her support. The same principle will govern payment of permanent maintenance.

Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands and provides for matters connected therewith or incidental thereto. This Act, inter alia, provides that a divorced Muslim woman shall be entitled to:

- Reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband
- Where she herself maintains children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children
- An amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim Law and
- All property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends.

In addition, the Act also provides that where a divorced Muslim woman is unable to maintain herself after the period of iddat, the magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to the Muslim Law and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of such relatives and such maintenance shall be payable by such relatives in proportion to the size of their inheritance of her property and at such periods as he may specify in his order.

Where such divorced woman has children, the magistrate shall order only such children to pay maintenance to her and in the event of any such children being unable to pay such maintenance, the magistrate shall order parents of such divorced woman to pay maintenance to her.

In the absence of such relatives or where such relatives are not in a position to maintain her, the magistrate may direct State Wakf Board established under Section 13 of the Wakf Act, 1995

functioning in the area in which the woman resides, to pay such maintenance as determined by him.

The Parsi Marriage and Divorce Act, 1936 recognises the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by the court as alimony during the time a matrimonial suit is pending in court, is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Indian Divorce Act, 1869 inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi Law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

Succession

The Indian Succession Act was enacted in 1925. The object of the Act was to consolidate the large number of laws which were in existence at that time. Laws governing succession to Muslims and Hindus were excluded from the purview of the Act. While consolidating the law in respect of succession, two schemes, one relating to succession to property of persons like Indian Christians, Jews and persons married under the Special Marriage Act, 1954 and the other relating to succession rights or Parsis, were adopted.

In the first scheme, applying to those other than Parsis, in the case of a person dying intestate leaving behind a widow and lineal descendants, the widow would be entitled to a fixed share of one-third of property and lineal descendants shall be entitled to the remaining two-third. This law was amended subsequently with the object of improving rights of widows and it was provided that where the intestate dies leaving behind his widows and it was provided that where the intestate dies leaving behind his widow and no lineal descendant and the net value of the estate does not exceed Rs 5,000, the widow would be entitled to the whole of this property. Where the net value of the estate exceeds Rs 5,000 she is entitled to charge a sum of Rs. 5,000 with interest at four per cent payment and in the residue, she is entitled to her share. The Act imposes no restriction on the power of a person to will away his property.

Under the second scheme, the Act provides for Parsi intestate succession. By the Indian Succession (Amendment) Act, 1991 (51 of 1991), the Act was amended to provide equal shares for both sons and daughters in their parental properties, irrespective of the fact that it was that of the father or that of the mother. It also enables the Parsis to bequeath their property to religious or charitable purposes, etc., without any restrictions. In effect the amended law provides that where a Parsi dies intestate leaving behind a widow or widower as the case may be, and children, the property shall be divided so that the widow or widower and each child receives equal share. Further, where a Parsi dies leaving behind one or both parents in addition to children, or widow widower and children, the property shall be so divided that the parent or each of the parents shall receive a share equal to half the share of each child.

This Act was amended by the Indian Succession (Amendment) Act, 2002. It was felt that section 32 of the principal Act is discriminatory to widows and as such the proviso to section 32 was omitted to remove discrimination in this regard. Section 213 was also amended by this amending Act to make Christians at par with other communities.

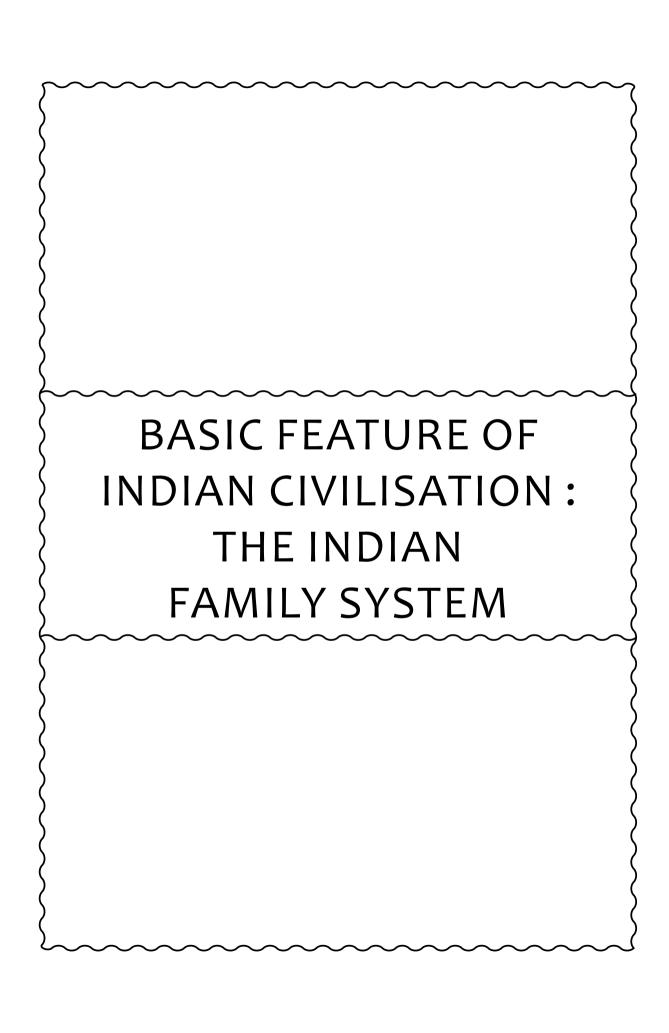
UNDERSTANDING PERSONAL LAWS IN INDIA

The law relating to intestate succession among Hindus is codified in the Hindu Succession Act, 1956 (30 of 1956). It extends to the whole of India except the State of Jammu and Kashmir. The remarkable features of the Act are the recognition of the right of women to inherit property of an intestate equally with men and abolition of the life estate of female heirs.

A vast majority of Muslims in India follow Hanafi doctrines of Sunni law. Courts presume that Muslims are governed by Hanafi law unless it is established to be the contrary. Though there are many features in common between Shia and Sunni schools, yet there are differences in some respects. Sunni law regards Koranic verses of inheritance as an addendum to pre-Islamic customary law and preserves the superior position of male agnates. Unlike Hindu and Christian laws, Muslim law restricts a person's right of testation. A Muslim can bequeath only one-third of his estate. A bequest to a stranger is valid without the consent of heirs if it does not exceed a third of the estate, but a bequest to an heir without the consent of other heirs is invalid. Consent of heirs to a bequest must be secured after the succession has opened and any consent given to a bequest during the lifetime of the testator can be retracted after his death. Shia law allows Muslims the freedom of bequest within the disposable third.



REAL	DING MATERIAL FO	R 1ST REGIONAL T	RAINING FOR SEN	ISITIZATION OF F	AMILY COURT MAT	TERS



BASIC FEATURE OF INDIAN CIVILISATION: THE INDIAN FAMILY SYSTEM

1. Chapter Overview

Family is one of the main socialising institutions of the society. Since ancient times, the family has been the most important child care institute in India as children are expected to grow under the glory of family where a satisfactory rearing of child is ensured. According to Pope – "the family is more sacred than the State." It was pointed out by Will and Ariel Durant that the family is nucleus of civilisation. The universal declaration of human rights prescribes the family as the natural and fundamental unit of society. Family is virtually a social organisation or a unit of men and women out of relationship.

The importance of family lies in bringing up the child to a full man in the family atmosphere. It has been a time honoured belief in our culture that the child is a gift of God that must be nurtured with care and affection within the family and society as a future dawn. As per Confucius-the strength of a Nation is derived from the integrity of its homes. It is the famous saying that a comfortable home is a great source of happiness. It ranks immediately after health and good conscience as aptly said by Byron. Without loving heart there is no meaning for home. The purpose of this chapter is to describe the theoretical framework of this research by defining family and giving insight into the Indian family system.

2. Family

Family, a basic unit of social structure, the exact definition of which can vary greatly from time to time and from culture to culture. How a society defines family as a primary group, and the functions it asks families to perform, are by no means constant. There has been much recent discussion of the nuclear family, which consists only of parents and children, but the nuclear family is by no means universal. In the United States, the percentage of households consisting of a nuclear family declined from 45% in 1960 to 23.5% in 2000.¹ In preindustrial societies, the ties of kinship bind the individual both to the family of orientation, into which one is born, and to the family of procreation, which one founds at marriage and which often includes one's spouse's relatives. The nuclear family also may be extended through the acquisition of more than one spouse, or through the common residence of two or more married couples and their children or of several generations connected in the male or female line. This is called the extended family; it is widespread in many parts of the world, by no means exclusively in pastoral and agricultural economies. The primary functions of the family are reproductive, economic, social, and educational; it is through kin itself variously defined that the child first absorbs the culture of his group².

3. Indian Family System

In India the family is the most important institution that has survived through the ages. India, like most other less industrialised, traditional, eastern societies is a collectivist

¹ en.wikipedia.org/wiki/American_family_structure

² The Columbia Encyclopedia, Sixth Edition Copyright© 2004, Columbia University Press

society that emphasizes family integrity, family loyalty, and family unity. C. Hui and H. Triandis³ defined collectivism, which is the opposite of individualism as, "a sense of harmony, interdependence and concern for others". More specifically, collectivism is reflected in greater readiness to cooperate with family members and extended kin on decisions affecting most aspects of life, including career choice, mate selection, marriage and its continuity.

The Indian family has been a dominant institution in the life of the individual and in the life of the community.4 For the Hindu family, extended family and kinship ties are of utmost importance. In India, families adhere to a patriarchal ideology, follow the patrilineal rule of descent, are patrilocal, have familialistic value orientations, and endorse traditional gender role preferences. The Indian family is considered strong, stable, close, resilient, and enduring.⁵ Historically, the traditional, ideal and desired family in India is the joint family. A joint family includes kinsmen, and generally includes three to four living generations, including uncles, aunts, nieces, nephews, and grandparents living together in the same household. It is a group composed of a number of family units living in separate rooms of the same house. These members eat the food cooked at one hearth, share a common income, common property, are related to one another through kinship ties, and worship the same idols. The family supports the old; takes care of widows, never-married adults, and the disabled; assists during periods of unemployment; and provides security and a sense of support and togetherness.⁶ The joint family has always been the preferred family type in the Indian culture, and most Indians at some point in their lives have participated in joint family living.⁷

The beauty about the Indian culture lies in its age-long prevailing tradition of the joint family system. It's a system under which even extended members of a family like one's parents, children, the children's spouses and their offspring, etc. live together. The eldermost, usually the male member is the head in the joint Indian family system who makes all important decisions and rules, whereas other family members abide by it dutifully with full respect.

A major factor that keeps all members, big and small, united in love and peace in a joint family system in India is the importance attached to protocol. This feature is very unique to Indian families and very special. Manners like respecting elders, touching their feet as a sign of respect, speaking in a dignified manner, taking elders' advice prior taking important decisions, etc. is something that Indian parents take care to inculcate in their kids from very beginning. The head of the family responds by caring and treating each member of the family the same.

Hui, C. and Triandis, H. (1985), 'Measurement in Cross-Cultural Psychology: A Review and Comparison of Strategies', Journal of Cross-Cultural Psychology, Vol. 16.

⁴ Mullatti, L. (1992), 'Changing Profile of the Indian Family', The Changing Family in Asia, UNESCO Principal Regional Office for Asia and the Pacific, RUSHSAP Series on Monographs and Occasional Papers 35, Bangkok.

⁵ Shangle, S. (1995), 'A View into the Family and Social Life in India', Family Perspective, Vol. 29, pp 423–446.

⁶ Chekki, D.A. (1996), 'Family Values and Family Change', Journal of Comparative Family Studies , Vol. 27, No. 2, pp 409-411

Nandan, Y. and Eames, E. (1980), 'Typology and Analysis of the Asian-Indian Family', In Saran, P. and Eames, E. (Eds.), The New Ethnics: Asian Indians in the United States, Praeger, New York.

The intention behind the formation of any social unit will fail to serve its purpose if discipline is lacking and the same applies to the joint family system as well. Due to this reason, discipline is another factor given utmost importance in the joint family system in India. As a rule, it's the say of the family head that prevails upon others. Incase of any disagreement, the matter is diligently sorted out by taking suggestions from other adult members. One usually also has to follow fixed timings for returning home, eating, etc.

The reason why Indians are proving to emerge as a prosperous lot globally, many researches claim, is because of the significance they attach to the joint family system. All working cohesively to solve a problem faced by any one or more members of the joint family, is what works magic in keeping one tension-free, happy and contended even in today's highly competitive environment. An Indian may be a top corporate honcho or a great sportsperson or a movie actor and so on in a particular professional field, but all these accomplishments relegate to the backseat when at home.

With the advent of urbanisation and modernisation, younger generations are turning away from the joint family form. Some scholars specify that the modified extended family has replaced the traditional joint family, in that it does not demand geographical proximity or occupational involvement and does not have a hierarchal authority structure. This new family form encourages frequent visits; financial assistance; aid and support in childcare and household chores; and involvement and participation in life-cycle events such as births, marriages, deaths, and festival celebrations. The familial and kinship bonds are thus maintained and sustained. Even in the more modern and nuclear families in contemporary India, many functional extensions of the traditional joint family have been retained, and the nuclear family is strongly embedded in the extended kinship matrix. In spite of the numerous changes and adaptations to a pseudo-Western culture and a move toward the nuclear family among the middle and upper classes, the modified extended family is preferred and continues to prevail in modern India.

India is an extremely pronatalistic society, and the desire to have a male child is greatly stressed and is considered by some to be a man's highest duty, a religious necessity, and a source of emotional and familial gratification. Because male children are desired more than female children, they are treated with more respect and given special privileges. Male children are raised to be assertive, less tolerant, independent, self-reliant, demanding, and domineering. Females, in contrast, are socialised from an early age to be self-sacrificing, docile, accommodating, nurturing, altruistic, adaptive, tolerant, and religious, and to value family above all. In rural areas, low-income women have always worked outside the home. In urban areas, there has been a substantial increase in the number of middle- and upper-class women working to supplement their husbands' incomes. In a traditional Indian family, the wife is typically dependent, submissive, compliant, demure, nonassertive, and goes out of her way to please her husband. Women are entrusted with

⁸ Ibid. 25, p 22

Kakar, S. (1981), 'The Inner World: Psychoanalytic Study of Childhood and Society in India', Oxford University Press, Bombay

Pothen, S. (1993), 'Divorce in Hindu Society', In Tepperman, L. and Wilson, S. (Eds.), 'Next to Kin', Prentice Hall, Englewood Cliffs, New Jersey.

¹¹ Kumar, P., and Rohatgi, K. (1987), 'Value Patterns as Related with High and Low Adjustment in Marriage', Indian Journal of Current Psychological Research, Vol. 2, pp 98–102.

the responsibility of looking after the home and caring for the children and the elderly parents and relatives.

Child rearing practices in India tend to be permissive, and children are not encouraged to be independent and self-sufficient. The family is expected to provide an environment to maximise the development of a child's personality and, within the context of the Hindu beliefs and philosophy, positively influence the child's attitudes and behaviours.

Adolescence and young adulthood are particularly stressful and traumatic stages in the lives of Indian youths. In one way, they desire emancipation and liberation from family but residing in the matrix of the extended family makes it difficult for them to assert themselves and exhibit any independence in thought, action, or behaviour. Social changes are gradually occurring but arranged marriages are still the norm, and dating generally is not allowed. Furthermore, sex and sexuality issues are not openly discussed, sex education is not readily available, interrelationships with the opposite sex are discouraged, and premarital sex is frowned upon. In the traditional Indian family, communication between parents and children tends to be one-sided. Children are expected to listen, respect, and obey their parents. Generally, adolescents do not share their personal concerns with their parents because they believe their parents will not listen and will not understand their problems.¹²

4. Problems of India's Changing Family

The family has been and continues to be one of the most important elements in the fabric of Indian society. The bond that ties the individual to his family, the range of the influence and authority that the family exercises make the family in India not merely an institutional structure of our society, but accord give it a deep value. The family has indeed contributed to the stability to Indian society and culture. 13

Today, the Indian family is subjected to the effects of changes that have been taking place in the economic, political, social and cultural spheres of the society. In the economic sphere, the patterns of production, distribution and consumption have changed greatly. The process of industrialisation and the consequent urbanisation and commercialisation have had drastic impacts on the family. Migration to urban areas, growth of slums, change from caste oriented and hereditary occupations to new patterns of employment offered by a technological revolution, the cut-throat competition for economic survival and many other economic changes have left their impact on the family.

Briefly speaking, these changes in the socio-economic-political-cultural milieu of our society have led to changes in the structures, functions, roles, relationships and values of the family. In the context of the changes in the economic system more and more members of the family are moving away from the larger family circle and living as individuals or members of a nuclear unit in urban areas. The patterns or loyalties, obligations and expectations have changed. The cases of the child and the aged in particular have become a problem for many due to structural changes in the family.¹⁴

Medora, N. P., Larson, J. H., and Dave, P. B. (2000), 'East- Indian College Student's Perceptions of Family Strengths', Journal of Comparative Family Studies, Vol. 31, pp 408–424

¹³ www.egyankosh.ac.in/bitstream/123456789/36906/1/Unit-1.pdf

Bharat S. (Ed.) (1991), Research on Families with Problems in India: Issues and Implications. Vol. 1, Tata Institute of Social Sciences, Bombay.

4.1 Disappearing Joint Family System

Since time immemorial the joint family has been one of the salient features of the Indian society. But the twentieth century brought enormous changes in the family system. Changes in the traditional family system have been so enormous that it is steadily on the wane from the urban scene. There is absolutely no chance of reversal of this trend. In villages the size of joint family has been substantially reduced or is found in its fragmented form. Some have split into several nuclear families, while others have taken the form of extended or stem families. Extended family is in fact a transitory phase between joint and nuclear family system. The available data suggest that the joint family is on its way out in rural areas too.¹⁵

The joint family or extended family in rural areas is surviving in its skeleton or nominal form as a kinship group. The adults have migrated to cities either to pursue higher education or to secure more lucrative jobs or to eke out their living outside their traditional callings, ensuing from the availability of better opportunities elsewhere as well as the rising pressure of population on the limited land base. Many of the urban households are really offshoots of rural extended or joint families. A joint family in the native village is the fountainhead of nuclear families in towns. These days in most cases two brothers tend to form two independent households even within the same city owing to the rising spirit of individualism, regardless of similarity in occupation, even when the ancestral property is not formally partitioned at their native place.

The nuclear family, same as elsewhere, is now the characteristic feature of the Indian society. According to the Census of India data¹⁶, of all the households nuclear family constituted 70 percent and single member or more than one member households without spouse comprised about 11 percent. The extended and joint family or households together claim merely 20 percent of all households. This is the overall picture about the entire country, whereas in the case of urban areas the proportion of nuclear family is somewhat higher still.

An extended family, which includes a couple with married sons or daughters and their spouses as well as household head without spouse but with at least two married sons, daughters and their spouses, constitute a little less than one fifth of the total households. With further industrial development, rural to urban migration, nuclearisation of families and rise of divorce rate and the proportion of single member household is likely to increase steadily on the line of industrial West. This is believed to be so because the states, which have got a higher level of urbanization, tend to have a higher proportion of single member households. Similarly, about a couple of decades ago almost 20 percent households contained only one person in the USA.¹⁷ More or less, a similar situation exists in other developed countries as well, and above all, not a single country has recorded decline in the proportion of single member households during the last three decades. In fact, the tendency is more towards increase in the proportion of single member households.

Singh, J.P. (2004), 'The contemporary Indian family', In Adams, B.N and Trost, J. (Eds.), 'Handbook of World Families', Sage Publications Inc., California.

¹⁶ Census of India (2011), Available at http://www.censusindia.net/.

¹⁷ Skolnick, A. and Skolnick, J.H. (1980), 'Family in Transition', Little, Brown and Company, Boston.

As the process of family formation and dissolution has become relatively faster now than before, households are progressively more headed by relatively younger people. Census data from 1971 onward have clearly borne out that at the national level over three-fifths of the households are headed by persons aged less than 50.¹⁸ There is every reason to believe that proportion of households headed by younger persons is likely to constitute a larger proportion than this in urban areas where the proportion of extended family, not to speak of joint family, is much smaller than that of rural areas.

The emergence of financially independent, career-oriented men and women, who are confident of taking their own decisions and crave to have a sense of individual achievement, has greatly contributed to the disintegration of joint family. Disintegration of joint family has led to closer bonds between spouses, but the reverse is also true in certain cases. For many, nuclear family is a safer matrimonial home to a woman. In bygone days people generally lived in joint families, yet familial discord never escalated into extreme physical violence or death, as we so often come across such instances in our day-to-day life and also know through national dailies, both electronic and print media.

4.2. Changes in Authority Structure

Once the authority within the family was primarily in the hands of family elders. The general attitude of members of the family towards the traditional patriarch was mostly one of respect. Loyalty, submissiveness, respect and deference over the household were bestowed on him. These attributes also encompassed other relationships in the family, such as children to their parents, a wife to her husband, and younger brothers to their older brothers. Within a household no one was supposed to flout the will of his elders. The father, or in his absence the eldest brother, was consulted on all important family matters like pursuing litigation in courts of law, building a house, buying and selling of property and arranging marriages, etc. The joint family did not allow the neglect or disregard of elders. The age-grade hierarchy was quite strong. Now the people of younger generation, particularly those with modern tertiary education, do not seem to show the same reverence which their fathers had for their parents or elders.

Among women, patriarch's wife was the paramount authority. In fact, women's position depended on the position of their husbands in the household. The wife of the household head or mother-in-law was in charge of the household. Her word was law or at least had the same force. Her decisions were made for the entire family and not for the welfare of the individuals in it. Young women in the family were expected to be dutiful and obedient. Self-assertion, even in bringing up their own children, was blasphemy. Widows and those spurned by their husbands were assured of the family roof, though mostly as voiceless members.

With a view to absolving themselves of responsibility now parents cleverly encourage their educated sons and daughters-in-law to take independent decision in a joint and extended family situation, leave aside urban areas, the similar situation has started to emerge in rural areas too. This is not unusual when sons and daughters tend to possess a higher

¹⁸ Ibid. 33, p. 28

¹⁹ Gupta, G.R. (1978), 'The joint family', In Das, M.S. and Bardis, P.D. (Eds.) 'The Family in Asia', George Allen & Unwin, London.

level of education and a greater degree of exposure of the world outside the family than ever before. Now boys and girls, contrary to the old practice, are beginning to assert their wishes in mate selection. Parental decisions are no more supreme. Changes concerning erosion of authority of old guards, particularly in matters of mate selection, are on gradual decline in rural areas too.

Yet another interesting fact about the change in authority structure within the family is that about 10 percent of all the households are headed by women.²⁰ Most of the female household heads are usually independent and gainfully employed. In the absence of their husbands, either because of death, separation, transfer in job or business engagement, women are themselves able to run the affairs of their family. Long distance migration of men for employment is also an important reason for the emergence of such households. The phenomenon of female-headed household assumes significance in the Indian society because in the past when the joint family system was so preponderant that the female-headed household was quite an uncommon phenomenon.

4.3. Changes in Marital Practices

The traditional system of values of the Indian society, especially that of Hindus, has been such that it stood for the practice of early as well as universal marriage for females. Child marriage or pre-puberty marriage all through has been an archetypal institution of India. The mean age at marriage was reported to be quite low in the 19th century and so also in earlier days. The mean age at marriage for females was about 13 years between 1901 and 1931 censuses²¹ and it did not differ much between different communities. Of all the legal measures the Child Marriages Restraint Act 1929 (and its further amendments in 1949, 1955 and 1978) happened to be quite effective one. Rise in the age at marriage really became conspicuous during the post independence era, that is, during the period onward 1950. The act was further amended in 1978 wherein boys' marriage age was raised to 21 and girls' age to 18 years. On the whole, the state level census information for the last one hundred years has revealed a clear rise in the age at marriage for girls. During 1891-1991 the age at marriage increased by 4 to 7 years in different parts of the country. The Census of India, 2011²² has estimated an age of 21.5 at marriage.

