RLR

RGNUL Law Review

RGNUL Law Review

Volume 1

Number 1

January - June 2011

INAUGURAL ISSUE

PART - I

A Journal of the RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB

RGNUL Law Review (RLR)
Volume 1, Number 1 January-June 2011

Subscription Details

One Year	Rs. 500/-	Two Year	Rs. 900/-
Three Year	Rs. 1300/-	Five Year	Rs. 2000/-
Overseas US/UK	$20 /£10	Life Membership	Rs. 10,000/-

Price Per Copy

Individual Rs. 300/- Institution Rs. 400/- Alumni /Students Rs. 200/-

Mode of Citation: 2011 RLR (1) 25

A Refereed Research Journal

RGNUL Law Review
(RLR)

INAUGURAL ISSUE

PART-I

JANUARY - JUNE 2011

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
MOHINDRA KOTHI, THE MALL ROAD, PATIALA - 147 001
TEL.: 0175 – 2304188, 2304491, 2221002 TELEFAX: 0175 - 2304189
E-MAIL: info@rgnulpatiala.org WEBSITE: www.rgnulpatiala.org

Justice Ranjan Gogoi
Chief Justice
Punjab & Haryana High Court

Chief Justice's Bungalow,
 # 35, Sector 4, Chandigarh-160001
Tele: 2749770 (R), 2740880 (O)

March 3, 2011

MESSAGE

I congratulate the Rajiv Gandhi National University of Law, on the publication of the Inaugural issue of RGNUL Law Review (RLR). It is indeed a moment of pride and satisfaction for all of us. Research is the most important pillar of legal education. The dynamics of law renders it open to much deliberations, debates and discussions. I hope the RLR would provide a forum to legal experts for expressing their scholarly ideas on the contemporary issues of vital importance and be an intellectual asset for the legal fraternity. I wish the Journal a great success.

Ranjan Go.

(Ranjan Gogoi)

PATRON
PROFESSOR (DR.) PARAMJIT S. JASWAL
VICE-CHANCELLOR
RGNUL

MESSAGE FROM PATRON

The Inaugural issue of *RGNUL Law Review (RLR)* is a step in the direction of evolving a culture of enquiry and examination in the area of socio-legal research. Research is one of the most important part of academics in the contemporary world and the contemporary discourse on law has brought into limelight some unresolved yet pragmatic issues. It has become imperative for professionals to take each and every debate in law as the starting point of new enquiry and study. Yet we must never forget that law does not exist in isolation rather its genesis and evolution is closely related to the social-sciences. RLR will appreciate and encourage contributions with multi-disciplinary dimensions. It is encouraging and heartening to see an overwhelming response, in shape of contributions to the journal. I extend my sincere gratitude to our referees and contributors. I congratulate the entire team of *RGNUL Law Review* for adding yet another feather to the cap of University.

(Paramjit S. Jaswal)

NON-INSTITUTIONAL TREATMENT : SOME ISSUES IN THE LEGISLATIVE ASPECT OF NON - INSTITUTIONAL TREATMENT OF OFFENDERS IN INDIA

Professor Balraj Chauhan*
Dr. Mridul Srivastava**

Modern correction in India emphasizes the scheme of non-institutional treatment of offenders for variety of reasons. The chief among these are, that it being immensely economic, saves the offender from unhealthy jail contagion, and accords an environment replete with disciplined freedom; making the self-efforts of the offender finding full play in the re-education, reformation and rehabilitation of his own 'self'. But this non-institutional treatment which is mainly 'probation' and 'parole' has been provided under a 'judicial umbrella' made of '*Criminal Procedure Code*, 1973', '*Probation of Offenders Act*, 1958, and various Children Acts including the *Juvenile Justice (Care and Protection) Act*, 2000. The disposition measures provided under these acts include (i) discharge absolute; (ii) discharge conditional; (iii) discharge under supervision; (iv) forfeiture; (v) fine; and (vi) compensation. The availability of these non-institutional correctional measures to the offenders is subject to their fulfillment of the required conditions for release, prescribed under various sections of these acts.

Probation is a method "of the criminal justice system in which a delinquent of criminal offender, adjudicated or found guilty of a crime upon a finding, verdict, or plea of guilty, is released by the court without commitment to an institution or prison, subject to conditions imposed by the court and to the supervision of a probation service". The rationale for probation is that it retains the individual in the community, aborts the stigma and the criminalization that would ensue from imprisonment, and

---

* Vice-Chancellor, Dr. Ram Manohar Lohiya National Law University, Lucknow
** Assistant Registrar (Academics) and Faculty in Criminology, Dr. Ram Manohar Lohiya National Law University, Lucknow.

is more economical than institutionalization. The pre-sentence investigation reports is the main tool for providing background information for sentencing, which is prepared by a probation officer attached to the court and seeks to assess the offenders background and present circumstances to suggest a correctional disposition. Some of the supplementary purposes may be as under:-

(a) aiding the probation officers in rehabilitation efforts;
(b) serving as an information source for systematic research;
(c) aiding correctional institutions in classification and treatment; and
(d) aiding parole boards in decision.

The primary objectives of the report entails the following elements:

(i) to focus light on the defendant's personality and character;
(ii) to offer insight into his needs and problems;
(iii) to help understand the world in which he lives;
(iv) to learn about his relationships with people; and
(v) to discover those salient factors which underline the specific offence and his general conduct.

It is the submission of this paper that the implementation of non-institutional programmes of correction follows the spirit of the letters of law. A close scrutiny of these acts and their relevant sections, reveals that there are certain inherent flaws and shortcomings in the laws itself. This paper, therefore proposes to examine some of the issues in the legislative aspect of the non-institutional treatment of offenders in India, in the support of its submission.

Broadly, the pre-sentence investigation report contains:

- Legal data
- Prior record
- Biographical data
- Official version of the offence
- Defendant's version of the offence
- Defendant's version of the prior record

- Medical/drug history
- Family history
- Defendant's history/ education
- Other factors
- Evaluation
- Recommendations

1.1 Non-Institutional Correctional Measures

1.1.1 Discharge Absolute

Under *Criminal Procedure Code* of 1973 (Section 360), the *Probation of Offenders Act*, 1958 (Section 3) and the various Children Acts, it has been provided that the court in trivial cases which do not reveal any criminal disposition or likelihood of repetition, may forgive the offender altogether and order him to be discharged absolutely after 'admonition' or 'advice'. But the Act has nowhere explained or defined the nature of this admonition or advice. Though the value of this action of the court cannot be questioned, yet the very absence of any definite outline or model, may cause serious doubts about the suitable selection of words, contents and tone in every different type of case. There is also an undeniable possibility that in the execution of this delicate responsibility the judge may mishandle the case which can prove more disastrous for the accused than the punishment itself. The accused has already suffered so much of humiliation of arrest, police custody, appearance before the court, arranging for the surety perhaps rude and impatient handling of the case by the police and therefore it would be criminal if further judicial wrath, anger or insult is heaped upon him by the judge or magistrate while admonishing or advising him.

Section 360 (1) clearly states that "when any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life and no previous conviction is proved against the offender, if it appears to the court before which he is

convicted, regard being given to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the court may direct and in the meantime to keep peace and be of good behaviour.

The right application of 'admonition' or 'advice', depends upon the institution of judges, their capability in selecting the right type of cases and adjustment of their tone and words of caution in such a way that it can stir the conscience of the offender and can also prove an effective warning. However, applied indiscriminately it may mean an 'easy let off' and a blessing for repeated performance. As long as the suitable criterion for the selection of right type of cases and the corresponding nature of admonition or advice is not evolved, this job of releasing the offender is fraught with serious social implications. As a remedy it may be suggested that courts may be given free hand in selection. However, some broad directions may be laid down which may guide the judges in the disposition of cases to be released absolutely after having admonished or advised.

1.1.2 Discharge Conditional

The provision for conditional discharge has been made by the Criminal Procedure Code (Section 360), The *Probation of Offenders Act* (Section 4(1)) and the *Juvenile Justice Act*, 2000. This type of discharge is the discharge on the condition that the offender keeps good behaviour during a specified period. The primary purpose is to wean away the first casual offenders from foul prison environment and provide them a chance to make better citizens. The type of cases deserving this non-institutional treatment are to those who are of deprived character, can succumb to sudden temptation, may be led astray by force of circumstances, bad company or an evil influence or those who commit crime out of mere thoughtlessness, inadvertence, ignorance or sudden incontrollable impulse

or due to destitution or disregard of the family. The offenders, who have been generally excluded from it are those who reveal long planning and preparation, craft and deceit.

As a principle it is all right to release the casual offender on a surety or bond of good behaviour but the injudicious application of conditional release particularly of young offenders involves twofold risks for the public and the youth. The public may be led to believe that young offenders can get off with any crime without punishment and this may act as an incentive to criminal parents to initiate their children in to the life of crime. The young offenders also having escaped punishment may be tempted to repeat. The judge has to look into two directions while permitting conditional release reformation of the offender and deterrence for the potential future wrong doers, emphasizing the preventive aspect so that crime may not increase in the existence of this legal leniency. The clarification of this provision, in terms of its specific use in various types of offences, is needed in order to clear the room of doubt or any injudicious discretion.

1.1.3 Discharge Under Supervision

It is doubtful that 'conditional discharge' and 'discharge absolute' will cut much ice in the absence of any competent supervision, friendly counseling and expert advice by any person trained in social work methods, particularly correction. The provision of discharge under supervision is known as 'probation proper' which can also be called as 'social case work treatment in freedom'. The probation under supervision of a probation officer is provided by the *Probation of Offenders Act*, 1958 (Section 4(4)) and various Children Acts.

The success of probation rests upon the judicious selection of cases and the probation officer's skilled handling and 'supervision'. The provisions of disposal of cases on pre-sentence investigations seem to suffer from a severe lacunae. The soundness of making such investigation before guilt is established is debatable. Since the source through which the information is collected is either the accused himself or his defendants or his family

members who are simultaneously doing every possible thing to defend him, it is difficult to arrive at a correct and scientifically valid conclusion about the circumstances leading to the Commission of crime. It can, therefore, be suggested that such social investigations should start when the guilt is established. This will give the court some time to forget and get over the annoyance given to it by the accused during the trial.

Another serious anomaly which seems to have crept in the *Probation of Offenders Act*, 1958 in as much as it deals with the 'adult probation' is that the submission of 'report' is not a legal requirement. Social investigations by a competent person have not been considered important. It may be submitted here that the success of probation depends upon the selection of right type of cases. The court in the pre-occupation of its tremendous routine work, is hardly in a position to collect suitable information about the accused which can work as a guide line for the court in his release. It is, therefore, desirable that the provision of compulsory submission of report of probation officer must find the place in the body of law. This should be made compulsory in all cases of 'first offenders' and no court should be allowed to issue the probation order without having received such a report. In addition the recommendations of the probation officer's report about the kind of punishment and correctional measures best suited must influence the fixation of the sentence by the court. Protection of society's welfare interests through deterrence and preventive measures and the rehabilitation of the offenders combined together must determine the attitude of the court in the disposal of cases. The spirit incorporated into the phrase "circumstances of the case including the nature of the offence and the character of offender" can be best used in any on the carefully prepared social investigation reports of the probation officer. The Section 4, of the *Probation of Offenders Act*, 1958, therefore, requires necessary amendments.

The maintenance of 'double standards' about the submission of the probation officer's social investigation report in the cases of adults and juveniles, is objectionable on the ground that it is a baseless indiscrimination which goes against the spirit of probation. Furthermore, even in the case of young offenders, Section 3 or 4 of the Act empower

the court to consider the report 'if any.' The use of this word 'if any' imply that the submission of a report is not a statutory requirement. In this case the probation officer may or may not submit the report. If all the probation officers start sleeping over social investigations in case of every young offender and take the advantage of this un-understandable provision, the whole probation will become a judicial discretion and will have no social aspect. However the court's discretion to discharge the offender absolutely, or conditionally or under supervision, can be exercised judiciously without the report, is a matter of conjecture.

In Children Acts we find another mockery of probation (supervision) as they provide that the child can be released after admonition or advice or to the care of a parent or guardian or may be placed, under supervision. This use of word may mean that supervision in the case of misled delinquents is not considered essential. One may doubt the effective impact of the action of the court in freeing the carrying child only on few words of admonition or advice and sending the child to original parents who had already shown their gross negligence and complete failure in looking after the child. One wonders how on one fine morning the negligent parents have learnt the best ways of handling their naughty and delinquent dear ones. There can be no denying of the fact that parents in their bid to get back the child will be prepared to compromise with all sort of written and verbal assurances. Supervision of the probation officer in all cases of young delinquents, even when the bond has been filled by the parents, should be an essential legal requirement in the ideally suited methods of child probation.

Probation also suffers from another serious judicial handicap that the conditional discharge even with supervision includes only those conditions as behavioural restrictions for the probationer which the court has prescribed for him. The released offender is only responsible to carry out certain restrictions of movement, behaviour, employment, residence and companionship which the judge has deemed useful for him. The probationer who is expected to have free hand and free initiative in his re-education or rehabilitation has no room for his own choice. The probation officer too has been left without any say in this matter of crucial

importance. This provision undermines the utility of probation officer for the probationer. The provision seems to be based on the assumption that a probation officer is a person of secondary importance, who cannot safeguard the better interests of the probationer and be trusted to the extent of having a completely free hand in the matters of probationer's freedom of movement, behaviour, employment, residence and company. This creates a kind of dualism in what the probation officer thinks good to be done for the social rehabilitation of the probationer and the judge whose 'good' for the probationer is confined to the limited and rigid boundaries of law. Moreover, the fixation of permanent, lasting and unchanging conditions once in the beginning, closes the doors of all progressive behavioural changes and environmental modifications of the probationer necessitating subsequent relaxations, alterations and concessions in the conditions prescribed earlier. The condition of abstention from intoxicants, employment and residence are such, which if prescribed without the willing co-operation of probationer and the recommendations of the probation officer, are likely to result in violation or lie telling. For this dishonesty of the probationer the law makes ample room only because of assuming the sole responsibility in working out the conditions of probation without the help of the other two parties. The passive role of probation officer on the vitally important question of fixing the conditions for the probation of the offender limits his area of concern and jurisdiction and turns him into an official, a bureaucrat, a custodian and the watchman of the sanction of law. Because of this legal limitation, the case work supervision of the probation officer remains in practice, a mere 'inspection' of the probationer. The right course in this regard will be that the *Probation of Offenders Act*, 1958 should include a section making it obligatory for the court to call for and seriously consider the opinion, suggestions and recommendations of the probation officer while fixing the restrictive conditions for the release of the offender.

1.1.4 Forfeiture of Property; Fines; and Compensation

The absolute forfeiture of property is worse than even capital sentence and cannot be treated as a correctional measure. This deprives the accused of the very thing he had and throws him on the roads as a pauper and a

person without any means. Although the deterrent effect of this measure cannot be questioned, it should be very restrictively and sparingly used as provided under Section 126, 127 and 169 of the *Indian Penal Code*, 1860. This kind of release is a dangerous court generosity and it in fact retards (instead of accelerating) the earlier and speedier growth of rehabilitation process.

Fines are an effective correctional measure, as an alternative to short term imprisonment for minor offences and offences of purely technical nature, but under no circumstance leading to default in payment, should lead to imprisonment. It may also be paid in installments. Fixation of fines for various offences should be left entirely to assess the payability and the means of the offender.

Under Section 5 (i) of the *Probation of Offenders Act*, 1958, the provision of compensation to the victim of the offence along with the cost of proceedings can be granted on the discretion of the court, provided that the accused has some movable or immovable property or is in an easy position to pay. But this compensatory amount has not been fixed, any civil court can collect any amount under Section 40 of the Act. The chance of faulty evaluation of the offender's economic condition or payability under this provision is not a far-reaching probability. Moreover in case the entire property of the accused goes, he will be put on the verge of economic collapse. Although Section 5 of the *Probation of Offenders Act*, 1958 prescribes that the default in payment cannot lead to imprisonment but the provision of restitution is still not there. This leaves us to examine the question of restitution as a special condition of probation and parole properly, prescribing the payment of compensation in installments or through part time work so that the offender may live with his family and carry on his normal employment during the rest of their day. In some cases even a formal apology of restitution will be quite appropriate. It may be pointed out here that restitution of victim of the offence has been practically ignored by our penal laws as a whole and needs consideration which can give effectiveness to penal actions.

Lastly a very basic question may be raised against the 'authority', as such which interprets laws and exercises full powers in granting institutional or non-institutional measures for the release or the imprisonment of the offenders or the legislation measures for the release or the imprisonment of the offenders. The legislations which cover the aforesaid measures of non-institutional correction have a socio-legal nature. The judges and magistrates in India, no doubt, have a legal training, experience, competence and responsibility for the application of the provisions of the law, but it is doubtful that they fully understand the social aspect of these laws without even the brief orientation in social tenets of the erstwhile philosophy of correction philosophy of correction. Many of them do not have conviction or faith in the essentials of socially oriented non-punitive correctional measures of the non-institutional type. Without any adequate background of social sciences, more particularly in modern criminology and penology, it is difficult for them to appreciate the psycho-social implications of crime, delinquency and correction. Since, their verdicts are based on purely legal interpretations of the 'law', the legal aspect howsoever fallacious, inopportune or ineffective may be, gets upper hand on the social side of correctional measures. This difficulty can be removed if the jurists of the country can be apprised, trained or oriented in the social aspects of 'offence', correction and rehabilitation. It will not be improper if the qualifications for their appointment must include a background in contemporary criminology and penology as one of the preferential conditions. It is also difficult to reconcile that most of the major states in the country have their separate *Probation of Offenders Act* in addition of the *Central Act*. This cause confusion and gives rise to varying practices on the same land. It is, therefore, desirable that these State Acts should be repealed and the *Central Act* should apply everywhere and should cover all the States in the country within its fold.

To conclude it can be said without any reservation that the correctional machinery of the non-institutional type, suffers from some very serious contradictions, anomalies and debatable issues. The whole legal framework of correctional legislations needs to be revised and re-examined and new, logically consistent, useful and uniform practices should be evolved.

DIVINE CONCEPT OF DHARMA AND PROTEAN FACE OF JUSTICE : SOME REFLECTIONS*

Professor (Dr.) A. Raghunadha Reddy**

1.1 Introduction

Indian jurisprudence is as old as humanity itself. There is no founder of it other than the creator himself[1]. The ancient legal thinkers expounded their own indigenous legal system based on sound principles of reasoning and human welfare and excelled in many respects from other legal systems of the world[2]. The ancient scriptures and *Dharmashastras* of the ancient Hindu religion are comprehensive codes to regulate human conduct. The law of the *Dharmashastras* closely resembled the natural law and the law of the reason. The ancient Hindu State was tolerant towards all religions which is one of the bases of secularism indigenous to India. The freedom of thought in ancient India was as considerable as to find no parallel in the West. Hindu Jurisprudence is rooted in Hindu religion and custom. Like other ancient laws Hindu law is mixed up with religion[3].

The ancient Indian legal philosophers evolved a system of legal theory based on their concept of *dharma.* Hindu traditions recognize four distinct values or goals of human life; love and physical pleasure *(Kama),* acquisition of material well-being *(artha),* morals and the good *(dharma)* and spiritual liberation *(moksha). Dharma* is the fixed position of duty and of rights in the sense of what is proper and normative. It is not restricted to personal ethics but also designates religious observance and secular law,

---

* The paper presented at 7th ASLI Conference held on 25-26t May 2010 at Kuala Lumpur, Malaysia.

** Dean, P.G. and Research Studies, Tamil Nadu Dr. Ambedkar Law University, Chennai, India

1 See, Sen, P.N., *General Principles of Hindu Jurisprudence,* p. 374. (Sen appreciated the merits of the Hindu legal philosophy of the past).

2 Mayne, *Hindu Law and Usage Preface,* First, ed., p.1.

3 Manu *Smriti,* Chap. I, Verse 108.

prescribing the individuals social and legal standing within the wider domains of community, caste, class and station. Expanding its range even further, *dharma* connotes a cosmic contract to which the individual is bound. This notion of *dharma* is at once metaphysical and ethical. *Dharma* is often presupposed as condition for *moksha.* In the *Bhagavadgita,* one of the central ethical texts of the tradition, Arjuna, the protagonist is instructed in the path of *dharma* as a precondition for enlightenment.[4]

However, *dharma* which is as old as humanity itself has lost all its credence and ancient glory. It has lost its divinity. Contemporary Indian jurists have been allergic to study indigenous law and traditions. The ancient Hindu law was modified, supplemented and finally superseded by various modern legislative enactments. In the research paper, it is proposed to study critically as to how the divine concept of *dharma* has been transformed into the modern concept of justice.

1.2 The Concept of Dharma in the Ancient Period

Etymologically the word *dharma* is derived from the root 'Dhri' which means to sustain or uphold. *Dharma* of ancient Indian legal system comprised all the three namely law, morality and religion. However, it is to be noted that modern law doesn't touch the moral or religious aspect of ancient *dharma.* Law in the modern context is confined to rights, legal obligations and duties etc. The modern law is mainly concerned with actions or omissions and does not bother about motives. The religious part of *dharma* always looked to the motives behind the act. Law proper has been a part and parcel of ancient *sanatan dharma*[5] and has been nurtured by it since ages. Man's outer existence was controlled by legal and moral rules while the inner self was regulated by the religious precepts. Therefore, *dharma* has been translated as religion. In the strict sense of the

---

4 Joseph Prabhu, "Trajectories of Hindu Ethics" in William Schweiker (ed.) *Religious Ethos*, 2008, pp. 355-363.

5 *Sanatan,* means one that is ancient and everlasting. Thus, *Sanatana Dharma* means an ancient *dharma* that was, is and will last till eternity.

word, religion may be said to be obedience to the law of God. According to M.K. Gandhi, "God and his law are synonymous terms and therefore, God signifies an unchanging living law[6]. In most of the cases the meaning of *dharma* is religious ordinances or rites.[7] It is the soul of all religions and ever present and never ending[8].

In the ancient Indian legal system, *dharma* and law were synonymous. Law being a part of *dharma* there was no disharmony and discard between law and *dharma.* Both constituted a single integrated whole. Duty was the foundation head of all laws. The fundamental principle underlying *dharma* is universally accepted regularity of order. Religion and law were only the facets of dharma. Conduct is the basis of *dharma.* Non-violence is the essence of *dharma.*[9]

Hindu State was, thus, subservient to the law or *dharma* which guided and controlled the State[10]. Hindu thinkers always held law or *dharma* superior to State or Government. It was, therefore, paramount duty of the king to promote the cause of the *dharma.* The king was to rule according to *dharma.* He was subservient to *dharma.* In *Mahabarata,* there is a reference to social contract theory wherein king is appointed by God with the consent of the people and *dandaneeti* (sanction or punishment) was created to punish those who violated *dharma.* It is true that king exercised absolute powers but subject to the law of *dharma* as interpreted by Brahmin scholars, Rishis.

Hindus developed theory of Government and State called *Rajadharma.* The *Arthashastras* and *Dharmasastras* give a detailed exposition of *Rajadharma* under which protection of people and maintenance of social

---

6 For details see K.B. Panda J., *Sanatan Dharma and Law,* 1977, p. 23.
7 Pandurang Vaman Kane, *History of Dharmasastra,* Vol. I, 1968, p. 1
8 See Paranjape, *Jurisprudence,* pp. 78 - 82.
9 See Praveen Vyapari, *Philosophy of Law - Indian View; See also* Satyajeet A. Desai, *Mulla Hindu Law;* V.D.Mahajan, *Ancient Indian History,* 13th, ed..
10 K.V., Aiyangar, *Aspects of the Social and Political System of Manusmriti,* 1949, p. 169; See also Jaganmohan Reddy, *Quest for Justice,* 1970, p. 197.

individuals in society but also sets out the objectives of the traditional system of medicine, *Ayurveda*[22].

1.4 Manu Concept of Dharma

Manu observed that *dharma* is that which is followed by those learned in the *Vedas* and what is approved by conscience of the virtuous who are free from hatred and inordinate affection[23]. He pointed out that *dharma* is a noble feeling born from within the heart, which has approval of virtuous people. But he stressed that mere noble feeling is meaningless unless it is translated into action. Therefore, in order to constitute *dharma* both noble motive and action are necessary. According to Manu, the ten characteristics of *dharma* are: fortitude, forgiveness, mind control, non-theft, purity of body and mind, sense control, wisdom, knowledge, truth and non-anger. Out of four fold indices of *dharma*, *sadachar* (good conduct) aspect corresponds to law.

In the modern sense, *sadachar* or moral law which is humane and just is to be adjudged by the law in force. Manu used the term *dharma* for justice. According to *Gautama, Apastamba, Vasistha, Manu* and *Yajnavalkya*, principal sources of *dharma* were *Vedas*, *Smrithis* and Custom. *Sruthis* consists of *Vedas* and *Upanishads*. Manu's concept of *dharma* is a complete blending of religion, morality and law. Brahma is the author and regulator of *dharma*. *Sadachar* aspect of *dharma* is law according to Manu. *Dharma* includes totality of rules governing the social order. The basis of *dharma* is beyond the reach of individual human will. *Dharma* did not just connote administration. It also had ecclesiastical overtones.

In an orderly society, *Artha* and *Kama* should conform to aspect of human behavior. Its observance was considered a must for peace and happiness of individuals and the society. *Dharma* includes all aspects of a society. It

---

22 See, R. Donald Davis, Jr. on *Dharma*.
23 Vyas Samhita, Ch. I, Verse IV.

sustains the world. Every act or conduct which was in disobedience to rules of *dharma* is called *Adharma.* Those who destroy *dharma* get destroyed. An orderly society would be in existence if everyone acts according to *dharma* and thereby, protect *dharma.* (Slogan *Dharmo rakshathi rakshitaha*) Such an orderly society which would be an incarnation of *dharma* can protect the rights of individuals. Thus, individual is only a trustee of society and trusteeship has got relevance of *dharma*[24]. However, *dharma* does not ignore the materialistic ideals.