A new law banning child marriage was passed in December 2006. The law provides certain positive initiatives for the intervention of courts to prevent child marriages through stay orders. Child marriages are solemnised during times of festivals such as Akshaya Tritiya, Akha Teej, Ram Navami, Basant Panchami and Karma Jayanti.²³ According to UNICEF report²⁴, 47 percent of India's women aged 20-24 were married before the legal age of 18, with 56 percent in rural areas.

Child marriages have been prevalent in many cultures throughout human history, but have gradually diminished since some countries started to urbanise and experience changes in the ways of life for the people of these countries. An increase in the advocacy of human rights, whether as women's rights or as children's rights, has caused the traditions of child

National Family Health Survey-1 (1992-93) (1994), 'India: Introductory Report', IIPS and ORC Macro, Mumbai.

²¹ Ibid. 34, p. 28

²² Ibid.

²³ social.un.org/index/LinkClick.aspx?fileticket...tabid=215

²⁴ UNICEF (2009), The State of the World's Children, Division of Communication, UNICEF, United Nations Plaza, New York.

marriage to decrease greatly as it was considered unfair and dangerous for the children. Today, child marriage is usually practised in countries where cultural practices and traditions of child marriage still have a strong influence. Although child marriages have been outlawed a long time ago, South Asia has currently the highest prevalence of child marriage of any region in the world.²⁵ India, as noted above, happens to be a forerunner in this regard.

Yet another important marital practice is consanguineous marriage which has been the notable feature of a large segment of the Indian society since long. Through the ages the system of cross-cousin and cross-uncle niece marriages has been the most favoured kind of marriage in South India. The most desirable mate for a man has been his own sister's daughter or mother's brother's daughter.²⁶ In the face of rising dowry practices across the country consanguineous marriages have appreciably declined in South India in recent years. However, such marriages have remained tabooed among the vast majority of Hindus of North India. The Hindu Marriage and Divorce Act 1955 prohibits marriage among close relatives, called sapinda marriage. The sapinda relationship extends as far as the third generation in the line of mother and the fifth in the line of father. In North India only Muslims, certain scheduled castes and scheduled tribes tend to practice consanguineous marriages. Most of the tribal groups practice consanguinity of both types such as marriages with the father's sister's daughter, the mother's brother's daughter and the elder sister's daughter.²⁷

The Indian society has been a highly endogamous. Marriage within the same subcaste has been followed very strictly. The scheduled tribes are also endogamous, but most of the tribal communities practice clan exogamy.²⁸ Polygamy, more particularly polygyny, has been one of salient features of Indian family. It has been more popular among Muslims than Hindus. Here it is not suggested that the incidence of polygyny is more common than monogamy. The polygamous males often derived support from age- old scriptures and mythological stories. But mainly those who had no issue from the first wife practised such marriages. With the rise in the level of literacy the incidence of polygyny has receded even among the Muslims despite the fact that such marriages have got full cultural and legal sanction. While monogamy is the predominant form of marriage, there are a large number of tribes practicing sororal polygyny and non-sororal polygyny.²⁹

4.4. Dissolution of Marriage

The dissolution of marriage has been quite uncommon and rare in India for a long time. In case of any crisis or threat to stability of marriage, caste, community, kinsmen, tended to have played a dominant say. People had both respect for and fear of social values and public opinion. Authority of community, though implicit, has been supreme. The system of religious belief has provided enough sustenance to the institution of marriage and family. Individual choice has always been subservient to the communal sentiment or public

²⁵ Ibid.

Driver, E. D. and Driver, A.E. (1988), 'Social and demographic correlates of consanguineous marriages of south India', Journal of Comparative Family Studies, Vol. 19, pp 229-244.

²⁷ Singh, K. S. (1997), 'The Scheduled Tribes' (People of India, Vol. III), Oxford University Press, New Delhi.

²⁸ Ibid

²⁹ Ibid. 45, p. 34.

opinion. Hindu marriage is taken as a life-long union for the couple, as it is a sacrament, rather than a contract between the couple to live in a social union so long as it is cordially feasible. Even in the event of frequent mental and physical torture, most Indian women persist in marriage, since remarriage of divorced or separated women is quite difficult. Morality relating to sex is so highly valued that every male wants to marry a virgin girl only. In the past Hindus demanded pre-nuptial chastity on the part of both, but now it is by and large limited to females. Virginity is regarded as the girls' greatest virtue and a symbol of respectability. Under the circumstances remarriage of women is so difficult that annulment of marriage is a very hard choice or option.

Despite all these there has been a significant change in the views and attitudes towards sanctity of marriage in the recent past, especially in cities. Marriage is no longer held to be a 'divine match' or a 'sacred union'. Now it is more like a transfer of a female from one family to another, or from one kinship group to another. The marriage is no longer sanctified as it was believed in the past, and is viewed only as a bonding and nurturing life-long relationship and friendship. The rather flippant and superficial reasons given by many women and men to break a marriage may not portend well for the future. Indian marriages are still largely resilient and lasting, whereas in many developed countries they seem to break up for seemingly trivial reasons. Marriages are very vulnerable or fragile there. One in every four or five marriages breaks up despite more space and freedom in the West. The longevity of marriage in most developed countries ranges on an average from five to seven years. While in India divorce rates are among the lowest in the world. Only one out of 100 marriages ends up in divorce here. These days divorce rates in India's urban sphere are, however, slowly mounting.³⁰

Marriage counsellors, formerly pooh-poohed at, have today assumed a lot of importance in guiding couples through stormy seas and averting the imminent pain of divorce. Today in cities there is disenchantment with the system of arranged marriages in a large number of cases. The Indian family is faced with a new kind of social and psychological constraints. The women, however, tend to be more concerned about their marriage than men and in case of a problem they are expected to go for counselling. They are expected to take the lead to resolve conflicts and when they give up the effort, the marriage is generally over. In today's shifting values and changing times, there is less reliance on marriage as a definer of sex and living arrangements throughout life. Today in cities there is disenchantment with the system of arranged marriages. There is a greater incidence of extra-marital relationships, including open gay and lesbian relationships, a delay in the age at marriage, higher rates of marital disruption and more egalitarian genderrole attitudes among men and women. It is reported that in big metropolises a new system of 'live-in-arrangements' between pairs, particularly in upper stratum of society, is steadily emerging as a new kind of family life. Anyway, a relatively higher divorce rate in cities, inter alia, connote that marriage is an institution in trouble, or else expectations are so high that people are no longer willing to put up with the kinds of dissatisfactions and empty shell marriages that the previous generations tolerated. High rate of remarriages clearly means that people are sacrificing their marriages because of unsatisfactory relationships.

4.5. Domestic Tension and Violence

Violence within family settings is primarily a male activity. The prime targets are women and children. The women have been victims of humiliation and torture for as long as we have written records of the Indian society. Despite several legislative measures adopted in favour of women during the last 150 years, continuing spread of modern education and women's gradual economic independence, countless women have continued to be victims of discrimination and violence in the country. Increasing family violence in modern times has compelled many social scientists to be apologists for the traditional joint family-as happy and harmonious, a high-voltage emotional setting, imbued with love, affection and tenderness. India's past has been so romanticised by certain scholars that they have regarded the joint family as the best form of family.

There are data³² showing that in India 40 percent of women have experienced violence by an intimate partner. These stark figures underline the fact that, although the home and community are places where women provide care for others, they are also places where millions of women experience coercion and abuse. A study of five districts of the State of Uttar Pradesh has revealed that 30 percent of currently married men acknowledge physically abusing their wives.³³ About fifty percent of the women experiencing physical violence also reported physical abuse during pregnancy.

With the rise in the level of education and exposure to mass media, women tend to have greater awareness of the notion of gender equality, faith in the effectiveness of legal action to protect their rights, and confidence in such institutions as family courts and certain voluntary organizations working for women. Yet there is no sign of abatement in gender related violence. Cases of domestic violence, like wife-battering and forced incest with the women of the household, are so personal and delicate that they are seldom reported to the police or law courts. We are sure that the recent legislation of anti- domestic violence act of 2005 would certainly take care of the problem of gender-based violence of the Indian woman to a very large extent.

There is another side of the story of domestic violence as well which has remained uncovered, particularly by feminist writers. It is roughly estimated that every year more than 58000 educated women are making the life of their husbands hell by misusing antidowry law and domestic violence act and under these laws legal terrorism is continuing openly to extort money from the husbands and their families. More than 52000 married men are ending their life due to various type of harassment and domestic violence faced form their beloved wives in the form of verbal abuse, financial abuse, mental abuse, sexual abuse, relationship cheating, etc.³⁴

Singh, J.P. (2002), 'Social and cultural aspects of gender inequality and discrimination in India', Asian Profile, Vol. 30, No. 2, pp 163-176.

³² Ibid. 41, p. 33.

³³ UNC, 1997, Uttar Pradesh Male Reproductive Health Survey 1995-96 (The Evaluation Project), University of North Carolina at Chapel Hill, NC.

³⁴ Ibid. 41, p. 33

4.6. Problems of Children

Children constitute a little over 30 percent of the total population of the country according to the 2001 Census of India.³⁵ Evidence suggests that they are quite vulnerable and their exposure to violations of their protection rights remains widespread and multiple in nature. The manifestations of these violations are very varied, ranging from child labour and child trafficking to commercial sexual exploitation and many other forms of violence and abuse. With an estimated 12.6 million children engaged in hazardous occupations³⁶, for instance, India has the largest number of child labourers under the age of 14 in the world. Although poverty is often cited as the cause underlying child labour, other factors such as discrimination, social exclusion, as well as the lack of quality education or existing parents' attitudes and perceptions about child labour and the role and value of education need also to be considered.

While systematic data and information on child protection issues are still not always available, evidence suggests that children in need of special protection belong to communities suffering disadvantages and social exclusion such as scheduled castes and scheduled tribes, and the poor. The lack of available services as well as the gaps persisting in law enforcement and in rehabilitation schemes also constitute a major cause of concern. The children of poor families, especially those of artists, craftsmen, and other professions are trained by their parents and elders of the family in their vocations such as weaving, tanning, sweeping dyeing, hairdressing, painting, carpentry and agriculture. A vast number of children grow up lending a helping hand to elders in their home- industries. The practice or intergenerational transfer of traditional callings more or less is still continuing. Such kids who lack formal schooling, but working and specializing in some craft or their traditional callings help them build a career.

Indeed, the poverty in India forces many parents to send their children to earn extra money. The employers who hire such children pay them paltry wages. One can see boys of poor families act as vegetable vendors throughout India. Children of construction workers help in bringing water, cleaning vessels or collecting twigs for fuel. Their parents are compelled to come to cities when monsoon fails and they cannot cultivate their lands.

Children are also subjected to gender based discrimination. Discrimination against women in fact starts the day she is born. Sometimes it also starts when she is in her mother's womb as a foetus. The practice of female foeticide, despite being illegal, is vigorously practised in urban India. The girl child's right to survival, health care and nutrition, education, social opportunities and protection has to be recognised and made a social and economic priority. Along with this the basic structural inequalities that cause poverty, malnutrition and the low status of women have to be addressed, if these rights are to be ensured. Within family parents are first to practice gender based discrimination and it is the first school of learning where girls are inculcated the values of their being inferior to their brothers.

Although India loves their children, still thousands of children roam the streets of major cities around the country and receive no education, proper food, clothing, or a bed to sleep in at night. Awareness presentations through multi-media, contributions, talking

³⁵ Ibid. 34, p. 28

³⁶ Ibid.

and sharing information among friends, education, self-help initiatives and good old fashion kindness are all that is needed to get these kids off the streets. Basically they need five things for their living: food, clothing, shelter, medical assistance and education.

Contrary to the above, there are children who belong to the well-off sections of society, but they are also not free from problems. They are facing a different kind of problem either due to lack of adequate care or attention from their working parents or due to heavy expectation from them by their parents in a fiercely competitive modern world full of uncertainties in life. In cases of working mothers, children are placed in an entirely different situation. The demands of city life are such that both wife and husband tend to remain outside their home for work even at the cost of interests of their children. Working couples are unable to give proper care and affection to their children. Obviously, latchkey children of working couples are strangers to the sense of security enjoyed by their own parents. The system of surrogate mothers or the Montessori and Kindergarten systems of schooling has proved to be a very poor substitute for family as an agent of socialization. With the diminished role of family as an agent of socialization juvenile delinquency is on the increase. In the past children enjoyed security of a kind unknown today. Growing up under the joint care of adults made them feel responsible for all the extended members of the family, besides their own parents. Now children are at greater strain than ever before because in general parents intend to accomplish those things in their life through their children what they themselves could not be able to achieve, no matter how difficult they are. Children are put under great stress and stain to score high marks at schools to be able to meet the ever-increasing challenges of fiercely competitive world of education and employment. In addition to helping their children achieve higher goals of life, women, sometimes both the parents, have to work harder with a view to attaining economic independence and maintaining a higher standard of living of their family.

As stated above, there has been appreciable decline in fertility over the years. This has not been possible without recording drastic changes in the attitude of people towards the size of family and the value system of patriarchy and patriliny. Based on studies on fertility behaviour and contraceptive practices one can conclusively contend that perhaps no element of the Indian social system has experienced greater changes than the system of family during the post-independent period. This is clearly borne out by various empirical investigations. Despite considerable decline in fertility or lesser burden of children on the family, there is no improvement in the quality of care of children especially in rural areas.

There hardly exists any pre-school or community centre in villages. There also does not exist even a basic facility of play ground for children. The older children have to mind the younger children at home and sometimes they are also expected to lend helping hands to their parents in the household chores as and when required. The poor children learn the expected roles of life of their own with the passage of time, while the well-off peasantry send their children to private schools in towns and cities for better schooling.

5. Chapter Summary

In this chapter, an introductory theme, definition and meaning of family is presented. Indian family system and contemporary changes affecting the family structure in India

BASIC FEATURE OF INDIAN CIVILISATION: THE INDIAN FAMILY SYSTEM

in terms of disturbed family, changes in marital status, and problems of children are addressed in detail.

The basic unit of the Indian society is patrilineal family unit and wider kinship groupings. The most widely desired residential unit is the joint family, ideally consisting of three or four patrilineally related generations, all living under one roof. Due to the continuous and growing impact of urbanization and westernisation, nuclear family has now become the characteristic feature of the Indian society. The phenomenon of male-headed households has now been transforming into female-headed ones. Another noticeable change in the Indian family system is dissolution of marriages and the number of divorce cases is slowly mounting day by day. Increasing domestic violence has been reported in India, as a result of family fragmentation and loss of social support systems in marriage. The major influence that has been cast by the changes in all spheres of the society is on children leading to child labour, trafficking and other forms of abuse. Poverty is the main factor among all the reasons behind all such negative occurrences making their lives miserable. At the same time, children of well-to-do families are also experiencing several problems in terms of lack of attention from their busy parents and a great strain from high expectations to excel in the competitive world.



READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS					

FAMILY VIOLENCE: NATURE & DIMENSION

FAMILY VIOLENCE: NATURE & DIMENSION

Introduction

"From the cradle to the grave, women are objects of violence from those nearest and dearest to them. And it is a never ending cycle for there is considerable evidence of intergenerational transmission of domestic violence". (Freeman, 1979, p 239)

Development is about protection of human rights of the concerned populations. It pre-supposes active participation of the population in the decision-making processes while social justice remains one of the most important and cherished goals of development. However, contradictions do remain as a result of various processes not only among nations at a global level, but also significantly within sections of population within a country. People continue to be marginalized on the basis of caste, class, religion, ethnicity, colour, and sex etc. in India. Discrimination and exploitation on the basis of gender constitutes a serious issue which effectively means that half the human race is unable to realize its potential and condemned to sub-optimal standards of existence. This problem has received world-wide attention and several efforts have been made to bridge the seemingly ever-widening gap. Yet even after years of efforts to integrate women into the mainstream development process the effectively of the same remains to be questioned owing to a multitude of factors which aid the continued marginalization of women. Women's access to education, health, employment and political spaces still remain distant goals in many nations of the world. One of the most serious impediments to women's development is the phenomenon of continuing and increasing violence against them. Needless to say, this constitutes a serious violation of women's human rights. Violence against women is one of the most significant, yet little understood and acknowledged factor instrumental in the phenomenon of marginalization of women in the development processes. Gender violence manifests itself in various forms female foeticide and infanticide, sexual abuse, incest, molestation, sexual harassment at work and on the streets, marital rape, domestic violence in the form of wife assault and woman battering. In some places, there exist culture-specific forms of violence against women like female genital mutilation in some African countries and harassment/ murder /beating for dowry in India. Of all the forms of violence that women face, domestic violence remains the least reported and largely suppressed.

For women, violence is a phenomenon which starts at conception and carries on through their entire life span. In India, pre-birth selection and consequent infanticide is a common occurrence and the preference for a male offspring widespread. Discrimination continues by way of access to adequate food, prompt medical facilities, burden of household work, care of siblings and so on leading to lack of education and consequent lack of awareness and empowerment and imparting of skills. Adolescence brings with it the complete withdrawal of the little freedom of mobility, fear of and occurrence of sexual assaults; both within and outside of the family. Vulnerability is further compounded by early marriages and early child bearing and the disastrous consequences of the same on the health of women. In India, specifically, child marriages further accentuate the girl's vulnerability. The reproductive age is, for a lot of women, punctuated with physical, mental and emotional abuse by their husbands. Millions of Indian women face severe harassment due to unfulfilled dowry demands and many are victims of homicide and are even driven to suicide.

All these foster a deep and inescapable sense of dependency in women who are left with no alternative but to continue to live with and depend on abusive partners for want of any other choice. Additionally, women constantly need to negotiate their space and contend with abuse at the workplace too. An important aspect is that a woman may experience violence either once in one of her life-cycle phases or be continually exposed to multiple instances of violence at various points in time. It has, however been established beyond doubt that domestic violence is probably one of the most endemic forms of violence against women throughout the world.

What sets out domestic violence from other forms of violence against women is that it occurs within the framework of intimate relationships in a situation of dependency, making reporting and access to legal aid and other support services difficult. Moreover that domestic violence exists is not even recognized by the law.

Domestic violence is still an issue that 'can be sorted out within the four walls of the house* and some amount of violence is considered part of the normal 'wear and tear of marriage'. However, change comes in society, may not for better. Cases on atrocities against women are showing rising trend so much so that every day the columns in newspapers are full of reports of abuse of children and women and deaths of women or suicide committed for not fulfilling the greedy demands of the husbands and/ or their near relatives.

Women constitutes about one-half of the global population, but they are placed at various disadvantageous positions due to gender difference and bias. They have been the victims of violence and exploitation by the male dominated society all over the world. Indian society is a tradition bound society where women have been socially, economically, physically, psychologically and sexually exploited from time immemorial, sometimes in the name of religion, sometimes on the pretext of writing in the scriptures and sometimes by the social sanctions. The concept of equality between male and female was almost unknown to us before enactment of the Constitution of India. Of course, the Constitution, which is the supreme law of the land, seeks to secure to its citizens including women folk, justice-social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and promote fraternity assuring dignity of the individual¹. The difference in treatment between men and women by the state is totally prohibited by the Constitution of India. But the equality of status guaranteed² by the Constitution is only a myth to millions of women for whom life is stalked by various kinds of violence within their homes.

Domestic violence is the most serious violation of all basic rights that a woman suffers in her own home at the hands of members within her own family. The manifold problems associated with domestic violence have been systematically exposed by data and in depth work undertaken by several people in the women's movement. Indeed, a number of recent studies such as the National Family Health Survey and National Crimes Records Bureau³ have identified the home as the site of violence against women and girl children. Almost every six hours, some where in India, a young married woman is being burnt alive, beaten to death, or forced to commit suicide. At least 20percent of married women between the ages of 15 and 49 have experienced domestic violence at some point in their lives, domestic violence has not only serious consequences for the health and well-being of the individual women, but it also serves to maintain their subjugation as a class.⁴ It is generally denying the woman her rights as an individual.

With independence, women were granted equal status with men. The government made an all out effort to raise the status of women in the various fields through legislation. Compulsory Education, the Hindu Marriage Act, 1955, raising of marriageable age, the Adoption Act, 1956, Dowry Prohibition Act, 1961 and legalizing of abortion are all in favour of women. But the law alone is not enough to bring about a radical change. With rapid urbanization and industrialization of the century, exploitation of women in recent years has been a serious menace to our society.

Notwithstanding the multiplication of legislation on various fields, with a view to improve the social, political and economic conditions and status of women, even the ancient forms of victimization, child marriage and premature consummation resulting in early and dangerous pregnancies sati, female infanticide, illegal abortions, dowry deaths, rape, eve-teasing and various other forms of molestation of women still continue. In fact, since the passing of the Dowry Prohibition Act and even after several amendments to the I.P.C., Cr. P. C. and the Evidence Act, dowry deaths are on the increase. The Hindu Marriage Act of 1955 and the Hindu Succession Act, 1956 securing for women the right to divorce and property have not automatically given women rights. Under the Hindu Succession Act, parents are depriving daughters even from ancestral property. Though, bigamy is an offence, the rate of desertion by Hindu husbands and illegal second marriage is higher than "Talaq" rate of the Muslims.

Women's health is given consideration only in terms of maternity, leaving women beyond the reproductive age, young, unmarried girls and widows outside health and nutrition schemes. The government's family planning programmes have a heavy gender bias.⁶

The condition of elderly women is also not satisfactory especially those of widows. She has to earn and run the house to raise her children. If she does not earn, her condition is even worse. If the widow has no issues, she has to work hard as a maid servant in her husband's joint family or relations who might have taken her in and is totally dependent, for all her needs, on others. She has neither economic security nor a say in decisions concerning her and her children. Families still believe that once a daughter is given away in marriage, she can not be given away again to another person. Hence, widow remarriage, though sanctioned by Hindu Widows Remarriage Act of 1856, seldom takes place and is discouraged.⁷

Thus, we see that the condition of Indian woman is very much unhappy. Woman in India is still surrounded by violence, neglect and exploitation. What is the price fixed for a woman's services day and night within the household? Love is the reward, but where is the reward of the husband and the in-laws don't appreciate the bride's services? Perhaps nowhere, except the fire on her clothes and her body. This is happening everywhere in our country these days and the number is increasing alarmingly. Even the educated urban and well informed women are exposed to such events. The Committee on the Status of Women in India (1974) rightly concludes that "the entire exercise of our committees has indicated that in certain important areas and for certain sections of the female population there has been repression from the normative attitudes developed during the freedom movement. Large section of women have suffered a decline of economic status. Even after the promulgation of these laws (legal measures), the protection enjoyed by the large masses of women from exploitation and injustice is negligible. Though women don't numerically constitute a minority, they are beginning to acquire the features of a minority community by the recognized dimensions of inequality of class, economic situation, status (social position) and political power. The chasm between the values of a new social order

proclaimed by the constitution and the realities of contemporary Indian society as far as women's rights are concerned remains as great as at the time of independence.⁸

DOMESTIC VIOLENCE: CONCEPTUAL CLARIFICATION

In Indian society, violence is bursting. It is present almost everywhere and nowhere is this eruption more intense than right behind the doors of our homes. Behind closed doors of homes all across the country, women are being tortured, beaten and killed. It is happening in rural areas, towns, cities and in metropolitans as well. It is crossing all social classes, genders, racial lines and age groups. It is becoming a legacy being passed on from one generation to another.

The term used to describe this exploding problem of violence within our homes is Domestic Violence. This violence is towards someone who we are in a relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a male's or a female's atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms such as physical, economic, sexual or emotional.

Domestic violence may be perpetrated by spouses, lineal ascendants and descendants and the lateral branch of the family up to the IV degree whether they are related by blood, marriage, fosterage or adoption, or by intimate partners or legal guardians. Violence within families, right from the denigration of honour, is considered to be domestic violence and is covered under the general provisions of penal codes even if it not explicitly mentioned therein. Moreover, the laws themselves have been amended and harmonised so as to remove obstacles in tackling the issue of domestic violence. For example, earlier definitions of rape exclusively spoke of extra¬marital rape, and marital rape did not expressly constitute an offence (in most cases).