1.5 Different Contextual Meanings and Dimensions of Dharma

In fact the term *dharma* in Hindu Jurisprudence passed through several transitions. It acquired the meaning of what is just and customary.[25] Many modern theories of law originated from *dharma.*[26] Unlike Western Jurisprudence, Hindu jurisprudence considered the kingship only as an instrument for the enforcement of *dharma* as the law and not as the source of law. Law is the King of Kings[27]. Epics contain the most important principles of *dharma* which are accepted and prevailing in the society. In *Bhagavad Gita* where Lord Krishna is speaking to Arjuna who is hesitating to give the order to commence battle, tells him what his duty as *kshatriya* is? The advice of Krishna reveals the importance of *dharma.*[28] *Gita* preaches us that God is attained by doing one's duty i.e., *karma.* A man devoid of sense of *dharma* or duty is a veritable beast[29].

Significantly, even the western modern legal thinkers, such as Compte, Duguit and Kelsen have also accepted the predominance of the duty as an essential element of law. To quote Duguit "the only right which any man can possess is the right to do his duty". His theory of social solidarity

---

24 S.R. Myneni, *Jurisprudence and Legal Theory, pp.* 21-27.
25 Berolzaheimer, *The Worlds Legal System,* 1963, p. 39.
26 D.D. Agarwal, *Jurisprudence in India - Through the Ages,* 2002, p. 58.
27 Law is a *Chatra* of *Chatras*; Truth and Law are one and the same, *Upanishad,* 1, Ch. 4 verse 4.
28 See, N. Krishna Kumar, *Jurisprudence of Comparative Law,* 2007, pp. 25-36.
29 *Srimad Baghavat Gita,* Ch. 12.

suggests that even the sovereign or the State does not stand in any special position or privilege and its existence is justified only so long as it fulfils its duty[30]. Kelsen also has suggested that the essence of law is duty and there is no such thing as individual right in law. He reiterated that legal right is merely the expression of duty as viewed by the person entitled to the fulfillment of that right[31].

The meaning of *dharma* changes according to the attitudes of the transmitters but in a majority of cases the term connotes a sense of propriety or morality. *Ramayana* is replete with full of *dharmic* administration. In *Mahabharatha,* the term is chiefly associated with action. It is interpreted as virtuous behaviour in accordance with intrinsic nature, behaviour in terms of activity and non-activity and cosmic order. The concept of *dharma* mentioned in the *'Nikayas'* stands for something sublime, peaceful, subtle and trans-rational[32]. The king Ashoka was advocating *dhamma*-virtues of the law of piety to be practiced. Ashoka gave up vihara yatra and went on *dharmayatra.* He propogated his universal religion (*dharma*) aimed at the welfare of the masses. In the Bhabru Edict, he openly declared his faith in the *Budha, dhamma* and *samgha*[33]

Dharma is a code of conduct supported by the general conscience of the people. It is not subjective in the sense that the conscience of the individual imposes it, nor explained in the sense that the law enforces it. *Dharma* does not force men into virtual but trains them for it. It is not a fixed code of mechanical rules, but a living spirit which grows and moves in response to the development of the society.[34] The concept of *dharma*

---

30 Duguit, *The Law and the State*, 31 *Harv L. Rev* (1917); *Object to Law,* 21 *Col. L. Rev.*, 1921, p. 126.

31 See, Hans Kelsen, *What is Justice*? (1957); *the Pure Theory of Law* (1934) (Revised), 1960.

32 See Patrick Olivelle (ed.) *Dharma, the Hindu Book Review*, February, 9, 2010.

33 See, B.N. Puri, M.N. Das, A.C. Pradhan, *A Comprehensive History of India,* Second Pillar Edict.

34 S. Radhakrishnan, *the Heart of Hinduism*, Madras, 1936, pp. 17-18.

differentiates humans from animals[35]. All the four *Vedas* speak about the concept and taught the humans on how to live; how to live as good humans and die gracefully[36].

Dharma is considered the fulcrum of Indian civilization since it is not affected by any linguistic, sectarian or regional differences.[37] The term itself is untranslatable for it has several connotations. Discussing the place of '*dharma*' in the *Rigveda*, it is not considered central to the *lexicon*, although it occurs as many as sixty three times. There are Indo-European parallels to '*dharma*'. Its Iranian equivalent in old Persian is "remedy" which is totally different from the Indo-Aryan conception.[38] Paul Horsch, in his article, attempts to examine the evolution of the term '*dharman*' from its Indo-Aryan origin to the position it occupies in the intellectual history of India, tracing the various phases it has gone through[39].

1.6 Gandhian Perception of Dharma

In the past *dharma* was tied to a hierarchical system of duties and obligations and to the preservation of status. It gave little or no attention to the idea of democratic citizenship. Gandhi felt that time had come to redefine the scope of *dharma* to include notions of citizenship, equality, liberty, fraternity and mutual assistance. He presents his notion of redefined *dharma,* the vision of a new Indian or Gandhian civic humanism - one that the *Gita* and *Ramayana* had always contained in *potentia,* but something Indian civilization had not actualized fully in practice. He tried to offer a glimpse of *dharma* in his *Hind Swaraj*[40]. The meaning of *Hind Swaraj* is the rule of *dharma* or *Ramarajya.* It is the desire for the welfare of others. Gandhi believed that he would be able to give Indians a

---

35 Maria Heim, "Differentiations in Hindu Ethics" William Schweiker (ed.) *Religions Ethics*, 2008, p. 341.
36 Manu (2.6).
37 See *Supra note* 21.
38 See, M.C. Setalwad, , *Law and Culture,* 1965, pp. 20-21.
39 Paul Horsch on *Dharma.*
40 For details see M.K. Gandhi, *Hind Swaraj* in Antony J. Parel (ed.), 1997, XVI.

practical philosophy, an updated conception of *dharma* that would fit them to life in the modern world.

1.7 Justice: Theoretical Perspectives

The ultimate object of every legal system is to secure justice. There is no Indian perspective of justice since the ancient Indian concept of *dharma* has been influenced by the principles of Islam, Christianity and Western liberal ideas. The ancient Indian concept of *dharma* is the concept of righteousness which includes justice[41]. Victory of Good over evil and justice over injustice was accepted as an immutable universal rule. However, the meaning of justice varies with time and place. It is very difficult in giving a meaning to the concept. It has reversal dimensions. Some people equate justice with moral values like truth, mercy, charity etc., others may emphasize equality as the essence of justice. It is also possible to define justice negatively as absence of discrimination, domination, exploitation and tyranny. Justice really involved doing good not only to human beings but to all that is good in nature. Justice is benevolence. Sen has advocated real or functional justice in the place of ideal justice[42].

Justice has a protean face, capable of change, readily assuming different shapes and endorsed with highly variable features. According to Plato, justice consists in a harmonious relation between the various parts of the social organism. However, Aristotle took a different approach when he opined that justice consists in "some sort of equality". Justice is a social virtue which is concerned with relationships between persons. Justice alone is the Good. He emphasized equality as a yardstick for justice[43].

---

41 C.K. Allen, *Aspects of Justice*, p. 34.

42 Amartya Sen, *The Idea of Justice*, 2009; Adam Smith noted that the term justice has several meanings; see also *The Theory of Moral Sentiments*, 6th ed., 1970; and Thomas, *The Judicial Process*, 2006.

43 For details see *infra* note 55.

A much more egalitarian view of justice was advocated by the American Socialist Lester Ward. He opined that justice consists in the enforcement by society of an artificial equality in social conditions which are naturally equal.[44] A fundamentally divergent attitude towards justice was taken by the English Philosopher and Socialist Herbert Spencer. The Supreme value he linked to the ideal of justice was not equality but freedom.[45] Every individual, Spencer argued has the right to reap whatever benefits he can derive from his nature and capabilities. Everyman is free to do that which he wills, provided he infringes not the equal freedom of any other man. Immanuel Kant took a position similar to that of Spencer. Thomas Hobbes gave security oriented approach to the problem of justice.[46]

The theory of justice developed by John Rawls constitutes another attempt to combine the values of freedom and equality in the analysis of the meaning of justice.[47] For Rawls, justice is fairness. It is rooted in the idea of social contract. The concept of just entitlement is central to the concept of justice as presented by Robert Nozick-the prominent critique of Rawl's theory of justice[48]. For Roman Jurist Ulpian,[49] justice is the constant and perpetual will to render to everyone that to which he is entitled. At an earlier period of Roman history, Cicero[50] had described justice as "the disposition of the human mind to render to every one his due".[51]

There is an emphasis in these two definitions on the subjective aspect of justice. Justice is identified with a certain attitude of the human mind, a willingness to be fair and a readiness to give recognition to the claims and concerns of others. Justice is the correct application of law, as opposed to arbitrariness.[52] It is one of the measuring rods for the

---

44 See Karl Marx, *Critique of the Gotha Programme*, (ed.) C.P. Dutt, 1966, p. 10.
45 Herbert Spencer, *Justice*, 1891, p. 46.
46 Thomas Hobbes, *Decive*, (ed.) S.P. Lamprechit, 1949, p.15
47 John Rawls, *A Theory of Justice*, 1971, pp. 60-61/
48 Nozick, *Anarchy, State and Utopia*, p. 51
49 Dig. I. 1. 10.
50 *De Finibus Bonorum et malorum*, transl. H. Rackharm, 1951, Bk. V. xxiii. 65-67.
51 *Ibid.*
52 Alf Ross, *In Law and Justice*, 1959, p. 280.

protection particularly vulnerable groups[63]. It clearly shows that the Court is concerned with the welfare of the humanity[64]. Access to justice is provided to the needy by evolving strategies of PIL/SAL, legal aid and speedy trial to make equal justice a reality. The evolution of human rights, compensatory, environmental and poverty jurisprudence is the testimony that the Court is conscious of *dharma/*justice and the role of constitutionalism. Justice is clearly reflected in the basic structure doctrine[65] as expounded by the Supreme Court.

1.9 Concluding Remarks

From the above it is concluded that *dharma/justice* is an evolving concept. It is an elusive concept also. It seems to defy definition. No holistic or universal definition is possible. *Dharma* like the sacred Ganges has been the eternal spring of Indian ethic, morality, law, religion and philosophy. In the ancient legal system law and *dharma* were one and the same. Thereafter, realization of justice depended on law. Law and justice were viewed as two different concepts.

In the context of Indian constitutional ordering, justice became independent and end product of law. Consequently, independence of justice has gained ground. The concept has been all pervading, governing, ordering, regulating and directing human being in their earthly and spiritual pursuits. It has been a liberating force helping man to attain freedom from bondage, indiscretion and exploitation. That is the essence of the teachings of Indian seers, saints, philosophers, jurists and the judges.

---

63 *Visakha* v. *State of Rajasthan,* AIR 1997 SC 3015. Gender equality and equity were promoted due to the binding obligations of CEDAW to which India is a signatory.

64 See the contribution of National and State Human Rights Commissions set up under the Protection of the *Human Rights Act,* 1993.

65 See *Kesavananda Bharathi* v. *Kerala,* AIR 1973 SC 1461; *Indira Nehru Gandhi* v. *Rajnarain,* AIR 1975 SC 2299; *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789; *IR Coelho* v. *State of T N,* AIR 1999 SC 3179.

BIOTECHNOLOGY REGULATION IN INDIA : DISSECTION OF BRAI BILL, 2010

Professor Paramjit. S. Jaswal*
Professor Nishtha Jaswal**
Amanpreet Kaur***

1.1 Introduction

The production and development of technology is not an isolated scientific activity; rather it is embedded in and influenced by the social, environmental, economic and political conditions. This holds true for modern biotechnology (such as genetic engineering), a technology that manipulates living organisms to produce 'novel' genetically modified crops, food, livestock, drugs/vaccines, etc.

Biotechnology is an extraordinary innovation. It raises great expectations of economic prosperity and improved capacity to address pressing problems of poverty and environmental degradation, whilst simultaneously raising great concerns about the type of social and physical world they promise.

Modern biotechnology has been hailed as a miracle to solve problems such as world hunger, health and environmental degradation, particularly by biotechnology companies, some scientists and governments. But, one needs to examine the environmental, socio-economic and political context in which the technology has been developed. To do this we need to ask questions such as: What was the purpose of developing the technology?

---

* Vice-Chancellor, Rajiv Gandhi National University of Law, Punjab at Patiala.
** Chairperson, Department of Laws, Panjab University, Chandigarh.
*** Research Scholar, Department of Environment and Vocational Studies, Panjab University, Chandigarh.

How it effects environment?
Who controls the technology?
How much does it cost?
What is the trend of GMOs being developed and for whose benefit?

Concerns regarding the release of GMOs in environment are many. Effect on non-target species, flow into the host DNA, increased invasiveness, biosafety etc, all have affected its acceptance, research and development. On ethical basis, the very idea of modifying life, is rejected as it is considered as interference in God's work. Varied acceptance of GMOs globally, emanates from the divergent economic and political concerns of different countries. The net gains and value from a technology depends on the socio-economic, cultural and political factors governing each country. Such impending issues have strongly affected the acceptance of GMOs in particular and biotechnology in general.

1.2 Indian Scenario

Biotechnology which is perceived as a revolution through out the world has the capability to become a dominant player in Indian market too. Today, India holds a small share of global biotech market but it is one of the fastest growing knowledge-based sectors in India and is expected to play a key role in shaping India's rapidly developing economy. With numerous comparative advantages in terms of research and development (R&D) facilities, knowledge, skills, and cost effectiveness, the biotechnology industry in India has immense potential to emerge as a global key player.

The Indian biotech industry grew threefold in last five years with revenues of US$ 3 billion in 2009-10, a rise of 17 per cent over the previous year, according to the eighth annual survey conducted by the Association of Biotechnology-Led Enterprises (ABLE) and a monthly

journal, BioSpectrum, based on inputs from over 150 biotech companies.[1]

On the basis of its application, the Indian Biotech industry is divided into different sectors: biopharma, bioservices, bioagri, bioindustrials and bioinformatics. The biopharma sector contributed nearly three-fifth to the industry's revenues at US$ 1.9 billion, followed by bioservices at US$ 573 million and bioagri at US$ 420.4 million. The remaining revenue came from the bioindustrials US$ 122.5 million and bioinformatics US$ 50.2 million segments. It is estimated that in future, health care products would dominate the Indian biotech market, roughly 40% of the total market followed by agriculture of about 30%. It is also estimated that contract research and bioinformatics would pick up and account for as much as 25% of the biotech market. The Agri-Biotech would see growth rates of as much as 60%, Diagnostic and Therapeutics of about 25% and Vaccines of about 15%.[2]

The Government of India realized the potential and benefits of this industry at an early stage and formed the Department of Biotechnology in 1986 that has now become the central agency, responsible for policy, promotion of R&D and for international cooperation and manufacturing activities. It has been increasing its outlays to provide financial support to this industry, which includes setting up a venture capital fund, to support small and medium enterprises. Amending number of Acts inline with international legislation on GMOs to make them more globally compatible is also being done. Many state governments have also realized the benefits/importance of this industry. State governments namely Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have begun to formulate their policies, develop R&D centers to encourage and nurture the Biotech industry.

---

1 Bio-Spectrum-ABLE (Association of Biotechnology Led Enterprises) *Eighth Annual Survey of the Indian Biotech Industry,* 2010.

2 A.S. Ninawe, *India's Endeavors in Biotechnology: A Policy Overview*, Tailoring Biotechnologies, Vol 2 (3), 2006/07.

The initiatives taken by both Central government and State governments have given a big boost to the Biotech industry in India. Foreign companies looking for new markets and to expand facilities to much more economical locations can find India ever more open and responsive to their needs.

But in the backdrop of these steps to promote biotechnology in the country, there is an onus of controversies regarding the biosafety of transgenics, environmental problems, and concerns in germ line therapy, stem cell research and prenatal diagnosis. These issues need to be addressed with scientific rigour and logic, so as to present a clear picture to the public and erase any doubts.

1.3 Biotechnology Regulation- India

Keeping pace with growing interest of private and public sector in this field, an extensive, immaculate and exhaustive policy framework dealing with various aspects of biotechnology is a pre-requisite. Thus, finding space in regulation to consider the full range of issues provoked by Biotechnology and its applications is a huge challenge.

In India, the Genetically Modified Organisms are regulated under the Environment Protection Act 1986 (EPA). In addition the Indian biosafety regulatory framework comprises

- Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro Organisms/Genetically Engineered Organisms or Cells, 1989 notified by Ministry of Environment & Forests on Dec 5, 1989 under Environment (Protection) Act, 1986.
- Recombinant DNA Safety Guidelines,1990
- Revised Recombinant DNA Safety Guidelines, 1994.
- Guidelines for Research in Transgenic Plants & Guidelines for Toxicity and Allergenicity Evaluation of Transgenic Seeds, Plants and Plant Parts, 1998.
- National Seed Policy, 2002.
- Seeds Act, 1966.

- The Plants, Fruits and Seeds [Regulation of import in India] Order 1989 issued under Destructive Insects and Pests Act, 1914.
- Biological Diversity Act, 2002.
- Food Safety and Standards Act, 2006.

The objective of EPA is protection and improvement of the environment. The Act calls for the regulation of Environment Pollutants, defined as any solid, liquid or gaseous substance, present in such concentration that tend to be injurious to the environment.[3]

The 1990 and 1994 DBT guidelines recommend appropriate practices, equipments and facilities necessary for safeguards in handling GMOs in agriculture and pharmaceutical sectors. These guidelines cover the R&D activities on GMOs, transgenic crops, large-scale production and deliberate release of GMOs, plants, animals and products into the environment, shipment and importation of GMOs for laboratory research. The 1998 DBT guidelines cover areas of recombinant DNA research on plants including the development transgenic plants and their growth in soil for molecular and field evolution. It also calls for the toxicity and allergenicity data for ruminants such as goats and cows, from consumption of transgenic plants. It also requires the generation of data on comparative economic benefits of a modified plant.

The regulations classify activities involving GMOs into four risk categories, provide lists of bacterial, fungal, parasitic and viral agents that fall into each category, and specify the roles of the institution and the company, the IBSC and the RCGM vis à vis the risk categories:

Category I comprises routine recombinant DNA experiments conducted inside a laboratory;

---

3 See, *the Environment Protection Act*, 1986, section 2.

Category II consists of both laboratory and greenhouse experiments involving transgenes that combat biotic stresses through resistance to herbicides and pesticides;

Categories III and above comprise experiments and field trials where the escape of transgenic traits into the open environment could cause significant alterations in the ecosystem.[4]

Through the biosafety regulations, Government of India established a three-tier regulatory structure at the central level in New Delhi comprising three committees:

The Review Committee on Genetic Manipulation (RCGM) under the Ministry of Science and Technology (MoST);

The Genetic Engineering Approval Committee (GEAC) under the Ministry of Environment and Forestry (MoEF);

The Monitoring and Evaluation Committee (MEC) under DBT/MoST;[5]

DBT provides the secretariat for RCGM and MEC, and the MoEF for GEAC. The GoI also issued directives on the setting up a de-centralised structure consisting of Institutional Biosafety Committees (IBSCs) and State and District Level Committees (SBCCs and DLCs). The biosafety regulations indicate in broad terms the composition and responsibilities of all these six bodies.[6] DBT is represented on all of them except the SBCCs and DLCs. IBSCs have been established in all institutions (public and private) that deal with GMOs.

---

4 See the *Revised Guldelines for Research in Transgenic Plants and Guidelines for Toxicity and Allerginicity Evaluation of Transgenic Seeds, Plants and Plant Parts,* 1998, section 4.

5 *The Manufacture, Use, Import, Export and Storage of Hazardous Micro Organisms, Genetically Engineered Organisms or Cells Rules,* 1989, section 4.

6 *Ibid.*

But, even as late as of 2004, only three states (out of a total of twenty-five states and several 'union territories' that make up the Indian Union) had created SBCCs, while DLCs have not been set up anywhere. RCGM's mandate is to assess and decide on the applications submitted by institutions and companies for conducting R&D work, greenhouse tests and contained field tests on plots of less than one acre in size (0.4 hectare)

Apart from these, number of new acts and rules as well as amending of the existing acts is being done, to formulate more extensive and globally compatible policy. It includes amending of The Indian Patents Act, 1970, and Drugs and Cosmetics Act as well as formulating new acts like The Farmers Rights Act, Traditional Knowledge Act, Food and Standards and Safety Act, 2006.

The extraordinary growth of the Indian biotechnology sector has significant implications for policy in the area of regulation. Thus, necessitating the need for regular and continuous upgrading, amending and formulating laws, rules and guidelines, to be in step with the technology.

1.4 Biotechnology Regulatory Authority of India Bill (BRAI)-2010

India does not have a separate statute to govern the regulation of GMOs in our food and farming systems. We only have executive orders/rules under the Environment Protection Act, 1986 and these rules are easily changeable and altered by the regulators whereas having a proper statute would ensure that frequent, undemocratic changes in rules, guidelines and protocols will not be made too easily. The purpose of any such regulation flows from the inherent risks and hazards associated with these technologies.

The 2004 Report of the Task Force on the Application of Agricultural Biotechnology commissioned by the Ministry of Agriculture and the Ministry of Environment and Forests to evaluate the regulatory

framework for products of agricultural biotechnology and recombinant pharmaceuticals, respectively and chaired by Prof. M.S. Swaminathan, recommended the establishment of an "autonomous, statutory and professionally-led National Biotechnology Regulatory Authority" (NBRA). Similarly the 2005 Report of the Task Force on Recombinant Pharma chaired by Dr. R.A. Mashelkar supported the establishment of a National Biotechnology Regulatory Authority/Commission "providing a professionally managed single window mechanism for giving various clearances including biosafety issues"[7]

In 2005, DBT published a draft National Biotechnology Development Strategy which elaborated a ten year vision for the future of biotechnology in India. Key policy recommendations and approaches to implement these were established through a process of multi-stakeholder consultations that focused on cross-cutting issues of relevance to all sub-sectors of the biotechnology community. Under the topic of regulatory mechanisms, the National Biotechnology Strategy recommended "a competent single National Biotechnology Regulatory Authority be established with separate divisions for agriculture products/transgenic crops, pharmaceuticals/drugs and industrial products; and transgenic food/feed and transgenic animal/aqua culture.[8] The NBRA will be an independent, autonomous, statutory agency established by the Government of India to safeguard the health and safety of the people of India and to protect the environment by identifying risks posed by, or as a result of, modern biotechnology, and managing those risks through regulating the safe development and deployment of biotechnology products and processes.

In order to establish and empower the NBRA, DBT promulgated new legislation, National Biotechnology Regulatory Authority Bill, 2008. It was revised and rechristened as Biotechnology Regulatory Authority of India Bill (BRAI), 2009. Intended to provide an opportunity to

---

7 Viren Konde, *Biotechnology Regulation in India: Progress so far*, 2008.

8 *Ibid.*

consolidate and enhance the efficiency and effectiveness of biotechnology regulation, increase collaboration with state governments in this area, promote public confidence in the regulatory system, and facilitate international trade, BRAI Bill lies in parliament to be enacted.

The Bill is mandated for the "establishment of the Biotechnology Regulatory Authority of India to regulate the research, transport, import, manufacture and use of organisms and products of modern biotechnology regulatory procedures". It assumes that a technology can be made safe by making the regulation effective and efficient and protection of the health (human and animal) and environment from the risks posed by modern biotechnology and its applications should be their main objective. The Bill is often accused by anti- GMO campaigners as, playing a role of a clearing house for Biotechnology and its applications.

Section 15 pertaining to the inter-ministerial advisory board, has reduced the role of such board to only as an advisory whereas because of the wide implications of GMOs beyond biosafety, requires inter ministerial and a broad based approach to decision making.[9]

Constitution of three Units, Risk Assessment Unit, Enforcement Unit section23 and Products Ruling Committee, under Section 22, 23 and 25 respectively for a 'science-based evaluation of the application' whether it is for import or manufacture or for any other purpose has been done.[10]

There is no provision for independent testing by the authority and independent testing facilities. Risk assessment should consist of an evaluation of the biosafety dossier submitted by the crop/product developer including mandatory independent, public scrutiny but also independent testing for further verification of results and any proposed Authority should have the testing capabilities established for this.

---

9 See, *the Biotechnology Regulatory Authority of India Bill*, 2009, section 15.

10 *Id.*, sections 22, 23 and 25.

The Risk Assessment Unit looks over the applications pertaining to research, transport or import and presents its "clear assessment" to the Authority and a Products Ruling Committee for manufacture or use of GMOs and products thereof, for making recommendations to the Authority. There is no need for a Risk Assessment Unit and a Products Ruling Committee separate from each other. There can be only one Risk Assessment Unit and no Ruling should be allowed by anyone who is supposed to assess and evaluate.

Risk Management aspects have been neglected in the proposed legislation. It is not enough to have an Enforcement Unit with empowered Monitoring Officers as in section 23. There should be clear clauses for reviewing of approvals and permissions, time bound permissions in each case and clauses for revoking and cancellations of approvals.[11]

Further Section 26 (5) states that if the authority has reasonable grounds to believe that the person may not comply with the conditions which may be imposed under clause (a) with respect of the authorization, it may in writing refuse to grant authorization. Given the corrupt nature of the regulatory systems, this situation can be easily used by big MNCs by reneging from any written commitment. In that case whether such an approval will be revoked, or not is not clearly mentioned.[12]

Section 27(2) provides for retaining confidential commercial information, which is completely against the current RTI scenario. Instead, it should have clauses on information disclosure that too before decision-making. All product development and biosafety-related information has to be pro-actively disclosed and placed in the public domain before decision-making. Provisions regarding public scrutiny of applications should also be included.[13]

---

11 *Id.*, section 23.

12 *Id.*, section 26 (5).

13 *Id.*, section 27 (2).

Provisions related to Import of Organisms and Products thereof are laid under Section 32, where apart from authorization to detain imported packages suspected to contain organisms and products thereof, there should be a provision for Importer's Declaration & Certification at the time of import that the Independent testing facilities consignment does not contain any GMOs or products thereof, for every consignment coming into India.[14]

Food, agriculture, animal husbandry and fisheries are State subjects, but the current Bill under section 34 envisages only an advisory role for the state governments in the form of "State Biotechnology Regulatory Advisory Committees" with no decision-making powers. Following this Orissa, Kerala, Assam and several other States have been opposing the Bill.[15]

Section 40 notifies laboratories for the purposes of this act, where non-accredited labs may also be notified due to the emerging nature of modern biotechnology and facilities and equipment in labs. Such notification of non-accredited labs has drawn flak from various sections of the society.[16]

Further, Section 55 (3) on Biotech Regulatory Appellate Tribunal, with its time bar of two years from the date of the cause of action for an appeal on a substantial question is not to be allowed. Effects of genetic modification may show up any time even beyond two years, so there should be no such time bar. This Tribunal should be more broad based and consist of people beyond certain technical expertise.[17]

Under Section 63, misleading public on GMOs and products is punishable. This is completely objectionable and is meant to harass civil

---

14 *Id.*, section 32.
15 *Id.*, section 34.
16 *Id.*, section 40.
17 *Id.*, section 55.

society groups working on these issues. The liability clauses in this proposed legislation are very weak. The distinction made between companies, universities, society, trust, government departments etc as under section 67 and 68 is not needed and the penal clauses should apply uniformly. The legislation should have express clauses on Redressal or Compensation and Remediation or Cleaning up. The legislation should also have a clause that makes the crop developer solely liable for any leakage, contamination and so on throughout every stage of the product development cycle. Further, the penalty of one year imprisonment and two lakh rupees fine is no deterrent and this should be made more rigorous.[18]

Section 81 expressly states that this Act will have an over-riding effect on other Acts. Such effect this ignores and could impinge on or override the legislations like Biological Diversity Act, with a mandate to conserve and sustainably use biological diversity.[19] Similarly, Section 87 (2), asks for a repealing of any law in force for the time being in any State corresponding to this Act including any licensing authority that the state government's concerned agencies might have under any other Law. Such action will barge upon the constitutional powers that state governments have over their Agriculture and health.[20]

The proposed legislation has no clauses on public participation. The Cartagena Protocol on Biosafety's (under the Convention on Biological Diversity) Article 23.2 states that 'Parties...shall consult the public in decision-making process regarding living modified organisms...' and India is a signatory to it. Any statute on this matter should have systemic mechanisms built for public participation in decision-making including having representatives from credible and committed farmers' and consumers' groups in the decision-making bodies, apart from larger public consultations.

---

18 *Id.*, sections 63, 67 and 68.

19 *Id.*, section 80.

20 *Id.*, section 87 (2).

The BRAI Bill emanates from the DBT, Ministry of Science and Technology which is mandated to promote Biotechnology, and in particular modern biotechnology. Placing the BRAI under the Department of Biotechnology will result in a direct conflict of interest and such autonomous regulatory authority should not be housed under the Ministry of Science & Technology or more specifically within the Department of Biotechnology. Activists have instead called for a National Biosafety Authority under either the Ministry of Environment and Forests or the Ministry of Health, since environment and health are expected to be directly affected by GMOs.

The BRAI once formed, will look at impacts of modern biotechnology on human and animal health as well as environment. The issues of social justice, inter-generational equity, impact of genetic pollution (beyond environmental impacts) and political economy of these decisions have been left out. It only deals with the safety and efficacy aspects of biotech products, leaving the controversial commercialization aspect hanging in the air.

1.5 Conclusion

Elements of biotechnology regulation which are currently spread over multiple acts could be brought under one line of control by forming BRAI. Over all, it is a promising step towards biotechnology regulation in the country, but could be made more proficient by making necessary changes on the following key guidelines:

- Precautionary Principle as the central guiding principle
- Inter-generational equity
- Polluter Pays Principle
- Going in for the GM option only in case other alternatives are missing

Statues based on such principles have been found missing in the current draft of BRAI Bill 2010. Any regulatory regime around GMOs should have the primary mandate of protecting health of people and the

environment from the risks of modern biotechnology. A biotechnology regulatory body should justify all the efforts and innovations in biotechnology and their usefulness to mankind.

Thus, a road map needs to be prepared to flow the biotechnology innovations and its regulation in our country. The Biotechnology future in India will be challenging as well as exciting. So, we should be prepared to face and tap this remarkable technology for the benefit of our populace.

OFFENCES AGAINST RELIGION VIS-À-VIS FREEDOM OF SPEECH AND EXPRESSION*

G.I.S. Sandhu**

1.1 Introduction

The Indian Penal Code, 1860 devotes separate Chapter XV to Offences Relating to Religion. The originally framed penal code has four sections in this Chapter viz. Sections 295-298. Another Section 295A was included through 1927 amendment.[1] These provisions mainly aim at prohibition of any kind of act that hurts some religious feelings. The underlying principles in these provisions is that every person should have freedom to follow his or her own religion and no man should be allowed to insult the religion of another or religious feelings of any class or group.[2] Religion sensibilities of others should be respected. Therefore, the deliberate acts of insult of religion or annoyance are made punishable in order to prevent religious animosities that could lead to disturbance of public order. All these provisions of the Penal Code have been there before the coming into force of the Constitution of India on 26 January 1950. Whereas the Constitution confers religious freedom to various religious groups, it has

---

* A paper presented at International Seminar on RELEVANCE OF THE INDIAN PENAL CODE IN MODERN AGE (Commemorating the Hundred and Fiftieth Anniversary of the *Indian Penal Code*, 1860) Organized by the Centre for Criminal Justice Administration, Dr. R M L National Law University, Lucknow, on December 14-15, 2010.

** Professor (Dr.) G.I.S. Sandhu, Registrar cum Professor of Law, Rajiv Gandhi National University of Law, Punjab at Patiala.

1 *The Criminal Law Amendment Act*, 1927 section 2 (Act 25 of 1927). This section was enacted after the decision of the Lahore High Court in *Rajpaul* v. *Emperor*, AIR 1927 Lahore 590 *(Rangila Rasool Case)* In this case the accused was convicted under section 153A of the Indian Penal Code by the Magistrate for making derogatory remarks against the Prophet Mohammed. But the Lahore High Court quashed the conviction holding that Section 153A was intended to prevent persons from making attack on a particular community as it existed in the present time and is not to prevent it against deceased religious leader. Therefore, to fill the lacuna section 295A was inserted in offences relating to religion.

2 Draft Penal Code, note at p. 136.

also adopted the policy of State neutrality in matters of religion. As such, India has developed its own unique concept of secularism requiring complete separation of church and the State[3]. The various provisions[4] of the Constitution of India, promote the idea of secularism and by implication prohibit the establishment of a theocratic State. The State is under obligation to accord equal treatment to all religions and religious sects of all denominations.[5] In 1976 the word secular was expressly incorporated in the pre-amble of the Constitution.[6] Thus, it is observed that constitutionally, India is a secular nation, but any 'wall of separation' between religion and State exists neither in law nor in practice, the two can and often do, interact and intervene in each other's affairs within the legally prescribed and judicially settled parameters. Indian secularism does not require a total banishment of religion from societal or even State affairs. The only demand of secularism, as mandated by the Indian Constitution, is that the State must treat all religious creeds and their respective adherents absolutely equally and without any discrimination in all matters under its direct or indirect control.[7]

Therefore, the Supreme Court in *S.R. Bommai v. Union of India*[8] held that religious tolerance and equal treatment of all religious groups and protections of their life and property and of the places of their worship are an essential part of the secularism enshrined in our Constitution. Hence the present concept of secularism in India is not merely a passive attitude of religious tolerance. It is also a positive concept of equal treatment of all religions.[9]

The aforesaid meaning and concept of religion has been made clear through the interpretation of various provisions of the Constitution in the

---

3 Mohammad Tahir, "Religion, Law, and Judiciary in Modern India", *Brigham Young University Law Review* 2006 http://findarticles.com accessed on 30.11.2010.
4 See, The Constitution of India, Articles 14, 15, 16, 25-28, 29, 30, 44 and 51A.
5 M.P. Jain, *Indian Constitutional Law*, Fifth Edition (2008), p. 1202.
6 *The Constitution of India, Forty Second Amendment*, 1976.
7 *Supra note* 3.
8 AIR 1984 SC 1918 (1994) 3 SCC 1.
9 *Supra note* 5.

Indian context which is different from many religious and pluristic societies. Here on the one hand the State is secular but on the other hand provides freedom to the individuals to profess and propagate their religion without any interference by the others. Reasonable restrictions are also provided on the exercise of fundamental rights by law, where any conduct of an individual is liable to insult other person's religion or outrage the religious feelings of class of persons. Incidentally, some penal and semi penal provisions have been there in the Indian Penal Code and the Code of Criminal Procedure, before the Constitution on India came into force on declaration of India as a democratic republic. The validity of these provisions has been put to test on the constitutional parameters on several occasions before the higher judiciary. In the course of time the Judiciary has laid down guidelines and standard of conduct that needs to be maintained, for fair balance between individual freedom to exercise fundamental rights and interest of public order in the society. In this paper a humble attempt has been made to discuss some penal and quasi penal provisions vis-à-vis freedom of speech and expression.

1.2 Offences against Religion Committed Through Written or Spoken Words etc.

Religion has not been defined under the Indian Penal Code or under the Constitution of India. The Supreme Court has observed in a 1954 judgment[10] that, "Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Budhism and Jainism which do not believe in God or in any intelligent first cause." Again in *PMA Metropolitan v. Main Mar Marthoma*[11] the Supreme Court expressed that:

> "... Religion is the belief which binds spiritual nature of men to super-natural being'. It includes worship, belief, faith, devotion, etc. and extends to rituals. Religious right

---

10 *Commission H R E, Madras* v. *S. Lakshmindra*, AIR 1954 SC 282 (291).
11 AIR 1995 SC 2001 (2026).

> is the right of a person believing in a particular faith to practice it, preach it and profess it."

Therefore, the constitutional guarantee not only protects the freedom of religious opinion, but it protects also acts done in pursuance of religion.[12]

The *Indian Penal Code*, 1860 has provided definitions of offences against religion and also punishment for these offences in five different Sections from 295-298. The penal provisions envisage that there should not be any interference in following one's religion. The prohibitions are regarding injury or defiling place of worship with intent to insult the religion of any class;[13] Deliberate and malicious acts intended to outrage religious feelings of any class of citizens of India by insulting its religion or religious belief;[14] Disturbing religious assembly;[15] Trespassing of burial places etc.;[16] Uttering words etc. with intent to wound religious feelings.[17] The purpose of present discussion on offences, under Sections 295-A and 298 of the Indian Penal Code and quasi penal proceedings under sections 95 and 96 of the Code of Criminal Procedure are relevant.

Section 295-A of the Penal Code deals with deliberate and malicious acts of any person who intended to outrage feelings of any class citizens of India, either by spoken or written words, or by signs or visible representations or otherwise, either insults or attempts to insult the religion or religious belief of that class. The punishment prescribed is upto three years imprisonment or fine or both. This offence requires a deliberate and malicious intention of outraging the religious feelings of any class of citizens.[18] Therefore acts done carelessly and without malicious intention do not come within the ambit of this penal provision. As such, the act must be deliberate as well as malicious. An act may be deliberate but not

---

12 *Supra note* 10.
13 The Indian Penal Code, 1860 Section 295.
14 *Id.*, section 295-A.
15 *Id.*, section 296.
16 *Id.*, section 297.
17 *Id.*, section 298.
18 *Ram Lal Puri* v. *State of Madhya Pradesh* AIR 1971 MP 152.

malicious. Further malicious intention need not be ill will or enmity against specific persons, but when an act is done voluntarily without a lawful and just excuse, malice may be presumed. This intention may be gathered from the nature of the language used and from the circumstances.[19]

Cognizance of the offence under Section 295A can only be taken with the previous sanction of the concerned government under Section 196(1) of the Code of Criminal Procedure, 1973. It is cognizable, non-bailable and non-compoundable.

1.3 Forfeiture of Publications Involving Offences Against Religion

In relation to forfeiture of the publications containing material that may constitute any offence under sections 124A or 153A or 153B or 292 or 293 or 295-A of the Indian Penal Code, the provision in Section 95 of the Criminal Procedure Code, 1973 (hereinafter referred as Code) empowers the State Government to declare copies of the publication to be forfeited to the Government. The State Government may be notification stating the grounds of its opinion, declare each copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to the government and thereupon any police officer may seize the same wherever found in India. Any magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be there.

The power to issue a declaration of forfeiture under this provision postulates compliance with twin conditions viz. (1) the Government must form the opinion that such newspaper, book or document contain any matter, the publication of which is punishable under Section 124 A or

---

[19] K.D. Gaur, *A Text Book on the Indian Penal Code*, Third Edition, p. 375.

Section 153A or Section 153B or Section 292 or Section 293 or Section 295A of the Indian Penal Code and (ii) the Government must state the grounds of its opinion. Section 96 of the Code entitles any person having an interest in any newspaper, book or other document, in respect of which declaration of forfeiture is made under Section 95 of the Code, to move the High Court for setting aside the declaration, on the ground that it does not contain any such matter as is referred to in Sub-section (1) of Section 95 of the Code.

It has been observed by the Supreme Court that the power to forfeit a newspaper, book or document is a drastic power. It not only has a direct impact upon the due exercise of right of freedom of speech and expression as envisaged in Article 21 of the Constitution, it also clothes the police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonable suspected to be found, again impinge upon the right of privacy. Therefore, provision has to be construed strictly and exercise of power under it has to be in the manner according to the procedure laid down therein.[20]

The provisions under Section 95 of the Code for forfeiture of publication refer to certain penal provisions in the Indian Penal Code, those include Section 295A. Therefore, for any action of forfeiture of any material the Government is required to satisfy itself about the presence of necessary ingredients of the respective offence. Otherwise, the procedure is independent of the prosecution and conviction of the concerned person under these penal provisions. The scope of Section 95 of the Code was examined by the Apex Court in *Baragur Rama Chandrappa and Others v. State of Karnataka*[21] The Court observed that it is fallacious to mathematically equate the proceedings under Sections 95 and 96 of the Code with trial under Section 295A of the Indian Penal Code, with the accused in dock. Section 95 do not require that it should be proved to the

---

[20] *State of Maharashtra and Others* v. *Sanghraj Damodar Rupawate and Others,* MANU/SC/0466/2010 Para 19.

[21] (2007) 5 SCC 11.

satisfaction of the State Government that all requirements of the punishing sections including *mens rea* were fully established and all that Section 95(1) required was that the ingredients of the offence should "appear" to the Government to be present.

The order passed by the government is not challengeable in any court except through an application to the High Court under Section 96 of the Code. A person having any interest in any such publication may take the plea that it did not contain any such matter relating to the offences referred in Section 95 (1) of the Code. Such application shall be heard and determined by the special bench of three judges. The High Court while hearing on application if not satisfied that the material contained any such matter as is referred in Section 95(1) of the Code, it shall set aside the declaration of forfeiture.

The grounds of government opinion must be stated in the notification issued under Section 95 of the Code. While testing the validity of the notification, the High Court has to confine the inquiry to the grounds so disclosed.[22] The validity of the order of forfeiture depends upon the merit of the grounds.[23] If no grounds are given the notification can be set aside and it is not the duty of the High Court to find for itself whether the book contained any such material, whatsoever.[24]

Both conviction under Section 295A Indian Penal Code through prosecution and the forfeiture of publication by proceeding under Sections 95 and 96 of the Code require the consideration of ingredient of the offence as provided under the Indian Penal Code. The conviction/forfeiture is to be determined on basis of the words in the publication by the trial court / the Government, whether it insults or offends religious feelings of the class of citizens or not. The right to freedom of speech and expression is not absolute and is subject to

---

22 *Supra note* 20 Para 25 (i)
23 *Ibid.*
24 *Id.*, Para 25 (iii).

reasonable restrictions as envisaged under clause (2) of Article 19 of the Constitution and law may provide for punishment for the deliberated and malicious acts outraging the religious feeling of any class of citizens in the interest of public order. Consequently in reference to these offences if it appears to the Government that any publication is punishable under Section 295A it may notify its publication by giving the grounds about its opinion. The constitutional validity of this penal provision is analyzed in the following discussion.

1.4 Freedom of Speech and Expression and Offences Against Religion

Article 19 (1) (a) enshrines freedom of speech and expression. But the freedom is subject restriction laid down in Article 19 (2) that law may provide for reasonable restrictions on the exercise of the right in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Penal provisions in Sections 295A and 298 Indian Penal Code and section 95 of the Code are the examples that put reasonable restrictions on the freedom of speech and expression, when it impinges upon religious feelings of a class of persons. It is felt that in a country like India, where with vast disparities in language, culture and religion, the unwarranted and malicious criticism or interference in the faith of others is not permissible. At the same time, the concern is to protect the cherished right to freedom of speech and expression.

The provisions in Section 295A of the Indian Penal Code, 1860 faced the challenge of fundamental right to freedom of speech and expression in Article 19 (1) (a) before the Supreme Court in *Ramji Lal Modi v. The State of UP.*[25] It was contended before the Supreme Court that this penal provision does not come within reasonable restriction as required by Article 19 (2) of the Constitution, because as per requirement 'in interest

---

[25] AIR 1957 SC 620.

of public order' needs to be an ingredient of the offence. It was further pleaded that insulting the religion or the religious beliefs of a class of citizens in India may not lead to public disorder in all cases although it may do in some cases. Whenever a law provides as the impinged section does, to authorize the imposition of restriction on the exercise of fundamental right to freedom of speech and expression, in language wide enough to cover restrictions both within and without the limitation of constitutionally permissible legislative action, affecting such right, the court should not uphold the impugned provision, even in so far as it may be applied within the constitutionally permissible limits, as it is not severable. It was also pointed out to the court that Section 295-A has been included in Chapter XV of the Indian Penal Code which deals with offences relating to religion and not in Chapter VIII which deals with offences against the public tranquility. Therefore, offences relating to religion have no bearing on the maintenance of public order or tranquility and consequently a law creating an offence relating to religion and imposing restrictions on freedom of speech and expression cannot claim protection of Article 19 (2).

The Supreme Court did not accept the aforesaid argument. It observed that a reference to Articles 25 and 26 of the Constitution which guarantee the freedom of religion will show that the argument is utterly untenable. The right to freedom of religion assured by those Articles is expressly made subject to public order, morality and health.[26] Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interest of public order.[27]

---

26 See, *supra note* 4, Articles 25 and 26.

27 *The State of Uttar Pardesh* v. *Lalai Singh Yadav*, AIR 1977 SC 202 para 8

In some earlier decisions[28] pronounced in 1950, prior to the First Amendment [29] of the Constitution the Supreme Court had ruled that where the language employed in the statute is wide enough to cover restrictions on fundamental right both within and without the limits of constitutionally permissible legislative action affecting the right and possibility of its being applied for the purpose not sanctioned by the Constitution cannot be ruled out, the law must be held wholly void. But after the afore said substitution of the clause (2) of the Article 19, the Constitution protects a law in so far as such law imposes reasonable restrictions on the exercise of right conferred by sub clause (a) of Article 19 "in the interest of the security of the state, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."[30]

Therefore the Supreme Court in *Ramji Lal Modi* case[31] while determining the constitutional validity of section 295A of the Indian Penal Code observered that the language employed in the amended clause is "in the interest of" and not "for the maintenance of". The expression "in the interest of" makes the ambit of the protection very vide, because a law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of public order. Therefore, when certain activities have tendencies to cause public disorder law may impose reasonable restrictions "in the interest of public order" although in some cases those activities may not actually lead to breach of public order.

The Court further defined the scope of section 295A by observing that this section does not penalize any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens, but it

---

28 *Chintaman Rao* v. *The State of Madya Pradesh*, (1950) SCR 759, See also *Ramesh Thapar* v. *State of Madras*, (1950) SCR 594 and *Brij Bhushan* v. *The State of Delhi*, (1950) SCR 605.

29 *The Constitution (First Amendment) Act*, 1951, Section 3 substituted new clause (2) to Article 19 with retrospective effect.

30 *The Constitution (Sixteenth Amendment) Act*, 1963 further added [the sovereignty and integrity of India] after the words 'in the interest of 'in the clause (2) of Article 19.

31 See *supra note* 25.

penalize only those acts of insults to and those varieties of attempts to insult the religion or religious beliefs of a class of citizens which are perpetrated with a deliberated and malicious intention of outraging the religious feelings of that class. Insult to religion offered unwittingly or carelessly or without any deliberate and malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberated and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and section which penalizes such activities is within the protection of clause (2) of Article 19 of the constitution as a law imposing a reasonable restrictions on the exercise of right to freedom of speech and expression guaranteed by Article 19 (1) (a). Therefore, the Court found that the language employed in section 295A is not wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental right guaranteed by Article 19 (1) (a) and consequently the question of severability does not arise. Further, it appears that Section 295A meets the parameters of constitutional validity when it is strictly applied in aggravated situations where there is deliberated and malicious intention to insult a religion or outrage religious feeling of a class of persons.

1.5 Freedom of Speech and Expression and Forfeiture of Publication Insulting Religion or Outraging Religious Feelings

It is believed that a scientific temperament and a spirit of enquiry is essential for human development and is a *sine qua non* for progress and for social change. Article 51 A (h) clearly recognizes this principle. Like wise Article 19 (1) (a) of the Constitution gives every citizen the right to freedom of speech and expression and this freedom is yet another vehicle towards the same direction and goal.[32] Freedom of expression is

---

[32] *Supra note* 21.

essential for (i) it helps the individual to attain self fulfillment; (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[33]

However while enjoying the freedom of speech and expression no person has the right to impinge upon the feelings of others. The State as such is obligated not merely to preserve and protect society against breaches of peace and violation of public order but also to create conditions where the sentiments and feelings of people of diverse or opposing beliefs and bigotries are not so molested by ribald writings or offensive publications as to provoke or outrage groups into possible violent action.[34] Section 95 of the Criminal Procedure Code provide for forfeiture of the material in the form of newspaper, book or document or other form by the government if he material as such offends certain provisions of the Indian Penal Code, those *inter alia* include section 295A. The Supreme Court while deciding the case of forfeiture of book under section 99A of the Code of Criminal Procedure, 1898 that corresponds to section 95 of the present Code, has ruled[35] that a drastic restriction on the right of a citizen when imposed by a statute calls for a strict construction especially when quasi penal consequences also ensue. The Supreme Court in The State of *Uttar Pradesh v. Lalai Singh Yadav*[36] has observed that:

> ... (T)he interest of public order and public peace, public power comes into play not because the heterodox few must be suppressed to placate the orthodox many but because everyone's cranium must be saved from mayhem before his cerebrum can have chance to simmer. Hatred, outrage and like feelings of

---

33 *Indian Express Newspaper (Bombay) Pvt. Ltd and others* v. *Union of India*, MANU/SC/0340/1984.

34 *Supra note* 27.

35 *Ibid.*

36 *Supra note* 27 para 14.

> large groups may have crypto-violent proneness and the state, in its well grounded judgment, may prefer to stop the circulation of the book to preserve safety and peace in society. No enlightened state, would use this power to suppress advanced, economic views, radical rational criticism or fearless exposure of primitive obscurantism, but a ordered security is a constitutional value wisely to be safeguarded if progressive and regressive are to peacefully co exist. This is spirit of Section 99A of the Code. The actual exercise will depend not of doctrinaire logic but practical wisdom.

As such the Government has the power and responsibility to preserve the societal peace and to forfeit publications which endanger it. But what is thereby prevented is freedom of expression, that promoter of permanent interest of human progress. Therefore the law (Section 99A) fixes the mind of the administration to the obligation to reflect on the need to restrict and to state the grounds which ignite the action.[37] Therefore to forfeit the publication the Government has to give grounds of its opinion clearly. The grounds must be distinguished from the opinion. Grounds of opinion must mean conclusion of facts on which conclusion is based. There can be no conclusion of fact which has no reference to or is not *ex facie* based on facts.[38] The effect of the words used in the offending material must be judged from the standard of reasonably strong minded, firm and courageous men and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also relevant for judging the probable consequence of writing.[39] The afore said analysis of the power of forfeiture of material under Section 95 of the Code are constitutionally permissible in the circumstances to prevent real danger larger public order.

---

37 *Id.*, para 18.
38 *Naryan Dass Indurakhya* v. *State of Maharashtra*, (1972) 3 SCC 676
39 *Supra note* 20.

1.6 Conclusion

India is a secular state with no state religion unlike some other neighboring countries. At the same time it is a plurist society with people having cultural diversity and professing different religion. The Constitution of India not only gives the freedom to the individuals to profess and propagate their religion and culture but also provides protection against unwarranted aggression of their faith by others. The protections extend in the form of penal law and other quasi penal actions. Incidentally these provisions were there in the penal and procedural law before the adoption of our Constitution as a sovereign republic. In view of the multicultural society a there is need to maintain a fair balance in individual freedoms, those are *sine qua non* of a progressive society, and the need to provide protection to the religious groups that their religions or religious feelings are not maliciously assailed. The provisions under the Indian Penal Code in the form of Sections 295A and 298 of the Indian Penal Code and Sections 95 and 96 of the Code of Criminal Procedure , have direct bearing on the cherished right to freedom of speech and expression enshrined under Article 19 (1) (a) of the Constitution of India. Since right to freedom of speech and expression is not an absolute right and is subject to reasonable restrictions contained in clause (2) of Article 19 as substituted by the first amendment of the Constitution in 1951. (This clause was further amended in 1963 through sixteenth amendment to extend the restriction on freedom of speech and expression in the interest of sovereignty and integrity of India) No doubt the afore said provisions under the Indian Penal Code and the Code of Criminal procedure meet the challenges of constitutional validity, but much depends on application of these provisions in appropriate situations and by strictly adhering to the prescribes procedure.

SUICIDE : HISTORICAL BACKGROUND, POSITION AND RELEVANCY IN VARIOUS COUNTRIES WITH SPECIAL REFERENCE TO INDIA - ITS CAUSES AND PREVENTION

Anil Trehan*

1.1 Introduction

Life is a stage with one entrance but many exits. Among those, suicide is one exit having a long ancestry. In 1968, the World Health Organisation defined suicidal act as "the injury with varying degree of lethal intent" and that suicide may be defined as "a suicidal act with fatal outcome". Suicidal acts with non fatal outcome are labeled by World Health Organisation as "attempted suicide." Suicide has been an act of condemnation as well as commendation through the ages. The act of suicide is forbidden in Koran and the Holy Bible. The common belief among Hindus is that a person who commits suicide will not attain "Moksha" and his soul will wander around, haunting and tormenting people.

Suicide has historically been treated as a criminal matter in many parts of the world. While it's technically true that a person who has successfully committed suicide is in some respects beyond the reach of the law, there could still be legal consequences in the cases of treatment of the corpse, or fate of the person's property. The associated matters of assisting a suicide and attempting suicide have also been dealt with by the laws of some jurisdictions.