The spectrum of domestic violence (which, incidentally, has a high level of recidivism) may include psychological, physical, sexual, financial and emotional abuse which may manifest itself as physical injury, the deprivation of food, money or other resources, intimidation, humiliation and degradation, and may result in an hedonism, pain, exhaustion, isolation, alienation, depression, fear, and decreased levels of self-esteem, productivity and attentiveness.

LEXICON MEANING OF VIOLENCE

The lexicon meaning of the violence refers to any physical force or any damage or injury to person or property. According to Webster's New Collegiate Dictionary⁹ violence means "exertion of any physical force for instance: (a) violent treatment or procedure, (b) profanation infringement, outrage, assault, (c) strength, energy, activity displayed or exerted, vehement, forcible or destructive action or force, (d) vehemence in feeling, passion, order, furry, fervor.

The Chamber's twentieth century dictionary describes violence as excessive unrestrained or unjustifiable use of force. Violence also means outrage, profanation injury or rape. Infliction of injury on other people is the essence of violence. It may be either physical or mental. On the legal level, it is illegal employment of methods of physical coercion for personal or group ends. The infliction of injury by police is exercise of state's force as long as it is legal. But as soon as it crosses the boundary of legality and inflicts injury for lust or for personal gain, it becomes violence and is more dangerous than the violence by ill armed and ill organized collectivity people¹⁰.

According to Encyclopaedia of Crime and Justice¹¹ in a broad sense, "violence is a general term referring to all types of behaviour either threatened or actual, that result in the damage or destruction of property or the injury or death of an individual". In a limited sense, violence means "all types of illegal behaviour, either threatened or actual that results in damage or destruction of property, or in the injury or death of an individual". In general; the definition covers that behaviour, generally considered as violent including such crimes as criminal homicide, forcible rape, child abuse, aggravated assault and most kinds of collective violence.

According to Black's Law Dictionary, "violence means unjust or unwarranted use of force usually accompanied by fury, vehemence, or outrage, physical force unlawfully exercised with the intent to harm". 12

The Encyclopaedia of Social Sciences¹³ defines violence in the social context as "the illegal employment of methods of physical coercion for personal or group ends ... which is distinct from force or power" ... a purely physical concept. It goes beyond the dictionary meaning of the term 'violence' as merely the exercise of physical force so -as to inflict injury or damage to persons or property both spiritual and non-spiritual. The "illegality" and "illegitimacy" of social violence will differ on situational norms and social context. There has been overlapping between "force" and "violence", "legitimate" and "illegal violence", between "violence" on the one hand and "discrimination" and "oppressions" perpetuated on the female folks as a group. For all these reasons, 'social violence' is roughly defined as the illegal use of physical, mental and social concern or use of threats for personal or group ends reflected broadly in our traditional social structure and present day developmental processes. Here, the 'coercive' aspects (physical, psychological and social), 'threats' for harm (battering, killing, insulting, isolating, molestation and rape, eve teasing) and the 'discriminating' and 'oppressive' aspects (subjugation in different walks of life i.e. child rearing and child bearing, employment, low wages, education, health, denial of opportunities for dissent, etc.) are included.

Thus, the social violence means illegal use of force or threats for use of such force by the patriarchal social order and their agents (e.g. men) against women folks in general for perpetuating the goals of that group (e.g. men) for subjugating women physically, socially and psychologically.¹⁴

According to Elise Boulding¹⁵(1981) structural violence refers to the structural patterning of the family, cultural norms and values and also political and economic system of a particular society that determine who will injure and who will endure. Some individuals are deprived of society's benefits and are rendered more vulnerable to sufferings than others. Structural violence establishes physical violence. Women experience both structural and behavioural violence. In all societies, where patriarchal family structure prevails, women are protected by the patriarch from other men, but they become victims of men in their own families. In many societies, women are not allowed to born even (foeticide) or female children are killed for fear of financial burden in their marriages. Pregnant and lactating women are ill fed and may face risks of death in child birth in many societies. Most pitiable conditions are of single women like unmarried, widowed, deserted or divorced.

Thus, sociologists have explained the "why" aspect of violence and not what the term violence in itself means. No doubt, many manifestations of violence against women (foeticide, female infanticide, bride burning, wife battering, deprivations and discriminations in child rearing practices) have their causes in the social structure and systems.¹⁶

The social psychologist Moyer¹⁷(1976) defines violence as a form of human aggression that involves inflicting physical damage persons or property. For psychologists, violence and aggression are twin terms but with certain differences between them. Allen¹⁸ uses the term aggression in both constructive and destructive senses, whereas violence is used only in destructive senses. Aggression can be sublimated in intrinsic, assertive or domineering behaviour such as humour sports, scientific research etc., but violence can not be sublimated. It can only be redirected or substituted. Social psychologists have dealt with inter-personal behavioural violence. They have tried to define violence in terms of human aggression which inflicts physical injury. In violence against women, cases of female infanticide, bride burning, dowry murder, rape, women battering, etc. may be included which involve physical injury.

A definition of aggression, acceptable to most social psychologists says-Aggression in any form of behaviour directed towards the goal of harming or injuring another living being who is motivated to avoid such treatment. However, the concept of intentionality is important in separating aggressive behaviour from other forms of behaviour that might lead to some harm. Wrightsman and Deaux (1981)²⁰ argue that the definition of aggression does not limit aggression to physical harm. Verbal insults and even the refusal to give a person something that he or she needs can be considered a form of aggression.

As per Niroj Sinha(1987)²¹ Violence' may include specially in relation to females both the physical violence against women and exploitation of all kinds. But she is not satisfied with such a definition, to her any group of persons may be identified as "victims" of violence if they are shown the threat of use of force against them if they do not act as per the desires of the group of persons, identified as oppressors. It not only includes all kinds of physical violence against women but will also include the context and particular situations under which such "threats of use of force" are indicated. This definition also suffers from a few limitations i.e. it does not operationally define the context and situations under which the use of force becomes violence.

Niroj Sinha(1989) is probably correct when she indicates that "threat of use of force against female forcing her unwillingly to do a thing in a particular situation that she would not do is an indicator of violence against her. This may be a sensitive definition if all the indicators of situational oppressions., are clarified. The "illegitimate use of force" in critical areas of choice for female e.g. vocation, selection of life partner (marriage), sex behaviour, search for self-identity, participation in public life, etc. as customarily revealed in social customs, traditions and laws is considered as violence. Gelles²⁰ categorized family violence into three varieties e.g., (a) normal violence (routine, normative and necessary), (b) secondary violence (when the use of violence to resolve a conflict is contrary to family norms, it creates additional conflict over violence which produces further violence), and (c) volcanic violence occurs when the offender has reached the end of line, has run out of patience, it is illegitimate violence that is explained as arising out of the building of stress and frustration the stress builds up to the point where the offender "erupts" into violence.

A narrow concept of violence may suggest an act of illegal, criminal use of physical force, but it also includes exploitation, discrimination, upholding of an unequal economic and social structure, the creation of an atmosphere of terror a situation of threat, reprisal and other forms of violence.

While these concepts of violence are interrelated, the specificity of violence related to the situation of women demands a closed and critical look of the aspects of structural violence, i.e. acts of violence that are exercised on the part of the family and society. The state not only, tends to overlook these forms of violence but perpetuates them in the name of the cultural legitimacy and the maintenance of 'law and order'.

OPERATIONAL DEFINITION OF VIOLENCE

An operational definition²² of violence is still lacking which can include all cases of violence against women.

Besides cases which involve physical injury, cases of verbal abuse, rebuke, threats, eve teasing, deprivations, discriminations and obstructions in attaining goal responses of women are all violence against women. Even if they do not involve physical injury, they lead to psychological injury and destruction of the personality of a woman.

Even in eases of physical injury, it is justified to say that there is no psychological hurting. In every case of inter-personal violence, the element of psychological injury is present except in the case of murder where the person does not exist to experience the psychological torture at all.

An operational definition of violence can include all cases of violence against women:

"Any aggressive behaviour of a person or persons hurting body or positive regard or both of another person or persons is human violence". When analyzed:

- 1. Aggressive behaviour means vigorous behaviour or action.
- 2. A person' means a victimizer either male or female. 'Hurting body' means inflicting physical injury (in destructive sense).
- 3. Positive regard' means need to be loved or accepted by others as a person.
- 4. Another person means the victim.

CONCEPT OF DOMESTIC VIOLENCE

Domestic violence is an extremely complex and vicious form of abuse, committed most often within the four walls of the family house and/or within a particular deep-rooted power dynamic and socio-economic structure, which do not allow even the acknowledgement or recognition of this abuse. Meaning and detection of domestic violence itself is the most demanding task. Violence against women in any form is a violation of the right of equality. State inaction in the field of preventing violence would itself be a violation of fundamental right to equality.

United Nations General Assembly adopted the Declaration on the Elimination of All forms of violence against women on 20th December 1993 which recognized that violence against women is a manifestation of historically unequal power relations between men and women which have led to domination over and discrimination against women by men and the prevention of the full advancement of women. Article 1 of the Declaration defined violence against women as follows-

"Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".²³

According to Black's Law Dictionary, "domestic violence means violence between members of a household, usually spouses, an assault or other violent act committed by one member of a household against another".²⁴

The meaning of domestic violence and the range of acts which amount to domestic violence will become clear from a look at the general laws, criminal and civil, which address acts which could constitute domestic violence.

CRIMINAL LAW PERSPECTIVE

The Criminal law in India is contained primarily in the Indian Penal Code, 1860 (IPC). The IPC is supplemented by special laws, which define and punish specific offences.

The Indian Penal Code

Under the IPC, there is no direct definition of the term domestic violence but its meaning can be inferred from various provision such as 'culpable homicide'²⁵, murder²⁶, dowry death²⁷, Abetment of suicide²⁸ cruelty by the husband or relatives²⁹, Female infanticide, or forcing the wife to terminate her pregnancy³⁰, misappropriation of the spouse's property,³¹ hurt³² grievous hurt,³³ grievous hurt by dangerous weapons'³⁴ and voluntarily causing hurt to extort property,³⁵ wrongful restraint'³⁶ or confinement'³⁷ of the spouse within her matrimonial home, use offeree³⁸ and assault'³⁹ on the spouse, are also forms of domestic violence recognized as offences under the IPC. Marital rape is yet another common form of domestic violence⁴⁰.

In 1983, matrimonial cruelty was introduced as an offence in the IPC.⁴¹ Cruelty was defined as "any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life or limb or health (whether mental or physical) of the woman". It includes harassment of the woman in connection with demands for property and the like.

This is a grey area of law and evidence. While many progressive nations have legislated on marital rape, our law has so far only conferred a limited recognition. Non-consensual sexual intercourse by a man with his own wife may be an offence if she is living separately under a decree of separation or any custom. ⁴² In many a violent marriage, the spouse subjects the wife to acts of sexual humiliation. Interestingly the IPC even addresses such forms of violence-the provision for 'unnatural offences'. However, this provision has rarely been used in the matrimonial context.

CONCEPT UNDER SPECIAL LAWS

Under some special legislation the domestic violence has been recognized in various forms such as the Dowry Prohibition Act, 1961, criminalizes the giving and taking of dowry.⁴⁴ There is another form of domestic violence which was rampant in our past but ebbed in the last century, i.e. Sati which means the burning or burying alive of widow along with the body of her deceased husband or any other relative, or with any article, object or thing associated with the husband or relative.⁴⁵ The Pre¬conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 recognizes that domestic violence is also perpetrated in the form of forced termination of female fetuses⁴⁶.

CIVIL LAW ON DOMESTIC VIOLENCE

Civil law too follows criminal law, inasmuch as it addresses facets of domestic violence without specifically defining domestic violence. Even references in the statutes, to aspects of domestic violence are generic and it is only through judicial decisions that such provisions have been given life and meaning.

The Dissolution of Muslim Marriages Act, 1939 (DMMA), stipulates cruelty⁴⁷ as a ground for divorce.

The Hindu Marriage Act, 1955 (HMA,⁴⁸ term cruelty has been understood to mean acts of physical as well as mental cruelty and is a ground for divorce as well as judicial separation.⁴⁹ The Special Marriage Act, 1954 (SMA)⁵⁰, the Indian Divorce Act (IDA),⁵¹ and the Parsi Marriage and Divorce Act (PMDA),⁵² all allow 'cruelty' as a ground for divorce. However, none of the Acts elaborate or detail the nature of cruelty. Domestic violence would certainly qualify as cruelty under these statutes.

UNDER THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT. 2005

To be honest, before 2005, there was no definition of domestic violence in Indian law. A frequent perception of domestic violence against women is that it is limited to physical harm perpetrated on adult women within a marital relationship. But the definition of domestic violence has been made broad by the Act of 2005 which acknowledges the multiple possibilities would lead to domestic violence that are more inclusive of the experiences of all women.⁵³ This Act defines the expression" domestic violence" to include actual abuse or threat of abuse-physical, sexual, verbal, emotional or economic violence⁵⁴.

The core of a definition of domestic violence consists of all the acts that constitute violence. Some definitions are narrow and focus on a specific act of violence and others are broader and incorporate the full range of acts. In India, public discourse and the media equate domestic violence with dowry violence. This incomplete representation undermines awareness of the widespread, daily psychological, physical, and sexual abuse women confront that is often unrelated to dowry. As a result, newspapers may fail to report the less sensational stories that do not involve bride-burning and unnatural death. Indian legislation on marital violence perpetuates this narrow definition. For example, both Section 498A of the Indian Penal Code and the Dowry Prohibition Act emphasize violence within the context of dowry harassment. However, informal discussions with women by researchers and activists have underlined the need for greater study of other factors and characteristics associated with abuse.⁵⁵

NATURE AND CHARACTERISTICS OF DOMESTIC VIOLENCE

Domestic violence can also be seen as a violation of the fundamental right to live with dignity, and of the right to equality and equal protection of the law guaranteed under the Indian Constitution⁵⁶. Domestic Violence is in the majority of cases, violence against a woman by the members of the house where she resides. It can be the husband, his parents, or siblings or any other resident who has the overt or covert latitude for actions that can cause physical or mental agony to the woman. But, the most important aspect of this kind of violence is the fact that "it happens behind the closed doors" and is most often denied by the very woman who has been the victim of violence. It is this aspect of the crime that segregates itself from all other kinds of social violence.⁵⁷

Domestic violence is violent victimization of women, within the boundaries of family, usually by men (or his family).⁵⁸ A woman may of any age,⁵⁹ she may be a girl child, unmarried, married or elderly woman including a widow or such women with whom men have marriage like relationship. Violence can be both physical and psychological. It indicates threats or aggressive behaviour towards her not only to her physical being, but towards her self-respect and self-confidence.

Domestic violence against women may be psychological, physical or sexual. Psychological violence is carried out with psychological weapons (threats, insults, humiliating treatment, denial of human existence) rather than physical attack. Physical violence 'includes all types of aggressive physical behaviour towards the woman's body (victim). Sexual violence could include both passive (denial) or active violence. It will also include cases of perversity. Victimiser of domestic violence may be husband or his family members. Domestic violence could occasionally be seen in other relations also (i.e. by parents, brothers or others in parents family).

Domestic Violence knows no age, socio-economic, religious, racial, gender or educational, barriers. It is a myth that only the poor or uneducated are victims of domestic abuse. Most studies indicate that there is also a high incidence of spousal abuse in the more affluent neighbourhoods. Although a poor victim has the terrible problem of not having resources available, the more affluent spouse may also be in an equally desperate trap due to social stigmas, greater economic pressures and the increased societal position and power that the partner may have at his or her disposal.

Family and friends are indirect victims of abuse. The isolation and terror that victim lives with deprives those closest to him or her from meaningful and fulfilling relationships. Often the abuser will harm others close to the victim in an effort to hurt or control the victim. An abuser may harm children, other family members, friends, pets, personal belongings and the family home. Isolation keeps a victim trapped. Frequently, a batterer isolates the victim from the family socially, emotionally and geographically. The victim is frequently forbidden to see trusted friends and family, and is denied the opportunity to go to school or work outside the home. There is little or no access to or control 'over finances, in the midst of this terrible isolation, the abuser employs "brainwashing" tactics, and with no input to the contrary from anyone outside the relationship, there will be no way for the victim to test reality.

RECOGNIZING THE VIOLENCE

Forms of Physical Abuse Physical Abuse Indicators

The following is a list of Physical Abuse Indicators in the order of less to more severe on a lethality or injury scale. Most ongoing abuse escalates in more or less this order, so that the presence of an action identified below is indicative of probable past abuse, even if there have been no serious physical injuries or prior police or court involvement. In addition, even if the abuse has not reached a certain danger level, it does not mean that the situation is not dangerous or physically abusive. A person can be severely injured as a result of "minor abuse".

Verbal abuse, humiliation, isolation from family and friends. Throwing things, punching walls, hurting pets, not letting the victim leave, demanding sex. Pushing, shoving, grabbing, shaking, throwing things at the victim. Slapping with open or back of hand, twisting arms, legs and fingers. Kicking, biting, hair pulling, banging or shaking head. Choking, attempted strangulation,

smothering. Beating up (pinned to the wall/floor, repeated kicks and punches). Threatening with weapons, knives, guns, autos, poisons. Assault with a weapon.

Forced sex.

Research has found that there are certain factors that are important in assessing the lethality potential in a particular situation. However, predicting lethality is difficult, as all serious battering relationships can be unpredictable and have the potential to flare up quickly. Nonetheless, the reported presence of some of these factors can be used to assist in making judgments about the level of protection necessary at any particular moment.⁶²

Forms of Emotional Abuse Insults

Constant or extreme criticisms that injure the personal, emotional sexual and professional image. Insults can greatly undermine a person's self-confidence and eventually render the victim emotionally incapacitated.

Rejection

Direct or indirect statements that create feelings of unworthiness. Constant rejection teaches a victim that he or she is unworthy of receiving loving behaviour. Rejection can be used as punishment for not cooperating with an abusive partner.

Abusers may also employ rejection in an attempt to justify their anger towards the victim.

Emotional Threats and Accusations

Direct or indirect statements made in an attempt to cause emotional or physical harm to the victim. This includes lying about the victim's behaviour, attitude or emotional state.

Emotional Blackmail

A statement or behavior that uses fear, guilt, insecurity or confusion to trap a victim into giving the abuser power over him or her.

Possessive and Punitive Behaviour

Perceiving another person as physical property or an emotional extension of himself or herself. Behaviour includes jealousy, limiting freedom, creating isolation, denying a person's capabilities or opportunities to develop. Many times it includes using shame and guilt to prevent a victim from getting the deserved support and protection.

Basing Relationships on Unrealistic Expectations

This includes an assumption by the abuser that he or she knows what is best for the victim. Denying someone the opportunity to discover and define himself or herself prevents the possibility of a mutually beneficial and realistic relationship.

Threats to Harm or Take Away Children

One of the most common reasons given for resuming an abusive relationship is the fear that the abuser will act on the threats of taking the children from the victim.⁶³

Other Forms of Domestic Violence

Sexual Abuse

Sexual abuse is often present along with physical and emotional abuse. It is very difficult for the victim to describe sexual abuse that may be coerced by threats of further harm or actually accompanied by physical force. Most often a victim is bullied into complying with the abuser's demands to engage in sexual acts, or at a time when she is not physically fit for sexual activity, such as immediately after childbirth, surgery or during illness. The shame a victim feels afterwards further ties her to the batterer.

Child Abuse

Studies suggest that in approximately one-half of those abusive families where children are present, some form of physical and/ or sexual abuse of children exists. The abusive partner usually is the one who may abuse the children. In most cases, where children witness domestic violence, they can be expected to have emotional effects and are at a higher risk for violence themselves. Additionally studies show that violence affects children before birth. Assaults during pregnancy may lead to miscarriage, fetal injury and pre-term labour. The presence of child abuse makes a dangerous situation more lethal especially when there is intervention by social services without an understanding of the dynamics of violent relationships. Removing the abusive partner or a child from the home may escalate the violence rather than stop it.

Elder Abuse

In Asia, studies by researchers in China (Hong Kong SAR), India, Japan and the Republic of Korea have drawn attention to the problem of elder abuse, but no official action, in terms of policies or programme development, has followed so far.

The definition developed by Action on Elder Abuse in the United Kingdom⁶⁴ and adopted by the International Network for the Prevention of Elder Abuse states that: "Elder abuse is a single or repeatedact, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person." Such abuse is generally divided into the following categories:

- Physical abuse the infliction of pain or injury, physical coercion, or physical or drug induced restraint.
- Psychological or emotional abuse the infliction of mental anguish.
- Financial or material abuse the illegal or improper exploitation or use of funds or resources of the older person.
- Sexual abuse non-consensual sexual contact of any kind with the older person.
- Neglect the refusal or failure to fulfil a care giving obligation. This may or may not involve a conscious and intentional attempt to inflict physical or emotional distress on the older person.

A workshop on elder abuse held in South Africa in 1992 drew a distinction between mistreatment (such as verbal abuse, passive and active neglect, financial exploitation and overmedication) and abuse (including physical, psychological and sexual violence, and theft)⁶⁵. Since then, focus groups have been held with older people recruited from three historically "black" townships in South Africa to determine the level of knowledge and understanding of elder abuse within these communities.

In addition to the typical Western schema that comprises physical, verbal, financial and sexual abuse, and neglect, the participants wished to add to the definition:

- loss of respect for elders, which was equated with neglect;
- accusations of witchcraft;
- abuse by systems (mistreatment at health clinics and by bureaucratic bodies).

The focus groups produced the following definitions⁶⁶:

- Physical abuse beating and physical manhandling.
- Emotional and verbal abuse discrimination on the basis of age, insults and hurtful words, denigration, intimidation, false accusations, psychological pain and distress.
- Financial abuse extortion and control of pension money, theft of property, and exploitation of older people to force them to care for grandchildren.
- Sexual abuse incest, rape and other types of sexual coercion.
- Neglect loss of respect for elders, withholding of affection, and lack of interest in the older person's well-being.
- Accusations of witchcraft stigmatization and ostracization.
- Abuse by systems the dehumanizing treatment older people are liable to suffer at health clinics and pension offices, and marginalization by the government.

In India research suggests that an elderly victim is abused more often by an aging partner and care taking children than those who are harmed by non-family caretakers. Family violence does not usually stop on its Own. Family violence is a public health problem⁶⁷.

Mutual Violence

Dating Violence

Dating violence refers to verbal, physical, psychological or Economic Violence

Victim is frequently denied opportunities or capabilities to develop and work. There may be discrimination, deprivation and obstruction in goal achievement. Victim may be denied opportunities to go to schools or work outside the home, they may have little or no access to or control over finances.

A victim of domestic violence may act in ways that seem incomprehensible to people not aware of the dynamics of abuse. The victim may not understand his or her actions, denying the abuse in a desperate attempt for self-preservation.

The abuser's control of a victim may affect the simplest decision a victim may need to make. Domestic Violence is a crime by perpetrator, not the victim. A batterer must take full responsibility for his or her violent behaviour⁶⁸ sexual abuse that occurs in relationships before partners marry or begin cohabiting. The term does not imply anything about the length or stability of the relationship. An act is classified as dating violence whether it occurred within the context of a single date or over a long period of time. Although popular attention has focused on sexual violence within dating relationships (date rape), researchers have noted that the full gamut of aggressive behaviour, including murder, occurs within violent dating relationships.

ABUSE ESCALATES IN FREQUENCY AND SEVERITY OVER TIME

A victim of domestic violence will often lose the ability view other people's behaviour in an objective or neutral light, victim loses the ability to trust other people. Thus, he or she often feels isolated.

Many people believe that the victim of violence must somehow have invited it, encouraged it, or even found some kind satisfaction from it. No victim likes to be abused. Victims ha the same expectations of love, trust and a fulfilling relationship as we all do. Thus, we see that even in present Indian society, position of the woman is not better. While she is held in high esteem, worshipped, considered as an embodiment of tolerance and virtue, she has also been the victim of untold miseries, hardships, atrocities and violence caused and perpetrated by the male dominated society, in her most sacred and safe place-the home.

DOMESTIC VIOLENCE IN INDIA

In India, we have unique situation of co-existence of all forms of violence especially of elimination of women, e.g. selective female foeticide, female infanticide, bride burning and sati. The incidence of violence of all forms within family has also gone up. Even today, various forms of violence against women are prevalent in our society, though many cases remain unreported due to cultural norms, apathy or ignorance. They may manifest themselves directly in wife battering, abduction, eve-teasing, verbal abuses or verbal rebukes. Women on many occasions are victimized by all sorts of discriminations, deprivations and obstructions in goal achieving and responses. These incidents may occur in the family, offices, agricultural fields, industries or even public places. It sounds surprising that on animal level predatory aggression (killing and eating) occurs between the species and not within the species, but. a human being, the highest on the evolutionary level, kills another human being of his own species.⁶⁹

Inflicting and experiencing violence in many subtle forms causing and suffering mental pain in day-to-day life, has become ways of our world in inter¬personal relationships. The cruelty, the hate that exists in ourselves is expressed in the exploitation of the weak by the powerful and the cunning .⁷⁰

The worst part of the problem is that women today, are not feeling safe and secured even in the family. The concept of home, sweet home is no more, so far many women, who suffer violence against themselves by the members of the family. Home is no safe place when it comes to aggressive behaviour.⁷¹

In the last four decades, there has been an alarming increase in the incidence of violence within and outside the family. Today, we hear more about wife beating, dowry deaths, sexual crimes and even reversion to medieval practices like "sati". Over the years, the nature of domestic violence has changed, now it has assumed following characteristics:

- 1. Differences between the husband and wife and increasing divorce is becoming common.
- 2. Men are marrying more than once, partly because they can get a new girl and partly because of the dowry.
- 3. Human feelings are gradually evaporating. A man resorts even to murder the wife if he does not get the expected dowry or if he is attracted to another girl.

- 4. The growing dowry system is gradually making the baby girl unwanted. People are restoring to foeticide and sometimes, baby girls are even killed afterbirth. Besidesthis-
- 5. Women are ignored in house work and outside home. They are suffering innumerable tortures from their in-laws and husbands. They are frequently beaten up and denied food and shelter.

All these cases reveal the true nature of the system of marriage and family in our society. The stereotypes rules of men and women are rigidly defined. While the material gains brought by the men are for everyone to see the inputs provided by the women being distant are often invisible. The amount of time, energy and labour spent by women in performing her duties go unnoticed. Often, she has to pay in terms of sacrificing her likings, interests and skills while the society offers man many opportunities to go out of house and share with others his joys and sorrows, such opportunities are very less for a woman. This mental violence, agony of losing life's most precious treasures and the lack of opportunities to share it with somebody also stems out of our societal structure. In such violence, there are no visible body marks. But the wounds inflicted on the mind are difficult to heal.

The woman right from the moment of stepping into the husband's home tries to forget her own identity and adjust everything according to the needs of the new place and the people living in it. In spite of it, she is under a constant watch and is often criticized for anything, e.g. for not bringing enough money from her parents, for not being trained properly, etc. She tends to overlook these facts, because she has been 'trained' to do so. The society, the religion, her parents and in-laws, everyone expects her to become her husband's shadow. The worst thing is that all these come as a rude shock to her after marriage, because the institution of marriage in our society is highly glamorized. Hence for a woman, 'the union of souls' turning into a nightmare is a truly horrifying and shattering experience. The mental violence may be committed in such a subtle manner that others will never come to know of it.⁷²

FORMS OF DOMESTIC VIOLENCE IN INDIA

Violence against women is not a myth, but a reality. It exists and exists everywhere. The problem of violence against women is as old as the world in cosmologies, mythologies or legends. The type, frequency, intensity and control of violence against women may vary from time-to-time or place-to-place.

In India, we have unique situation of co-existence of all forms of violence specially of elimination of women, e.g. selective female foeticide, female infanticide, bride burning and sati. The incidence of violence of all forms within family has also gone up. Even today, various forms of violence against women are prevalent in our society, though many cases remain unreported due to cultural norms, apathy or ignorance. They may manifest themselves directly in wife battering, abduction, eve-teasing, verbal abuses Domestic violence may take many forms. The main categories are usually identified-physical, sexual and emotional or psychological; but this classification is fairly crude and there are endless variations within each category.

Domestic Violence Against Women

This form of domestic violence is most common of all. One of the reasons for it being so prevalent is the orthodox and idiotic mindset of the society that women are physically and emotionally weaker than the males. Though women today have proved themselves in almost every field of

life affirming that they are no less than men, the reports of violence against them are much larger in number than against men. The possible reasons are many and are diversified over the length and breadth of the country. According to United Nation Population Fund Report, around two-third of married Indian women are victims of domestic violence and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from domestic violence, especially in the states of Bihar, U.P., M.P. and other northern states.

The most common causes for women stalking and battering include dissatisfaction with the dowry and exploiting women for more of it, arguing with the partner, refusing to have sex with him, neglecting children, going out of home without telling the partner, not cooking properly or on time, indulging in extra marital affairs, not looking after in-laws etc. In some cases infertility in females also leads to their assault by the family members. The greed for dowry, desire for a male child and alcoholism of the spouse are major factors of domestic violence against women in rural areas. There have been gruesome reports of young bride being burnt alive or subjected to continuous harassment for not bringing home the amount of demanded dowry. Women in India also admit to hitting or beating because of their suspicion about the husband's sexual involvement with other women. The Tandoor Murder Case of Naina Sahni in New Delhi in the year 1995 is one such dreadful incident of a woman being killed and then burnt in a Tandoor by his husband. This incidence was an outcome of suspicion of extra marital affairs of Naina Sahni which led to marital discord and domestic violence against her.

In urban areas there are many more factors which lead to differences in the beginning and later take the shape of domestic violence. These include - more income of a working woman than her partner, her absence in the house till late night, abusing and neglecting in-laws, being more forward socially etc. Working women are quite often subjected to assaults and coercion sex by employees of the organization. At times, it could be voluntary for a better pay and designation in the office.

Violence against young widows has also been on a rise in India. Most often they are cursed for their husband's death and are deprived of proper food and clothing. They are not allowed or encouraged for remarriage in most of the homes, especially in rural areas. There have been cases of molestation and rape attempts of women by other family members in nuclear families or someone in the neighbourhood. At times, women are even sexually coerced by their partner themselves against their will. They are brutally beaten and tortured for not conceiving a male child. Incidents like, ripping off a woman's womb for killing the female foetus when she disagrees for abortion have also come to light especially in rural areas. Female foeticide and female infanticide continue to be a rising concern.

Also as expressed by Rebecca J. Burns in the following lines, "When I am asked why a woman doesn't leave abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving." A common Indian house wife has a tendency to bear the harassment she is subjected to by her husband and the family. One reason could be to prevent the children from undergoing the hardships if she separates from the spouse. Also the traditional and orthodox mindset makes them bear the sufferings without any protest.

Other forms of physical abuse against women include slapping, punching, grabbing, burdening them with drudgery, public humiliation and the neglect of their health problems. Some of the other forms of psychological torment against them could be curtailment of their rights to self-expression and curbing the freedom to associate with the natal family and friends.

DOMESTIC VIOLENCE AGAINST MEN

There is no question that domestic violence directed against women is a serious and bigger problem, but domestic violence against men is also increasing gradually in India. The supremacy of men in the society makes one believe that they are not vulnerable to domestic violence. Battering of men by their spouse and family members has become a concerned issue and is another form of domestic violence under purview of judiciary. In India, compared to violence against women, violence against men is less frequent but it has already taken a deadly shape in many of the western countries by now.

Males have reported incidences of assault against them like pushing, shoving, slapping, grabbing, hitting which are intended to harm them and also take their lives on many occasions. Recently, hundreds of husbands gathered in Chandigarh and Shimla to voice their opinion for men's rights and protection against domestic violence subjected to them by their wives and other family members. It reflects the need for a special law for curbing domestic violence against men in present times.

If we contemplate over the reasons behind this form of domestic violence we would find some of the possible causes such as not abiding by the instructions of the wives, inadequate earning of men, infidelity towards wives, not helping the partner in household activities, not taking a proper care of children, abusing the spouse's family, infertility of men, spying the activities of partner, doubting the partner all the time and not trusting her, revolt by the wife when asked to look after in-laws etc. On many occasions the spat between men and women becomes public thereby influencing the society around especially in the villages. In urban areas such forms of violence may go unreported because of greater privacy. Also the families find their reputation at stake in urban areas.

DOMESTIC VIOLENCE AGAINST CHILDREN/TEENS

Children and teenagers in our society are not spared from the evil of domestic violence. In fact, this form of violence is second in terms of number of reported cases after the 'violence against women'. There is a lot of variation in the form of its occurrence in urban and rural areas and in upper/middle class and lower class families in India. In urban regions, it is more private and concealed within the four walls of homes. The possible reasons could be disobeying parental advises and orders, poor performance in academics or not being at par with other children in neighbourhood, debating with parents and other family members etc. In addition to this, factors like not being socially intelligent or as active as the parents expect them to be, abusing the parents or speaking ill about other family members, not returning home on time are some other factors.

In rural areas it could be harassment for child labour, physical abuse or harm for not following family traditions, forcing them to stay at home and not allowing them to go to school etc. Domestic violence against girls is in fact more severe at homes. As the common mob mentality of India prefers to have at least one male child after marriage, the girls in most of the occasions

are cursed and assaulted for having taken birth in the home. This kind abuse is prevalent both in cities and villages but is more common in latter case. Then there are cases of paedophilia causing sexual harassment of children in homes by family member themselves. In fact the number of rape cases of pre-matured girls has been rising since last few years. A survey of teens and college students found that rape accounted for 67 percent of sexual assaults in girls. Apart from sexual abuse and rape, pushing, slapping, punching, stalking and emotional abuse are other forms of domestic violence against children.

Adding to the above mentioned causes, there are also instances of abuse against children who are physically and/or mentally challenged. Instead of providing them proper health care and treating them politely, these children are beaten and harassed for not cooperating and attending to what family members ask them to do. They are even emotionally abused by cursing them having been in such retarded or handicapped state. In fact in poor families, there have been reports of selling body organs of the retarded children for getting money in return. It reflects the height of cruelness and violence against innocent children.

DOMESTIC VIOLENCE AGAINST OLDS

This form of domestic violence refers to the violence which old people at home are subjected to by their children and other family members. This category of domestic violence largely goes under-reported in India. It is because of the dependency of olds on their children and having a fear of not being looked after or even ousted if the violence is revealed in public. The main causes of violence against aged people are - children being hesitant in bearing the expenses of the old parents, emotionally victimising the olds and beating them to death to get rid of them. On various occasions, they are beaten for doing something against the desire of family members. One of the very common reasons includes torture for property grabbing.

A perturbing trend is the vulnerability of ageing women to domestic violence in various forms. Given existing structures of gender discrimination, old women are prone to a greater risk than men of becoming victims of material exploitation, financial deprivation, property grabbing, abandonment, verbal humiliation, emotional and psychological torment. When they fall seriously ill, it is more likely that it is the elderly women in the family who will be denied proper health care. There is also a widespread understanding that the neglect, deprivation and marginalisation of older women are the normal consequences of ageing. In fact the plight of young widows in homes as discussed above now becomes more serious as a result of the ageing of those women. They are cut off from the society they are living in, ignored, abused, cursed, and considered as bad omens. The atrocities of sons, daughter-in-laws, daughters and husbands could be another cause of domestic violence specifically against older women. They are restrained from cooking, housekeeping, or participating in activities outside the home.

While it is difficult to accurately measure the extent of the problem on a national scale, given the fact that most families deny that such abuse but we do know that the number of old people in our midst is growing. A current estimate puts the 60-plus population at around 90 million in India and is projected to have a population of 142 million older people by 2020. Given this demographic reality an important concern is the kind of action the country can take at the individual and societal level to alleviate abuse and neglect of elderly class.

OTHER FORMS OF DOMESTIC VIOLENCE IN INDIA

There are some more possible forms of domestic violence prevalent in India other than the ones listed above. On a serious note, family wars or clan wars are deadly forms of domestic violence across the country. The reason of such type of violence include dispute over property, physically or emotionally abusing any member of other family or clan, any religious cause or conflict arising during a religious ceremony, jealousy because of progress and financial status of other family, inter-caste marriage etc. This form of violence is common in many states like Haryana, Punjab, Andhra Pradesh etc.

One of the other forms of domestic violence is ill-treatment of servants and maids in households. In many of the affluent homes, servants are deprived of their salary and basic necessities. They are harassed and beaten and to work without even taking adequate rest. Similarly maids are molested by males in the family. Atrocities against small children working as servants are common and increasing.

CAUSES OF DOMESTIC VIOLENCE

Violence against married women is also a manifestation of class oppression. The specificity of violence on women involves as analysis of gender and its centrality to the family which has gender inequalities in day-to-day life. Domestic violence, battering, dowry, rape, suicide are the manifestations of gender inequalities within the family system. Women's exclusion from the ownership of land is largely the basis of their subordination and dependence on men.

Women activists regard specificity of violence against women as a part of general violence against oppressed classes. The forms of control and coercion exercised in the case of women are gender specific and arise out of a hierarchical gender relationship, where men are dominant and women are subordinate. Women are instruments through which the social system reproduces itself and through which systematic inequality is maintained. This inequality is further strengthened and maintained overtime by the socialization process. She believes it to be true. She accepts whatever is given to her as her fate.⁷³

The causes of domestic violence are not known to date. The research carried out in different parts of the world indicates that any social structure which treats women as fundamentally of less value than men is conducive to violence against women. Victims of violence are predominantly women while perpetrators are overwhelmingly males, which give credence to the theory that violence is an outcome of gender inequality.⁷⁴

Violence against women in marital situation has more to do with the relationship of husband and wife in the social matrix. The 'cultural factors relating to marriage, status of women and power structure relationship between man and woman in the society are important while describing violence against women in the family context. It may also have its origin in psychological factors like irrational, pathological behaviour of abuser and the victim, which subsequently affect the interpersonal relationship of both the parties. It has also been considered as the condition of learned helplessness. Absence of viable alternatives of survival and lack of proper support group also forces a woman to continue tolerating violent behaviour. It has been seen that men feel relieved after seeing the battered faces of their wives. It boosts and nurtures their egoistic superiority complex. On the other hand, woman's acceptance of beating as a common phenomenon and as a way of interaction with their husband further perpetuates violence. It has

been noticed that lack of awareness of their own rights and a general social belief in women's subordination perpetuates a low self-image in women and her inferior status, especially in a country like India. She is taught that marriage is the ultimate goal she has to achieve; 'only her dead body will come out of her in-law's house'. All this conditioning gradually becomes the nature of an Indian woman.⁷⁵

Poverty, alcoholism, unemployment, frustration and poor role modeling also contribute to violent behaviour. But alcohol or drug abuse, depression, lack of money or lack of a job do not directly cause domestic violence. These may be factors which may put women at greater risk of violence because of the stresses created by financial hardship and relationship crises.

Many abusers blame the victim or other things for their violent acts and do not take responsibility for the abusive behaviour. But in reality, domestic violence is not caused or provoked by the actions or inactions of the woman.

The major factor behind the violent behaviour of men as explained by a group of researchers is the patriarchal attitude of the Indian society which perceives woman as an 'object' rather than a 'subject' and gives her a low status in the society. Patriarchy legitimizes violence in man-woman relationship.

Violence arises from patriarchal notions of ownership over women's bodies, sexuality, labour, reproductive rights, mobility, and level of autonomy. Deep-rooted ideas about male superiority enable men to freely exercise unlimited power over women's lives and 'effectively legitimizes it too'. Violence is thus a tool that men use constantly to control women as a result of highly internalized patriarchal conditioning which accords men the right to beat their wives and thus ostensibly perform the duty of chastising them. The unequal and hierarchical gender relation manifests itself clearly in the familial setup and is accentuated by clear demarcation of sex roles and sexual division of labour.

There is enough data to suggest that the family is the most physically violent group or institution that the individual is likely to encounter, "The perception that the family is the most loving and supportive group or institution has blinded us from seeing the violent side of family life". The family has been described as "the cradle of violence" and the marriage license as "the hitting license".

Traditional sex role socialization reinforced the idea that the women's needs were fulfilled and their identities derived only directly through men. Cultural norms encouraged the belief that the failure of the marriage represented the women's failure as individuals. Thus, it is in the process of trying to save the marriage at all costs, that women suffer from intense feelings of shame and guilt, and this keep them trapped in their relationships. Victimization also occurs through a process called "brain washing" in which not only are the victims merely psychologically exploited or physically injured, but the abusers use their power and the sanctity of family relations to control and manipulate the victim's perception of reality.

Many cultures, including Indian, consider the integrity of the group or community to be of greater importance in sustaining the quality of life, rather than the needs of the individual. The Indian woman is directly or indirectly encouraged to sacrifice her own needs, feelings or interests constantly for the needs, feelings and interests of some other person or community: be it children, husband, family or community.⁷⁹

This social conditioning results in the basic difference between how men and women view themselves and the reasons for their violent interactions. There is a tendency in the wives of violent husbands to perceive their husband's violence as caused by factors internal to them. The husbands on the other hand, externalizes the causes of his behaviour. He blames his violence on circumstances such as stress, his partner's behaviour, a "bad day," alcohol or other factors.

Studies have shown that adults who were abused or neglected as children were more likely to be involved in delinquency and adult criminal behaviour. Likewise, parents who were abused when they were children were approximately six times more likely to abuse their own children. There are also reports available of women who succumb to the abuse and continue staying on with the perpetrator despite repeated victimization. Repeated violent victimization rendered women less skilled at self-protection, less sure of themselves and their own worth, and more apt to accept victimization as a part of being female.

Other factors indicated that abused women were more likely to stay if:

- (a) the abuse was less severe and less frequent;
- (b) they had experienced violence as children; and
- (c) they had fewer resources and less power in terms of education or employment. In short, the more entrapped a woman was in her marriage; the more she suffered at the hands of her husband, without calling for help outside the home. There is another perspective, which surmises that women themselves are to a large extent responsible for their abusive status. This behaviour has been referred to as "learned helplessness" and serves as an explanation as to why some women who even after separation from their abusive husbands, tended to re-marry similar kind of men.⁸⁰

The crime of wife battering and cruelty has received social, moral and religious sanction form our society. State in turn, seems to protect that culture of violence and battering by adopting the role of onlookers to the incidence of domestic violence.

Historically, violence against women has not been treated as a "real" crime. This is evident in the lack of severe consequences such as incarceration or economic penalties for men guilty of battering their partners. Rarely are batterers ostracized in their communities, even if they are known to have physically assaulted their partners. Batterers come from all groups and backgrounds, and from all personality profiles.

In the case of Kundalabala v. State of Andhra Pradesh⁸¹ Dr. Anand, J. observed: "Of late there has been an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. This growing cult of violence and exploitation of the young brides continues unabated. There is a constant erosion of the basic human values of tolerance and the spirit of "live and let live". Lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime".

Understanding a complex phenomenon like violence against married women so deeply embedded in the socio-cultural context, is by no means an easy task. Though many women would prefer to opt out of the abusive situations, it is important to understand why it becomes difficult for most of them to do so. Religious philosophy, customs and rituals serve to reinforce the phenomenon of Sati-Savitri and Pati-vrata and keep alive the tradition of male dominance and female oppression⁸².

The Indian culture which glorifies the image of a woman who is tolerant and receptive of whatever is given to her by the husband, is another reason which prevents women from walking out of the violent relationship. At times, religion perpetuates a culture where a woman is supposed to be submissive, respecting her in¬laws and considering their husbands like a lord or the master. Symbolic emotional appeal has been used to confine the Indian woman into the vicious circle of subjugation and oppression.⁸³

In trying to leave her husband's abode the Indian woman would be defying cultural norms and would end up inviting society's wrath, ostracism and disrespect. It is the inability to face these frightening consequences that makes most women choose to cope within the boundaries of their tormented surroundings. Many women also express suicidal thoughts but do not attempt suicide. It has been found that one of the factors deterring abused women from suicide is their dependant young children, for whom these women visualized a bleak future.⁸⁴

Thus, there are several causes of violence against married women. More so, these are guises under which violence is inflicted. Important among them are the husband's personality traits like jealousy, suspicious domination and demanding his emotional disturbances and his low self-esteem. The precipitating characteristics of wives are: (a) irritative nature, (b) disobedience or questioning attitude, (c) petty issues of house management, (d) her refusing to act as an instrument for satisfying husband's ambition, (e) suspicion about sexual infidelity, (f) getting money from wives as a right, (g) just to exercise control over wife. Though alcoholism and unemployment or financial constraints appear as causes, even non-alcoholics as well as economically stable families have an equal number of incidents of violence. The former types of families have a dual problem of alcoholism as well as violence. Violence and cruelty due to dowry demands is one of the most common causal factors peculiar to Indian society.

Many theories have been developed to explain why some men use violence against their partners. These theories include family dysfunction, inadequate communication skills, provocation by women, stress, chemical dependency, lack of spirituality and economic hardship. The major ones are the "generational theory" (batterer's history of abuse as a child), the "social learning theory" (learning to use violence as a method of conflict resolution) and the "provocative wife theory" i.e., wife provoking misconduct. The wife's tolerance is explained in terms of "traditional socialization", or "learned helplessness" (Ahuja, 1988; Agnes, 1980; Sinha, 1989; and Mahajan, 1988). The Social Bond Theory of Ahuja (1988) attributes this to the social structural conditions like family crisis, role frustrations, inappropriate upbringing and unfortunate incidents in life.85.

All these issues may be associated with battering of women, but they are not the causes. Removing these associated factors will not end men's violence against women. The batterer begins and continues his behaviour because violence is an effective method for gaining and keeping control over another person and he usually does not suffer adverse consequences as a result of his behaviour.

CONSEQUENCES OF VIOLENCE AGAINST WOMEN.

Physical and mental health consequences of violence and abuse

Gender-based violence against women is a major public health problem, resulting in considerable avoidable morbidity and mortality. The global health burden because of violence among women in the reproductive age group is 9.5 million Disability Adjusted Life Years (DALYs), which is as

high as some other major health concerns such as Tuberculosis (10.9 million DALYs), HIV (10.0 million DALYs) and sepsis during childbirth (10 million DALYs)⁸⁶

Violence can in extreme cases also lead to death as in cases of suicides and homicides. Accidents and injuries, including self inflicted injuries and intentional injuries by others are also found to be associated with violence among women. Two studies from Bangladesh and India shed light on cases of deaths due to abuse of the women. The study from Bangladesh examined 270 cases of deaths due to abuse reported in newspapers in 1982-1985. 29 percent of the women had been beaten to death, 39 percent had been subjected to other forms of physical torture and ISpercent had been attacked with sharp weapons. In an Indian study of 120 dowry deaths, all the women were found to be below 25 years of age. 46percent of the women had died because of burns, 34percent had died because of drowning. In 86percent of the cases homicide, the principal accused were the husbands.87. Three studies from India that have documented deaths by suicide have found that marital discord has been an important factor leading to suicides among women. For example, in a study in Delhi, there were 56percent suicide cases among women, which were attributed to marital discord and ill treatment by the husband and the in-laws. In Madras and Daspur, women between the age groups of 15 to 24 years had committed suicide and the reasons for these were quarrel or maladjustment with their husbands. Abuse can also lead to a number of physical ailments such as irritable bowel syndrome, gastrointestinal disorders, and other chronic pain syndromes88.

In addition to immediate physical injury, violence can make women vulnerable to a number of immediate and long term effects such as infectious diseases, mental health problems, injuries, chronic pain syndromes, gastrointestinal problems, hypertension, diabetes and asthma⁸⁹

Gender-based violence also affects women's mental health. It erodes women's self confidence and leads to problems such as depression, post traumatic stress disorders, suicides and alcohol and drug abuse, sleeping as well as eating disorders, anxieties and phobias⁹⁰.