1.2 Historical Background

In ancient Athens, a person who had committed suicide (without the approval of the state) was denied the honors of a normal burial. The person would be buried alone, on the outskirts of the city, without a

---

* Lecturer, Department of Laws, Guru Nanak Dev University, Regional Campus Gurdaspur (Punjab).

headstone or marker.[1] A criminal ordinance issued by Louis XIV in 1670 was far more severe in its punishment: the dead person's body was drawn through the streets, face down, and then hung or thrown on a garbage heap. Additionally, all of the person's property was confiscated.[2] By contrast; soldiers who had been defeated were expected to commit suicide in Ancient Rome and Feudal Japan.

Even in modern times, legal penalties for committing suicide have not been uncommon. By 1879, English law had begun to distinguish between suicide and homicide, though suicide still resulted in forfeiture of estate. Also, the deceased were permitted daylight burial in 1882.

The first organizations to promote the legalization of voluntary euthanasia in the United States and Great Britain formed in the 1930s. For several decades these organizations remained small and had little impact. However, in the late 1970s the pro-euthanasia movement gained significant momentum after a highly publicized incident in the United States. In 1975 a 21-year-old woman named Karen Ann Quinlan suffered a respiratory arrest that resulted in severe and irreversible brain damage and left her in a coma. Several months later, after doctors informed them that their daughter's recovery was extremely unlikely, Quinlan's parents requested that artificial means of life support be removed. The hospital refused this request.

After a lengthy legal battle, in 1976 the Quinlans obtained a court order allowing them to remove the artificial respirator that was thought to be keeping their daughter alive. The New Jersey Supreme Court ruled that the Quinlans could disconnect the device so that the patient could "die with dignity." This decision spawned increased discussion of the scope of patients' rights to control their death. (Although the respirator was

---

1 Plato *Laws, Book IX.*

2 Durkheim, Émile (1897). *Suicide.* New York: The Free Press, 1997, ISBN 0-684-83632-7.

removed in 1976, Quinlan began to breathe on her own. She lived until 1985 without ever regaining consciousness.).

1.3 Types of Suicide

The imminent sociologist of 19th Century 'Emile Durkheim' in his masterpiece "Le Suicide" consider suicide to be a social fact and social forces to be responsible for it and mentioned the following four types of Suicide:

- Egoistic Suicide.
- Altruistic Suicide.
- Anomic Suicide.
- Fatalistic Suicide.

1.3.1 Egoistic Suicide

Egoistic Suicide Occurs when the solidarity of group or community declines to such an extent that the individual cannot rely on it for any support. The individual is isolated and becomes suicidal because the ties uniting him with others are broken due to the weakening of the social fabric. The main cause of egoistic suicide is excessive individualism.

1.3.2 Altruistic Suicide

Altruistic Suicide is obverse of egoistic suicide. It is a result of the excessive integration of the individual into the group. Here individual interest merges into the social or collective interest. Man has no significance before society. Society gobbles up the personality of individuals. Society encourages or requires the individual to sacrifice his life.

1.3.3 Anomic Suicide

Anomic Suicide is the result of breakdown of social community and the resulting disturbance of social equilibrium. It is man's nature to be eternally dissatisfied and to have unlimited desires. An anomic suicide

happens when a sudden change occurs and society has no ideals before it. It often happens in economic crisis as well as breakdown of conjugal relations in the society. It occurs due to the society's insufficient presence in the individual.

1.3.4 Fatalistic Suicide

Fatalistic Suicide is the result of excessive negative expectations of persons with future pitilessly blocked and passions violently chocked by oppressive discipline. The suicide of slaves and of those who were subject to excessive physical and moral despotism is the examples of it.

1.4 Laws Relating to Suicide in Different Countries

1.4.1 Australia (Victoria)

In the *Australian* state of *Victoria*, while suicide itself is no longer a crime, a survivor of a *suicide pact* can be charged with *manslaughter*. Also, it is a crime to counsel, *incite*, or aid and abet another to attempt or commit suicide, and the law explicitly allows any person to use "such force as may reasonably be necessary" to prevent another from committing suicide.

1.4.2 England & Wales

Suicide (and thus, also attempted suicide) was illegal under *English Law*, known as *Felo de se*, but ceased to be an offence with the passing of the *Suicide Act*, 1961; the same Act makes it an offence to assist a suicide. While the simple act of suicide is lawful the consequences of committing suicide might turn an individual event into an unlawful act, as in the case of *Reeves v. Commissioners of Police of the Metropolis* [2000] 1 AC 360[3], where a man in police custody hanged himself and was held equally liable with the police (a cell door defect enabled the hanging) for the loss suffered by his widow; the practical effect was to reduce the police damages liability by 50%. In 2009, the House of Lords ruled that the law

---

3 House of Lords Judgment - *Commissioners of Police for the Metropolis* v. *Reeves.*

concerning the treatment of people who accompanied those who committed assisted suicide was unclear, following *Debbie Purdy*'s case that this lack of clarity was a breach of her human rights. (In her case, as a sufferer from multiple sclerosis, she wanted to know whether her husband would be prosecuted for accompanying her abroad where she may wish eventually to commit assisted suicide, if her illness progresses.) As a result, this law is expected to be revised.[4]

1.4.3 Ireland

Attempted suicide is not a criminal offence in Ireland. Assisted suicide and *euthanasia* are illegal however. Under Irish law self-harm is not generally seen as a form of attempted suicide.

1.4.4 Netherlands

In the *Netherlands*, being present and giving moral support during someone's suicide is not a crime; neither is supplying general information on suicide techniques. However, it is a crime to participate in the preparation for or execution of a suicide, including supplying lethal means or instruction in their use. (*Physician-assisted suicide* may be an exception).

1.4.5 Russian Federation

In Russia, inciting someone to suicide by threats, cruel treatment or systematic humiliation is punishable by up to 5 years in prison. (Article 110 of the Criminal Code of the Russian Federation)

1.4.6 Scotland

Suicide is not an offence under Scots Law. However, the offence attempting suicide is a Breach of the Peace. There was no legislation in England and

---

4 www.guardian.co.uk/society/2009/jul/30/debbie-purdy-assisted-suicide-legal-victory.

Wales until 1961 when the *Suicide Act* was passed. A person who assists a suicide might be charged with *murder*, *culpable homicide* or no offence at all depending upon the facts of each case.

1.4.7 Singapore

In *Singapore*, a person attempting to commit suicide can be imprisoned for up to one year.

1.4.8 United States

Historically, various states listed the act as a felony, but all were reluctant to enforce it. By 1963, six states still considered attempted suicide a crime (North and South Dakota, Washington, New Jersey, Nevada, and Oklahoma, which repealed its law in 1976). By the early 1990s only two US states still listed suicide as a crime, and these have since removed that classification. In some U.S. states, suicide is still considered an unwritten "common law crime," as stated in Blackstone's Commentaries. (So held the *Virginia Supreme Court* in *Wackwitz v. Roy* in 1992.) As a common law crime, suicide can bar recovery for the family of the suicidal person in a lawsuit unless the suicidal person can be proven to have been "of unsound mind." That is, the suicide must be proven to have been an involuntary, not voluntary, act of the victim in order for the family to be awarded money damages by the court. This can occur when the family of the deceased sues the caregiver (perhaps a jail or hospital) for negligence in failing to provide appropriate care.[5] Some legal scholars look at the issue as one of personal liberty. According to **Nadine Strossen, former President of the ACLU,** "The idea of government making determinations about how you end your life, forcing you...could be considered cruel and unusual punishment in certain circumstances, and Justice Stevens in a very interesting opinion in a right-to-die case raised the analogy."[6]

---

5 "On Sound and Unsound Mind: The Role of Suicide in Tort and Insurance Litigation", *Journal of the American Academy of Psychiatry and the Law*, 2005.

6 Interview with Nadine Strossen, David Shankbone, Wikinews, October 30, 2007.

1.5 Suicide in India

Suicide is an important issue in the Indian context. More than one lakh (one hundred thousand) lives are lost every year to suicide in our country. In the last two decades, the suicide rate has increased from 7.9 to 10.3 per 100,000. There is a wide variation in the suicide rates within the country. The southern states of Kerala, Karnataka, Andhra Pradesh and Tamil Nadu have a suicide rate of > 15 while in the Northern States of Punjab, Uttar Pradesh, Bihar and Jammu and Kashmir, the suicide rate is < 3. This variable pattern has been stable for the last twenty years. Higher literacy, a better reporting system, lower external aggression, higher socioeconomic status and higher expectations are the possible explanations for the higher suicide rates in the southern states.

According to National Crime Bureau of India, in 2006-07, 5857 young men committed suicide which is 16 per 1,00,000 whereas average of world suicide rate is 14.5 per 1,00,000. The majority of suicides (37.8%) in India are by those below the age of 30 years. The fact that 71% of suicides in India[7] are by persons below the age of 44 years imposes a huge social, emotional and economic burden on our society. The near-equal suicide rates of young men and women[8] and the consistently narrow male: female ratio of 1.4: 1 denotes that more Indian women die by suicide than their Western counterparts. Poisoning (36.6%), hanging (32.1%) and self-immolation (7.9%) were the common methods used to commit suicide. Two large epidemiological verbal autopsy studies in rural Tamil Nadu reveal that the annual suicide rate is six to nine times the official rate[9,10]. If these figures are extrapolated, it suggests that there are at least half a

---

7 Accidental Deaths and Suicides in India. *National Crime Records Bureau.* Ministry of Home Affairs. Government of India Report, 2005.

8 Mayer P, Ziaian T. *Suicide, Gender and Age Variations in India. Are Women in Indian Society Protected from Suicide?* Crisis, 2002; 23, pp. 98-103.

9 Joseph A, Abraham S, Muliyil JP, George K, Prasad J, Minz S, et al. *Evaluation of Suicide Rates in Rural India Using Verbal Autopsies,* 1994-9. BMJ 2003; 326, pp. 1121-22.

10 *Gajalakshmi* V. and *Peto R.*, "Suicide Rates in Tamil Nadu, South India : Verbal Autopsy of 39,000 Deaths in 1997-98", *Int J Epidemiol,* 2007. doi:10.1093/ije/dyl308.

million suicides in India every year. It is estimated that one in 60 persons in our country are affected by suicide. It includes both, those who have attempted suicide and those who have been affected by the suicide of a close family or friend. Thus, suicide is a major public and mental health problem, which demands urgent action.

Divorce, dowry, love affairs, cancellation or the inability to get married (according to the system of arranged marriages in India), illegitimate pregnancy, extra-marital affairs and such conflicts relating to the issue of marriage, play a crucial role, particularly in the suicide of women in India. A distressing feature is the frequent occurrence of suicide pacts and family suicides, which are more due to social reasons and can be viewed as a protest against archaic societal norms and expectations. In a population-based study on domestic violence, it was found that 64% had a significant correlation between domestic violence of women and suicidal ideation[11]. Domestic violence was also found to be a major risk factor for suicide in a study in Bangalore[12]. The population-based study has been done in various cities in India; however, the Bangalore study is the only psychological autopsy study that focused on completed suicide and domestic violence. Poverty, unemployment, debts and educational problems are also associated with suicide. The recent spate of farmers' suicide in India has raised societal and governmental concern to address this growing tragedy.

1.6 General Causes of Euthanasia

There may be three situations when euthanasia may take place viz.

(I) 'Voluntary euthanasia' occurs when a person voluntarily requests the termination of his or her life.

---

[11] World Health Organization. World Health Report. Mental Health - New Understanding - New Hope. WHO: Geneva; 2001.

[12] Gururaj G, Isaac M, Subhakrishna DK, Ranjani R. *Risk Factors for Completed Suicides: A Case-Control Study from Bangalore, India,* Int Control Saf Promot, 2004, 11:183-91.

(II) 'Non-voluntary euthanasia' when a person is not mentally fit to make an 'informed request' for termination of life.

(III) 'Involuntary euthanasia' when a person has not made a request for termination of his or her life.

1.7 General Justified Euthanasia (Where Legal) Occurs If

(I) The patient makes a voluntary, informed, and stable request.

(II) The patient is suffering unbearably with no prospect of improvement.

(II) The physician consults with another physician.

(IV) The physician performing the euthanasia procedure carefully reviews the patient's condition.

Officials estimate that about 2 percent of all deaths in the Netherlands each year occur as a result of euthanasia.

1.8 The Relevant Questions

Is there not a freedom to die? Does a right to life include a right to die? If euthanasia is medically assisted suicide, are there different forms of euthanasia, the permissible and the impermissible types? If the patient is in a vegetative state, who could be competent to consent for withdrawal of the life support systems? What shall be the role of courts in this exercise? The idea of this article is only to explain the concepts through judgments rendered already by the Supreme Court of India and of the courts elsewhere, particularly in the UK and the USA, and is not judgmental in any way, approving or disapproving any of the practices.

In India, euthanasia is illegal and punishable under Section 300 Exception 5 of the Penal Code as culpable homicide not amounting to murder. However, there is a growing awareness amongst jurists and social scientists that euthanasia should be made legal in case of

terminally ill. If enacted, such a law must provide sufficient safeguards, appropriate supervision and control to avoid misuse of the provision. Moreover, Section 306 of the Penal Code makes abetment of suicide punishable and Section 309 of The Penal Code makes attempt to commit suicide itself punishable.

1.9 Right to Die vis-à-vis Right Not to Die - A Constitutional Dilemma

Article 21 of the Constitution: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Section 309 of I.P.C.: *Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.*

Section 309 of I.P.C. has been questioned not only on the grounds of morality but also on the ground of constitutionality of the said provision. There have been many cases dealing with the question of whether S.309 is constitutionally valid or not. There have been conflicting opinions expressed in these cases regarding the constitutional validity of the section – one holding section constitutionally valid, while the other striking it down being violative of Article 21 of the Constitution which guarantees 'right to life,' which would reveal that there is ample force in both the contentions. Now, lets make a careful perusal of these conflicting rulings of the apex court.

- ***Maruti Shripati Dubal* v. *State of Maharashtra***[13]: In 1987, the Bombay High Court struck down S.309, IPC as ultra vires vide Article 21 of the Constitution which guarantees 'right to life and liberty'. The Court said that the 'right to life' includes

---

[13] 1987 Cri.LJ 743 (Bom).

the 'right to live' as well as 'right to end one's life' if one so desires. Justice P. B. Sawant said:"...who make suicide attempt on account of acute physical ailments, incurable disease, torture, decrepit physical state induced by old age or disablement, need nursing homes and not prison to prevent them from making the attempts again."

- ***P. Rathinam / Naghbhusan Patnaik* v. *Union of India***[14]: In 1994, a Division Bench of the Supreme Court comprising of Justices R. M. Sahai and B. L. Hansaria, while allowing petitions upheld the Bombay and Delhi High Courts' decisions (in Maruti Shripati Dubal's case and Sanjaya Kumar's case) and overruled Andhra ruling (in Chenna Jagdeshwar's case). The two petitioners assailed the validity of S. 309 of the IPC by contending that the same is violative of Articles 14 and 21 of the Constitution. While striking down S.309, IPC, the apex court said 'it is a cruel and irrational provision violative of Article 21 of the Constitution'. Expanding the scope of Article 21, the Court upheld that, 'right to life' includes 'right not to live a forced life'; i.e., to end one's life if one so desires.

- ***Gian Kaur* v. *State of Punjab***[15]: However in 1996, a five member Constitution Bench of the apex court overruled its decisions of 1994 in P. Rathinam / Naghbhusan Patnaik. Dismissing the petition challenging the constitutionality of S.306 on the ground that it punished an act which was nothing but assistance to a person in the enforcement of his fundamental 'right to die' under Article 21 as S.309 was held unconstitutional, the apex Court held S.306, IPC as constitutional and said that the 'right to life' doesn't include 'right to die'. Extinction of life is not included in protection of

---

14 AIR 1994 SC 1844.
15 (1996) 2 SCC 648 : 1996 Cri.LJ 1660 (SC).

life. The Court further held that S.306 constitutes a distinct offence and can exist independently of S. 309, IPC. There is no correlation between the two sections.

As regards S.309, IPC is concerned, the Court said that the 'right to life' guaranteed under Article 21 of the Constitution did not include the 'right to die' or 'right to be killed', and therefore, an attempt to commit suicide under S.309, IPC or even abetment of suicide under S.306, IPC are well within the constitutional parameters, and are not void or ultra vires. The 'right to death', if any, is inherently inconsistent with the 'right to life', as is death with life.

Srivastava Kaur* v. *Chandigarh Administration[16]: decided on 23-8-2009, when the Supreme Court refused to terminate a foetus of a mentally retarded woman who was a victim of rape and who had been brought up in a State-run orphanage, when the latter applied for the Court's permission for abortion. The Supreme Court, while rejecting the request of the State Administration and in reversing the permission granted by the High Court did so, not on a high moral ground that abortion was not permissible, but on the ground that a substituted judgment by the Administration cannot be applied, when the best interest principle that would guide shall be that the woman, although mentally retarded, had opted to retain the foetus and carry it to full term. It is most likely that the Supreme Court would have granted the woman permission to terminate the pregnancy as well, if the woman had wanted an abortion, having regard to the fact that the *Medical Termination of Pregnancy Act* makes possible for a rape victim to secure a legal abortion, if she so desired. It is a matter of interest that on 3-12-2009, the woman gave birth to a healthy child at a government hospital at Chandigarh. A

16 (2009) 9 SCC 1.

mentally retarded person, who was a rape victim, willed her child to come into the world with full life; whose will shall determine if Aruna, also a rape victim who was pushed to the vegetative state by a rapist, should be kept alive or exit the world? Do the above cases give any guidance? If they do not, the Supreme Court will tell you soon. Till then, it should engage interesting public debate, with due sensitivity to the patient lying (not dying, god willing) in the hospital.

1.10 Suicide Prevention

The view that suicide cannot be prevented is commonly held even among health professionals. Many beliefs may explain this negative attitude. Chief among these is that suicide is a personal matter that should be left for the individual to decide. Another belief is that suicide cannot be prevented because its major determinants are social and environmental factors such as unemployment over which an individual has relatively little control. However, for the overwhelming majority who engage in suicidal behaviour, there is a probably an appropriate alternative resolution of the precipitating problems. Suicide is often a permanent solution to a temporary problem. Mrazek and Haggerty's[17] framework classified suicide prevention intervention as universal, selective or indicated on the basis of how their target groups are defined. Universal interventions target whole populations with the aim of favorably shifting proximal or distal risk factors across the entire population. Selective interventions target subgroups whose members are not yet manifesting suicidal behaviour but exhibit risk factors that predispose them to do so in the future. Indicated interventions are designed for people already beginning to exhibit suicidal thoughts or behaviour.

---

[17] P.J. Mrazek, R.J. Haggerty, *Reducing Risks for Mental Disorders*: Frontiers for Preventive Intervention Research. National Academy Press: Washington DC; 1994.

1.10.1 Non Government Organisations (NGO's)

India grapples with infectious diseases, malnutrition, infant and maternal mortality and other major health problems and hence, suicide is accorded low priority in the competition for meager resources. The mental health services are inadequate for the needs of the country. For a population of over a billion, there are only about 3,500 psychiatrists. Rapid urbanization, industrialization and emerging family systems are resulting in social upheaval and distress. The diminishing traditional support systems leave people vulnerable to suicidal behavior. Hence, there is an emerging need for external emotional support. The enormity of the problem combined with the paucity of mental health service has led to the emergence of NGOs in the field of suicide prevention.

The primary aim of these NGOs is to provide support to suicidal individuals by befriending them. Often these centers function as an entry point for those needing professional services. Apart from befriending suicidal individuals, the NGOs have also undertaken education of gatekeepers, raising awareness in the public and media and some intervention programmes. However, there are certain limitations in the activities of the NGOs. There is a wide variability in the expertise of their volunteers and in the services they provide. Quality control measures are inadequate and the majority of their endeavors are not evaluated[18].

1.10.2 National Plans to Curb Suicide

The World Health Organization's (WHO's) suicide prevention multisided intervention study on suicidal behaviors (SUPRE-MISS), an intervention study, has revealed that it is possible to reduce suicide mortality through brief, low-cost intervention in developing countries.

---

[18] Vijaya Kumar L., Armson S., *Volunteer Perspective on Suicides : Prevention and Treatment of Suicidal Behaviour*. Hawton K, (ed.) Oxford University Press, 2005, p. 335.

There is an urgent need to develop a national plan for suicide prevention in India. The priority areas are reducing the availability of and access to pesticide, reducing alcohol availability and consumption, promoting responsible media reporting of suicide and related issues, promoting and supporting NGOs, improving the capacity of primary care workers and specialist mental health services and providing support to those bereaved by suicide and training gatekeepers like teachers, police officers and practitioners of alternative system of medicine and faith healers. Above all, decriminalising attempted suicide is an urgent need if any suicide prevention strategy is to succeed in the prevailing system in India.

10 th September - World Suicide Prevention Day: The World Suicide Prevention Day was formally announced on 10 th September, 2003. Each year the International Association for Suicide Prevention (IASP) in collaboration with WHO uses this day to call attention to suicide as a leading cause of premature and preventable death. The theme for the year 2007 is "*Suicide Prevention-Across the Life Span*". It calls attention to the fact that suicide occurs at all ages and that suicide prevention and intervention strategies may be adapted to meet the needs of different age groups. It is hoped that the theme will focus on vulnerable, ignored and stigmatized groups and also draw together researchers, clinicians, societies, politicians, policy makers, volunteers and survivors in a concerted.

1.11 Conclusion

First of all, we need to ask ourselves a question - "Does Article 21 of the Constitution guarantee a 'right to life' or a 'liability of life'?" Now if it is 'right to life', let's ask another question - "Is a right to be enjoyed or to be forced upon? i.e., can a person be forced to 'enjoy' a right to his detriment?"

According to me, with all due respect to the honorable courts and their decisions, the answer to the second question is "A right is to be 'enjoyed' and not 'forced upon'. A person can't be forced to 'enjoy' a right to his detriment".

But while making euthanasia illegal, we are doing nothing but forcing the 'right of life' upon a person for whom life is nothing but a burden, he no longer wishes to endure. We are forcing him to live a 'cursed life' which is full of mental and physical torture, pain and agony; a life which we already know is not going to subsist for long.

Suicide is a multifaceted problem and hence suicide prevention programmes should also be multidimensional. Collaboration, coordination, cooperation and commitment are needed to develop and implement a national plan, which is cost-effective, appropriate and relevant to the needs of the community. In India, suicide prevention is more of a social and public health objective than a traditional exercise in the mental health sector. The time is ripe for mental health professionals to adopt proactive and leadership roles in suicide prevention and save the lives of thousands of young Indians.

NARCO - ANALYSIS TESTS IN INDIA: MYTH AND REALITY

Anjani Singh Tomar*

1.1 Introduction

Recent judgment of Hon'ble Supreme Court has given rise to much debate on the validity and effectiveness of the Narco analysis tests. The test is widely used in the matters which involve grave criminal activities and at the same time require expert opinion. Indian Criminal justice system is based on the principle of "Fair Trial". Other way is to say standing on the adversarial system of the delivering justice to the victim. Here the accused is considered as innocent until proved guilty by the prosecution. Again the prosecution has to follow the principles laid down in the *Constitution of India, Criminal Procedure Code, Evidence Act* and the various guidelines issued by the Hon'ble courts. After that the prosecution sets its theory, plead before the various courts and then get the judgment delivered. Above all the judgment does not come so easily, it then depends on the Examination in chief, cross examination and then re examination. This procedure is for both the parties. After going through all these procedures the decision is finally given by the courts. Then again arguments are to be heard by both the attorneys (prosecution and defence) on the issue of the sentence. After completion of which do we find that the accused, if proved guilty beyond doubt could be sentenced to any punishment. Till this time he is considered innocent. Now with the advent of the concept of ***"Plea Bargaining"*** being incorporated in *Criminal Procedure Code* (section 265-A) that, one finds for the matters which are not very serious, can be given a chance for the accused to be condoned. Thus if one neutrally sees the judicial system in India, it is clear that it is

---

* Assistant Professor of Law, Gujrat National Law University, Gandhinagar, Gujarat.

quite fool proof and there is not any chance of any guilty to be given a way out or an innocent to be victimized. But that all depends on the presentation of the evidence and pleadings of the advocates before the courts. Courts in India are independent and impartial. No one can believe that if every thing goes by word to word of the law, there will be any misleading or wrong judgment. But the reverse is also true, there may be chances, where due to manipulated evidences, decisions might have flaws. Hence the degree of the truthfulness of the admissible evidences is must in Indian judicial system. Thus one can find that the authenticity of the evidences collected by the prosecution agency need to be checked and verified before admitting it in the court of justice. There are different ways suggested in the procedural laws of India. One of those requires the expert opinion, in which the persons who are skillful are expected to reveal their opinion for the courts, to find out the truth. Indian society has seen several hundred years of the slavery and manipulations of laws for the few. Hence, a better and flawless system was being developed by which nothing from the previous could be repeated. Thus making Indian Judicial system an unblemished system, where not even a single innocent could be punished. This was the basic objective in the mind of the founding fathers of our country, but later with the circumstances, where corruption become rampant in India, several bypasses were developed. Still, looking to other judicial systems in the world, India has honest prosecution agencies working toachieve justice. Although it is also true that many times the prosecution, (police) in India is known for many inhuman practices, but that is not always true in all the cases.