In cases of Intimate Partner Violence (IPV), violence against women leads them to maintain a distance from their partner. Their sexual life is affected adversely. Many of them file for divorce and seek separation which again affects the life of children. Some continue to be exploited in lack of proper awareness of human rights and laws of the constitution.

Impact on women's reproductive health

A growing number of studies show that violence by partners and sexual abuse affects the sexual and reproductive health of women in numerous ways.

Forced sex is associated with trauma

In many parts of the world, marriage is taken as granting men the right to have sexual relations with their wife and to use force and power to demand sex from the wife even if she does not want sex. Sexual coercion ranges from rape to different forms of pressure, force and fear that compel girls to have sex against their will. Studies such as those from India⁹¹ and Philippines found that women agree to have sex even if they do not want it because of fear of violence from their husbands. In a Philippines survey, it was found that 43percent of married women from the reproductive age group said that they could not refuse sex with their husband because of fear of beatings from them⁹²

Forced sexual initiation could be extremely traumatic for many young women. Studies in Africa, New Zealand and the US show that many women experience forced

sexual initiation at very young ages. Even within marriage, the first sexual experience is very traumatic for women, especially in those parts of the world where women are not given adequate information on sex. For example, a study on married women in a low-income community in India found that women found their first sexual experience extremely traumatic with 18 percent having only having a vague idea of what to expect on the wedding night⁹³. Child sexual abuse is a common form of violence in all societies that remains undetected to a great extent. Studies have shown that sexual abuse is much more common among girls than among boys (it is about 1.5 to 3 times more among girls than among boys). Sexual abuse can lead to a wide range of behavioural and psychological problems among children along with sexual dysfunction, low self esteem, depression, thoughts of suicide, alcohol and substance abuse and sexual risk taking⁹⁴.

Violence can lead to unwanted pregnancies

Lack of autonomy and powerlessness can lead to unwanted pregnancies among the women as the women do not have the right to deny sex with their husbands nor can they use any form of contraception. For example, a study in Nicaragua found that abused women were twice as likely to have four or more children than those who were not abused. Another large-scale survey among married men in Uttar Pradesh, India found that forced sex could lead to unintended pregnancies. Men who admitted to having forced sex with their wives were found to be 2.6 times likely than other men to cause an unplanned pregnancy⁹⁵.

Violence prevents the use of contraceptives and increases the risk of sexually transmitted infections

Many studies have shown that women are afraid to bring up the issues of contraception with their husbands because of the fear of being beaten up. Husbands do not like their wives to use contraception in some cultures because of the fear that this might encourage their wives to be unfaithful. Having many children can be considered as a sign of virility by the husbands and the desire from the wife to use contraception as a challenge to his masculinity. Unprotected sex can also increase the risk of women who are unable to negotiate condom use with their partners to a number of sexually transmitted diseases such as STIs and HIV, and to unwanted pregnancies.

Violence can also lead to high-risk pregnancies among women

It has been found that around the world, one woman in every four is sexually abused by her partner during pregnancy. Women experiencing violence before and during pregnancy are found to be more likely to delay check-ups and treatment during pregnancy, have less weight gain. They are also prone to infections such as sexually transmitted infections, unwanted or mistimed pregnancies, vaginal and cervical infections, kidney infections and bleeding during pregnancies⁹⁷

Violence is also linked with adverse pregnancy outcomes such as abortions, miscarriages, premature labour and foetal distress. Seven studies in developing countries have shown that violence during pregnancy leads to low birth weight. Violence can also indirectly affect the pregnancy by influencing the woman's health behaviour such as alcoholism, smoking and substance abuse. Stress and anxiety because of violence can also affect a pregnant woman leading to preterm deliveries, decreased food intake⁹⁸.

Violence may also lead to maternal deaths

In the Indian subcontinent, it has been found that violence leads to a considerable amount of maternal deaths. A recent study of over 400 villages and seven hospitals in India in the three districts of Maharashtra found that 16percent of all deaths during pregnancy were due to domestic violence⁹⁹. Another study in rural Bangladesh related to homicides and suicides found that forms of violence such as dowry related harassment, stigma because of rape or pregnancy outside marriage led to 6percent of the maternal deaths between 1976 and 1986 and 31 percent of maternal deaths among women in the age group of 15-19¹⁰⁰.

Violence increases the risk of gynaecological problems among women.

Gynaecological disorders such as chronic pelvic pain which is associated with 10 percent of gynaecological visits in many countries and one quarter of hysterectomies. Various studies have found an association between chronic pelvic pain and history of sexual abuse, sexual assault and or physical or sexual abuse by partners. This may be due to injuries, stress or an expression of psychological distress through physical symptoms. Sexual abuse during childhood has also been associated with increased sexual risk taking leading to sexually transmitted infections leading to chronic pelvic pain associated with pelvic inflammatory diseases. Sexual violence can also lead to irregular vaginal bleeding, vaginal discharge, painful menstruation, pre¬menstrual distress, pelvic inflammatory diseases and sexual dysfunction with problems such as lack of desire, difficulty with orgasms etc ¹⁰¹.

Gender based violence and abuse hinders development

Besides its direct impact on women's health, gender-based violence against women has other human costs. It also hinders development by undermining women's participation in development related activities, reduces their labour participation and earnings.

One of the most affected groups are children who witness violence. Such children have an increased risk for emotional and behavioural problems such as anxiety, depression, poor self-esteem, poor school performance, disobedience, nightmares, and physical health complaints. For example, in a study in rural Karnataka, it was found that children of mothers who were beaten received less food than other children did, which implies that these women probably could not bargain with their husbands on their children's behalf¹⁰²

Economic multiplier effects

These take into consideration the economic impact of violence on the life of the woman as well as on economic productivity. Violence has been found to lead to decreased labour participation of the women, reduced productivity at work and lower earnings affecting the quality of life of the woman. For example, it has been found that about 30percent of the women lost their jobs in the United States as a direct effect of abuse. Another study in Chile found that women who had undergone abuse were found to earn less than half of the earnings as compared to other women.

EFFECTS ON CHILDREN

One of the severe effects of domestic violence against women is its effect on her children. It is nature's phenomenon that a child generally has a greater attachment towards the mother for she is the one who gives birth. As long as the violence subjected to the mother is hidden from the child, he/she may behave normally at home. The day when mother's grief and suffering

is revealed, a child may become upset about the happening deeply. Children may not even comprehend the severity of the problem. They may turn silent, reserved and express solace to the mother. When the violence against women is openly done in front of them since their childhood, it may have a deeper and gruesome impact in their mindset. They get used to such happenings at home, and have a tendency to reciprocate the same in their lives. It's common in especially in rural homes in India which are victimised by the evil of domestic violence.

EFFECT OF DOMESTIC VIOLENCE ON THE SOCIETY

All the different forms of violence discussed in this essay adversely affect the society. Violence against women may keep them locked in homes succumbing to the torture they face. If they come out in open and reveal the wrong done to them for help and rescue, it influences the society both positively and negatively. At one hand where it acts as an inspiration and ray of hope for other suffering women, on the other hand it also spoils the atmosphere of the society. When something of this kind happens in the society, few families may witness the evil of domestic violence knocking their door steps. Some families try to imitate what others indulge in irrespective of it being good or bad for the family.

EFFECTS ON THE PRODUCTIVITY

As mentioned earlier, domestic violence affects the productivity level of the victim negatively. Men and women lose interest in household activities. If they are employed they fail to work with full capabilities in workplace. Children are found to concentrate less on studies. They drop out of school and do not get the education which otherwise they might have got if they were not tormented and thus the country loses a productive asset. Therefore, the nation's productivity altogether gets affected because of domestic violence in homes. When old people are tortured and physically abused, they separate themselves from family members and their daily activities are restricted to themselves. The guardianship they can provide out of their experience, the moral values which they can instill in the grandchildren are all not done as they

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- 31 Section 405 read with section 406, IPC
- 32 Section 321, IPC.
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- 34. Section 326, IPC.
- 35. Section 327, IPC
- 36. Section 349, IPC.
- 37. Section 340, IPC.
- Section 349, IPC. A person is said to use force to another if he causes, motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion as brings the substance into contact with any part of the other's body, or with anything which that other is wearing or carrying or with anything so situated that such contacts affect that other's sense of feeling.
- 39 Section 351, IPC. Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend

that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

- 40 Section 375 IPC
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- 54 Section 3 of the Act says that any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-
 - (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
 - (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce him or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
 - (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause(a) or clause (b); or
 - (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

For the purpose of section 3:

- (i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
- (ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

- (iii) "verbal and emotional abuse" includes-
 - (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and
 - (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.
- (iv) "economic abuse" includes-
 - (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
 - (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonable required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
 - (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.
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READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS					

MARRIAGE **AS AN** INSTITUTION

MARRIAGE AS AN INSTITUTION

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

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

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

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

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

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

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

Legal Perspective

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

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

Types of Marriage

Polygyny

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

Types of Polygyny

It is of two types namely:

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

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

Causes of Polygyny

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

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

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

Polyandry

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

Types of polyandry

Polyandry may take two forms namely:

- 1. *Fraternal Polyandry*: In this form one wife is regarded as the wife of brothers who have sexual relations with her. It is also known as alelphic polyandry. The children are treated as the offspring of the elder brother. This practice of being mate, actual or potential, to one's husband's brother is called "levirate." It is prevalent among the Todas.
- 2. *Non-fraternal polyandry:* In this type, the husbands need not have any close relationship prior to marriage. The wife goes to spend some time with each husband. So long as a woman lives with one of her husbands, the others have no claims over her. Nair polyandry

was one of these types. If a child I born out of such relationship, then any husband is chosen its social parent by a special ritual.

Causes of Polyandry

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

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

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

Monogamy

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

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

Advantages

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

- *Universally Practicable:* Since there is one-to-one ratio in almost all the societies, only monogamy can provide marital opportunity and satisfaction to all the individuals. No other forms can equally satisfy all. Economically Better Suited: No man of ordinary income can think of practising polygyny. Only a rich man can maintain a couple of wives and their children. Only monogamy can adjust itself with poverty.
- Promotes better Understanding between Husband and Wife: Monogamy produces the highest type of love and affection between husband and wife. It contributes to family

peace, solidarity and happiness. Vatsayana, remarked "At best a man can only please one woman physically, mentally and spiritually. Therefore, the man who enters into marriage relations with more than one woman, voluntarily courts unhappiness and misery"

- Contributes to stable Family and Sex life: Monogamous family is more stable and long lasting. It is free from conflicts that are commonly found in polyandrous and polygynous families. Herbert Spencer has said that monogamy is more stable and the consequent family bond is stronger.
- *Aged parents are not neglected:* It is only in monogamy that old parents are protected and looked after properly.
- **Provides better Status for Women:** Women are given only a very low position in polygyny. Their rights are never recognised. They can be divorced at will. But in monogamy, women enjoy better social status. In the modern societies they enjoy almost equal social status with men. Thus some cultures value monogamy as an ideal form of family organization. However, many cultures prefer other forms of family organization. Anthropological data suggests a majority of societies prefer polygamous marriage as a cultural ideal. There are multiple forms of non monogamy that are used to organize families, as well multiple forms of monogamy such as marriage, cohabitation and extended families.

Rules of Marriage

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

Exogamy

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

That exogamy prevents the marriage of all near relatives is true only if membership of the exogamous group is determined by descent reckoned through both parents, but this is very rare. Normally descent is traced through only one parent and it is therefore inevitable that certain close blood-relations will not belong to the same group and will therefore be possible mates for each other. Thus if a tribe is patrilineal a man can select wives from among his mother's sisters, her brother's daughters and her brother's son's daughters, and, were exogamy the only marriage prohibition, even his mother would be available to him. On the other hand, clan exogamy does prevent unions between people bearing no relationship to each other, since membership of a clan is dependent upon fictive, not blood relationship.

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

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

Forms of Exogamy

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

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

Endogamy

Endogamy is the form of marriage in which one must marry within one's own caste or other group. This rule doesn't permit marriage of close kin. Endogamous marriage is one which is confined within the group. As a matter of fact, endogamy and exogamy are relative terms. That which is endogamous from one viewpoint is exogamous from the other.

Forms of Endogamy

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

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

Advantages

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

Disadvantages

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

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

Hindu Marriage

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

individual function but has social importance. Its ideals are fulfilment of Dharma, procreation and enjoyment of sexual pleasure. It exhibits an integral approach to this social institution.

Aims of the Hindu Marriage

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

Forms of Hindu Marriage

The Hindu scriptures admit the following eight forms of marriage:

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

- 6. *Rakshas marriage:* This type of marriage was prevalent in the age when women were considered to be the prize of the war. In this type of marriage the bride-groom takes away the bride from her house forcibly after killing and injuring her relatives.
- 7. *Paisach marriage*: This type of marriage has been called to be most degenerate. In this type a man enters into sexual relationship with a sleeping, drunk or unconscious woman. Such acts were regularised after the performance of marriage ceremony which took place after physical relationship between the man and woman.

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

Conditions for a Hindu Marriage

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

- 1. Neither party has a spouse living at the time of the marriage;
- 2. At the time of the marriage, neither party-
- 3. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
- 4. Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- 5. Has been subject to recurrent attacks of insanity. The bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;
- 6. The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
- 7. The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Hindu Marriage Act, 1955

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

- Classification of Hindu marriage: According to this act, Hindu marriage can be divided into three classes void, voidable and valid
- Determination of the age for marriages: by the provisions of this act, the minimum age limit for the boys and girls has been fixed at 18 and 15 years respectively.
- *Provision for monogamy*: According to this act, a Hindu male or female can enter into matrimony only if no spouse of either is alive at the time of the marriage. Thus, Section 5 and Clause 1 of this Act provide for monogamy in Hindu society.
- *Provision for the Guardianship of the Mother:* According to this act, the mother will be considered as the legal guardian of the minor son or daughter after the father.

• *Provison for Divorce:* This act provides for divorce by wife or husband under certain specific circumstances.

Special Marriage Act, 1954

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

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

- 1. Neither party has a spouse living;
- 2. Neither party-
- 3. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
- 4. Though incapable of giving a valid consent, has been suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- Has been subject to recurrent attacks of insanity;
- 1. The male has completed the age of twenty-one years and the female the age of eighteen years;
- 2. The parties are not within the degrees of prohibited relationship;
- 3. Where the marriage is solemnized in the state of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Important Rites in the Hindu marriage

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

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

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

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

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

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

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

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

Modern Changes in the Hindu Marriage

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

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

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

Problems of Marriage

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

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

Divorce in India

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

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

Divorce provisions and grounds under the laws are as follows:

Hindu Law

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

- (1) Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party
 - has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
 - has, after the solemnization of marriage, treated the petitioner with cruelty; or
 - has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
 - has ceased to be a Hindu by conversion to another religion; or
 - has been incurably of unsound mind, or has been suffering continuously or
 intermittently from mental disorder of such a kind and to such an extent that the
 petitioner cannot be reasonably expected to live with the respondent.
 - has been suffering from a virulent and incurable form of leprosy; or
 - has been suffering from venereal disease in a communicable form; or
 - has renounced the world by entering any religious order; or
 - has not been heard of as being alive for a period of seven years or more by those
 persons who would naturally have heard of it, had that party been alive.
- (1A) either party to a marriage whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-
 - that there has been no resumption of cohabitation as between the parties to the
 marriage for a period of one year or upwards after the passing of a decree for judicial
 separation in a proceeding to which they were parties; or
 - That there has been no restitution of conjugal rights in a proceeding to which they were parties.

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

Special Marriage Act, 1954[64]

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

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

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

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

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

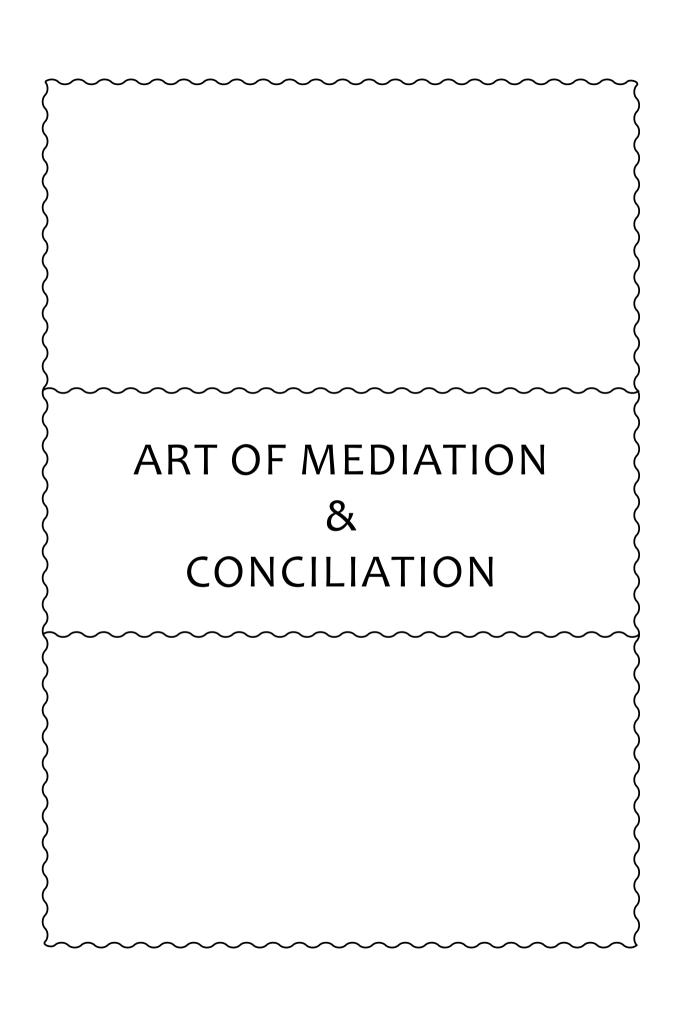
Conclusion

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

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

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





ART OF MEDIATION & CONCILIATION

CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

by Justice M. Jagannadha Rao

One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different.

- (a) In the year 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of 'mediation' or 'conciliation'. Sub-section (1) of sec. 30 permits the arbitral tribunal to "use mediation, conciliation or other procedures", for the purpose of reaching settlement.
- (b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of 'conciliation' and 'mediation' as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals definition of 'conciliation' or 'mediation' in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

Conciliation

In order to understand what Parliament meant by 'Conciliation', we have necessarily to refer to the functions of a 'Conciliator' as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to 'Conciliation' by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of 'conciliation' under sec. 89 because, it says that once a reference is made to a 'conciliator', the 1996 Act would apply. Thus the meaning of 'conciliation' as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned business practices between the parties. Subsection (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Subsection (4) is important and permits the 'conciliator' to make proposals for a settlement. It states as follows:

"Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to 'reformulate the terms' after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

"Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations."

The above provisions in the 1996 Act, make it clear that the 'Conciliator' under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make "proposals for a settlement" and "formulate the terms of a possible settlement" or "reformulate the terms". This is indeed the UNCITRAL concept.

Mediation:

If the role of the 'conciliator' in India is pro-active and interventionist as stated above, the role of the 'mediator' must necessarily be restricted to that of a 'facilitator'.

In their celebrated book 'ADR Principles and Practice' by Henry J. Brown and Arthur L. Mariot (1997, 2nd Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that 'mediation' is a facilitative process in which "disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication."

In yet another leading book on 'Dispute Resolution' (Negotiation, and Nancy H. Rogers (1999, 3rd Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

"Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others' views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

"In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. In stead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties' own efforts to do so."

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the lord Chancellor's Department on Alternative Dispute Resolution (http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm) (Annexure A), where while defining 'Mediation' and 'Conciliation', it is stated that 'Mediation' is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term 'conciliation' is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the 'mediator' is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a 'conciliator'. We have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator' in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation "is a process in which the Conciliator plays a proactive role to bring about a settlement" and mediator is "a more passive process".

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a 'mediator' rather than a 'conciliator'. Brown says (p 272) that the term 'Conciliation' which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term 'mediation'. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use 'conciliation' to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, 'Advisory, Conciliation and Arbitration Service' (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to 'employment', the term 'conciliation' is used to refer to a mediatory process that is wholly facilitative and non- evaluative. The definition of 'conciliation' formulated by the ILO (1983) is as follows:

"the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator."

However, according to the ACAS, 'mediation' in this context involves a process in which the neutral "mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see www.nadrac.gov.au) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms "conciliation" and "mediation" are used in diverse ways. (The 'New" Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words 'conciliation' and 'counselling' have disappeared in USA. In USA, the word 'conciliation' has disappeared and 'mediation' is used for the neutral who takes a pro-active role. For example:

"Whereas the terms 'conciliation' and 'conselling' have long since disappeared from the literature in reference to dispute resolution services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with 'mediation' grafted on as a separate dispute resolution service in 1991."

Conversely, policy papers in countries such as Japan still use the term 'conciliation' rather than 'mediation' for this pro-active process (see www.kantei.go.jp/foreign/judiciary/2001/0612 report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where 'conciliation' is treated as being at the less formal end of the spectrum while 'mediation' is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

"Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute...."

In an article from US entitled "Can you explain the difference between conciliation and mediation" (http://www.colorodo.edu/conflict/civil-rights/topics/1950.html), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat 'conciliation' as less formal and 'mediation' as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a 'conciliator'. The above article shows that in US the word 'mediator' reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, 'Conciliation' is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

ART OF MEDIATION & CONCILIATION

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.