1.2 Narco Analysis Tests in India: History and Requirement

Narco analysis test is actually a term which was coined in 1936, by Stephen Horsley. This is actually a mid-way between the hypnotism and narcosis. Here the truth is to be discovered from the mind of the accused through the use of the drug. Now before going into the details of the process, let us find out the requirement of the technique where and why? The technique is not very commonly used in India,

but it was major tool in the West. This is quite often used to find and read out the intricacies of the mind of the person in question. There are several categories of criminals. The one which are naïve and are prone to crime due to the circumstances are the most common type of criminal in each society. But there is one more category which is most often called as recidivist or the habitual offenders. These have a tendency to carry out offences on regular basis. These may grow much grave when it comes to the offences which are anti-social or anti-human. These offenders have guilty mind and are discreet about their ***modus oprendii.*** As a result of which it becomes very difficult to trace these fellows. These types of silent criminals are the one, who are experts in the crimes similar to involvement in the economic crimes, social crimes, and technology specific crimes. Brusquely that can be described as the terrorist activities, mass frauds, online crimes etc. Such criminals have very discreet way of working and thus become difficult to adduce evidences against them. For example it becomes difficult, rather impossible to find the guilty of the bomb blast, as they work very quietly and uniquely. The types of evidences are merely circumstantial, which makes the work nearly unfeasible for prosecution agencies. Thus based on the weak evidences it is quite impossible to punish or restrict these blameworthy. To find alternatives, several additional techniques are thus thought of. These are the supplementary techniques by which prosecution can be complemented to reach the end of the incidence. Narco analysis, Brain mapping, Lie detector tests are such few additional techniques. As discussed before this is not a new technique, rather as old as 1936. The use has been variously done through out the known time. In USA this method was much common. But there was certain reservation to the judiciary; as a result it went to dormant stage. But very latest after the ***"twin tower attack"***, this was subject to reversal and now it is recommended to find the mental condition of accused. In India, its use can be traced not before 2001, where it was for the first time used by Bangalore situated Forensic Lab (FSL). The Narco analysis was done for the matter related with the tracing of the famous dacoit *Veerappan.* The judgment of Supreme Court (5th May2010) has come

just 10yrs after its use in the Indian judicial system, that it should not be in violation of article 20(3) of the Indian constitution. The test much in question is permitted in only few of the forensic labs of the country and the process is much hermetic, leaving not much space for any argument in its opposition. Its use is mostly recommended by the courts in only serious cases involving the circumstances not very clear about the truth brought to the courts.

1.3 Narco Tests and its Methodology

Human brain is a master piece, and nothing much can be discovered by the medical practitioners. The most common thing we can get about is that, it has two types, as conscious and subconscious. The later being more powerful then former. If there is any thing which a person wants to hide from the Universe might get it stored in his sub-conscious mind. The conscious mind may be tempered and concocted by the person himself, but it could be difficult in case of sub-conscious mind. If any method could be developed that may help to read the sub-conscious mind, which would help to bring out many mysteries. One such method is the Lie detector tests. And as witnessed by the author in the FSL itself, there is nothing self-incriminatory. The test is done in the observation of an expert person who could read the changes in the mind of the accused through the graph. This is done in absolute privacy of the person and expert talking together. There is a place, an outlet by which the members of the family or the lawyer of the accused could watch the process. There is nothing like one which may bring out any violation of privacy of the person. Thus it is just like any other normal tests of the human body which would involve the co-operation from the patient.

The narco analysis on the other hand involves the use of a drug being injected into the veins of the person which gives him a state between being awake or sleep. Usually the drug which is used is the Sodium Pentathol. This particular drug has a tendency to inhibit the essential amino acid present in the human body. By this way it induces sleep and some one can ask certain questions related to a meticulous thing stored in the sub-conscious mind can be traced. This method is very harmless

as it does not persuade any harmful effect as to the mind or body of accused. The drug is just a minor stupefying one. The sub conscious mind of the accused is to be traced not very strongly or in any way endangering to the life and liberty of the person. It is just a smart manner to read the mind through certain questions. When the narco tests are being conducted it is only with the doctor and the patient who could be there in the room. The questions are not very intricate, rather just suggestive. The proper manner to address this method would be to say this as the ***Psychological*** test for the accused. Here the expertise of the person handling the questions is very important. Along with this is the involvement of the person to any drug or its reaction is also to be carefully monitored. The drug is used to induce minor sleep into the brain of the person, so that he could not tell lies or about the hidden facts. Or that the person would not have the control to let the lie slip out of his mouth. The other part of it would be to say that if a person so wishes, he can very well go through with this exercise and avoid being be detected. It can be very well understood that it is just sleep inducing drug which is given to the person to loosen his control over the sub-conscious mind and with the help of specially designed questions he can be made to reveal the truth knowingly or unknowingly. The drug is administered very carefully and the whole test, like other medical tests is carried out with the due permission of the accused. Moreover, as the part of the family or his lawyer could also be present at the test side, and *most importantly, every narco analysis takes place in camera.* That is to say the accused always has a right to say that he had been forced for carrying out the said test.

1.4 Myths and Realities of the Narco Tests

In India, the famous judgment of 5th May 2010, has initiated a debate as to the application of Narco tests in deciding the fate of an accused. The myths are so many and they are so rampant that the truth is some where obscure in it. The very first myth is that this test is actually a part of the third degree methods being adopted by the police officers. The reality is that the third degree methods (so called) are always based on the torture to the body of the accused. It is carried out at such places which are

never disclosed to the common men. At the same time, the police officers are wholly in charge of the same. Now comparing this to the narco tests, one find that the tests are being carried out in the Forensic lab. It is monitored by the lawyer or the family member of the accused. This does not involve any police officer, not even by chance. The test can not be called as affecting the mind and body of the accused as it does not lead to the any harmful affect , more then which is caused by the accused himself/herself consuming the products like tobacco or other drugs. Moreover none of the tests are carried out without the permission of the courts.

The second myth related to this is that, narco test are to be considered as against article 20(3) of the Constitution. That is to say it engrosses violation of the fundamental right of the accused. But the reality is that the test are always conducted with the prior permission of the accused and that too in the extreme circumstances where the matter so requires. For example in the matter of Nithari scandal, or Stamp scam. If there is cardiogram being taken of an accused with his permission and its result goes into show that the person has falsely got the medical relief, it would be similar to the narco test where it can be revealed that the accused is actually involved in some crime but not letting the world know about it. If every thing which the accused say would be violation of the Article 20 (3) then why do we have the provision of confessions in the *Evidence Act*? Article 20 (3) talks about the forced part to the confession, but in case of the narco test, it is simply allowable by accused. As far as drug consumption is concerned it is never of the level where the accused looses complete control over his mind. The author strongly believes and advocates that it is not violative of any fundamental right. Imperative question could be that once the person in query has been involved in the gross violation of others fundamental right, how can he/she be worthy of his/her own fundamental right? If the punishment is not the only remedy that one can give to victim, then why going for rights restored to the accused? Another aspect is that if every thing starting from the statements of accused being made to Police, to the tests results are not to be made admissible, then how are prosecution agencies going to work? What will happen to their morals and confidence when one finds that it

is all in vain? There must be some weapon in the hands of the agencies which can motivate them to work.

Third myth is that the test is total violation of the human rights of the accused and he is tortured to the level he tells the truth. Some time the analysts also put answers into the mouth of latter and thus, he/she can be easily trapped by the prosecution agencies. The reality is that all the narco tests are being conducted with court permission, and according to the guidelines of the National Human Right Commission that is, NHRC. Now with this and the *in camera* recording of the whole test leaves no room for any doubt or the place to consider it any where violative of any human right as well. The NHRC could also trace the violation as well. What is imperative here is that, the test is being conducted where it is expedient to do so. Where in cases like the Aarushi murder case, it was difficult to find the truth of her parents, it was being adjudicated. The judiciary of India is independent and impartial as well. One can not expect that other then the truth revelation could be the motive behind such test. The consent of the accused is also recorded with Judicial Magistrate, making it even more comprehensible.

The unanswered quest in these states of affairs: There are several integral aspects of the concerned test which need to be answered in the light of the latest judgment. Although the debating is good but the quest it left for us to read, study and teach is difficult. With narco tests it becomes easy for the prosecution agencies to trace the plots of the further crimes in society. As it happened in case of the narco test of the accused of the Hyderabad blasts. The success story is also there with the western countries. Now if the process is harmless and it is without torture, plus that it is easy in disclosure of the crimes, this should be promoted from the prosecution agencies as well. Otherwise not much is left in the hands of the investigation of the crimes.

There are many Human right protection groups that are against the test. They blame it with being inhumane and also against the fundamental right of the accused. The contention upheld is that the Human Right of every human are to be protected. Once the persons like Manender

Singh Pandher, or Telgi or Godhara incidence are talked about, who are involved in gross violation of the human rights of other individuals, why the activists come in support of the victims? Now a days it has become very strange that laws in India are framed which are totally accused oriented. If the legislature does not think about the victims, our whole system will be disturbed. The tests if are to be condemned or looked at with a pessimistic viewpoint, then entire criminal investigation would eventually become a part of the blame game. Then it would be very soon that our justice system would be protecting only the criminals, as their Human Rights are more important! The banning or vestigial use of the forensic test would bring our community no where. No exaggeration to say that for making a peaceful society, deterrence is a vital factor. By up keeping Narco tests as regular feature with the crime investigation would definitely help us reach our goal. To maintain morale of investigation in higher spirits it is required that they should be given concrete weapons. Narco tests, though not directly but indirectly prove a boon to curb the crimes which are committed in dark and with absolute secrecy. The major reason for its non acceptance by the pubic is lack of awareness among common men. If it is included as the part of the training of the prosecuting agencies, or if it is made to study by the law students, the problem could be solved. Many times it also happens that the defence lawyer takes the plea of being inhuman to his client as most of the persons associated with the adjudication are not aware of its nature.

1.5 Conclusion

Narco analysis has come up as an additional tool in the investigation of crimes. Normally it is prescribed in those cases where the courts find it totally impossible to find the evidences. The tests are conducted according to the guidelines issued by the National Human Right Commission in India. Along with this, these are only conducted upon the accused once he/she permit it to do so. Although some time they may come across as to the misuse of any method, which is there for every development in human world. But its utilization for the investigation can't be undermined. The far reaching things may not

have been obtained so far, but none the less its utility is an accomplishment. Other then this, there is also a possibility that the person under the surveillance may be proved non guilty. The tests are to find out the hidden truth of the mind, nothing defamatory or derogatory. Once it comes to the application of law, there is only one vital factor that is the integrity and independence of the Nation and welfare of the community. Hence there should be no disparity for its application.

Narco tests were never taken in India as weapons against the person; rather it is the tool to implement law. The use of it is not very late, only since 2001 that it is allowed in country. There are only few reported cases where the police might have used it for finding the truth form non staid criminals. That action is also condemned largely. Yet the importance of the tests could not be undermined. The only remedy which can be thought of is the application with some precautionary measures. The test could be conducted in presence of the Judicial Magistrate or Commission issued by him. Since the whole process is completed within in camera proceedings, the same could be produced in the trial with the accused being one to witness. The lawyer is allowed to be with his client, so he should be allowed to object the type of questions that are put to the patient. As the judicial magistrate would be present there, he could allow or disallow the same. If the Magistrate could not visit the lab, he can join with video conferencing. Secondly, it should also be ensured that the evidence collected through the narco tests never be used for defamation or defacing the personality of the accused.

The major reason for the non acceptance of this process in the system is the lack of awareness on the part of the common men and the adjudicatory bodies themselves. There is much about the process which is actually in dark, few people know it. The subject should be made more popular among the legal fraternity and among the students of law as well. This will help to address the issue properly. Other aspect could be the restriction of information gained for any other matter, other then the one which requires the narco analysis. Thus

summarily it could be understood that there are myths attached to the narco tests in India. But they do not have much substratum. The only thing which is required here is the proper education about the subject. This would solve much predicament about the whole process as well. But it is highly recommended by the author that it should be retained in Indian judicial system. The decision should be welcomed with the sense that nothing could be made forceful.

APPRAISING RAINBOW RIGHTS : THE MORAL AND CRIMINAL QUARTERS OF HOMOSEXUALITY IN INDIA

Ashish Virk*

1.1 Generalities of Rainbow Rights

In itself, homosexuality is as limiting as heterosexuality: the ideal should be to be capable of loving a woman or a man; either, a human being, without feeling fear, restraint, or obligation. Simone de Beauvoir (French Writer and Feminist)

Why rainbow? Rainbow became the official symbol of modern lesbian and gay rights movement in 1978, when Gilbert Baker, a renowned gay seamstress in San Francisco, conceived of the rainbow flag as a worthy symbol for San Francisco's gay pride parade. The gay movement claimed the rainbow, and it remains the foremost symbol of gay pride, replacing the pink triangle, which was used to identify homosexuals in Nazi Germany and which has always carried negative connotations of the homosexuals as victims. In her book *Another Mother Tongue*, Judy Grahn explains the symbolism of the rainbow in the lesbian and gay movement in several ways. Moreover, some in the movement embrace the rainbow as a fitting tribute to much loved gay icon Judy Garland, who gave the most well known rainbow song ever, a song whose lyrics capture the hope of a better world (Grahn, 1984).[1] ***Why Rights?*** Rights, because the focus of the paper is also on legal arguments, those have been made in courtrooms in several countries. The rights are constitutionally granted to all citizens and persons. Lesbians and gay men are citizens and persons; and yet, as the law has developed, gay men and lesbians have not enjoyed

---

* Assistant Professor, Panjab University Regional Centre, Civil Lines, Ludhiana, Punjab.

1 Grahn Judy, *Another Mother Tongue : Gay Words, Gay Worlds*, Boston : Beacon Press, 1984, pp. 272-73.

the same constitutional rights or protections as they would have enjoyed had they been non-gay persons (Cain, 2000).[2]

'Homosexual' is an adjective, not a noun. It describes, in part, as adjectival modifier, a person the dominant trait of whose *sexualis* inclines him to seek the satisfaction of his sexual drives in relationships with persons of his own sex. The term homosexuality, which is so casually used today in almost every day vocabulary, came into being only in the late 19th century in Europe when discussions on the varied expressions of sex and sexuality became acceptable in academic circles. The term was used to describe "morbid sexual passion between members of the same sex." It was declared 'unnatural' by colonial laws, as unnatural as casual sex between men and women that was not aimed at conception (Baird, 1995).[3] The origin of homosexuality means exploring the origins of all sexual preference. Though there remains much confusion about the origin of homosexuality, broadly two perspectives have been developed. Different theories which can be placed into these two perspectives are briefly explained below.

The Biological Perspective: This perspective has gained support in recent years with research that has suggested that homosexual orientation may be connected to or may reside in a particular gene or particular physiological makeup. Some researchers have explored the chemical and hormonal bases of homosexuality. Roper believes that homosexuals' orientation may be determined by testosterone action on the brain. A reduction in testosterone levels results in reduced proliferation of hypothalamic nuclei, which are said to play a vital role in psychosexual orientation (Roper, 1996).[4]

---

2 Cain Patricia, *Rainbow Rights : The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement*, Colorado: West-View Press, 2000, pp. 2-3.

3 Baird Robert, *Homosexuality : Debating the Issues.* New York: Prometheus Books, 1995, p. 225.

4 W.G. Roper, "The Etiology of Male Homosexuality", *Medical Hypothesis*, 1996, 46, pp. 85-88.

LeVay also believes that brain development may determine whether a person has homosexual tendencies or not. He pinpointed that a cell group, called INAH3 (derived from third interstitial nucleus of the anterior hypothalamus), is twice as large in men as in women. In autopsies of 19 homosexual and 16 heterosexual men who died of AIDS, he found that the cell group was two or three times larger in the heterosexual men than in the homosexuals and in some of the gays the cell group was altogether absent (LeVay, 1994).[5]

A research conducted at the National Cancer Institute, USA, by a team led by Dean Hamer is considered perhaps the best-known work on this topic. The research held that there is possibility of a genetic basis to sexual orientation, especially in the region of human DNA known as Xq28. The team concluded that there may be at least one gene that is inherited by a son from his mother that helps to determine whether the son is predisposed to be heterosexual or homosexual. Presumably, a common version of the gene increases the likelihood that the son will be heterosexual, and an uncommon version of the gene increases the likelihood that the son will be homosexual (Hamer, 1994).[6]

The Learning Perspective: This perspective represents an alternative, but not completely separate, explanation of homosexuality. Many social scientists believe that although it has a biological basis, sexuality is a social construction that has been learned in interaction with others. It is not dictated by body chemistry or anatomical structures, but by experiences, social situations, and social expectations. Male and female are socially constructed categories, as it is the conduct that arises from these roles. In other words, people learn to become homosexuals through the same general processes by which they learn to become heterosexual. It is the content of this learning that differs. Social scientists believe that

---

5 Le Vay, Simon and Dean Hammer, "Evidence for a Biological Influence in Male Homosexuality", *Scientific American*, 1994, 270, pp. 44-45.

6 Hamer Dean, *The Science of Desire: The Search for the Gay Gene and the Biology of Behaviour*, New York: Simon and Schuster, 1994, p. 21.

homosexuality is much more complicated than biological model indicates (Plummer, 1975).[7]

The Committee on Public Health of the New York State Academy of Medicine declared that homosexuality is indeed an illness, and that the homosexual is an emotionally disturbed individual who has not acquired a normal capacity to develop satisfying heterosexual relationships. However, later, the American Psychiatric Association in its Diagnostic and Statistical Manual proclaimed that homosexuality is not an illness and that homosexuals are not in need of special by virtue of their being homosexuals (Bayer, 1981).[8] Hence, beyond these general statements, it is not possible to provide the definite answer about the causes of homosexuality; moreover, to go into the details is not the motive of the present paper.

1.2 Is Homosexual Behaviour Immoral? A Chronological Exchange

To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Warren E. Burger ***(Chief Justice, US Supreme Court)***

Historically viewing, homosexual behaviour is often considered immoral because ancient societies were religiously regulated especially Europe and America. The proceeding part of the paper will highlight some of these events and will also remove the veil from the myth that homosexuality is a European concept which came to India with the advent of the British, though the fact is that such type of relations were much prevalent and accepted in the ancient society of India.

---

7 Plummer Kenneth, *Sexual Stigma : An Inter-actionist Account*, London: Routledge and Kegan Paul, 1975, p. 30.

8 Bayer Ronald, *Homosexuality and American Psychiatry : The Politics of Diagnosis,* New York: Basic Books, 1981.

In Europe: The concept of homosexuality did not exist similar in ancient societies as it does now in modern era. The Hebrews and the Greeks had no words for the homosexuality. Ancient Greek and Roman cultures permitted sexual activity with either sex, although exclusive sexuality with the same sex may have been rare and considered a bit unusual. In a survey Ford and Beach studied 76 folk societies of Europe and found that among 49 of them, 'homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community' (Ford, 1951)[9]. Commenting on religious aspect, some observers hold that negative position of the Christian Church on homosexuality has been longstanding and consistent; whereas others claim that homosexuality was tolerated in the Christian traditions until the mid-thirteenth century, after which the church adopted a more negative view. Soards points out that regulation in Spain about 700 A.D. held that homosexuals were to be castrated, an edict reinforced later by the declarations of the King of Spain at the Council of Toledo. By the twelfth century, homosexuals were ordered to show through confession and penance that they were worthy of redemption from their shameful sin of sodomy. Homosexuality did not play a prominent role in ecclesiastical debates during the reformation, but by the twentieth century, Protestant thought underwent a marked change. Interestingly, homosexuality was referred to as moral perversity. Theologian Karl Barth described homosexuality as a 'physical, psychological, and social sickness, the phenomenon of perversion, decadence, and decay, which can emerge when man refuses to admit the validity of the divine command' (Soards, 1995)[10].

Religious disapproval of homosexuality had an impact on legal provisions. Emperor Justinian condemned homosexual offenders to death in 538 A.D., and this portion of the Justinian Code served as the basis for the punishment of homosexuality in Europe for the next 1300 years.

---

9 Ford, Frank Beach, *Patterns of Sexual Behaviour*, New York: Harper and Row, 1951, p. 130.

10 Soards Marion, *Scripture and Homosexuality : Biblical Authority and the Church Today*, Louisville, K.Y. : Westminster John Knox Press, 1995, pp. 38-43.

During most of the time, homosexual acts were dealt by ecclesiastical punishments, and not by the government or courts in England, often tortured followed by death. By 1533, the jurisdiction of such offences was vested in royal courts, and the English statue enacted at that time provided for death without benefit of clergy as claiming clergy was typically allowed for offences deemed less serious. This punishment remained until the nineteenth century when it was reduced to life imprisonment. In France, as late as the mid-eighteenth century, homosexuals were burned at the stake. The Napoleonic Code, enacted after the French Revolution, omitted mention of homosexual acts, a situation that still prevails in many European countries. During the course of this century, other European countries maintained strong legal prohibitions against homosexuality, but they were infrequently enforced. Today, although laws seek to protect young people from homosexual acts and to protect public decency, most continental European countries do not consider homosexual acts committed in private by consenting adults to be criminals. Even in those countries where the behaviour is defined by law as criminal, violators are generally not prosecuted (Meier, 2006)[11].

In America: As in Europe, American laws were heavily influenced by religious admonitions. American statutes maintained a similar moral outrage, if not the precise wording of biblical injunctions. The 1837 North Carolina statue makes reference to 'the abominable and detestable crime against nature, not [to] be named among Christians' (Dworkin, 1987)[12]. Hence, sodomy was generally considered to be a crime both against law and against nature, until 1962, when Illinois became the first American state to repeal the criminal sodomy statue and finally in 2003 the U.S. Supreme Court[13] declared all sodomy laws to be unconstitutional;

---

11 Meier Robert, Gilbert Geis, *Criminal Justice and Moral Issues*, Los Angeles: Roxbury Publishing Company, 2006, pp. 122-123.

12 Dworkin Andrea, *Intercourse*, New York: Free Press, 1987, p. 153.

13 In 1998, police of Houston, Texas, responded to a possible weapons disturbance. Upon entering the residence, they observed John Lawrence, the resident and the other man, Tyron Garner, engaging in sexual act. The men were arrested and charged and convicted by a justice of peace under a Texas statue of engaging in 'deviate sexual intercourse with a member of the same sex.' The Supreme Court

however, it is still not religiously and socially accepted by people and considered an immoral and unnatural act.

In India: There are basically three sources to find out if homosexuality existed in India, and in what form, these are: images on temple walls, sacred narratives and ancient law books. Construction of Hindu temples began around the sixth century of the Common Era. Construction reached climax between the twelfth and the fourteenth century when the grand pagodas of eastern and southern India such as Puri and Tanjore came into being. Amongst scenes from epics and legends, one invariably finds erotic images including those that modern law deems unnatural and society considers obscene. Similar images also embellish prayer halls and cave temples of monastic orders such as Buddhism and Jainism built around the same time. In Khajuraho, there are images of either women erotically embracing other women or men displaying their genitals to each other. These images depicts that the idea of same-sex and what the colonial rulers termed unnatural intercourse did exist in India. In Indian epics and chronicles, there are occasional references to same-sex intercourse. For example, in the Valmiki Ramayana, Hanuman is said to have seen Rakshasa women kissing and embracing those women who have been kissed and embraced by Ravana. The Padma Purana is the story of a king who dies before he can give his two queens the magic potion that will make them pregnant. Desperate to bear his child, the widows drink the potion, make love to each other (one behaving as a man, the other as a woman) and conceive a child. In the Mahabharata, Drupada raises his daughter Shikhandini as a man and even gets 'him' a wife. According to a folk narrative from Koovagam in Tamil Nadu, the Pandavas were told to sacrifice Arjuna's son Aravan if they wished to win the war at Kurukshetra. Aravan refused to die a virgin. As no woman was willing to marry a man doomed to die in a day, Krishna's help was sought. Krishna turned into a woman, married Aravan, spent a night

---

with 6-3 vote, overturned the conviction ruling that the petitioners have the right to engage in private conduct, in consensual sexual behaviour, without government intervention. *Lawrence* v. *Texas*. [539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003)].

with him and when he was finally beheaded, Krishna mourned for him like a widow (Pattanaik, 2009)[14]. An overview of temple imagery, sacred narratives and religious scriptures does suggest that homosexual activities existed in ancient India, though not part of the mainstream, its existence was acknowledged but not approved.

The popular belief persists that homosexuality is an aberration imported from modern Europe or medieval West Asia, and that it was non-existent in ancient India, is hence wrong. This is partly because same-sex love in South Asia is seriously under-researched as compared to East Asia and even West Asia. With a few exceptions, South Asian scholars by and large ignore materials on homosexuality or interpret them as heterosexual. As a result, in his introduction to *The Gay and Lesbian Literary Heritage,* 1995, Editor Claude Summers claims that the silence of ancient and medieval Indian literature on this subject perhaps reflects the generally conservative mores of the people. Kidwai's and Vanita's *Same-Sex Love in India: Readings from Literature and History*[15], is a collection of extracts translated from a wide range of texts in fifteen Indian languages and written over a period of more than two millennia. They found that same-sex love and romantic friendship have flourished in India in various forms, without any extended history of overt persecution. These forms include invisible partnerships, highly visible romances, and institutionalized rituals such as exchanging vows to create lifelong fictive kinship that is honoured by both partners' and families. They demonstrate the existence in pre-colonial India of complex discourses around same-sex love and also the use, in more than one language, of names, terms, and codes to distinguish homoerotic love and those inclined to it. This is also confirmed by Sweet and Zwilling's[16] work on ancient Indian medical

---

14 Pattanaik, Devdutt, *Did Homosexuality Exist in Ancient India.* For more information visit, < http://www.gaybombay.org/?p=560> accessed on 20th November, 2009.

15 Saleem Kidwai, Vanita Ruth, *Same - Sex Love in India: Readings from Literature and History*, New Delhi, Macmillan, 2002.

16 Sweet Michael, Leonard Zwilling, "The First Medicalization : The Taxonomy and Etiology of Queers in Classical Indian Medicine", *Journal of the History of Sexuality,* 1993, p. 590.

texts. Kidwai also found evidence of male homoerotic subcultures flourishing in some medieval Indian cities. Like the erotic temple sculptures at Khajuraho and Konarak, ancient and medieval texts constitute irrefutable evidence that the whole range of sexual behaviour was known in pre-colonial India. It was in nineteenth-century that British administrators and educationists imported their generally anti-sex and specifically homophobic attitudes into India. Under colonial rule, what used to be a minority puritanical and homophobic voice in India became mainstream. The new homophobia was made overtly manifest by the British law of 1860, under Section 377, Indian Penal Code, which is still in force in India, whereas homosexuality between consenting adults was decriminalized in England in 1967 (Kidwai, 2002).[17]

1.3 Is Homosexual Behaviour Criminal?

The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Justice Kennedy (Lawrence v. Texas)

There are a number of sexual acts that appear to demand a legal response, such as those with involuntary partners, those with children regardless of their consent etc.; however, the focus of the paper will be on the homosexual relations between the consenting adults. Despite one's opinion on the issue, the fact is that sexual acts associated with homosexuality have been a subject of criminal law in the India and elsewhere, and this situation has existed for a long time. The proceeding part of the paper will discuss the legal status of homosexuality in India.