MEDIATION

Introduction

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

HISTORICAL PERSPECTIVE

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

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

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

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

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

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

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

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

MEDIATION IN INDIA

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

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

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

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

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

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

LEGAL RECOGNITION OF MEDIATION IN INDIA

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

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

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

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

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

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

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

EVOLUTION OF MEDIATION IN INDIA

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

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

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

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

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

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

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

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

READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS

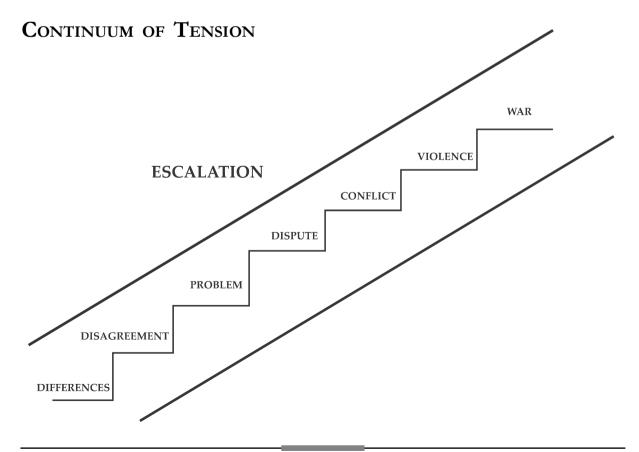
leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional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

Understanding Conflict

THE NATURE OF CONFLICT

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

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



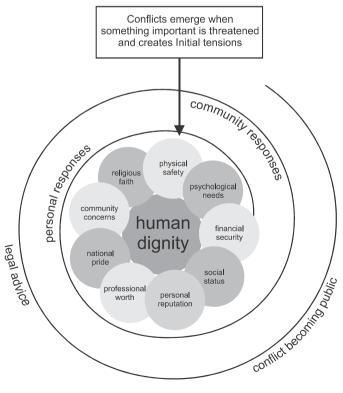
We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these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

THE DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE

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

THE CONFLICT CORE AND CONFLICT SPIRAL



2) THE CONFLICT SPIRAL

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

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

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

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

Conflict becoming public

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

3) THE CONFLICT TRIANGLE*

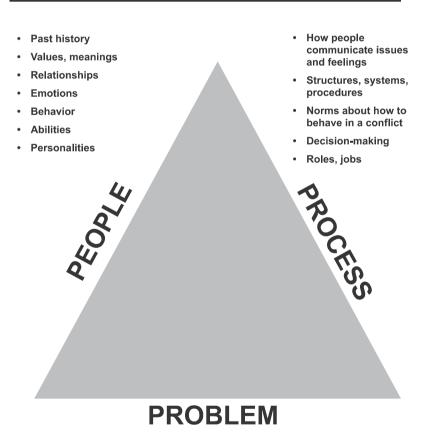
The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the

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

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

- 1. People. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.
- 2. Process. Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.
- **3. Problem.** Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

THE CONFLICT TRIANGLE -1



Perceptions

Solutions

outcomes

Interests, Needs

Consequences of possible

Facts

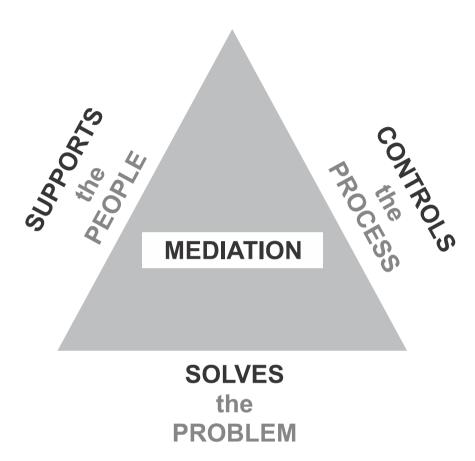
Issues

Positions

of events

Consequences

THE CONFLICT TRIANGLE -2



GOING BEYOND MERE PROBLEM-SOLVING

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

Causes of Conflict And Addressing Them

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

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

CONCEPT OF MEDIATION

- 1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.
- 1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.
- 1.2 Mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.
- 1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.
- 1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

- **1.5** Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- 1.6 Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.
- 1.7 In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator *facilitates* when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator *evaluates* when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.
- 1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.
- 1.9 Mediation is a private process, which is not open to the public. Mediation is also **confidential** in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for / during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.
- 1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.
- 1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".
- **1.12** The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

- **1.13** Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.
- **1.14** Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

Types of Mediation

- COURT- REFERRED MEDIATION- It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.
- 2. PRIVATE MEDIATION In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

- 1. The parties have **CONTROL** over the mediation in terms of 1) its *scope* (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its *outcome* (i.e., the right to decide whether to settle or not and the terms of settlement.)
- **1.1.** Mediation is **PARTICIPATIVE.** Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.
- **1.2.** The process is **VOLUNTARY** and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.
- **1.3.** The procedure is **SPEEDY**, **EFFICIENT** and **ECONOMICAL**.
- **1.4.** The procedure is **SIMPLE** and **FLEXIBLE**. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.
- **1.5.** The process is conducted in an **INFORMAL**, **CORDIAL** and **CONDUCIVE** environment.
- **1.6.** Mediation is a **FAIR PROCESS.** The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.
- **1.7.** The process is **CONFIDENTIAL**.

- **1.8.** The process facilitates better and effective **COMMUNICATION** between the parties which is crucial for a creative and meaningful negotiation.
- 1.9. Mediation helps to maintain/improve/restore relationships between the parties.
- 1.10. Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.
- 1.11. In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.
- **1.12.** A mediation settlement often leads to the **SETTLING OF RELATED/CONNECTED CASES** between the parties.
- **1.13.** Mediation allows **CREATIVITY** in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.
- **1.14.** When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.
- **1.15.** Mediation **PROMOTES FINALITY.** The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.
- **1.16. REFUND OF COURT FEES** is permitted as per rules in the case of settlement in a court referred mediation.

Comparison Between Judicial Process and Various ADR Processes

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

7.	Decision is appealable.	Award is subject to challenge	Decree/Order in terms of the
	11	on specified grounds.	settlement is final and is not
			appealable.
8.	No opportunity for parties	No opportunity for parties to	Optimal opportunity for parties
	to communicate directly	communicate directly with	to communicate directly with
	with each other.	each other.	each other in the presence of the
			mediator.
9.	Involves payment of court	Does not involve payment of	In case of settlement, in a court
	fees.	court fees.	annexed mediation the court fee
			already paid is refundable as per
			the Rules.
	MEDIATION	CONCILIATION	LOK ADALAT
1.	Mediation is a non-	Conciliation is a non-	Lok Adalat is non-adjudicatory if
	adjudicatory process.	adjudicatory process.	it is established under Section 19
			of the Legal Services Authorities
			Act, 1987.
			Lok Adalat is conciliatory and
			adjudicatory if it is established
			under Section 22B of the Legal
			Services Authorities Act, 1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third	Conciliator is a neutral third	Presiding officer is a neutral third
	party.	party.	party.
4.	Service of lawyer is	Service of lawyer is available.	Service of lawyer is available.
	available.		
5.	Mediation is party centred	Conciliation is party centred	In Lok Adalat, the scope of
	negotiation.	negotiation.	negotiation is limited.
6.	The function of the	The function of the	The function of the Presiding
	Mediator is mainly	conciliator is more active than	<u> </u>
	facilitative.	the facilitative function of the	
		mediator.	

ART OF MEDIATION & CONCILIATION

			1
7.	The consent of the parties	The consent of the parties is	The consent of the parties is not
	is not mandatory for	mandatory for referring a case	mandatory for referring a case to
	referring a case to	to conciliation.	Lok Adalat.
	mediation.		
8.	The referral court applies	In conciliation, the agreement	The award of Lok Adalat is
	the principles of Order	is enforceable as it is a decree	deemed to be a decree of the
	XXIII Rule 3, CPC for	of the court as per Section 74	Civil Court and is executable as
	passing decree/order in	of the Arbitration and	per Section 21 of the Legal
	terms of the agreement.	Conciliation Act, 1996.	Services Authorities Act, 1987.
9.	Not appealable.	Decree/order not appealable.	Award not appealable.
10.	The focus in mediation is	The focus in conciliation is on	The focus in Lok Adalat is on the
	on the present and the	the present and the future.	past and the present.
	future.		
11.	Mediation is a structured	Conciliation also is a	The process of Lok Adalat
	process having different	structured process having	involves only discussion and
	stages.	different stages.	persuasion.
12.	In mediation, parties are	In conciliation, parties are	In Lok Adalat, parties are not
	actively and directly	actively and directly involved.	actively and directly involved so
	involved.		much.
13.	Confidentiality is the	Confidentiality is the essence	Confidentiality is not observed in
	essence of mediation.	of conciliation.	Lok Adalat.

A ROLE PLAY TO DEMONSTRATE THE DIFFERENCES BETWEEN ADJUDICATION AND MEDIATION

"THE FAMILY PORTRAIT"

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

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

Exercise (i)

Arbitration (Adjudiction)

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

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

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

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

Exercise (ii)

MEDIATION

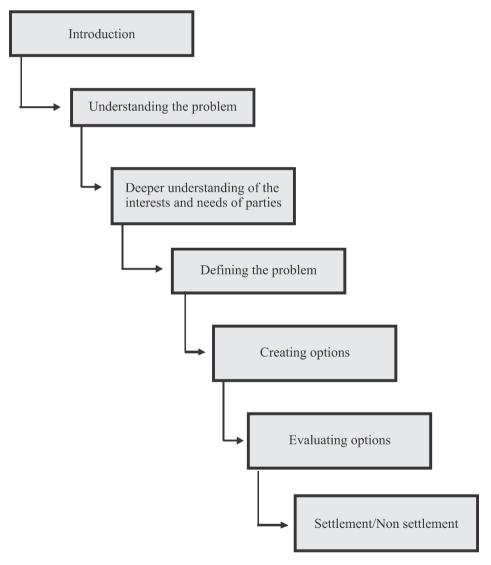
Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is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

Mediator is to demonstrate

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

THE PROCESS OF MEDIATION

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



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

CHAPTER-VI

STAGES OF MEDIATION

The functional stages of the mediation process are:

- 1) Introduction and Opening Statement
- 2) Joint Session
- 3) Separate Session(s)
- 4) Closing

STAGE 1: Introduction and Opening Statement

Objectives

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

Seating Arrangement in the Mediation Room

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

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

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

Introduction

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

The Mediator's Opening Statement

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

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

The mediator shall highlight the following important aspects of mediation:

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

The mediator shall explain the following ground rules of mediation:

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

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

STAGE 2: JOINT SESSION

Objectives

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

Procedure

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

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

STAGE 3: SEPARATE SESSION

Objectives

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

Procedure

(i) RE - AFFIRMING CONFIDENTIALITY

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

(ii) GATHERING FURTHER INFORMATION

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

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

hope to achieve);

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

(iii) REALITY - TESTING

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

- (a) A detailed examination of specific elements of a claim, defense, or a perspective;
- (b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;
- (c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;
- (d) Examination of the monetary and non-monetary costs of litigation and continued conflict;
- (e) Assessment of witness appearance and credibility of parties;
- (f) Inquiry into the chances of winning/losing at trial; and
- (g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

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

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

(I) ASKING EFFECTIVE QUESTIONS

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

Examples of effective questions:

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

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

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

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

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

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

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

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

(iv) BRAIN STORMING

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

There are 2 stages to the brain storming process:

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

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

Brainstorming requires lateral thinking more than linear thinking.

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

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

(v) SUB-SESSIONS

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

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

(vi) EXCHANGE OF OFFERS

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

STAGE 4: CLOSING

(A) Where there is a settlement

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

THE WRITTEN AGREEMENT SHOULD:

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

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

(B) Where there is no settlement

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

CHAPTER-VII

Role of Mediators

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

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

- (i) facilitate the process of mediation; and
- (ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

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

• assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

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

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator

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

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

(ii) Mediator and Adjudicator

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

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

(C) QUALITIES OF A MEDIATOR

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

- i. complete, genuine and unconditional faith in the process of mediation and its efficacy.
- ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

- iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.
- iv. highest standards of honesty and integrity in conduct and behavior.
- v. neutrality, objectivity and non-judgmental.
- vi. ability to be an attentive, active and patient listener.
- vii. a calm, pleasant and cheerful disposition.
- viii. patience, persistence and perseverance.
- ix. good communication skills.
- x. open mindedness and flexibility.
- xi. empathy.
- xii. creativity.

(D) QUALIFICATIONS OF MEDIATORS

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

- (a) (i) Retired Judges of the Supreme Court of India;
 - (ii) Retired Judges of the High Court;
 - (iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;
- (b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;
- (c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;
- (d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest

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

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

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

2. Awareness about competence and professional role boundaries

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

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

3. Practice Neutrality

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

4. Ensure Voluntariness

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

5. Maintain Confidentiality

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

- a. the mediator is specifically given permission to do so by the party concerned; or
- **b.** the mediator is required by law to do so.

6. Do no harm

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

7. Promote Self-determination

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

8. Facilitate Informed Consent

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

9. Discharge Duties to third parties

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

10. Commitment to Honesty and Integrity

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

- a. his qualifications and prior experience;
- b. direct or indirect interest if any, in the outcome of the dispute;
- c. any fees that the parties will be charged for the mediation; and
- d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

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

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

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

TRAINING OF MEDIATORS

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

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

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

DURATION OF TRAINING

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

NATURE OF TRAINING

Training consists of :-

- (i) Theory
- (ii) Exercises like role play and demonstration.
- (iii) Practical training of mediating a few actual disputes under the guidance of a trainer or a trained mediator.

CURRICULUM

The curriculum for training shall include :-

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

COMMUNICATION IN MEDIATION

- **1.1** Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.
- **1.2** Communication is not just TALKING and LISTENING. Communication is a process of information transmission.
- **1.3** The intention of communication is to convey a message.
- 1.4 The purpose of communication could be any or all of the following:
 - To express our feelings/thoughts/ideas/emotions/desires to others.
 - To make others understand what and how we feel/think.
 - To derive a benefit or advantage.
 - To express an unmet need or demand.
- 1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.
- **1.6** Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.
- 1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.
- **1.8** Consequently, a communication would involve :-

A Sender - person who sends a message.

A Receiver - person who receives the message.

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

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

information that is sought to be communicated.

Encoding - transforming message/information into a form that

can be sent to the receiver to be decoded correctly.

Decoding - understanding the message or information.

Response - answer/reply to a communicated message.

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

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

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

VERBAL AND NON-VERBAL COMMUNICATION

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

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

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

1.11 REQUIREMENTS FOR EFFECTIVE COMMUNICATION:

- i) Use simple and clear language.
- ii) Avoid difficult words and phrases.
- iii) Avoid unnecessary repetition.
- iv) Be precise and logical.
- v) Have clarity of thought and expression.

- vi) Respond with empathy, warmth and interest.
- vii) Ensure proper eye contact.
- viii) Be patient, attentive and courteous.
- ix) Avoid unnecessary interruptions.
- x) Have good listening abilities and skills.
- xi) Avoid making statements and comments or responses that could cause a negative effect.

1.12 CAUSES OF INEFFECTIVE COMMUNICATION:

- i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.
- ii) Misinterpretation and distortion of the message by the Receiver.
- iii) Differences in language and expression.
- iv) Poor listening abilities and skills.
- v) Lack of patience.
- vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

1.13 BARRIERS TO COMMUNICATION:

PHYSICAL BARRIERS:

- i) lack of congenial atmosphere.
- ii) lack of proper seating arrangements.
- iii) presence of third parties.
- iv) lack of sufficient time.

EMOTIONAL BARRIERS:

- i) temperaments of the parties and their emotional quotient.
- ii) feelings of inferiority, superiority, guilt or arrogance.
- iii) fear, suspicion, ego, mistrust or bias.
- iv) hidden agenda.
- v) conflict of personalities.

1.14 COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

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

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

- (A) Active Listening.
- (B) Listening with Empathy.
- (C) Body Language.
- (D) Asking the Right Questions.

(A) ACTIVE LISTENING:

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

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

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

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

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

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

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

- 1. Summarising: This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.
- 2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.
- **3. Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from *Positions* to *Interests* and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:
 - 1. Converts the statement from negative to positive.
 - 2. Converts the statement from the past to the future.
 - 3. Converts the statement from positions to interests.
 - 4. Shifts the focus from the targeted person to the speaker.
 - 5. Reduces intensity of emotions.

Example:

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

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

NOTE:

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

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

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

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

- 5. **Deferring:** A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.
- **6. Encouraging :** The mediator can encourage parties when they need reassurance, support or help in communicating. Example : " what you said makes things clear" or "this is useful information"
- 7. **Bridging**: A technique used by a mediator to help a party to continue communication. Example: "And-----", "And then----", The word "And" encourages communication whereas the word "But" could discourage communication.
- 8. **Restating:** In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."
- **9. Paraphrasing:** Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.
- **10. Silence:** A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.
- 11. Apology: It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologise.
 - **Example:** "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"
- 12. Setting an agenda: In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

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

BARRIERS TO ACTIVE LISTENING:

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

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

- (ii) Inadequate time: There should be sufficient time to facilitate attentive and patient listening.
- (iii) Pre-judging :-- A mediator should not prejudge the parties and their attitude, motive or intention.
- (iv) Blaming: -- A mediator should not assign responsibility to any party for what has happened.
- (v) Absent Mindedness: The mediator should not be half-listening or inattentive.
- (vi) Role Confusion: -- The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.
- (vii) Arguing / imposing own views:-- The mediator should not argue with the parties or try to impose his own views on them.
- (viii) Criticising
- (ix) Counseling
- (x) Moralising
- (xi) Analysing

(B) LISTENING WITH EMPATHY

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

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

Example:

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

Husband: "I am so sorry you had a hard day at work"

(focus is on listener/ husband)

Sympathy

Husband: "You had a hard day at work, mine was worse"

Sympathy

(focus on listener/husband)

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Husband: "You feel it was hard for you at work today.

Would you like to talk about it?"

(focus on speaker/wife)

Empathy

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

(C) BODY LANGUAGE:

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

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

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

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

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

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

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

(D) ASKING THE RIGHT QUESTIONS

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

TYPES OF QUESTIONS:

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

Examples: "Can you tell me more about the subject?"

"What happened next?"

"What is your claim?"

"What do you really want to achieve?"

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

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

Examples: "What colour shirt was the man wearing?"

"On which date was the contract signed?"

"What is the total amount of your medical bills?"

"Were you present in the market when the event occurred?"

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

Examples: "What if the disputed property is acquired by Government?"

"What if your husband offers to move out of the parental house and

live separately?"

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

CHAPTER-X

NEGOTIATION AND BARGAINING IN MEDIATION

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

What is Negotiation?

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

Why does one negotiate?

- a. To put across one's view points, claims and interests.
- b. To prevent exploitation/harassment.
- c. To seek cooperation of the other side.
- d. To avoid litigation.
- e. To arrive at mutually acceptable agreement.

NEGOTIATION STYLES

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

2) Accommodating Style Unassertive and Cooperative: He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.

3) Compromising Style Moderate level of Assertiveness and Cooperation: He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.

4) Competing Style Assertive and Uncooperative: The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.

5) Collaborating Style

Assertive, Cooperative and Constructive: He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is Bargaining?

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

TYPES OF BARGAINING USED IN NEGOTIATION

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

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

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

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

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

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

Negative consequences of Distributive Bargaining are:

- (a) By taking rigid stands the relationship is often lost.
- (b) Creative solutions are not explored and the interests of both parties are not fully met.
- (c) Time consuming.
- (d) Both parties take extreme positions often resulting in impasse.
- (ii) Interest-Based Bargaining: A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

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

Three steps in interest-based bargaining

There are three essential steps in interest-based bargaining.

- (a) Identifying the interests of parties.
- (b) Prioritizing the parties' interests.
- (c) Helping the parties develop terms of agreement/settlement that meets their most important interests.
- (iii) Integrative Bargaining: Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

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

As the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution. Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agree to help the customer to sell his old car at a good price.

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

NOTE:

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

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

BARRIERS TO NEGOTIATION

- 1) Strategic Barriers.
- 2) Principal and Agent Barriers.
- 3) Cognitive Barriers (Perception Barriers).

1) Strategic Barriers:

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

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

2) Principal and Agent Barriers:

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

3) Cognitive Barriers (Perception Barriers).

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

Example of Cognitive Barriers

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

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

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

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

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

Psychological impediments:

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

Anchor Price, Aspiration Price and Reservation Price

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

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

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

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

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

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

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

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

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

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

(c) Focus on interests

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

(d) Create variety of options

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

(e) Rely on objective criteria

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

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

Facts for Mohan Industries

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

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

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

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

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

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

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

Facts for All India Express

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

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

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

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

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

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

-XI

IMPASSE

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

Types of Impasse

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

- (i) Emotional impasse
- (ii) Substantive impasse
- (iii) Procedural impasse

Emotional impasse can be caused by factors like:

- ã Personal animosity
- ã Mistrust
- ã False pride
- ã Arrogance
- ã Ego
- ã Fear of losing face
- ã Vengeance
- Substantive impasse can be caused by factors like:
 - ã Lack of knowledge of facts and/or law
 - ã Limited resources, despite willingness to settle
 - ã Incompetence (including legal disability) of the parties
 - ã Interference by third parties who instigate the parties not to settle dispute or obstruct the

- ã settlement for extraneous reasons.
- ã Standing on principles, ignoring the realities
- ã adamant attitude of the parties
- Procedural impasse can be caused by factors like :
 - ã Lack of authority to negotiate or to settle
 - a Power imbalance between the parties
 - ã Mistrust of the mediator

STAGES WHEN IMPASSE MAY ARISE

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

TECHNIQUES TO BREAK IMPASSE

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

- (a) Reality Testing
- (b) Brainstorming
- (c) Changing the focus from the source of the offer to the terms of the offer.
- (d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.
- (e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.
- (f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.
- (g) Careful use of good humour.
- (h) Acknowledging and complementing the parties for the efforts they have already made.
- (i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

ART OF MEDIATION & CONCILIATION

- (j) Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.
- (k) Allowing the parties to vent their feelings and emotions.
- (l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.
- (m) Focusing on the underlying interest of the parties.
- (n) Starting all over again.
- (o) Revisiting the options.
- (p) Changing the topic to come back later.
- (q) Observing silence.
- (r) Holding hope
- (s) Changing the sitting arrangement.
- (t) Using hypothetical situations or questions to help parties to explore new idea and options.

CHAPTER-XII

Role of Referral Judges

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

Reference to ADR and statutory requirement

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

Stage of Reference

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

Consent

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

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

Avoiding delay of trial

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

Choice of Cases for reference

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

- i. (i) Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.
 - ii. Disputes relating to election to public offices.
 - iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
 - iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
 - v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.
 - vi. Cases involving prosecution for criminal offences.

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

- i) All cases relating to trade, commerce and contracts, including
 - -disputes arising out of contracts(including all money suits);
 - -disputes relating to specific performance;
 - disputes between suppliers and customers;
 - disputes between bankers and customers;

- -disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured
- ii) All cases arising from strained or soured relationships, including
 - disputes relating to matrimonial causes, maintenance, custody of children;
 - disputes relating to partition/division among family members/coparceners/co-owners; and
 - disputes relating to partnership among partners.
- iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);
 - disputes between employers and employees;
 - disputes among members of societies/associations/apartment owners' associations;
- iv) All cases relating to tortious liability, including
 - claims for compensation in motor accidents/other accidents; and
- v) All consumer disputes, including
 - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

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

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

Motivating and preparing the parties for Mediation

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

Referral Order

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

Role after conclusion of mediation

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

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

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

ROLE OF LAWYERS IN MEDIATION

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

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

- (i) Pre-mediation;
- (ii) During mediation; and
- (iii) Post-mediation.

(i) Pre-Mediation

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

(ii) During Mediation

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

iii) Post-Mediation

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

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

ROLE OF PARTIES IN MEDIATION

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

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

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

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

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

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

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

Conciliation

What is conciliation?

Conciliation is an alternative out-of-court dispute resolution instrument.

Like mediation, conciliation is a voluntary, flexible, confidential, and interest based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party.

The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interests.

Like in mediation proceedings, the ultimate decision to agree on the settlement remains with the parties.

Main benefits

Conciliation ensures party autonomy.

The parties can choose the timing, language, place, structure and content of the conciliation proceedings.

♦ Conciliation ensures the expertise of the decision maker.

The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and / or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.

♦ Conciliation is time and cost efficient.

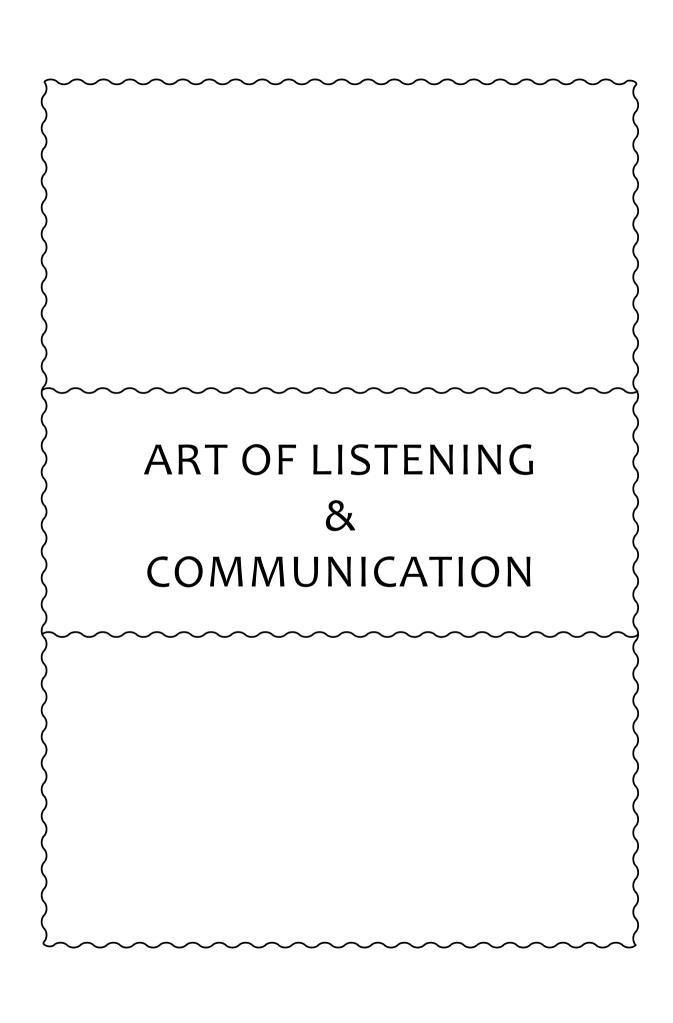
Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.