1.3.1 Unnatural Offences under Section 377 of IPC

The IPC was an important experiment in the larger colonial project along with exercises in codification like CPC and Cr. P.C. to apply the collective principles of common law in British India. T.B. Macaulay, the President

---

[17] Kidwai and Vanita Ruth, "Homosexuality in India : Past and Present". *IIAS Newsletter*, 2002, pp. 10-11. For more information visit,<http://www.iias.nl/iiasn/29/IIASNL29_10_Vanita.pdf> accessed on 20th November, 2009.

of the Indian Law Commission in 1835, was charged with the testing task of drafting these laws. Section 377's predecessor in his first draft of IPC was Clause 361, which defined a severe punishment for touching another for the purpose of unnatural lust[18]. He abhorred the idea of any debate or discussion on this heinous crime. The final outcome to prevent injurious activity evolved the following text.

'Whosoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section'.

The lack of any debate, suggesting the creation of this definition purely out of the discretion of Macaulay, also explains the sheer vagueness and ineffectiveness of the language of the proposed anti-sodomy section. The concept of unnatural touch was too vague to be an effective penal stature, and the final draft was a substantial improvement on the initial draft (Narrain, 2004)[19]. However, Section 377 in its final draft is still shrouded with euphemisms, though the Judiciary from time to time had tried to interpret these ambiguities in an explanatory way. Some of the ambiguities are explained below.

Blurred Objective Leading to Exploitation by Police: The objective of Section 377 has remained unclear. The offence was introduced into British India with a presumption of a shared Biblical morality. Historians have speculated that there were concerns by the British that not having wives

---

18 Clause 361: Whosoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any other person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to 14 years, and must not be less than two years. Report of the Indian Law Commission on the Penal Code. October 14, 1837. pp. 3990-91.

19 Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Delhi: Books for Change, 2004, p. 49.

would encourage their Imperial Army to become 'replicas of Sodom and Gomorrah' or to pick up 'special oriental vices' (Vanita, 2002)[20]. The controversy over the Section started with the eye-opening cases of Khairati,[21] Noshirwan,[22] and Minwalla[23]. All the three cases deal with idea of bodies marked with signs and appearances that indicate the possibility of committing sodomy. The section was used in the above cases against men who gave appearances of being homosexuals and therefore likely to commit the act, but haven't actually committed the offence. This has with the passage of time legitimized the actions, abuse, and harassment caused by Indian Police against the homosexuals in the present day India. These three cases could be one of the first examples of policing of homosexuality or sexually transgressive behaviour in India as prior to British rule there was no aggressive policing of homosexuality (Kidwai, 2000)[24].

'Sodomy' not Defined: The section does not define the specific offence of sodomy. This ambiguity in Section 377 has left it purely to the imagination of the judges to apply it to specific cases and also, in that process, determine what kinds of sexual acts qualify as unnatural offences. Till 1925, the courts found that the definition of carnal intercourse against the order of nature could not be extended to include acts of oral sex and

---

20 Vanita Ruth, *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*, London: Routledge, 2002, p.17.

21 In this case a eunuch was kept under constant supervision by the police and arrested upon being found singing dressed as a woman. The only incriminating evidence was the distortion of the orifice of the anus into the shape of the trumpet- a mark of habitual sodomite. *Queen-Empress* v. *Khairati*, 1884 ILR 6 ALL 204.

22 In this case two adult men were seen walking into the house of one of them. The neighbour peeped through the door panel and noticed that the two were attempting to commit sodomy. He took them to police station. The two was released and were not convicted as the act of sodomy was never completed. *Noshirwan* v. *Emperor*, AIR 1934 Sind 206.

23 In this case the accused was caught in the act of oral sex with another man in the back of the truck, in a semi-public place. Minwalla in a desperate attempt to redeem him, submitted to a medical examination to convince the court that his anal orifice was not shaped like a funnel, which is a sign of a habitual sodomite. The court confirmed the conviction with the reduced sentence, taking into account his physical attribute. *D.P. Minwalla* v. *Emperor*, AIR 1936 Sind 78.

24 *Supra note* 15, pp. 12-15.

therefore dismissed the cases as 'the act must be in that part where sodomy is usually committed'[25]. The court then extended the ambit of Section 377 and held that the section is not limited to 'coitus per anum' and can also be extended to 'coitus per os' and concluded that sin of Gomorrah is no less carnal intercourse than the sin of Sodom[26]. Sodomy hence, became a constructive element of the section along with the possibility of other sexual acts. The courts have now started using two essential parameters under the section. *Firstly,* existence of penetrative intercourse, with an orifice. *Secondly,* impossibility of conception, thus against the order of nature (Gupta, 2006)[27]. However, Lohana's Case[28] held sex for procreation only as an outdated theory, and considered oral sex to be a criminal offence. Hence, what exactly is covered under the term 'sodomy' by the law still remains unclear and ambiguous, creating a kind of mental and physical insecurity among the homosexuals.

Certain Terms Ignored by Law: Section 377 is applied to vague offences without defining the terms like carnal intercourse, order of nature, unnatural offences, sexual perversity etc., which now constitutes an important part of this section, (due to judicial interpretations) and are often used as synonym to homosexuality[29]. In Govindan's Case[30], for example, the court added thigh sex into the list of unnatural offences. Moreover, the court tried to define term 'sexual perversity', with the aid of Havelock Ellis and Corpus Juris Secundum, as an 'unnatural conduct performed for the purpose of sexual satisfaction both of the active and passive partners'[31], but the growing linkage between sodomy, sexual perversity, and homosexuality sans a discussion by the law makers, because even

---

25 *Government* v. *Bapoji Bhatt*, 1884 (7) Mysore LR 280.
26 *Khanu* v. *Emperor*, 1925 Sind 286.
27 Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals", *Economic and Political Weekly*, 2006, pp. 4815-23.
28 *Lohana Vasantla and Others* v *The State*, AIR 1968 Guj 252.
29 *Fazal Rab Choudhary* v. *State of Bihar*, AIR 1983 SC 323.
30 *State of Kerala* v. *K Govindan*, (1969) Cri. LJ 818.
31 *Lohana Vasantla and Others* v. *The State*, AIR 1968 Guj 254.

performing consensual sexual acts in a private space, equates homosexual with rapists by the courts[32].

Homosexuals and Heterosexuals not Differentiated: The section applies to both homosexuals and to heterosexuals, however over the years the general offence of sodomy became a specific offence of homosexual sodomy only, an important difference never reflected in IPC unlike other international laws which specifically differentiate between the two[33].

Hence, the outdated approach of Section 377 made during the British regime in accordance with their religious penchant, the wooly language, and hodgepodge of interpretations made by the Judiciary had ultimately made criminals out of homosexuals. The fear and apprehension of arrest by the police and harassment faced thereafter, is against their basic human rights enshrined in the Indian Constitution, which needs immediate consideration.

1.3.2 Homosexuality and Article 14 of Indian Constitution

Article 14[34] guarantees equality and also focuses on intelligible differentia, according to which there should be clear nexus between the enacted provisions or act and its objectives as for what purpose they have been enacted. The Supreme Court has held that the statue is void for vagueness if its prohibitions are not clearly defined. The provisions enacted should be clear so that persons affected know the true intentions[35]. Further, the court has held that where a law does not offer a clear construction and the persons applying it are in a boundless sea of uncertainties and the law prima facie takes away a guaranteed freedom,

---

32 *Pooran Ram* v *State of Rajasthan*, 2001 Cri. LJ 91.

33 Section 13 of the *Sexual Offences Act*, 1956, of England says, 'it is an offence for a man to commit an act of gross indecency with another man.'

34 Article 14 of the Indian Constitution Provides : 'The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.'

35 *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569.

the law must be held to offend the Constitution[36]. Hence, the above observations can be applied to Section 377, as it is vague and does not clearly define its prohibitions. Moreover, such vagueness leads to its arbitrary application especially by the agencies of criminal justice system.

1.3.3 Homosexuality and Right to Privacy

The international law through various documents like Universal Declaration of Human Rights, 1948,[37] International Covenant on Civil and Political Rights, 1966, to which India is a party,[38] and The European Convention on Human Rights[39] refers to right to privacy. However, a debate that whether homosexual behaviour of an individual comes under right to privacy and whether it should be criminalized or not, was heated by J.S. Mill's Harm Test, which argued passionately for a private space, free from state interference, even if it involves activities that members of a society don't like, as long as they don't harm anyone. In 1954, in Great Britain, the Secretary of State for the Home Department and the Secretary of State for Scotland appointed a committee to consider the criminalization of homosexual sodomy and prostitution. Based on the intense examination of witnesses and private deliberation, the committee ultimately issued the Wolfenden Report, 1957, recommending that homosexual behaviour between consenting adults in private should not be a criminal offence. Shortly, after the report was issued, Sir Patrick Devlin delivered a public lecture challenging these recommendations. This

---

36 *K.A. Abbas* v. *Union of India*, AIR 1971 SC 481.

37 Article 12 states: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

38 Article 17 refers to privacy and states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, or to unlawful attacks on his honour and reputation.'

39 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.'

lecture sparked the famous Hart/Devlin Debate over the role of morality in law. Devlin took the position that law properly expresses and enforces the moral standards of the community. Hart, relying on J.S. Mill's harm principle, took the position that the law ought to prohibit only those acts that harm to others. The committee's recommendation that private homosexual acts be decriminalized was finally adopted in 1967 in Britain (Cain, 2000)[40]. The report affected law reforms of various countries like USA, Canada etc., but not India.

Indian courts have protected Right to Privacy under Article 21[41] of the Constitution, however never had the opportunity to decide the question of state enforcement of private immorality. The lawyers in India had time and again pleaded England's legal stand on homosexuality to protect their client's interests and to bring some leniency for them however, judges have recorded their submissions referring to Hart/Devlin debates, which states that law should continue to support a minimum morality.[42] Though the Judiciary has not made its stand clear expressly on homosexuality, hence, Section 377 clearly violates the right to privacy guaranteed by the Constitution as it peeps into the houses of people without their consent and still punishes them for their private matters.

1.3.4 Homosexuality and Right to Dignity and Respect

The Labouchere Amendment of U.K. was famously termed as Blackmailer's Charter, because this anti-sodomy law made through the amendment was used notoriously by the blackmailers. Similarly, in India the Section 377 is being used to blackmail the homosexuals. A local community group in Mumbai called Gay-Bombay had been receiving numerous stories, experiences and complaints by gay men about their

---

40 Cain Patricia, *Rainbow Rights : The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement*, Colorado: West-view Press, 2000, pp. 136-137.

41 *Kharak Singh* v. *The State of U. P.*, AIR 1963 SC 1295, *R. Rajagopala* v. *State of Tamil Nadu*, (1994) 6 SCC 632.

42 *Anil K. Sheel* v. *The Principal, Madan Mohan Malvia Engg. College*, AIR 1991 All 120, para 15.

personal experiences with blackmailers. These stories typically involve entrapments by the police, when innocent gay men only hoping to meet another man for social contact, are duped into giving out a lot of money under threats of disclosure of their homosexuality. Ironically, under Sections 388 and 399 of IPC, if a person extorts money by accusing another of committing sodomy, he can be punished for up to life. Hence, the psychological and emotionally challenging effect of anti-sodomy laws on the personal lives of homosexuals is disappointing. Most of these homosexuals are under-confident, silent, and completely closeted about the reality of their queer desires. Blackmailers in the police are fully aware of these men who are terrified and consumed by the fear of the law to file a complaint against the erring policemen. A glaring fact that limits all the efforts of Gay-Bombay is that none of the victims of the crime have been able to come out and file a complaint, out of fear that Section 377 may, in some manner, become applicable to them (Gupta, 2006)[43]. The Supreme Court has held that 'every act that offends against or impairs human dignity would constitute deprivation pro tanto of his right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.'[44] Hence, the section affects dignity of homosexuals as it exposes a person of his sexual orientation and also punishes him and sends him to prison which violates his right to live a dignified life.

1.3.5 Homosexuality and Principle of Consent

'Consent of the victim is immaterial' and homosexuality is often equated with rape by the judiciary.[45] The term 'voluntary' in Section 377 makes consent irrelevant and also does not exclude from its ambit the consensual based sexual activities, even though two consenting adults may indulge in such activities within a private sphere. However, most of the studies focusing on the actual application of Section 377 of IPC show that in most

---

43 *Supra note* 27, pp. 1819-21

44 *Francis Coralie Mullin* v. *Administrator, U.T. of Delhi,* (1981) 1 SCC 608, at p. 619 para 8.

45 *Justice Pasayat in Mihir* v. *State of Orissa,* (1992), Cri.LJ 488.

cases that actually come under it deal with non-consensual and coercive sexual activities; but the presence of the section gives unnecessary and unjustified powers to police to access to people's home. The Lucknow incidents (Narrain, 2004)[46] show that the mere existence of Section 377, even if it cannot and is not being enforced in prosecuting sexual acts in private, adds certain criminality to the daily lives of homosexuals and puts them under the gaze of the law and a constant threat of moral terrorism (Gupta, 2006)[47]. Hence, the present sodomy law needs immediate consideration of the law makers so that it may not be misused by the law enforcing authorities in the country, against the consenting adult member of the society.

1.3.6 Homosexuality and Right to Health

The homosexuals are mostly reluctant to reveal same sex behaviour due to the fear of law enforcement agencies, keeping a large section invisible and pushing the infectious diseases underground. Officials of UNAIDS are of the opinion that there is no data on the homosexual population in India as even collecting such information is illegal under Section 377 and they are not able to prevent AIDS in the country[48]. In Naz Foundation Case[49], the affidavit filed by NACO revealed the same fact. It is held in the case that

---

46 In First incident, July 2001, Lucknow police under provocation that gay men were cruising in a well known public park and that NGOs were running condom distribution campaigns for MSM, raided the offices of NGOs. They arrested four men under Section 377. Only after 45 days and a vigorous national and international campaign, were the activists freed and charges under the section dropped. In Second incident, January 2006, Lucknow police arrested four men under Section 377 for allegedly having sex in a public park. The fact finding team held that none of the men were having public sex. All the accused were released on bail after 12 days, but the case still continues. The entire case is based on the foundation that these men are gay, and should be punished under Section 377. Arvind Narrain. Queer: Despised Sexuality, Law and Social Change. Delhi: Books for Change, 2004, p. 70.

47 *Supra note* 43, pp. 4819-21.

48 http://www.e-pao.net/GP.asp?src=12..161009.oct09, accessed on 20th November 09.

49 *Naz Foundation* v. *Union of India*, WP(C) No.7455/2001, Date of decision : 2nd July, 2009. For more information visit, < http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW7 4552001.pdf>, accessed on 20th November, 2009.

the hidden nature of such groups leads to poor access to condom, health care services and safe sex information. Moreover, the fear of harassment by law enforcement agencies like police leads to sex being hurried, leaving partners without the option to consider or negotiate safer sex practices. Thus, it is encouraging the spreading of HIV, which needs to be controlled, as Indian Constitution provides for right to health as a basic right of citizens in the country.

1.4 Crime Without Victims: Are There Limits to Criminal Law?

'The right to undisturbed performance of private consenting acts is more important than the immorality of the act.' ***H.L.A. Hart (Life, Liberty and Morality)***

J.S. Mill's 1859 essay, On Liberty, has provided an important and durable limiting condition in regard to criminal law. Mill argued that only legitimate purpose for which state power can be exercised over citizens in a free society, against their will, is to prevent harm to others. Such a criterion recognizes that, whatever their moral quality, most crimes are dangerous. It is the physical, financial, and social costs of crime that criminal law should address. Mill did not believe that harm to the perpetrator was sufficient grounds to criminalize; nor did he think it ever proper to criminalize conduct solely because the mere thought of it offended others (Richards, 1982)[50]. Moreover, Finnis's arguments against homosexuality based on 'natural law' were derived from ancient Greek traditions; the term first used by Plato in *Gorgias*, and then further developed by Aristotle. This being so, it is worth to see whether those Greek traditions did in fact use 'natural law' principles to rule homosexual conduct morally or legally substandard. Plato's dialogues contain several extremely moving celebrations of male-male love, and judge this form of love to be, on the whole, superior to male-female love because of its potential for spirituality and friendship. Plato's *Phaedrus* contains a

---

50 A.J. David Richards, *Sex, Drugs, Death, and the Law : An Essay on Human Rights and Over-Criminalization*, New Jersey: Rowman and Littlefield, 1982, p. 3.

closely related praise of the intellectual, political, and spiritual benefits of a life centered on male-male love. Plato says that the highest form of human life is one in which a male pursues 'the love of a young man along with philosophy', and is transported by passionate desire. He describes the experience of falling in love with another male in moving terms, and defends relationships that are mutual and reciprocal over relationships that are one sided. He depicts his pairs of lovers as spending their life together in the pursuit of intellectual and spiritual activities, combined with political participation. Aristotle speaks far less about sexual love than does Plato, but it is evident that he too finds in male-male relationships the potential for the highest form of friendship, a friendship based on mutual well-wishing and mutual awareness of good character and good aims. He does not find this potential in male-female relationships, since he holds that females are incapable of good character. The ideal city of the Greek Stoics was built around the idea of pairs of male lovers whose bonds gave the city rich sources of motivation for virtue. Although the Stoics wished their 'wise man' to eliminate most passions from his life, they encouraged him to foster a type of erotic love that they defined as 'the attempt to form a friendship inspired by the perceived beauty of young men in their prime.' they held that this love, unlike other passions, was supportive of virtue and philosophical activity (Baird, 1995).[51]

Though homosexuality has been tolerated in many societies and respected by great philosophers, but it has never been respected, particularly valued or held as an ideal of sexual relations. There is no reliable way, however, to gauge public opinion in such societies, nor is it possible to know accurately whether homosexuality, although tolerated, was viewed negatively or positively. Hence, viewing homosexuality negatively does not necessary mean that it is an appropriate candidate for criminalization. Sexual behaviour should be more socially regulated than legal judged. The social norms that govern sexual behaviour are usually powerful and broad. Moreover, it is doubtful that legal prohibitions can be more effective than

---

[51] Baird Robert, *Homosexuality : Debating the Issues*, New York: Prometheus Books, 1995, pp. 47-48.

social and religious, in regulating sexual conduct.

Homosexuality has been subject to legal prohibitions for a long time in India, but the content and perhaps the intent of the law needs to be changed. So too the public opinion, which in the end is a notably formidable force in the efforts to shape the law. Law is but one means of social control and not necessarily the most effective for any given act. Other institutions, such as family, religion, and community all have their own systems of rule making and rule enforcement. Most acts that are considered serious and immoral are subject to multiple social control and hence, homosexual behaviour should be left with the society to be judged and so legally homosexuality should be decriminalized as its benefits will contribute directly to the very dignity of the homosexual persons, as a full human being, and not just allow them to have a peaceful night with their lover in the confines of their bedroom.

INFLUENCE OF DEVADASI SYSTEM ON TRAFFICKING IN WOMEN : A CAUSAL ANALYSIS

Anupam Alhuwalia*

Prostitution and sexual trade has been the oldest of professions. Resultantly sexual exploitation of women and children also has existed from times immemorial. In olden days there had been culturally sanctioned practices like *Devadasi/ Jogins/ Mathamma,* which facilitated the availability of these women as prostitutes for men. At the time of their origin, these institutions enjoyed good social status and flourished under the royal patronage. Gradually with the passage of time the glory attached to these institutions vanished and the poor girls were reduced to the status of cheap prostitutes, who could be sexually exploited by any one. The saying in Marathi goes, "*Devadasi devachi bayako sarya gavachi*", meaning that she is servant of God but wife of the whole town/community[1]. *Devadasi* system forms a major push factor for trafficking of women in India.

Temple prostitution of both males and females not only existed in India but was prevalent in Aryan societies like Greece and Rome, and Eastern societies like Egypt.[2]In India there were certain culturally, religiously sanctioned practices which in deed enabled sexual servitude or exploitation of the servants. Sanskrit Literature mentions prostitution as *'Vashiyaavrati'* and prostitutes *as 'Vashiya'* Various *Smirits* have recognized prostitution and there are instances of prostitutions being taxed. *Arthashastra* of Kautalya has a chapter titled 'Superintendent of Prostitutes.' Kautalya also wanted to use prostitutes as spies, for collection of the secrets of the enemy for their kingdom.

---

* Lecturer, Department of Law, Guru Nanak Dev University Regional Campus, Jalandhar.

1 Jogan Shankar, *Devadasi Cult - A Sociological Analysis*, 2004, p. 157

2 V. Sithannan, *Immoral Traffic : Prostitution in India.*

In olden days there existed Devadasi Jogins, *Mathamma*. Under this culture little girls were dedicated to the deity and were married to it. The common feature shared by all these practices was that the girl was dedicated in the name of religion; she was married of to a deity usually by her family. Her groom in this marriage was immortal, and the women were exempted from the miseries of widowhood. After her dedication ceremony the ceremony of 'the first night' called *'Uditumbuvadu'* was celebrated. There after she was available for sex for the elder men of the village, including members of her own family or community.

Devadasi system was much prevalent in South India in the past and is still prevalent in many parts, in spite of the fact that law prohibits it. The term *Devadasi* is a Sanskrit word derived from a combination of two words, *Dev* means *Devta* or deity and *Dasi* means his female slave. Institution of *Devadasi* was unknown to ancient India. *Jaatakas, Kantilla* or *Vatsayana* do not mention them, but later *Puranas* found them useful. Historical records mark its existence and literary records show it existed and flourished during *Pallava* and *Chola* dynasties from 6th to 13th Century A.D in south India. The first reference to the institution of Devdasi is found in the mention of Queen Kolavati of Keshari Dynasty (6th century A.D.). This time witnessed the construction of the Brahmeswar temple and dedication of many women as Devadasis to it.[3]Devadasis were a special and venditate group of women attendants, some of whom were like the Vestal Virgins of Rome[4]. Though *Devadasi* system was practiced in almost all the Brahamanical temples, particularly the Shivaite temples in South India, in some regions it had attained its maximum growth, e.g. Chingleput, North and South Arcot, Tanjavur, Tiruchirapalli areas.[5]An inscription of 1004 A.D., in Tanjor temple mentions the numbers of

---

3 Aparimita Pramanik Sahoo, "A Brief History of Devadasi System" *Orissa Diary*, Vol. July 2006, available at http://www.orissadiary.com/Showyournews. Last accessed on 2 Jan 2010.

4 Sankar Sen, Jayshree Ahuja, *Trafficking In Women and Children Myths and Realities*, 2009, pp. 84-85.

5 *Id.*, p. 85.

Devadasis as 400 in Tenor temple, 450 in Brahideswara temple and 500 in Sorti Somnath temple[6].

1.1 Reasons for Dedication

Devadasis were taken in for fanning the deities, lighting the temple lamps and singing and dancing in praise of God. The women never married formally, having been ritualistically married to God.[7] Reasons for dedication were different for different regions. Some did it with a hope of God showering his blessings on them, some sought riddance from ailments, some for timely rainfall and good crop etc. In many families who did not have a child, they promised to dedicate their first daughter as *Devadasi*, if they had more children, specially a son. In Marathwara region this promise was made to Lord *Khandoba,* for such dedications in event of fulfillment of their desires.

1.2 Regional Names of Devadasi

After being dedicated to the deity these girls became acolyte at the temple. They lost their virginity at the hands of the temple priests and thereafter had frequent sexual encounters with other men of village, turning them into village prostitutes. This practice was prevalent at such a large scale and Devadasis existed in such a large number that they had a separate group/ sub-caste having their own culture, rituals, traditions etc.

Practice of *Devadasi* prevailed in different regions under different names. In Andhra Pradesh, devadasi practice is prevalent in Karimnagar, Warangal, Nizamabad, Mahaboobnagar, Kurnool, Hyderabad, Ananthapur, Medak, Adilabad, Chittoor, Rangareddy, Nellore, Nalgonda, and Srikakulam and were known as 'Bogam' or 'Jogin', In Karnataka, the practice has been found to exist in Raichur, Bijapur, Belgaum, Dharwad, Bellari and Gulbarga and were known as `Jogati' and `Basavi',

---

6 Vasant Rajas, *Devadasi : Shodha Ani Bodha*, (Marathi), 1997.
7 T.J.S. George, *The Enquire Dictionary*, p. 143.

In Maharashtra, the practice exists in Pune, Sholapur, Kolhapur, Sangli, Mumbai, Lathur, Usmanabad, Satara, Sindhudurg and Nanded and devadasis known as 'Dhini.' In Karnataka they were called 'Jogati' or 'Basavi', In Goa and western India the girls were known as 'Bhavin', in West Coast they were called 'Kudikar', in Tamil Nadu 'Murali', 'Thevardiyar' or 'Jageteen', in Assam as 'Nati,' in Orissa 'Ganika'and 'Mahari[8]', in Kerala 'Kuddikaras', 'Maharis' and 'Kuleena' in West Bengal.

Various studies have traced presence of this system in many other regions of India apart from South India. It was observed in parts of Maharashatra and Rajasthan, Madhya Pradesh, Orissa, Assam etc. Although it had not spread in North India there were certain castes as Tawaif, Ghandarb and Patur, who were dancers, singers and victims of Commercial sexual exploitation.[9] Beside this system, certain communities like Rajnat of Rajasthan, Bachada of Rajasthan – Madhya Pradesh border, Bedis of Madhya Pradesh also had some socially sanctioned practices that exploited women[10]. This practice of dedicating young women to temples continues in many parts of India even today. Official statistics indicated that there were up to 23,000 *Devadasi* in Karnataka and up to17, 000 *Jogini* in Andhra Pradesh[11]

1.3 Reasons for continuation of these practices

The reasons behind entry of women into these practices are numerous. These practices have strong roots in rural India, where the women folk do not have any other alternative employment opportunities. Forced by their poverty they enter these practices. Backwardness among women also forms a cause for it. Where as prostitutes are looked down by the

---

8 Mahari meaning 'Mohan Nari' i.e. God's Wife.

9 *Supra note* 3, p. 86.

10 *Supra note* 2 p. 16.

11 Figures provided respectively by Velugu, a programme of the State Government of Andhra Pradesh, and the Women's Development Corporation of the State Government of Karnataka.

community, women under the veil of *Devadasi* enjoy a better status in comparison to prostitutes around them. Daughters of Devadasi generally adopt the profession of their mother. Above all these practices are accepted by the communities and therefore, no will for their eradication exists in people involved in it. As a result the efforts put-forth by the government for putting an end to these practices do not achieve the desired results.

1.4 Legal Response to Practice of Devadasi

Social reformers like Raja Ram Mohan Roy, Ishwar Chander Vidyasagar, Govind Rannade, Karve and other social activists raised their voice against this practice which in turn had taken the form of religiously sanctioned prostitution. The fate of Devdasis was miserable as the institution had declined from the status it enjoyed in the past, when it enjoyed royal patronage.

In 1934 *Bombay Devdasi Prohibition, Act* was passed declaring dedication of women as an illegal act, irrespective of the fact whether it was willful or forced dedication. This legislation provided for rules for the protection of the interests of *Devadasis*. Due to efforts of Periyar E.V. Ramasami, Moovalore Ramamirthammayar and Dr. Muthulakshmi Reddy against this system in pre-independence era , the then Mysore State had taken steps to prohibit the devdasi system by passing *Madras Devadasi (Prohibition and Dedication)*, (Act XXXI of 1947)

These two Acts were replaced by The Karnataka Government by passing *Karnataka Devadasi (Prohibition and Dedication) Act*, 1982 which made Dedication of a woman as Devadasi an offence and in order to make the provisions more effective, higher punishment is provided for a person abetting the offence if he happens to be the parent, guardian or relative of the woman. Anyone found guilty in helping a girl to become a Devadasi or even attending the ceremony is liable to get 3 years prison term and fine up to maximum Rs 2000/- Parents and relatives fined up to maximum Rs 5000/- if they are found guilty encouraging the girl to be dedicated

Though a long period has passed after passing the said legislation, but it has not been able to achieve the desired results. The number of cases booked under it so far is no more than 85, and there has been conviction in only one case involving three people in Belgaum district[12].

Following the same line of action State of Andhra Pradesh passed *Andhra Pradesh Devdasi (Prohibition of Dedication) Act*, 1989 which provided for a punishment of three years to the one who either performs, promotes, abets or takes part in the dedication ceremony of the girls. *Goa Children's Act*, 2003 is the latest legislation in the same series, providing a strong action for making children available for commercial sexual exploitation.

1.5 Present Status of *Devadasi* System

To ascertain the exact number of devadasis in Karnataka, the women and child development department conducted a survey during 1993-94 and found there were 22,873 devadasis spread across 10 districts. In 2007, the government of Karnataka re-survey of devadasis in 14 districts and has revealed there are around 30,000 devadasis in these 14 districts.[13]

The report submitted to NCW by State of Karnataka says the practice has been found to exist in six districts – Raichur, Bijapur, Belgaum, Dharwad, Bellari and Gulbarga, while a survey done by the Department of Women and Child Development on the Devadasi system has identified as many as 22,873 Devadasis in the 10 northern districts of Karnataka.[14] In Andhra Pradesh Devadasi practice is prevalent in fourteen districts – Karimnagar, Warangal, Nizamabad, Mahaboobnagar, Kurnool, Hyderabad, Ananthapur, Medak, Adilabad, Chittoor, Rangareddy, Nellore, Nalgonda, and Srikakulam. In Maharashtra the Devadasi cult exists in ten districts – Pune, Sholapur, Kolhapur, Sangli, Mumbai, Lathur, Usmanabad, Satara, Sindhudurg and Nanded. Government of Orissa claims that the system has exited from the state and except for one Devdasi in the Jagannath

---

12 *The Hindu*, 2009.
13 *The Times of India*, 2009, Hubli.
14 *Ibid.*

temple; Puri none else is there in the state. Government of Tamil Nadu also claims the extinction of this system in the state.[15]

According to a survey carried out among 375 Devadasis by the Joint Women's Programme, Bangalore for the NCW, 63.6 per cent of young girls were forced into *Devadasi* system due to custom, while 38 per cent reported that their families had a history of Devadasis. The survey pointed out that Devadasi system is more prevalent among three Scheduled Caste communities - Holers, Madars and Samgars in Karnataka. Nearly 40 per cent of them join the flesh trade in cities and the rest are involved in their respective villages

According to National Commission for Women, estimated figure of around 2, 50,000 girls dedicated as Devdasis to Yellamma and Khondaba temples in south India Maharashtra - Karnataka border. 50% of Devdasis go to prostitution business and 40% join flesh trade in cities. But some critics say the 80% become prostitutes.[16]

In Belgaum, it is widely believed that trafficking by temple managers, brothel owners, pimps and older Devadasi takes place. In such contexts, recruiters may pay the costs of the 'marriage' ceremony. The survey in Belgaum showed that over 40 per cent (232 women) had gone at some stage in their lives to Mumbai, Goa or other major towns to work in the sex industry[17]Children of Devadasi are most at risk of being dedicated or becoming victims of trafficking because of their mother's status and the

---

15 Joint Women's Programme, Regional Centre, Bangalore, An Exploratory Study on Devadasi Rehabilitation Programme Initiated by Karnataka State Women's Development Corporation and SC/ST Corporation, Government of Karnataka in Northern Districts of Karnataka, Report Submitted to National Commission for Women, New Delhi, 2001-02 and Reports submitted by the respective State Governments to National Commission of Women, India

16 *Report available at* http://www.sadashivan.com/quotwomenquotandrights/id27.html (last accessed on Jan 3, 2010).

17 Report of Anti-Slavery International on, Ritual Slavery Practices in India - Devadasi, Jogini and Mathamma, 2007, p. 3.

fact that in some traditions the role is handed down through the generations[18]

1.6 Conclusion & Suggestions

There exists eleven types of prostitution in India and culturally sanctioned practices like Devadasi/ *Jogins/ Mathamma* are one of them. There are different legislations prohibiting the dedication of girls to such practices of *Devadasi/ Jogins/ Mathamma.* The government is tacking all incentives for the rescue and rehabilitation of these females, but the fact remains that girls in India are dedicated to these institutions even today. Once a female becomes a Devadasi, there are very high chances of her landing up as a prostitute in the brothels in the cities. It is therefore recommended that all possible efforts should be undertaken by the governments to check these practices. The laws should be made more stringent. Government should provide alternative arrangements of employment to these females so that they can take themselves out of the sex trade. Trafficking in women and children has multidimensional causes for it, and these culturally sanctioned practices form a major cause for trafficking of girls for commercial sexual exploitation. Therefore along with other means to check trafficking it is utmost necessary to check these practices as well, because every woman in this country deserves a respectable and dignified life.

---

[18] *Ibid.*

EVASION OF MAINTENANCE RESPONSIBILITY BY BIGAMOUS HUSBANDS : A CONFLICT IN JUDICIAL APPROACH

Pinki Sharma*

The famous ancient phrase - 'The hand that rocks the cradle rules the world' is presently nothing more than a proverbial rhetoric with its meaning marred, its beauty beguiled and charm charred as today that hand of a woman is bruised, her heart tortured, the head tormented and her oppressed and suppressed self cannot even shake off those strangulating shackles that rattle around her. Imagine Woman who has given birth to a man is looking for him for the recognition of her worth. However, see his deep sense of gratitude to her! He has subjected her to a life of dependence, denial and dejection where lost in the world of depression, oppression and suppression she is struggling hard for her survival.

The present article analyses the role of judiciary as far as the right to maintenance of an 'illegal' second wife is concerned. Generally, interpretation of statutory provisions is made to protect rights of a legally wedded wife, whose marriage fulfills all requirements - formal as well as legal. Section 5[1] of the *Hindu Marriage Act* deals with legal validity while

---

* Assistant Professor, Faculty of Law, University of Delhi.

1 *The Hindu Marriage Act*, 1956, section 5 : Conditions for a Hindu Marriage - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) 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

(c) has been subject to recurrent attacks of insanity (Words 'or epilepsy' omitted by marriage laws (Amendment) Act 1999, w.e.f. 29 December 1999).

(iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;

Section 7[2] deals with formal validity i.e. ceremonial validity. The Hindu marriage performed in contravention of any of the provisions of Section 5 is either void [sec 5 (i), (iv) & (v)] or voidable [sec. 5(ii)]. The violation of Sec. 5(iii), which deals with age limit, was being tolerated although it was penal in nature. On 19th December 2004 the law minister, Mr. H.R. Bhardwaj introduced the Prevention of Child Marriage Bill 2004 in Rajya Sabha and it was passed subsequently *Prohibition of Child Marriage Act*, 2006. It has a provision to declare child marriages as void, to provide for the custody and maintenance of children born of child marriages and to make the offences under the proposed legislation to be cognizable for investigation purposes.

There have been unfortunate situations where a woman who has been defrauded by the man to enter into a bigamous relationship has had to suffer, her status being that of an illegal wife[3].The reference to an 'illegal' wife in the present article is for a woman who has married a Hindu man under the *Hindu Marriage Act*, 1955 in violation of the provision of section 5(I).

1.1 Historical Background of the Concept of Bigamy

Though monogamy is the rule from Vedic times, polygamy has, as an exception, existed side by side. The rules relating to anuloma marriages allowed a man more than one wife. But, the wife who was wedded first

---

(iv) 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;

(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two; (Clause (vi) omitted by Act No 2 of 1978, section 6 and Sch. w.e.f. 1 October 1978

2 *Id.*, Section 7 Ceremonies for a Hindu marriage- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken.

3 Like *Yamunabai* v. *Anant Rao*, AIR 1988 SC 644; *Bakulbai* v. *Gangaram*, 1988(1) SCALE 188.

was alone the wife in the fullest sense. One text of Manu seems to indicate that there was a time when a second marriage was allowed to a man after the death of his former wife[4]. Another set of texts lays down special ground which justify a husband in taking second wife. It was only when a wife was barren, diseased or vicious that she could be superseded and a second marriage was valid; as also when she consented.[5] On the supersession of a wife, the husband had to make provision for her.[6]

A peculiar sanctity, however, seems to have been attributed to the first marriage, as being that which was contracted from a sense of duty, and not merely for personal gratification. As a norm, the first wife had precedence over the others and her first-born son over his half brothers.[7] It is probable that originally, the subsequent wives were considered as merely a superior class of concubines. Later, in the courts of British India, it was a settled law that a Hindu male could without any restriction marry again while his previous marriage subsisted without his wife's consent and justification.[8] Custom, however, did prevent the second marriage without the consent of the first wife and without making provision for her.

1.2 The Concept of Bigamy Under The Hindu Marriage Act

With the commencement of *Hindu Marriage Act*, 1955 (HMA), one of the conditions provided for a valid marriage was that neither party should have a spouse living at the time of the solemnization of the marriage[9]. Under the old law, there was a bar against a woman marrying a second husband while her first husband is alive unless

---

4 "Having, thus, kindled the sacred fires and performed funeral rites to his wife, who died before him, he may again light the nuptial fire". Manu, V, 168 and IX, 101, 102.

5 Yajn I; Manu, IX, 77-82.

6 Yajn II,148;Manu, IX, 77-82.

7 Manu, III, para 12,14,IX, paras 117,133-135.

8 Dayabhaga, IX, 6.

9 *Ibid.*

custom permitted her. There was no such bar against men, till some States passed laws for prevention of bigamous marriages, and introduced the principle of monogamy among Hindus.[10] After 1955, with the help of the aforementioned provisions and Section 11[11] of the *Hindu Marriage Act*, second marriages were declared null and void *ab initio*. Second marriage, during the subsistence of the first marriage, is illegal in India and the relationship arising from the same does not have any validity. In case of a spouse whose whereabouts are not available for more than 7 years, a presumption can be drawn under Section 108 of the *Indian Evidence Act*, 1872 (Evidence Act) that the spouse is dead. In such an event, the other spouse can marry a second time on the ground that the former marriage is dissolved due to the civil death of his/her spouse.

1.2.1 The Offence of Bigamy

The offence of bigamy is committed by a Hindu marrying again during the lifetime of his or her spouse, provided that the first marriage is not null and void. If the subsisting marriage is voidable then also offence of bigamy is committed. The guilty party is liable to be punished under Section 17 of the Hindu Marriage Act that provides for punishment for bigamy.[12] The offence of bigamy is committed only if the required ceremonies of marriage are performed. The second marriage cannot be taken to be proved by the mere admission of the parties. Essential

---

10 *The Bombay Prevention of Hindu Bigamy Act*, 1948; the *Madras Prevention of Bigamy Act*, 1949.

11 *Supra note* 1, Section 11 of the HMA, 1955.
Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party] (Inserted by Act 68 of 1976),be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12 *Id.*, Section 17.
Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living and the provisions of sections 494 and 495 of the *Indian Penal Code*, 1860 (Act 45 of 1860) shall apply accordingly.

ceremonies and rites[13] must be proved to have taken place[14]. In short, second marriage must be legally valid marriage so as to come within mischief of penal provisions.

A prosecution for bigamy will fail if what is established is that some sort of ceremonies, but not the essential ceremonies as prescribed by law or custom, were performed with the avowed purpose that the parties were to be taken as married, and it is immaterial even if it is established that the parties intended seriously to marry and were under impression that marital status will now be conferred on them[15]. The mere intention of parties, however serious, will not make them husband and wife and the accused will escape prosecution even if he deliberately performed defective ceremonies.[16] Hence persons who perform bigamous marriage cannot be guilty of bigamy if they omit deliberately or inadvertently, to perform the essential ceremonies of marriage. If the second marriage of the accused is declared void before the prosecution is commenced, no prosecution for bigamy can be made.

1.2.2 Who has locus standi?

Only the parties to the marriage can seek a decree of its annulment. The first wife not being a party to the second marriage has no *locus standi* to file a petition for annulment under sec.11 of the HMA. In *Ajay Chandrakar v. Ushabai*[17], the first wife filed a petition under sec.11of the HMA to get second marriage of her husband declared null and void. The court held that the remedy is available only to a person who is a party to such marriage, and the first wife not being a party, cannot file a petition under this section. The remedy available to wife is by way of suit for declaration under sec.34 of the *Specific Relief Act*, 1963. It is suggested presently that this clause should

---

13 *Supra note* 10.
14 *Priya Bala Ghosh* v. *Suresh* AIR 1971 SC1153; *Laxmi* v. *Maheshwar*, 1985 Ori 11.
15 Like *Kanwal Ram* v. *HP* AIR 1966 SC 614; *Bhau Rao* v. *State of Maharashtra*, AIR 1965 SC 1964; *Santi* v. *Kanchan*, AIR 1991 SC 816.
16 *Dr. A.N. Mukerji* v. *State*, AIR 1969 All 489.
17 2000 AIHC 1292 (MP).

be considered and amended. In case of bigamous marriage, the spouse of the first marriage is a directly affected party. Though technically speaking, the first wife of the husband may not be a party to the second marriage, but she is the one who is most adversely affected by such marriage. It is, therefore, suggested that in such cases, an exception should be made and the spouse of the first marriage should be given a *locus standi* to file a petition for annulment under section 11.

A void marriage can always be declared so even after the death of one of the parties if a cause of action can be shown by the third party i.e. succession rights. A challenge by a third party can be sustained even during the life time of both spouses, as their children cannot be included in coparcenary and made sharers.

1.3 The Concept of Right to Maintenance

Hindu sages, in most unequivocal and clear terms, laid down that maintenance of certain persons is a personal obligation. Like Manu declared: "The aged parents, a virtuous wife and an infant child must be maintained even by doing hundred misdeeds."[18] The responsibility to maintain certain relatives is a social, moral and legal one. The extent and degree of such liability however, varies depending on the relationship of the applicant with the respondent and other circumstances. In the social structure of Hindu society the joint family system looms large. The importance and extent of the right of maintenance necessarily arises from the theory of an undivided family. The head of such a family is bound to maintain its members, their wives and their children, to perform their ceremonies and to defray the expenses of their marriages; in other words, those who would be entitled to share in the bulk of their property are entitled to have all their necessary expenses paid out of its income. The right of maintenance includes persons who by reason of personal disqualification are not allowed to inherit, such as the idiot, lunatic,

---

[18] Cited in Mitakshara, II, 175.

insane etc. Such persons are excluded from inheritance and a share in partition but are given, in lieu thereof, maintenance. While their male issues, if not disqualified, are entitled to inherit, daughters of disqualified persons are, till marriage, and the wives entitled to be maintained[19]

The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage. She is entitled to be maintained by the husband whether he is possessed of any property or not. The Hindu texts impose a legal obligation on a husband to maintain his wife irrespective of possession of any property whether joint or self acquired.[20] She is even entitled to be maintained out of her profits of her husband's property within the meaning of section 39[21] of the *Transfer of Property Act* and can enforce her rights against the properties in the hands of the alienee with notice of her claim. A Hindu wife is entitled to claim maintenance under the personal laws as well as under the provisions of the Code of Criminal Procedure. While under the personal laws, an application of maintenance can be made only if there are, or have been, matrimonial proceedings under the Act, and in case of the Cr PC, there need not be any matrimonial litigation, and yet the wife may seek maintenance.

1.4 Hindu Wife's Right to Maintenance under Statutory Provisions

Under Hindu law there are two statutes, which provide for maintenance-the *Hindu Marriage Act*, 1955 (HMA) (Sections 24 and

---

19 Manu, IX, 108; Narada, XIII, 26-28, 33; Yajan II, 140, 142; Vishnu, XV, 32-34; Mit. II, x, 12-15; Dayabhaga,V, 10, 11.

20 Mayne-Hindu Law & Usage, 15th ed. (2006) para 725. p. 1225.

21 " When a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands".

25); the *Hindu Adoptions and Maintenance Act*, 1956 (HAMA)(Section18). The *Criminal Procedure Code*, 1973 (Cr. P.C.) (Section 125) also makes her entitled to claim of maintenance.

1.4.1 The Hindu Adoptions and Maintenance Act, 1956[22](HAMA)

The expression 'a Hindu Wife' has to be given its ordinary meaning. The word 'wife' though not defined under the Act, denotes a Hindu woman whose marriage is solemnized with a Hindu husband in accordance with the provisions of the Hindu Marriage Act and is not void or dissolved by a decree of divorce is, as such, a Hindu wife within the meaning of section 18 of the Act. Similar opinion was made by learned judge in *Suresh Khullar v. Vijay Khullar.*[23] The right of a wife for maintenance is an incident of the status of matrimony, and a hindu is under a legal obligation to maintain his wife. The obligation to maintain a wife is personal in character, and arises from the very existence of the relation between the parties. The word 'wife' in this section can also include a divorced wife, by applying the principle that the word 'wife' in section 25 of the *Hindu Marriage Act* implies a divorced wife and since both provisions deal with maintenance, this section would apply to a divorced wife. Similar observation was made by the learned judge of Gujrat High court.[24] This interpretation has been held *per incuriam* by the Bombay high court also.[25]

---

22 Section 18 (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,-
.....
(d) if he has any other wife living
.....
(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

23 2002 (2) HLR 727 (Del).

24 *Vibalal v Minaben* AIR 1995 Guj 88.

25 *Paditro Kalure* v. *Gayabai* AIR 2001 Bom 445.

1.4.2 The Criminal Procedure Code, 1973[26] (Cr. P.C.)

Section 125 of the *Criminal Procedure Code*, 1973 provides for maintenance of wives irrespective of their religion and the relief is speedy, swift and summary. This provision is enacted for social justice and specially to protect women, children and also old and infirm parents and falls within the constitutional ambit under article 15(3) reinforced by Article 39. Under the Criminal Procedure Code, only a legally wedded wife can claim maintenance. Where a marriage suffers from a legal flaw, which goes to the roots of the validity of the relationship, the wife is not entitled to maintenance under its provisions.

A wife can claim maintenance from her husband irrespective of her religion under Section 125, Cr. P.C. To prove the factum of marriage between the husband and the wife, a person must rely on whether the husband has treated the woman as his wife in the society. Accordingly, all relevant records wherein she has been referred to as his wife, or the joint bank account, or even the police complaint wherein he has stated that she is his wife, etc. can be used to prove her status.

---

[26] Section 125. Order for Maintenance of Wives, Children and Parents

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself

. . . . .

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate 21[***] as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct:

. . . . .

Explanation - For the purposes of the section 125 of the Cr.P.C.

. . . . .

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

1.4.3 The Hindu Marriage Act, 1955[27] (HMA)

The object of section 24 is to enable husband or the wife, as the case may be, who has no independent income sufficient for his or her support and the necessary expenses of any proceeding under the Act to obtain maintenance and expenses *pendent elite,* so that the proceedings may be conducted without any hardship on his or her part. Thus, this section confers a substantial right on the applicant during the pendency of the proceedings. The expression 'wife and husband' used in this section has not to be given a strict legal meaning as to convey only legally married wife and husband. It should mean a 'person claiming to be a wife or husband'. A wife should not be disentitled from claiming *pendente lite* even on a *prima facie* case having been found in favour of the husband that her marriage was void.

The expression 'any decree' under section 25 of the Act takes in only decrees granting reliefs which disturb the marriage, or confer to take away any legal character of status relating to the marriage and the decree

---

27 *Supra note* 1, Section 24, where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses oh the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable". » Section 25 of the HMA-. (1) Any court exercising jurisdiction under this Act, may at the time of passing any decree or at any time subsequent thereto, on application mads to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains un- married, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum, for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order."

of dismissal of the application will not fall within the meaning of 'any decree'. Similar observation was made by the apex court in *Chand Dhawan v. Jawaharlal Dhawan*[28]. Section 25 comes into play the moment there is a decree. The application can be filed any time after the said decree. It is not confined to any decree for divorce. The expression 'any decree' will include even marriages which have been declared to be nullity. The provisions in sections 24 and 25 are distinct and independent of each other. The dismissal of an application filed under section 24 during the pendency of the suit does not affect the maintainability of application under section 25.

1.5 Whether 'Second Wife' in Bigamous wedlock entitled to any statutory Relief?

The 'second wife' has no status of wife .She is an 'illegal' wife. Bigamy is defined as an offence not only under the criminal law but also under the HMA, Section 17, and HMA says that any marriage between two Hindus is void if on the date of such marriage, either party had a husband or wife living. The same is punishable under Section 494 and 495, IPC.

The 'second wife' has an option to get the marriage annulled under Section 11 read with Section 5(1) of HMA. Section 5, HMA provides for the conditions for the valid marriage, first condition being that neither party should have a spouse living at the time of the marriage. Accordingly, a marriage contracted while either party has a spouse living, can be annulled under Section 11 of *Hindu Marriage Act*, 1955. The provisions for divorce under Section 13, HMA also provide for the remedy available to the 'second wife'. Section 13 (2) (i) of HMA says that in cases of marriages performed before the commencement of this Act, a second wife can seek divorce on the ground that her husband's first wife was alive at the time of the solemnization of the second marriage.

---

[28] 1993 (3) SCC 406.

Even though the law is very clear on this point, 'second marriage' is a common practice in Indian society. As a result of the aforementioned contrast between the law and social practice, second wives in India have little protection under the law. Maintenance provisions are welfare measures aimed at preventing destitution of wives, but their application and interpretation has, many times caused a lot of hardship to indigent wives for no fault of theirs. Now if second or illegal wife files a petition for nullity, she can claim both interim and permanent maintenance. (Sections 24 and 25 of HMA) This important issue whether a wife whose marriage is void or defective is entitled to maintenance has come up before the courts on several occasions.

1.6 Judicial Activism

An analysis of the judicial pronouncements shows extreme contradictions. From a narrow, rigid, technical and mechanical approach to a pragmatic approach is evident in several cases. The courts granted maintenance to so called wives of void or bigamous marriage, notwithstanding the fact that the marriage was a nullity being void marriage.[29] There was no legal or formal validity yet these women were treated as wives for the purpose of grant of maintenance. The judges applied humanitarian, social and liberal approach while interpreting these welfare statutory provisions.

While deciding the issue of the second wife's maintenance the courts have not progressed in a linear trajectory, consolidating its earlier judgments. In fact there have been two streams with contradictory views that have been advanced over the years, which had made the situation ambiguous for women in invalid marriages claiming their rights of maintenance I would like to refer some cases, dealt under maintenance provisions,[30] depicting judicial approach.

---

29 *Govindrao* v. *Anandibai*, AIR 1976 Bom. 433; *Dayal Singh* v. *Bhajan Kaur*, AIR 1973 Punj 44.

30 See, Sections 24 and 25; Section 18 of the HAMA,1956 and Section 125 of the Cr. P.C. 1973.

In *Bakulbai v. Gangaram*, the court held that such a wife has no claim even where she is kept in dark about husband's first marriage. The legislature has upheld the legitimacy and paternity of the child born of a void wedlock but was not considerate about similar protection to the poor and innocent mother. In *Mangala v. Prahlad*[31] the Bombay High Court lamented the harshness of these rulings. A Hindu woman claiming maintenance against her husband is at once thrown out of court the moment the husband proves that he was clever enough to marry her during the subsistence of his own former marriage about which the woman may not have been aware at all. The law on the point has obviously taken a retrograde step. In *Rajeshbai v. Shantabai*[32]the court has made an observation while designating the second wife as an 'illegal' wife:

Undoubtedly, a female spouse united by marriage enters upon a status and is conferred with immediate as well as inchoate rights attached to such status... when that status is shaken and found to have no connection, it does not follow that even the inchoate rights of such person are totally eclipsed.

In *Yamunabai v. Anantrao*[33], the Supreme Court had advanced a narrow view and held that only a wife in a legally valid marriage is entitled to maintenance. Yamunabai had married Anantarao while his first marriage was subsisting and both the wives had cohabited together for some time. Later, Yamunabai was driven out and she filed a petition claiming maintenance under Section 125 of the *Code of Criminal Procedure*. The narrow rule of construction applied by the apex court while interpreting the statutory provision in this case and similar other cases had rendered the situation extremely difficult for women like Yamunabai.

---

31 (1994) Cri. LJ 2643, at p. 2644 (Bom.)
32 AIR 1982 Bom 231.
33 AIR 1988 SC 644.

It is true that while interpreting the statute, Courts not only may take into consideration the purpose for which the same has been enacted, but also the mischief it seeks to suppress[34]. While applying the maxim construction *ut res magis valeat quam pereat* namely, where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than the one which would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that parliament would legislate only for the purpose of bringing about an effective result[35].