♦ Conciliation ensures confidentiality.

The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.



READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS



ART OF LISTENING

A zoologist was walking down a busy city street with a friend. In the midst of the honking horns and screeching tires, he exclaimed to his friend, "Listen to that cricket!"

The friend looked at the zoologist in astonishment and said, "You hear a cricket in the middle of all this noise and confusion?"

Without a word, the zoologist reached into his pocket, took out a coin, and flipped it into the air. As it clinked on the sidewalk, a dozen heads turned in response.

The zoologist said quietly to his friend, "We hear what we listen for."

Day after day, inside and outside of business, we miss important information because we don't listen with full attention. We also misunderstand and misinterpret messages and ideas because of our preconceptions, biases, and wishes. Take the manager who dreaded to see his secretary go away for her two-week vacation. When the secretary told the boss she'd be taking time off, it just didn't sink in. Said the secretary later: "I told my boss three times I was planning on taking my vacation in October. It just didn't register."

Minor slipups in communication can have major repercussions, as any sensitive manager knows. Lack of communication between you and others in your company can not only foul up job assignments and raise the cost of doing business, it can also cause hurt feelings and generally lower morale.

Listening is an art that requires work, self-discipline, and skill. The art of communication springs as much from knowing when to listen as it does from knowing how to use words well. Ask any good salesperson or negotiator about the value of silence. He or she will tell you good listeners generally make more sales and better deals than good talkers.

To sharpen listening skills, you need patience and practice. Here are some suggestions that have helped others become better listeners:

- 1. **RESIST THE TEMPTATION TO MONOPOLIZE CONVERSATION.** If you like to dominate a situation or feel you know everything there is to know about a subject, you're probably a poor listener. Remain open to new ideas instead of impatiently waiting for a chance to butt in with what you think is the final word on the subject. Before you speak, make sure that the speaker has had a chance to make his point. Many people think aloud and tend to grope toward their meaning. Their initial statements may be only a vague approximation of what they mean.
- 2. **AVOID JUDGING THE SPEAKER TOO SOON.** Good listeners try not to become preoccupied with a speaker's mannerisms or delivery. Instead of thinking, for instance, "What a monotone this guy has," ask yourself, "What's in the message that I should know?" or "What can this add to my knowledge and experience?"
- 3. **DON'T FAKE ATTENTION.** When we decide that what a speaker has to say is boring or useless, we frequently pretend to listen. It's usually quite easy for an attentive listener to recognize that our "uh-huhs" are really "ho-hums." When he does, his thinking is likely to become confused, he may get annoyed, and his delivery will probably deteriorate.

Attentive listeners remain alert and maintain eye contact. Simple gestures -- nodding, raising the eyebrows, or leaning forward -- all can convey interest. Occasional comments, such as "I see," "That's interest," or "Tell me more about that," if said with genuine interest, can go a long way toward reassuring the speaker.

- 4. **LISTEN FOR IDEAS, AS WELL AS FACTS.** When we listen, we tend to get bogged down trying to retain the facts and we miss the ideas behind them. For example, when a person starts running through a list of seven points, the listener immediately begins mulling over the first point, trying to remember it. Meanwhile, point two is being explained. How he's preoccupied with two facts and is apt to miss the third point altogether. So it goes through point seven: some facts retained, some missed, and others confused. Instead of getting lost in a string of disassociated fragments, make an effort to understand what the facts add up to by relating them to each other and seeing what key ideas bind them together.
- 5. **BE ALERT TO NONVERBAL CLUES OR "BODY LANGUAGE."** Try not only to listen to what is said but also to understand the attitudes and motives that lie behind the words. Also remember that the speaker does not always put his entire message into words. For example, there is sometimes considerable difference between the auditory cues and the behavioral cues emitted by the speaker. While his verbal message may convey conviction about a new idea or proposal, his gestures, posture, facial expressions, and tone of voice may convey doubt and lack of enthusiasm.
- 6. **USE THE SPEED OF THOUGHT PRODUCTIVELY.** Because we usually think three to four times faster than we talk, we often get impatient with a speaker's slow progress, and our minds wander. Try using the extra time by silently reviewing and summarizing the speaker's main points. Then, when he's finished, you can restate the points and ask the speaker if you've understood the message. Questions such as "Is this what you mean?" or "Do I understand you correctly?" are not only supportive because they show your interest, they also reduce the chance of misunderstanding later on.

Everyone thinks they're great listeners.

What's easier than sitting down and just hearing what a person has to say right? Wrong.

Hearing isn't necessarily listening, nor is it necessarily listening well. As G.K. Chesterton said "there's a lot of difference between hearing and listening." The truth is, many people come to conversations with agendas, whether that is to make themselves be heard, or to make themselves not be heard, and to actually escape the conversation altogether. If you're an introvert, you probably opt for the latter.

If you're anything like me you probably find yourself on the receiving end of countless uninitiated conversations. Although you sit quietly and meekly listening to them, the fact is that you'd much prefer to slip away at the soonest given chance. The problem with constantly feeling this way is that we never actually hear the people who speak to us. We don't put our entire attention, interest or heart into listening and truly understanding them.

The Art Of Listening ... So Why May I Be Fooling Myself?

Just because you're quiet and you let others do 75% of the talking, doesn't mean you're a good listener. It doesn't mean you've mastered the art of listening either.

Did you know that the need to be understood and listened to is a basic human need, along with food, water and shelter? Well ... actually I made that bit up. But it makes sense doesn't it?

How many times have you longed to be heard and understood only to have the receiving end ordering a pizza in the background, shuffling through papers or texting while you talk? Now do you know how it feels?

Everyone Needs Someone To Talk To

And who better than you? After all, if you've got it flaunt it, right? If you're naturally quiet by nature and listen more than talk, why not master the art of listening? After all:

- You'll master a new skill.
- People will be more drawn to you and will like you more.
- You'll be a better friend, lover, teacher, employee and parent.
- Overall you'll be a happier person by making other people happy.

How To Master The Art Of Listening

After researching far and wide across the internet, I've compiled a list of the most important things you should know about the art of listening. Here they are:

1. Make Eve Contact.

This first rule is very obvious but frequently forgotten. If you don't look at the person while they're speaking, you give them the impression that you don't care what they say. In essence, it appears as though you don't even care about them. Simple.

2. Don't Interrupt.

Let the person speak uninterrupted. To master the art of listening you need to halt any good thoughts that come to mind and let the person say everything they need to say. Often times people simply need someone to talk to, not someone who will butt in and give their own thoughts and opinions. The goal is to shine the spotlight on them, not you.

3. Practice "Active Listening".

The art of listening isn't simply about staying quiet 100% of the time, it's also about asking
questions. These questions are for clarification, or for further explanation so that you can
fully understand what the speaker is telling you. For instance, questions like these are
brilliant: "Are you saying that", "What I heard you say was", "Did you
mean that ".

4. Show You Understand.

Another great way to show that you understand what the person is telling you is to nod. You can also make noises that show you're in tune with what the person is saying such as "yes", "yeah", "mhmm", "okay". This seems trivial, but it's important to not behave like a zombie and demonstrate some interest and comprehension.

5. Listen Without Thinking.

In other words, listen without forming responses in your mind. Be wholehearted and listen to the entire message. It's very tempting to fill the spaces, after all, our minds think

around 800 words per minute, compared to 125-150 words we speak per minute. Don't miss valuable information by letting your mind wander!

6. Listen Without Judgement.

To effectively master the art of listening it's extremely important to withhold any negative evaluations or judgements. Make it your goal to be open minded 100% of the time. After all, who wants to open up to a narrow minded person? It also helps to be mindful of your "shut off" triggers, which are the specific words, looks, or situations that cause you to stop listening. This way, you can prevent yourself from shutting off in the future.

7. Listen To Non-Verbal Communication.

About 60 – 75% of our communication is non-verbal. That's a lot! In order to know whether to encourage the speaker, to open yourself more, or to be more supportive in your approach, it's essential to know what the person's body is saying. Do they display signs of discomfort? Are they untrusting of you? Does their body language align with their words? To learn more about body language, try checking out some of Sol's Body Language articles.

8. Create A Suitable Environment.

It can be really difficult to listen to another person when the TV is screaming, your phone is buzzing and there are thousands of cars passing by. When you remove all of these distractions and find a quiet place to sit down and listen, it's much easier to listen empathetically with an open mind and whole heart. Also, when you indicate it would be good to "find a quiet place", you put importance in the person and what they have to say. Once again, you show care and consideration.

9. Observe Other People.

If you're really serious about mastering the art of listening, why not observe other people? One of the best ways to become a better listener is to observe the way people interact with each other, and all the irritating and rude things they do. Create an "annoying habit" checklist, and see if you do any. If you're brave enough, you can even ask someone you trust about what they like and dislike about the way you interact with others in conversation.

As Diogenes Laertius said: "We have two ears and only one tongue in order that we may hear more and speak less." The art of listening is an invaluable life skill. Not only will it help you communicate better with your friends and family, but it will help you succeed in every area of your life.

ART OF COMMUNICATION

As simple as communication seems, a lot of what we try to say to others and what they try to say to us gets misunderstood. Often this causes frustration, conflict and distance in our relationships, both personal and professional. But good and effective communication is essential to the working and cohesiveness of any team, group or partnership.

As L&D professionals, we logically know this but doing it sometimes poses challenges. There are parallels for all of us in the real-life business example that I discuss in this article.

I recently had a client who owns and runs a successful business with his business partner. Let's call him Steve. Steve's problem was that he and his business partner had stopped communicating. Sound familiar? Every time they tried to talk about a difficult issue, it ended in an argument. Things were strained to say the least. While the business was still making money, it was no longer any fun. The level of fight they were in was obvious to me, but less so to them. Find out later how I coached them to communicate across this difficult terrain.

Communication is part of our everyday existence. Not simply when we open our mouths to talk to someone but everywhere we look and listen (newspapers, TV, advertising, radio) we are participants in the act of communication. In fact, everything we do is a communication. What we say, what we don't say, what we wear, how we stand, the expression on our face - we are communicating all the time.

Given that communication is a constant for all of us and given our years of experience communicating with others, you would think that we would be masters of it by now. However the sad truth is that, for many of us, our more challenging communications are not successful and probably quite messy.

As an L&D professional, you will often face challenging conversations, whether they are with a business head in a 1:1, a review meeting with the business or just giving someone difficult feedback, and being able to handle these well is important.

A lot of the articles I read on communication tackle the issue from a quite technical perspective, discussing the theory and the technical aspects of communication. Trying to talk about something as messy as communication in this way is of little practical value and of no help when you are up against it trying to have a difficult conversation.

I want to give you some practical tools you can use straight away to become a more effective and self-aware communicator. Communication goes awry and we get a less than satisfactory outcome when we have not managed our state effectively and I want to explain why we need to value and use our emotional awareness more. To demonstrate how to have a difficult conversation I shan't give you the exact words to use, but I shall give you some principles and tools that you can try out.

One of the most vital communication skills is listening and I will talk about how you can employ greater levels of listening to build relationships.

Most forms of human behaviour in a relationship, by their nature, are messy. Look at marriage - the inability to communicate effectively is what causes all the pain, heartbreak, misunderstanding and

resentment. The same can be observed at national levels, in government and in business. The number of wars, conflicts, legal disputes and divorce is testament to this.

I believe the reason why communication gets messy is because we are unable to deal with the emotions that start to run when we encounter difficult discussions or situations. If we can become more adept at identifying the feelings that are coming up for us in any given moment, we can start to manage our state more effectively.

Our state is defined by our feelings. We all have hundreds of feelings every day - joy, rage, fear, defeat, despair, anxiety, sadness, contentment, vulnerability, worthlessness, happiness - just to mention a few. Being conscious of your feeling realm is a skill at which few of us are masters. Most of the time all we do is act out our feelings without realising why - we fight, argue, defend, withdraw, sulk, drink, take drugs etc.

However, when you are aware, and in control, of your emotions, you can manage stress and challenges, communicate well with others and display empathy. This is the power of developing your own emotional awareness, because it plays such a pivotal role in how well we communicate with others and, ultimately, decides how successful we are at building and managing relationships - at work and in life.

What is emotional intelligence?

At The Millar Method, we define emotional intelligence as an ability to cope with the demands of life in a competent way. This requires us to understand ourselves, our goals and our behaviour. It also requires that we have empathy, which is to understand others and their feelings, knowing that we all act because of how we feel. We believe that it is through emotional intelligence and empathy that we learn to manage relationships, build creative groups and motivate ourselves and others.

Whether we're aware of them or not, emotions are a constant presence in our lives, influencing everything we do. Our emotions, not our thoughts, motivate us. Without an awareness of what we're feeling, it's impossible to fully understand our own behaviour and manage our emotions and actions, let alone understand the needs of others.

In the example of my client Steve, he had no real idea of how he felt about the business and his partner, apart from "extremely frustrated!" In the coaching sessions, I got him to talk about how he really felt and it went something like this: "I feel misunderstood; I don't feel appreciated; I feel that I am the problem; every time I try to talk about things, I am told I am a control freak. I feel I am doing all the work and giving the tough messages. My partner just wants to be liked by everyone."

I asked him what outcome he wanted with his business partner: "I want us to be more honest about what is going on; I want it to be possible to talk about the bad things as well as the good stuff; I want it to be safe for either of us to raise issues without there having to be a fight; but most of all I want it to be fun again."

While I could not guarantee that it would be "fun again", I was able to facilitate him talking to his business partner.

These are six principles which, if you make them conscious, can help to navigate even the toughest of discussions.

Emotional awareness functions like instinct. When it's strongly developed, you'll know what you are feeling without having to think about it-and you'll be able to use these emotional signals to understand what is really going on in a situation and act accordingly.

Listening skills

Coupled with emotional awareness, listening is a key skill in communication. When people are listened to, they feel that they matter, that what they think and feel is important. This builds a solid foundation between two people and demonstrates encouragement and support for the other person.

Steve was able to listen deeply and reflect back what he had heard from his partner. Misunderstandings are common in communication; by listening and reflecting back what he had heard, he ensured his partner felt understood.

There are many levels and types of listening but I have only explored a few of them here and they are the ones I consider most useful and use in my coaching with Steve and his partner.

Internal listening

There are two levels of internal listening, which will be useful to understand.

The first is a focus on your own internal dialogue - the many inner voices that talk to, and about, us and give positive and negative messages both to us and to the outside world. Steve could hear that voice telling him that he was going to mess up and make things worse.

It can take time to develop a healthy relationship to our internal dialogue, as there are many thoughts and concepts we may not want to admit to ourselves. However, listening to it is important for emotional health.

Secondly, there is focused listening, when the focus is on the speaker. When people really listen in a focused way, you may see it reflected in their body language - they lean closer and maintain eye contact with the speaker. This type of listening takes effort.

At this level you take in all the information being conveyed. As well as what is being said, you also focus on the way it is said (the emotions behind the words, the energy with which the words are spoken, for example).

It is a good idea to use the 'three-second principle' in this type of listening: when the speaker stops speaking, wait for three seconds to establish whether they have actually finished talking before you reply.

When we practise effective listening, the results can be quite eye-opening:

- the individual will feel understood, valued and respected
- the individual is more likely to be genuinely disclosing and open
- you will obtain useful and valid data

READING MATERIAL FOR 1ST REGIONAL TRAINING FOR SENSITIZATION OF FAMILY COURT MATTERS

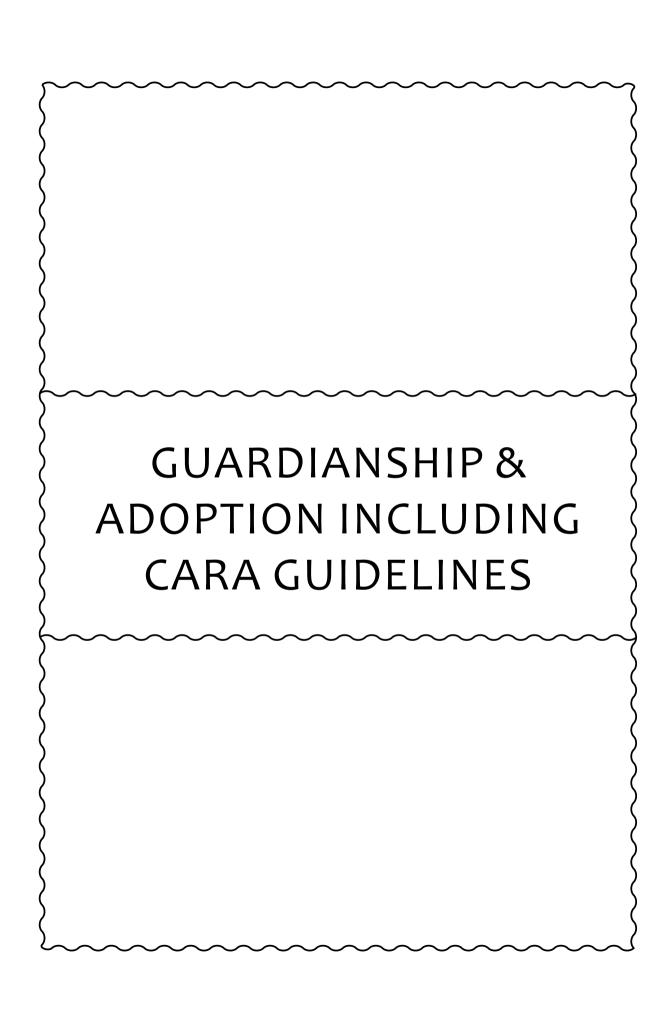
- it is an opportunity to state thoughts and feelings more clearly
- increased insight may help you to understand others' views
- it opens the door to creative thinking and problem-solving.

In conclusion, unless we evolve our emotional intelligence and learn new methods to communicate and process our experiences, unresolved issues increase the stress in a relationship until something drastic happens - someone leaves or the business collapses. Sometimes, frightened of having to address the issues, teams and partners just withdraw, disregard their emotions and settle for a safe but dull co-existence. No passion, no connection, no creativity, no fun.

Steve and his partner now work with me regularly. They have worked through a lot of stuff and they are both enjoying the business more. They still have their moments but they now have tools and more understanding.

All relationships in business and at home go through changes. Being able to communicate effectively through all of them is the real key to success.





LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

Supreme Court of India

Bench: Hon'ble Mr. Justice P.N. Bhagwati, Hon'ble Mr. Justice R.S. Pathak & Hon'ble Mr. Justice Amarendra Nath Sen

Lakshmi Kant Pandey
vs
Union Of India
1984 SCR (2) 795

1984 AIR 469 Decided on 6 February, 1984 JUDGMENT

Hon'ble Mr. Justice P.N. Bhagwati:—

This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the Shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents." The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated 1st September, 1982 the Court issued notice to the Union of India the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration

the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called 'Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

It appears that the Indian Council of Social Welfare thereafter in compliance with the directions given by the Court, filed copies of the Adoption of Children Bill, 1972 and the adoption of Children Bill, 1980. The adoption of Children Bill, 1972 was introduced in the Rajya Sabha sometime in 1972 but it was subsequently dropped, presumably because of the opposition of the Muslims stemming from the fact that it was intended to provide for a uniform law of adoption applicable to all communities including the Muslims. It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strong sentiments expressed by the members of the Muslim Community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill, 1980 which was introduced in the Lok Sabha eight years later on 16th December, 1980, contained an express provision that it shall not be applicable to Muslims. Apart from this change in its coverage the Adoption of Children Bill, 1980 was substantially

in the same terms as the Adoption of Children Bill, 1972. The Adoption of Children Bill 1980 has unfortunately not yet been enacted into law but it would be useful to notice some of the relevant provisions of this Bill in so far as they indicate what principles and norms the Central Government regarded as necessary to be observed for securing the welfare of children sought to be given in adoption to foreign parents and what procedural safeguards the Central Government thought, were essential for securing this end. Clauses 23 and 24 of the Adoption of Children Bill, 1980 dealt with the problem of adoption of Indian children by parents domiciled abroad and, in so far as material, they provided as follows:

"23 (1) Except under the authority of an order under section 24, it shall not be lawful for any person to take or send out of India a child who is a citizen of India to any place outside India with a view to the adoption of the child by any person."

(2) Any person who takes or sends a child out of India to any place outside India in contravention of sub-section (1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose shall be punishable with imprisonment for a term which may extend to six months or with fine, or with both. (24) (1) If upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

Provided that no application shall be entertained unless it is accompanied by a certificate by the Central Government to the effect that- (i) the applicant is in its opinion a fit person to adopt the child; (ii) the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant; (iii) the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this Act to enable the child to be repatriated to India, should it become necessary for any reason.

(2) The provisions of this Act relating to an adoption order shall, as far as may be apply in relation to a provisional adoption order made under this section. The other clauses of the Adoption of Children Bill, 1980 were sought to be made applicable in relation to a provisional adoption order by reason of sub-clause (3) of clause 24. The net effect of this provision, if the Bill were enacted into law, would be that in view of clause 17 no institution or organisation can make any arrangement for the adoption of an Indian child by foreign parents unless such institution or organisation is licensed as a social welfare institution and under Clause 21, it would be unlawful to make or to give to any person any payment or reward for or in consideration of the grant by that person of any consent required in connection with the adoption of a child or the transfer by that person of the care and custody of such child with a view to its adoption or the making by that person of any arrangements for such adoption. Moreover, in view of Clause 8, no provisional adoption order can be made in respect of an Indian child except with the consent of the parent or guardian of such child and if such child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the District Court can dispense with such consent if it is satisfied that the person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without reasonable cause to discharge his obligation as parent or guardian or can not be found or is incapable of giving consent or is withholding consent unreasonably. When a provisional adoption order is made by the District Court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which he is domiciled. These provisions in the Adoption of Children Bill, 1980 will have to be borne in mind when we formulate the guidelines which must be observed in permitting an Indian child to be given in adoption to foreign parents. Besides filing copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980 the Indian Council of Social Welfare also filed two lists, one list giving names and particulars of recognised agencies in foreign countries engaged in facilitating procurement of children from other countries for adoption in their own respective countries and the other list containing names and particulars of institutions and organisations in India engaged in the work of offering and placing Indian children for adoption by foreign parents.

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits or statements should be filed on or before 27th November, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to 1st October, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to 1st December 1982 in order that the record may be completed by that time. Pursuant to these directions given by the Court, various affidavits and statements were filed on behalf of the Indian Council of Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for promotion of Adoption Kuan-yin Charitable Trust, Terre Des Homes (India) Society, Maharashtra State Women's Council, Legal Aid Services West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such intercountry adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen

family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment." The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has Constituted the National Children's Board with the Prime Minister as the chair person. It is the function of the National Children's Board to provide a focus for planning and review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose:

"PRINCIPLE 2: The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically mentally morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

PRINCIPLE 3: The child shall be entitled from his birth to a name and a nationality.

PRINCIPLE 6: The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

PRINCIPLE 9: The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

PRINCIPLE 10: The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look

after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is

some time called 'inter country adoption' should be acceptable. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption' within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982, recognise the validity of this principle in clause 3.1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if: a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted aboard."

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

- "(a) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations and guidelines incorporated in the report of the Secretary General and the relevant material submitted by Governments already available to the Secretary General and the regional commissions.
- (b) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development-including family and child welfare-programmes."

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and

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Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner. None of the parties appearing could give us information whether any action has been taken by the General Assembly. But the draft Declaration is a very important document in as much it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage:

- "Art. 2. It is recognised that the best child welfare is good family welfare.
- 4. When biological family care is unavailable or in appropriate, substitute family care should be considered.
- 7. Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility.
- 8. Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive.
- 12. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family.
- 14. In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned.
- 15. Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible.
- 16. Legislation and services should ensure that the child becomes an integral part of the adoptive family.
- 17. The need of adult adoptees to know about their background should be recognized.
- 19. Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter- country adoption may be considered as a suitable means of providing them with a oily.
- 21. In each country, placements should be made through authorized agencies competent to deal with inter country adoption services and providing the same safeguards and standards as are applied in national adoptions.
- 22. Proxy adoptions are not acceptable, in consideration of the child's legal and social safety.
- 23. No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.
- 24. In inter-country adoptions, legal validation of the adoption should be assured in the countries involved.

25. The child should at all times have a name, nationality and legal guardian."

Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on 4th September, 1982. These guidelines were based on the Draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U.K. There are quite a few of these guidelines which are important and which deserve serious consideration by us:

- "1.4. In all inter-country adoption arrangements, the welfare of the child shall be prime consideration. Biological Parents:
- 2.2. When the biological parents are known they shall be offered social work services by professionally qualified workers (or experienced personnel who are supervised by such qualified workers) before and after the birth of the child.
- 2.3. These services shall assist the parents to consider all the alternatives for the child's future. Parents shall not be subject to any duress in making a decision about adoption. No commitment to an adoption plan shall be permitted before the birth of the child. After allowing parents a reasonable time to reconsider any decision to relinquish a child for adoption, the decision should become irrevocable.
- 2.5. If the parents decide to relinquish the child for adoption, they shall be helped to understand all the implications, including the possibility of adoption by foreigners and of no further contact with the child. 2.6. Parents should be encouraged, where possible, to provide information about the child's background and development, and their own health.
- 2.8. It is the responsibility of the appropriate authority or agency to ensure that when the parents relinquish a child for adoption all of the legal requirements are met.
- 2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

- 3.1. Before any plans are considered for a child to be adopted by foreigners, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country.
- 3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.
- 3.3 As far as possible, the child-study report shall include the following:

- 3.3.1. Identifying information, supported where possible by documents.
- 3.3.2. Information about original parents, including their health and details of the mother's pregnancy and the birth.
- 3.3.3. Physical, intellectual and emotional development.
- 3.3.4. Health report.
- 3.3.5. Recent photograph.
- 3.3.6. Present environment-category of care (Own home, foster home, institution, etc.) relationships, routines and habits.
- 3.3.7. Social Worker's assessment and reasons for suggesting inter-country adoption.
- 3.4. Brothers and sisters and other children who have been cared for as siblings should not be separated by adoption placement except for special reasons.
- 3.5. When a decision about an adoption placement is finalised, adequate time and effort shall be given to preparation of the child in a manner appropriate to his/her age and level of development. Information about the child's new country and new home, and counselling shall be provided by a skilled worker. 3.5. (a) Before any adoption placement is finalized the child concerned shall be consulted in a manner appropriate to his/her age and level of development.
- 3.6. When older children are placed for adoption, the adoptive parents should be encouraged to come to the child's country of origin, to meet him/her there, learn personally about his/her first environment and escort the child to its new home.

Adoptive Parents:

- 4.3. In addition to the usual capacity for adoptive, parenthood applicants need to have the capacity to handle the trans-racial, trans-cultural and trans-national aspects of intercountry adoptions.
- 4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant in formation for other authorities such as Courts.
- 4.5. The report on the family study which must be made in the community where the applicants are residing, shall include details of the following:
 - 4.5.1. Identifying information about parents and other members of the family, including any necessary documentation.
 - 4.5.2. Emotional and intellectual capacities of prospective adopters, and their motivation to adoption. 4.5.3. Relationship (material, family, relatives, friends, community)
 - 4.5.4. Health.
 - 4.5.5. Accommodation and financial position. 4.5.6. Employment and other interests.

- 4.5.7. Religious affiliations and/or attitude. 4.5.8. Capacity for adoptive parenthood, and details of child preferred (age, sex, degree of disability).
- 4.5.9. Support available from relatives, friends, community.
- 4.5.10. Social worker's assessment and details of adoption authority's approval.
- 4,5.11. Recent photograph of family. Adoption Authorities and Agencies:
- 5.1. Inter-country adoption arrangements should be made only through Government adoption authorities (or agencies recognised by them) in both sending and receiving countries. They shall use experienced staff with professional social work education or experienced personnel supervised by such qualified workers.
- 5.2. The appropriate authority or agency in the child's country should be informed of all proposed inter-country adoptions and have the opportunity to satisfy itself that all alternatives in the country have been considered, and that inter-country adoption is the optimal choice of care for the child. 5.3. Before any inter-country adoption plan is considered, the appropriate authority or agency in the child's country should be responsible for establishing that the child is legally free for adoption, and that the necessary documentation is legally valid in both countries.
- 5.4. Approval of inter-country adoption applicants is a responsibility of the appropriate authorities or agencies in both sending and receiving countries. An application to adopt a child shall not be considered by a sending country unless it is forwarded through the appropriate authority or agency in the receiving country.
- 5.5. The appropriate authority or agency in both countries shall monitor the reimbursement of costs involved in inter-country adoption to prevent profiteering and traffic king in children.
- 5.6. XX XX XX XX
- 5.7. When a child goes to another country to be adopted, the appropriate authority or agency of the receiving country shall accept responsibility for supervision of the placement, and for the provision of progress reports for the adoption authority or agency in the sending country for the period agreed upon.
- 5.8. In cases where the adoption is not to be finalised in the sending country, the adoption authority in the receiving country shall ensure that an adoption order is sought as soon as possible but not later than 2 years after placement. It is the responsibility of the appropriate authority or agency in the receiving country to inform the appropriate authority or agency in the sending country of the details of the adoption order when it is granted.
 - 5.8.1. In cases where the adoption is to be finalised in the sending country after placement, it is the responsibility of the appropriate authority or agency in both the sending and receiving country to ensure that the adoption is finalised as soon as possible.
- 5.9. If the placement is disrupted before the adoption is finalised, the adoption authority in the receiving country shall be responsible for ensuring, with the agreement of the adoption authority in the sending country that a satisfactory alternative placement is made with

prospective adoptive parents who are approved by the adoption authorities of both countries.

Adoption Services and Communities:

6.1. Appropriate authorities or agencies in receiving countries shall ensure that there is adequate feedback to the appropriate authorities or agencies in sending countries, both in relation to inter-country adoption generally and to individual children where required.

6.2. XX XX XX XX

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the Child:

7.1. Family:

It is essential that in inter-country adoption child is given the same legal status and rights of inheritance, as if she/he had been born to the adoptive parents in marriage.

7.2. Name:

When the legal adoption process is concluded the child shall have the equivalent of a birth registration certificate.

7.3. Nationality:

When the legal adoption is concluded, the child shall be granted appropriate citizenship.

7.4. XX XX XX XX

7.5. Immigration:

Before an inter-country adoption placement with particular prospective adopters is proposed, the appropriate authority or agency in the child's country shall ensure that there is no hindrance, to the child entering the prospective adopters' country, and that travel documents can be obtained at the appropriate time. We shall examine these provisions of the Draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in intercountry adoption.

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court"

is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

"When a foreigner makes an application for being appointed as the guardian of the person or property of a minor, the Prothonotary and Senior Master shall address a letter to the Secretary of the Indian Council of Social Welfare, informing him of the presentation of the application and the date fixed for the hearing thereof-he shall also inform him that any representation which the Indian Council of Social Welfare may make in the matter would be considered by the Court before passing the order on the application. A copy of the application shall be forwarded to the Secretary of the Indian Council of Social Welfare along with the letter of Prothonotary and Senior Master."

The High Court of Delhi has also issued instructions on the same lines to the Courts subordinate to it and these instructions read as follows:

- (i) A foreigner desirous of being appointed guardian or the person of a minor and praying for leave to remove the minor to a foreign country, shall make an application for the purpose in the prescribed form under the Guardians and Wards Act, attaching with it three copies of passport size photographs of the minor, duly attested by the person having custody of the minor at the time;
- (ii) If the court is satisfied that there is no ground for proceedings on the application, it shall fix a day for the hearing there of and cause notice of the application and of the date fixed for the hearing on the person and in the manner mentioned in Section 11, Guardians and Wards Act, 1890 as also to the general public and the Secretary of the Indian Council of child Welfare and consider their representation;
- (iii) Every person appointed guardian of the person of a minor shall execute a bond with or without a surety or sureties as the court may think fit to direct and in such sum as the court may fix, having regard to the welfare of the minor and to ensure his production in the court if and when so required by the court;
- (iv) On the court making an order for the appointment of a foreigner guardian of the person of an Indian minor, a copy of the minor's photograph shall be countersigned by the Court and issued to the guardian or joint guardian, as the case may be, appointed by the court alongwith the certificate or guardianship."

The High Court of Gujarat has not framed any specific rule for this purpose like the High Courts of Bombay and Delhi but in a judgment delivered in 1982 in the case of Rasiklal Chaganlal Mehta,(1) the High Court of Gujarat has made the following observations:

"In order that the Courts can satisfactorily decide an intercountry adoption case against the aforesaid background and in the light of the above referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naroji Road, Bombay-400001) and seek its assistance. If the Indian Council of Social Welfare so desires it should be made a party to the proceedings. If the Indian Council of Social Welfare does not appear, or if it is unable, for some reason, to render assistance, the Court should issue notice to an independent, reputed and publicly/officially recognised social welfare agency working in the field and in that area and request it to render assistance in the matter."

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus

has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certificate by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in

favour of an Officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter- country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves

as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of intercountry adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not

to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

- "(1) Identifying information, supported where possible by documents.
- (2) Information about original parents, including their health and details of the mother's pregnancy and birth.
- (3) Physical, intellectual and emotional development.
- (4) Health report prepared by a registered medical practitioner preferably by a paediatrician.
- (5) Recent photograph.
- (6) Present environment-category of care (Own home, foster home, institution etc.) relationships, routines and habits.
- (7) Social worker's assessment and reasons for suggesting inter-country adoption."

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for intercountry adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in intercountry adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner

for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must, before offering a child in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for the adoption. It is also necessary that the recognised welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or

child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

We must emphasize strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading upto the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.

We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be some what difficult for a grown up child to get acclimatized to new surroundings in a different land and some times a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child. But we make it clear that we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years. We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference. The statistics placed before us show that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents.

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application

should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expediticusly and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents.

Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have the effect of exciting his curiosity to meet its biological parents resulting in unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a

period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of Social Welfare of each of the State Governments as also to all the High Courts in the country and to the Indian Council of Social Welfare and the Indian Council of Child Welfare. We would direct that copies of this Order shall also be supplied to the Embassies and Diplomatic Missions of Norway, Sweden, France, Federal Republic of Germany and the United States of America and the High Commissions of Canada and Australia for their informations since the statistics show that these are the countries where Indian children are taken in adoption. S.R.

ANNEXURE-'A'

- 1. Source of Referral.
- 2. Number of single and joint interviews.
- 3. Personality of husband and wife.
- 4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),
- 5. Social status and family background.
- 6. Nature and Adjustment with occupation.
- 7. Relationship with community.
- 8. Description of home.
- 9. Accommodation for the child.
- 10. Schooling facilities.
- 11. Amenities in the home.
- 12. Standard of living as it appears in the home.
- 13. Type of neighbourhood.
- 14. Current relationship between husband and wife.
- 15. (a) Current relationship between parents and children (if any children).
 - (b) Development of already adopted children (if any) and their acceptance of the child to be adopted.
- 16. Current relationship between the couple and the members of each other's families.
- 17. If the wife is working, will she be able to give up the job?
- 18. If she cannot leave the job, what arrangements will she make to look after the child?
- 19. Is adoption considered because of sterility of one of the maritial partners?

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- 20. If not, can they eventually have children of their own?
- 21. If a child is born to them, how will they treat the adopted child?
- 22. If the couple already has children how will these children react to an adopted child?
- 23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.
- 24. Reasons for wanting to adopt an Indian child.
- 25. Attitude of grand-parents and relatives towards the adoption.
- 26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.
- 27. Anticipated plans for the adopted child.
- 28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)
- 29. Do the adoptive parents know any one who adopted a child from their own country or another country? Who are they? From where did they fail to get a child from that source?
- 30. Did the couple apply for a child from any other source? If yes, which source?
- 31. What type of child is the couple interested in ? (sex, age, and for what reasons.)
- 32. Worker's recommendation concerning the family and the type of child which would best fit into this home.
- 33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.
- 34. Name of agency responsible for post placement, supervision and follow up.



Salient Provisions of CARA Guidelines on Adoption (2017)

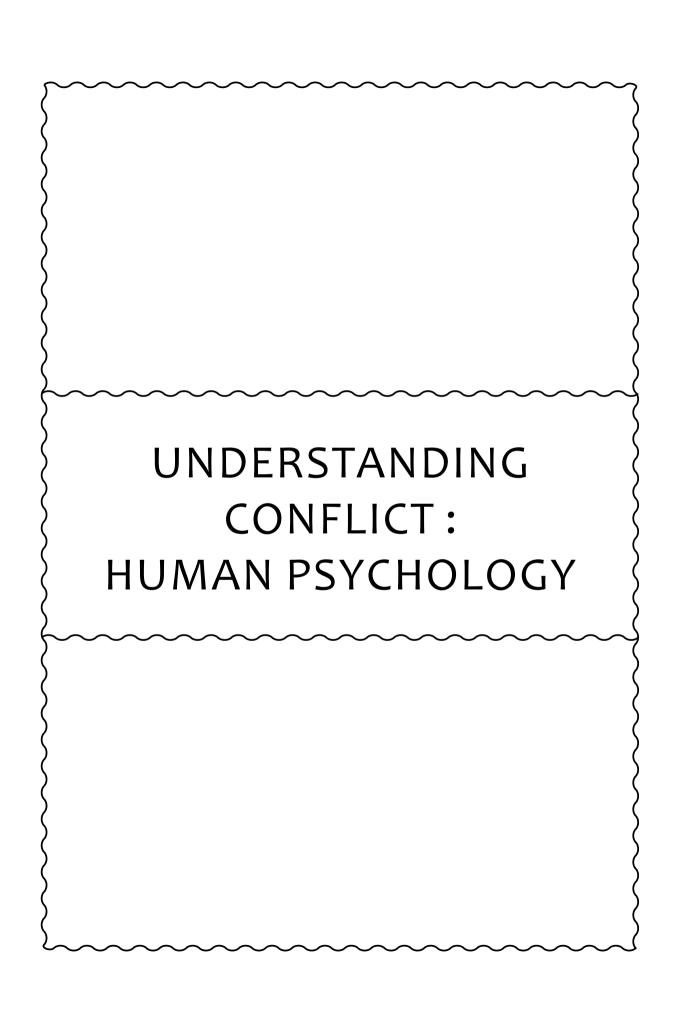
Adoption in India is regulated by the Central Adoption Resource Authority (CARA), an autonomous body under the Ministry of Women and Child Development, Government of India. Parents need to register with CARA (www.cara.nic.in) for adopting a child. A detailed knowledge of CARA guidelines is essential to understand your eligibility, the documentation required, the preferences you should indicate, the associated wait time, the child referral process and the long term benefits of accepting the first child you are referred.

Following are the key provisions of the latest 2017 CARA Guidelines:

- A married couple, a single male/female (unmarried, widowed or legally divorced) can adopt a child up to 18 years of age
- A single male can only adopt a male child. A single female can adopt a child of any gender.
- Parents with maximum composite age of 90 yrs (single parent's age of 45 yrs) can adopt a child up to 4 yrs of age
- Parents with maximum composite age of 100 yrs (single parent's age of 50 yrs) can adopt a child between 4-8 yrs of age
- Parents with maximum composite age of 110 yrs (single parent's age of 55 yrs) can adopt a child between 8-18 yrs of age
- Minimum age difference between the child and the parent should be 25 yrs
- ➤ The parent need to register online with CARA Adoption System CARINGS and upload required documents as per their status
- The parent can indicate following preferences while registering
 - Age of Child − 0-2, 2-4, 406, 6-8, 8-10, 10-12, 12-14, 14-18 yrs
 - Gender of Child − Boy / Girl / any Gender
 - State to adopt from − Give top 3 preferences or Anywhere in India
- The Specialized Adoption Agency (SAA) nearest to the parent's address will conduct their Home Study. The parent will become eligible for receiving a profile of the child only after the Home Study report (HSR) is uploaded in CARINGS.
- The parent will be offered profiles of 3 children in one or more referrals, as per availability of the children according to their preferences.
- The parent can see the entire profile and medical history of the child in the referral.
- The Parent can then choose to Reserve or Not Reserve a child within 48 hours of the referral (online only)
- ➤ Upon reserving, the child has to be accepted within 20 days. Parents who do not accept the child in the above period will be relegated to the bottom of the wait list.

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- Parents who do not Accept any of the 3 profiles will be relegated to the bottom of the wait list. However, their registration shall continue to be valid, with revalidation of the Home Study Report in every three years.
- A fee of Rs. 46,000 is payable to the SAA. The fee includes expenses for home study, legal services etc and no other sum is payable by the parent.



UNDERSTANDING CONFLICT: HUMAN PSYCHOLOGY

Whenever two individuals opine in different ways, a conflict arises. In a layman's language conflict is nothing but a fight either between two individuals or among group members. No two individuals can think alike and there is definitely a difference in their thought process as well as their understanding. Disagreements among individuals lead to conflicts and fights. Conflict arises whenever individuals have different values, opinions, needs, interests and are unable to find a middle way.

Let us understand conflict in a better way

Tim and Joe were working in the same team and were best of friends. One fine day, they were asked to give their inputs on a particular project assigned to them by their superior. There was a major clash in their understanding of the project and both could not agree to each other's opinions. Tim wanted to execute the project in a particular way which did not go well with Joe. The outcome of the difference in their opinions was a conflict between the two and now both of them just can't stand each other.

The dissimilarity in the interest, thought process, nature and attitude of Tim and Joe gave rise to a conflict between the two.

Conflict is defined as a clash between individuals arising out of a difference in thought process, attitudes, understanding, interests, requirements and even sometimes perceptions. A conflict results in heated arguments, physical abuses and definitely loss of peace and harmony. A conflict can actually change relationships. Friends can become foes as a result of conflict just as in the case of Tim and Joe.

A Conflict not only can arise between individuals but also among countries, political parties and states as well. A small conflict not controlled at the correct time may lead to a large war and rifts among countries leading to major unrest and disharmony.

It is a well known fact that neighbours are our biggest assets as they always stand by us whenever we need them. Let us take the example of India and China or for that matter India and Pakistan. India and Pakistan are twin sisters as there is hardly any difference in the culture, religion, climatic conditions, eating habits of the people staying in both the countries, but still the two countries are always at loggerheads and the reason is actually unknown. Small issues between the two countries have triggered a conflict between them which has now become a major concern for both the countries.

Misunderstandings as well as ego clashes also lead to conflicts. Every individual has a different way to look at things and react to various situations.

Mike wanted to meet Henry at the church. He called up Henry and following was the conversation between them.

Mike - "Henry, I want to meet you tomorrow at 9"

Henry tried Mike's number a several times but could not speak to him. Mike waited the whole day for Henry and finally there was a major fight between them. For Mike 9 meant 9 in the morning

whereas Henry misunderstood it for 9 in the evening and hence a major conflict between the two. It is always advisable to be very clear and very specific to avoid misunderstandings and conflicts. Any feedback or suggestion by an individual might not go very well with other individual leading to severe displeasure. It might hurt the ego of the other person resulting in a fight and major disagreement.

Phases of conflict

A conflict has five phases.

- 1. **Prelude to conflict** It involves all the factors which possibly arise a conflict among individuals. Lack of coordination, differences in interests, dissimilarity in cultural, religion, educational background all are instrumental in arising a conflict.
- 2. **Triggering Event** No conflict can arise on its own. There has to be an event which triggers the conflict. Jenny and Ali never got along very well with each other. They were from different cultural backgrounds, a very strong factor for possibility of a conflict. Ali was in the mid of a presentation when Jenny stood up and criticized him for the lack of relevant content in his presentation, thus triggering the conflict between them.
- 3. **Initiation Phase** Initiation phase is actually the phase when the conflict has already begun. Heated arguments, abuses, verbal disagreements are all warning alarms which indicate that the fight is already on.
- 4. **Differentiation Phase** It is the phase when the individuals voice out their differences against each other. The reasons for the conflict are raised in the differentiation phase.
- 5. **Resolution Phase** A Conflict leads to nowhere. Individuals must try to compromise to some extent and resolve the conflict soon. The resolution phase explores the various options to resolve the conflict.

Conflicts can be of many types like verbal conflict, religious conflict, emotional conflict, social conflict, personal conflict, organizational conflict, community conflict and so on.

Conflicts and fighting with each other never lead to a conclusion. If you are not on the same line as the other individual, never fight, instead try your level best to sort out your differences. Discussion is always a better and wiser way to adopt rather than conflicts.

Conflicts in families

Family conflict develops when members of a family have different beliefs or viewpoints, when people misunderstand one another, when someone gets hurt feelings and develops resentment, and when miscommunication leads to mistaken assumptions and subsequent arguments.

Family stages often cause conflicts. These include learning to live as a new couple (cohabiting or married), having the first baby and any subsequent children, sending a child to school, dealing with adolescence and experiencing the passage of young persons into adulthood. Each of these stages has innumerable possibilities for conflicts.

The other times conflicts occur is during changes in family situations. Separation and divorce create conflict, as do moving to a new town, starting a new job or starting a new school. Starting to commute long hours to and from work creates family conflict. Changes in financial circumstances also are life changes that can create conflicts.

Through time, the needs, values and opinions of family members can change and create conflicts. Change can occur between spouses, between parents and children, between siblings, between nuclear families and in-laws, and among extended family members. The above information is from the website of the Department of Health and Human Services, State Government of Victoria, Australia. From the Livestrong Foundation, there is additional information. Expanding on some of the causes of conflicts, one of the most common is money. The conflict can be not having enough money to meet expenses, competition for control of the money between spouses or partners, and disagreements about how to spend money.

Disagreements about types of child discipline cause conflicts. Parents can become polarized into the good parent and the bad parent, or the disciplinarian and the comforter. Such divisions are unhealthy for parents and children.

Sibling rivalry can cause conflicts, such as jealousy leading to teasing, competition, or verbal and physical abuse. If a parent favors one child, there are even greater conflicts. Sibling rivalry is normal provided it is contained by parental intervention and not damaging to the development of any of the children.

In terms of in-laws and extended families, problems arise if family members other than the nuclear family or blended family are intrusive into family matters. In these instances, conflict is inevitable, especially since boundaries and values differ significantly from person to person and family to family.

Studies show children and adolescents who move repeatedly are more likely to have problems in school. If moves coincide with other changes such as divorce, death, decreases in family incomes or new schools, they are even more problematic.

Moves put children into positions of having to make all new friends. Schools differ and have varying curricula and schedules. Children can become stressed, bored or depressed.

Children in kindergarten or first grade are vulnerable to moves because they are already in the process of separating from their parents and adjusting to school. Moving might precipitate these children regressing to more dependent relationships with parents.

Because of the increasing importance of peers, teens and preteens have even more problems moving. They might not talk to parents about their distress but might become depressed, anxious, withdrawn, rebellious or aggressive. If there is disagreement between parents about moving, their conflicts will affect the teenagers and children.

There are additional conflicts between extended family members and nuclear family groups. Common problems include relatives who wear out their welcome by staying too long. Then there are relatives who visit too often. Conflicts also can arise about relatives who call too often or too infrequently.

Interfering relatives who meddle in other people's lives can occur among extended family members or in-laws. It is not unusual for families to have interfering relatives. Further information concerning conflicts with relatives can be found on family education.com.

Unemployment negatively affects families because of the ensuing financial hardships. An article from the University of Michigan Library reported on the effect of unemployment on automobile workers and their families. The results were about workers from a fairly well-off segment of

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blue-collar automobile employees, not workers from low paid-jobs. The authors of this article believed results were negative considering that these workers were fairly well-off and the study measured hardships at the end of two years. This data demonstrated families were not prepared ahead of time to sustain periods of unemployment.







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