In *Trailokya Mohan v. State of Assam*,[36] petitioner having already a wife living named as Subarna Bala Nath , married a second time to one Sefali Debi and, thus committed the offence of bigamy punishable under the IPC read with the provisions of the HMA 1955. In this case the court observed in the light of the provision of sec 5 (1) HMA, where one of the condition of a valid Hindu marriage is that it should be solemnized between two Hindus, and neither party should have a spouse living at that time. Here the accused himself in his statement under Sec. 342 CrPC had admitted that he did marry 'A' whom he married first and that admission was corroborated by oral evidence of witnesses who in their cross-examination did not take a stand that the second marriage was invalid, there is a presumption of a valid marriage and when a strong satisfactory and conclusive evidence to rebut the presumption was totally lacking in the case, it must be held as a valid second marriage which was solemnized and that was on the basis of the admission made by the accused and it could be relied upon.

---

34 *Enterprises* v. *Commissioners of Customs* (2006) AIR SCW 4684.
35 *Nokes v. Doncaseer Amalgamation Collieries Ltd.* (1940) AC 1014.
36 AIR 1968 Assam 22.

On the positive side is the judgement of Justice M.H. Kania of the Bombay High Court in *Govindrao v Anandibai* in 1997. Here it was held that since the *Hindu Marriage Act* is a social legislation, it would not be right to adopt a narrow approach. It was further observed that it could not have been the intention of the legislature that even in a case where a Hindu woman was duped into contracting a bigamous marriage with a Hindu male, without knowing that there was already subsisting marriage to which he was a party, she should be deprived of her right to claim maintenance.

Before the commencement of the HMA, under the *Hindu Women's Rights to Separate Residence and Maintenance Act*, 1946, a Hindu married woman was entitled to maintenance if her husband contracted another marriage provided this happened before the commencement of that Act. Section 18, HAMA provides that a Hindu wife can claim maintenance from her husband on the basis of the aforementioned grounds amongst several others irrespective of the time when he contracted the other marriage (before or after 1956). Accordingly, a wife can claim maintenance from her husband even if she has abandoned him when she comes to know that her husband has another wife living. The phrase 'any other wife living has been interpreted variously by the different High Courts. In *Satyanarayana v. Seetharamamma*[37], the A.P. High Court held that 'wife living' meant existing or alive and not necessarily living with the husband. However, a subsequent decision of the Madras High Court on the other hand in *Annamalai Mudaliar v. Perunayee Ammal*[38], said that 'wife living' necessarily meant living with the husband. The Bombay High Court dissented from the decision of the Madras High Court, in *Manibai v. Mukundarao*[39], holding that under Section 18 of HAMA, the second wife can also claim a separate residence and maintenance under this Act.

---

37 AIR 1963 AP 270.
38 ILR (1964)1 Mad 845.
39 (1981) HLR 676.

But there has been a gradual consolidation of the rights of second wife. For instance, in *Narinder Pal Kaur v. Manjeet Singh Chawla,*[40]which was decided by the Supreme Court, the right of the second wife to claim interim maintenance was upheld. In yet another ruling delivered in 2002 in *R Arora v. B Arora,* the Bombay High Court has upheld the right of the second wife to separate residence and maintenance under Section 18 of the *Hindu Adoption and Maintenance Act.* In this case, while divorce proceedings were pending against the first wife, the husband entered into informal relationship with one R. Later, he reconciled with his first wife. So R filed for a declaration that her marriage is valid and for an injunction against dispossession and for maintenance. The family court passed an order restraining B from throwing R out from the flat in which she was residing along with her daughter and awarded maintenance of around Rs. 10,000 for herself and her daughter. In appeal, the Bombay High Court ruled that since the husband had reconciled with his first wife, the subsequent partner could not be expected to reside in the same house and that she was entitled to a separate residence.

While the judgment consolidated the right of the second wife to maintenance (which also includes the right to residence), the court has declared that marriage contracted subsequent through a "Divorce Deed" is invalid. The ground level reality is that this is a common practice among Hindus to opt for "quickie" divorces through documents drawn by lawyers. One reason why such practice has flourished is the delay in courts and the exorbitant cost of divorce litigation.

In *Suresh Khullar v. Vijay Kumar Khullar*[41], at the time of marriage the husband had competency to marry as he had ended his first marriage legally by an *ex- parte* decree after obtaining a divorce from a competent court, but later his first marriage revived and on the other hand he had filed a petition for divorce against wife from second marriage also. This second wife in turn claimed maintenance under Section 18 of the

---

40 AIR 2008 Del 7.
41 AIR 2008 Del 1.

HAMA. With the revival of first marriage, the husband pleaded that second marriage became void and she being now party to a void marriage was not entitled to claim maintenance as the same is available only to the first wife and not the second one. The Delhi High Court considered the situation under which the second marriage was solemnized and on the date when marriage took place the husband was a divorcee.

The High court followed the maxim "*ut res magis valeat quam pereat* i.e. where alternate constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than the one which would put hindrances in this way. If the choice is between two interpretations the narrower of which would fail; to achieve the manifest purpose of the legislation such a construction would be avoided, which would reduce the legislation to futility and a bolder construction based on the view that parliament would legislate only for the purpose of bringing about an effective result should be accepted. Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, fiction or confusion into the working of the system. The court made interpretation only in deciding the question of entitlement of the appellant to claim maintenance from the respondent under Section 18 of the *Hindu Adoptions and Maintenance Act* and took support in arriving at this conclusion from the *Domestic Violence Act*, 2005 showing that any woman who is living in an intimate physical partnership would be covered in the cases for claiming any maintenance.

Under criminal law, the first wife aggrieved by a second marriage can file a complaint for bigamy. Under Section 494, IPC, "whoever, having a husband or wife living, contracts a marriage during the life of the former husband or wife, is void..." and therefore, the same is also an offence punishable with imprisonment up to 7 years or fine or both. This section does not extend to any person whose marriage with such husband or wife has been declared void by the court of competent jurisdiction. Under Section 495, IPC, bigamy committed by concealing the fact of the first

marriage is punishable with 10 years imprisonment or fine or both. A complaint can also be filed for cheating under Section 415, IPC. Cheating is defined under Section 415, IPC, as fraudulently or dishonestly inducing the person so deceived to do or omit to do anything, which he would not do or omit if he were not so deceived. Such an act or omission should be proved to cause or likely to cause damage or harm to that person in body, mind, reputation or property. Therefore, if the fact of the subsistence of the first marriage is kept a secret, apart from a complaint under bigamy provision, a complaint can also be filed for those offences of cheating. Often it is difficult to prove the fact of the second marriage. A man faced with the criminal complaint for bigamy would often argue that his relationship with the second woman was not one of marriage as the necessary formalities of a valid marriage as required by law were not performed.

In *Sumitra Dev v. Bhikan Choudhary*,[42] the wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure for herself as well as for her minor daughter alleging that she had been married to the Bhikan sometime in 1971 and out of the wedlock the child had been born. She further alleged that the fact that the respondent was already married and his spouse was living was not known. After the discovery of the previous marriage of the respondent the relationship between the parties gradually became strained and ultimately the respondent started totally neglecting the appellant and refused to maintain her. She had, therefore, no option left but to ask for maintenance for herself as also for the child. The issue of maintenance was decided in the light of statutory provisions of the *Criminal Procedure Code*, 1973 (Section 125), the *Hindu Marriage Act*, 1955 (Section 7).

The Additional Sessions Court and the High Court adopted a technical approach while considering the question of marriage by applying tools of the Criminal Procedure Code, 1973 (Section 125); The *Hindu Marriage Act*, 1955 (Section 7) and *the Evidence Act*, 1872 (Section 114). Parties

---

42 (1885) 1 SCC 637.

had lived together about a decade. Public records including voters' lists described them as husband and wife and competent witnesses of the village of the wife as also of the husband had supported the factum of marriage. The witnesses have also spoken about the reputation of the appellant being known in the locality as the wife of the respondent.

In *Vimla v. Veeraswamy*[43] also the Apex Court held that: "However, under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife and is, therefore, not entitled to maintenance under this provision. Therefore, the law which disentitles the second wife from receiving maintenance from her husband under Section 125, Cr. P.C. for the sole reason that the marriage ceremony though performed in the customary form lacks legal sanctity can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage particularly when the provision in the Court is a measure of social justice intended to protect women and children."[44]

Even though the law for the interim maintenance under Section 24, the *Hindu Marriage Act* (HMA) does not categorically provide for maintenance to second wife, but the section has been given a very wide interpretation by the courts to bring the cases of second wives within its ambit. Now the second wife can claim interim maintenance under the interpretation given to Section 24, the *Hindu Marriage Act.* In *Laxmibai v. Ayodhya Prasad,*[45] it was held that 'wife' and 'husband' used in Section 24, the *Hindu Marriage Act* are not to be given strict literal meaning as to refer only legally married wife and husband. The expression wife and husband is in the context of the section and scheme of the Act should mean a person claiming to be a wife or a husband in any matrimonial litigation.

---

43 (1991) 2 SCC 375.
44 *Suresh Khullar* v. *Vijay Kumar Khullar* AIR 2008 Del 1.
45 (1991) 1 SCC 47.

Similarly, under Section 25, HMA the provisions for permanent alimony has also been interpreted widely by the courts to protect the rights of the second wives. After the declaration of the nullity of the marriage, the second wife can claim maintenance under this section. It was held in *Rajeshbai v. Shantabai,*[46] that a woman whose marriage is void because of the existence of another wife is entitled to maintenance under this Section. The second wife can claim interim maintenance under Section 20 of the *Hindu Adoption and Maintenance Act,* 1956 (HAMA). In *Kulwant Kaur alias Preeti v. Prem Nath,*[47] it was also said 'no sane lady would surrender herself unless she treats her male companion as her husband- whether the marriage is proved or not that is the point to be determined by the trial Court itself- but keeping in view the fact that the petitioner cohabited with the respondent, interim maintenance under Section 20, HAMA is allowed to her'.

In yet another case decided in 1987, *Shantaram Patil vs Dagubai Patil,* while deciding the right of a widow in an invalid marriage, the Bombay High Court had held: "Even if the marriage is void, the woman has a right against the husband. The right can be enforced not only in proceedings under Section 25 of the *Hindu Marriage Act* but in any proceeding where validity of marriage and the rights flowing from it are determined.The right can be enforced not only during the life time of the husband but also after his death against his property. In this case, the court also ruled that the son from the second marriage is entitled to share in father's property along with the first wife and her three children and the second wife is entitled to maintenance from the property of her deceased husband. But the 2003 full bench decision in the Bhausaheb case had overruled this view.

In *Rameshchandra Rampratapji Daga v. Rameshwari Rameschandra Daga,*[48] the issue came up again before the Bombay High Court. The wife

---

46 AIR 1982 Bom. 237.
47 (2002) DMC 565 (P&H)
48 2001 (1) Femi-Juris CC 60 (Bom).

filed a petition for judicial separation under s 10 of the HMA, and also for maintenance for herself and her minor daughter. The husband filed a counter-claim for annulment of the marriage, and denied the marriage itself. The wife was, however, able to establish the factum of marriage by oral and documentary evidence. The husband then alleged that the marriage was void under s 11 read with s 5(I) of the Act, as the wife's earlier marriage was subsisting. Against this, the wife averred that she had obtained a divorce by a compromise deed. The court, however, did not accept this. It held that a marriage could be dissolved only by decree, in the absence of any custom to the contrary. She did not lead any evidence as to any such custom. It was, therefore, accepted that the marriage was void. The husband, therefore, contended that the marriage being void, she was not entitled to any maintenance from him. The court relied on several cases[49]. It referred to the following observations of the court in *Krishnakant v. Reena*[50], which was a wife's petition under s 24 of the HMA, where the marriage was sought to be declared null and void:

The *Hindu Marriage Act* is a piece of social welfare legislation regulating the marital relations of Hindus consistently with their customary law, i.e Hindu Law. The object behind section 24 of the Act providing for maintenance *pendente lite* to a party in matrimonial proceedings is obviously to provide financial assistance to the indigent spouse to maintain herself or himself during the pendency of the proceedings and also to have sufficient funds to carry on the litigation so that the spouse does not unduly suffer in the conduct of the case for want for funds. The words 'wife' or 'husband' used in section 24 of the Act include a man and a woman who have gone through the ceremony of Hindu Marriage which would have been valid but for the provisions of section 11 read with clause (I) of section 5 of the *Hindu Marriage Act.* These words have been used as convenient terms to refer the parties who have gone through a

---

49 *Govindrao* v. *Anandibai,* AIR 1976 Bom 433; *Rajeshbhai* v. *Shantabai* AIR 1982 Bom 231; *Shantaram* v. *Dagubai* 1987 Mah LJ 179; *Laxmibai* v. *Ayodhya Prasad* AIR 1991 MP 47.

50 1999 (1) Mah. LJ 388.

ceremony of marriage whether or not that marriage is valid or subsisting, just as word 'marriage' has been used in the Act to include a purported marriage, which is void *ab initio.*

It was, accordingly held in *Rameshchandraji Rampratapji Daga's* case, that despite the marriage being null and void the wife is entitled to claim maintenance from her husband in this case. The husband made an appeal before the Apex Court. Justices D.M. Dharmadhikari and H.K. Sema, a division bench, pronounced a judgment on this contentious issue which has far reaching implications on Hindu women's rights, on December13, 2004. In its historical ruling in *Rameshchandra Daga v. Rameshwari Daga*[51], the apex court upheld the maintenance rights of women in such informal relationships or invalid marriages. The Supreme Court accepted the woman's plea that the husband, an advocate, was aware of the customary divorce at the time of his marriage and chastised him for denying the paternity of his daughter.

The judgment sets right the wrong suffered by legions of Hindu women for half a century. The *Hindu Marriage Act*, 1955 had rendered Hindu marriages monogamous. But though deemed "monogamous" in letter, Hindu marriages continued to be bigamous in reality. The advantage of this "legal monogamy" was to the husband as he could escape from the economic liability of maintaining his wife on the plea that the marriage suffered from a legal defect or lacked legal sanctity. Several earlier judgments had denied women in such relationship the right of maintenance by adopting a righteous and moral stand. The present judgment needs to be hailed for its departure from this moral high ground.

"The facts of this case tell the tragic tale of an Indian woman, who having gone through two marriages with a child born to her, apprehends destitution as both marriages have broken down," the judges comment with a note of compassion. Further the Supreme Court accepts that Hindu marriages, like Muslim marriages, were bigamous prior to the 1955

---

[51] AIR 2005 SC 422.

enactment. There is also a tacit acceptance that the ground reality has not changed much since the enactment. So though such marriages are illegal as per the statutory provisions of the codified Hindu law, the Supreme Court ruled that they are not "immoral" and hence a financially dependent woman cannot be denied maintenance on this ground.

In *Narinder Pal Kaur Chawla v. Manjeet Singh Chawla*[52] It was observed that section 18 (2) of the *Hindu Adoptions and Maintenance Act* entitles a Hindu wife to claim maintenance against her husband even if he has other wife living .This gives an impression that even a second wife may have right to claim maintenance .It is more so when 'Hindu wife' has not been defined under the Act. In the absence of any such definition given in the Act one has to interpret the expression in the spirit in which it appears in the statute. This is moreso when as per the provision of Section 4 of the Act, no external aid (from other statutes) is to be brought to define Hindu wife. This Act was brought into force in the year 1956. As on that date *Hindu Marriage Act*, 1955 was already in force, which contains provisions like S. 5 regarding void marriages. If "second wife", though her marriage is void under the *Hindu Marriage Act*, was to be denied maintenance, then the legislature would not have included provision like clause (d) in sub-section (2) of S. 18 of the 1956 Act or would have clarified that this clause was added only to take care of those second marriages performed before the *Hindu Marriage Act*, 1955 was enacted when polygamy was permissible for male Hindus. Clause (e) of sub-section (2) of section 18 of the 1956 Act, which uses the expression 'concubine' would also lend colour to the expression 'Hindu wife' in as much as, the legislature has carved out a distinction between 'second wife' and 'concubine'. The respondent husbands cannot take advantage of their own wrongs by not disclosing second wives the factum of first marriage. The court can read a male entering into second matrimonial alliance, as 'husband', why for the purpose of

---

52 *Supra note* 38.

granting maintenance to a woman, second wife be not treated as 'Hindu wife' in the absence of definition 'Hindu wife' specifically excluding second wife. Even if it presumed that the said 'wife' could not be treated as 'Hindu wife' since she is not legally wedded wife of respondent, such a wife is entitled to lump sum amount in the form of damages or otherwise[53]

After these rulings, it may be hoped that it will no longer be possible for a Hindu husband to escape from his liability of maintaining his wife on the plea that the wife is not formally divorced from her previous husband and that the woman is his concubine since his previous marriage is still subsisting.

1.7 Few Thoughts

Bigamy is strictly prohibited under the *Hindu Marriage Act* as well as the *Special Marriage Act* under which a Hindu can marry. Bigamy is a matrimonial wrong entitling the innocent spouse a relief and also an offence under the provisions of the IPC. But it is not easy to prove a bigamous marriage because of proof of compliance of essential enumerated ceremonies. The person who performs bigamous marriage cannot be guilty of bigamy if they omit deliberately or inadvertently to perform the essential ceremonies of marriage.

Even though the law is very clear on this point, 'second marriage' is a common practice in Indian society. As a result of the aforementioned contrast between the law and social practice, second wives in India have little protection under the law. Such things are bound to happen and dupes may take advantages and innocent persons may become their victims. In order to avoid this nuisance from our society, legislature must prescribe only one ceremony for the performance of a Hindu marriage (Sec.7 of HMA). Registration of marriage should be made compulsory (Sec. 8 of

---

[53] *Id.*, p. 8.

HMA) the second solution will help to eradicate another evil (child marriage) from our society.

The welfare provisions under the Hindu personal law statutes as well as the Code of Criminal Procedure applicable to all irrespective of religion provide for maintenance of wives. The maintenance under personal laws can be invoked only when there are proceedings pending (Sec. 24) or decided (Sec. 25) under that law, whereas there is no requirement of any matrimonial litigation under the CrPC.[54]

The Social legislations aimed to ameliorate the position of Hindu women are not proved effective. Stray misfortunes are inevitable. Such things are bound to happen and dupes may take advantage and innocent persons may become their victims.

Only the parties to the marriage can seek a decree of annulment of it. The first wife not being a party to the second marriage has no *locus standi* to file a petition for annulment under sec. 11 of the HMA. The remedy available to previous wife is by way of suit for declaration under sec. 34 of the *Specific Relief Act*, 1963. It may be stated that this clause should be considered and amended. An exception should be made and the spouse of the first marriage should be given a *locus standi* to file a petition for annulment under Section 11.

The social stigma attached with being a second wife, the absence of any legal status to the relationship, and the enormous pain of being cheated into the marriage are undoubtedly extremely depressing for a woman. Even though there is no recognition given to a second wife, yet thankfully due to the judicial interpretation of existing law, as discussed above, she may have some chances of getting maintenance. In the absence of any clear provisions under the law, her chances of claiming her rights are largely dependent on the discretion of the judges.

---

54 The *Code of Criminal Procedure (Amendment) Act*, 2001 (Act No. 50 of 2001) has done away with the limit of Rs. 500 per month.

Even under the criminal law, it is extremely difficult to prove bigamy, as the marriage has to be validly performed to prove the offence of bigamy. Usually these loop holes in the law are exploited by men to defend themselves in such cases. An amendment in the clause is the demand of the time. Maintenance should be granted to the suffering, innocent women under the uniformly applicable laws. But nobody should be allowed to take benefit of its own wrong.

In this background of contrasting legal precedents, lawmakers should make clear provisions to protect the rights of those women who have been duped into 'second marriages' so as to bring them some respite. The courts have become far removed from people's day-to-day life and the community is constantly finding ways to circumvent lengthy and long drawn legal procedures. Legal aid and judicial accessibility need to be made easily available to the common people.

DOMESTIC VIOLENCE - A CRITIQUE FROM HUMAN RIGHTS ANGLE

Dr. R. Revathi*

1.1 Introduction

All human beings are born free and equal in dignity and rights. Man, woman and child are humanity in unity. However, we discriminate between man and woman and consider the latter to be inferior. We have to remember that no man is born without a woman. There are some biological differences but they do not warrant basic discrimination[1]. Central to the contemporary doctrine of international human rights is principle of non-discrimination. The Constitution of India guarantees equality of status and opportunity to all citizens[2]. It also guarantees equality to all persons and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.

The Constitution is colour blind and human rights are gender blind. However, women are deprived of their rights, entitlements and are subjected to discrimination and exploitation at every level. Women are not able to lead a life free from violence both within and outside the home. Domestic violence that takes place within the four walls is partner violence in the West[3]. It is also known as spousal abuse. It is a type of gender-based violence that occurs within the social context of male domination, women subordination and their familial bonds.

---

* Associate Professor, The Tamilnadu Dr. Ambedkar Law University, Chennai

1 The UN General Assembly on July 2nd 2010 voted unanimously to create a UN entity for Gender Equality and the Empowerment of Women named UN Women (UNW). It is meant to be an egalitarian one. It is a major stride for human kind in general and for the development of the womanhood in particular. It brings to a close discriminatory disparity affirming the egalitarian gender jurisprudence unanimously. For details see V.R. Krishna Iyer, "Gender War, Yet to be Won", *The Hindu*, (2010).

2 See, Preamble to the Indian Constitution. Article 14 of the Indian Constitution envisages equality before law and equal protection of the laws; see also Articles 15 & 16 of the Constitution.

3 See, Jana L. Jasinski and Linda M. Williams (Ed.) *Partner Violence*, 1998.

Domestic Violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace[4]. It is a global phenomenon and has been on the rise constantly. It is deeply ingrained in our minds and in-built in our social and political culture. It is a pervasive problem in India that cuts across the age, education, social class and religion. Recent studies[5] indicate that violence against women in general and domestic violence in particular, is intricately linked to real or perceived fulfillment of masculinities. It appears that men are more likely to use violence against women if they are unable to fulfill hegemonic masculinity.

Of all types of violence against women domestic violence is the most serious type. Social practices, customs, beliefs, myths and patriarchy are the causative factors of domestic violence. The victims are not able to raise their voice or protest against violence. They live in the grip of fear and horror. Peace remains wanting and terror haunting in the family. For millions of people human rights seem mainly to be linked to one gender alone. It is felt that domestic violence must be treated as a human right violation. It has impact on psychological, emotional, social and financial dimensions. It is a slippery concept that cannot be understood only in physical terms. It has an impact on the dignity, personality and value of a person. In this paper an attempt is made to address all these issues from human rights angle. Further, the new law on domestic violence is examined as to how it is going to protect women's rights. The discussion is confined to the problem of domestic violence.

1.2 Domestic Violence: Need for Exploding the Public-Private Divide

---

4 In the *Platform for Action,* as per the core document of the Beijing Conference, 1995.

5 *Domestic Violence in India : Exploring Strategies, Promoting Dialogue* - Summary report of four studies, International Centre for Research on Women, Washington D.C., 2002.

It is most unfortunate that the home has become the least safe place for women, as it is the safest place for men to commit violence against women. Statistically, it is safer to be on the streets after dark with a stranger than at home in the bosom of one's family for it is there that the accidents of murder and violence are likely to occur[6]. It is due to their vulnerability domestic violence is happening within the four walls. The vulnerable person has little choice or capacity to escape from pain or injury. Therefore, vulnerability is central to human rights activism and intervention.

Once, domestic violence was treated as purely a private matter. Women seemed to be synonymous with 'domesticity'. Women within the household in fact discharge multi functional roles. In a way, they sacrifice some comforts and own responsibilities. They silently suffer by overburdening themselves. This has tremendous impact on their health. Undoubtedly, it is amounting to violation of human rights. Interference into domestic privacy has traditionally been seen as a greater evil than actual violence inflicted upon a wife[7].

If one subscribes to the view of Lord Denning,[8] home belongs exclusively to the female and the world is the exclusive domain of the male. Similar view was expressed by the American Supreme Court judge Bradley J[9] that pursuant to the common law "a woman had no legal existence separate from her husband who was regarded as her head and representative in the social state". It is submitted that there is clearly a public-private divide in terms of gender equality. Women have been discharging roles like motherhood,

---

6 Sydney Brandon: *Violence in Family,* 1976, p. 1.

7 *State* v. *Rhodes,* 1868, WL 1278 (N.C.)

8 See, Lord Denning, in his book *Due Process of Law* wrote: "A woman in her sphere does work as useful as a man in his. She has as much right to her freedom, to develop her personality to the full as a man. When she marries she does not become the husband's servant but his equal partner. If his work is more important in the life of the community, hers is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals". For details see, Ragini Nayak, "Needed: Gender Equity not Just Gender Equality, *"The Hindu-Open Page,* 2010.

9 *Bradwell* v. *Illinois,* 83 US at 130 &141; for details see Eileen Kaufman, "Women and Law" vol. IV, 2007, *Indian Jurid.Rev.* at 12.

rearing of children, cooking etc., which made them confine to private life. But the real argument is in terms of gender equity and not just equality. Gender equity denotes that one should be concerned towards the weaker sex and be fair towards them.

For gender equity to be institutionalized in our society, we have to see through parochial patriarchal mindsets and values and men and women share equal responsibility of the home and the world[10]. The step forward came in understanding domestic violence as a human rights violation and attempting to dissolve public-private divide in this regard[11]. Further feminization of human rights has led to the recognition that there should not be a public-private divide on international human right issues. It is to be noted that the purported intrusion in the private life is necessary for the increased recognition of domestic violence as a valid social concern.

1.3 Manifestations of Domestic Violence and Human Rights Violation

Domestic violence manifests both at natal home as well as conjugal home ranging from female foeticide, infanticide, child abuse, incest, child marriages, sati, honour killings, wife battering, cruel treatment, neglect and denial of the rights of aged women, abuse of widows, bride burning and dowry death etc[12]. It has terrible impact not only on the victims but also on their children and other members of the family. Each and every instance said above is considered as violation of a human right.

Women have the same right to bodily autonomy as men, especially as regards their reproductive organs. Surgical alteration of a woman's sexual organs for any reason other than her health is a violation of her human rights. Compelling women to bear unwanted children and forbidding

---

10 *Id.*, Sandhya Penta Reddy, "Stay at Home Mom"; see also *Id,* R. Tarangini, "A Win-win Situation" and see G. Krishnamurthy, "The Right Balance".

11 ICRW Report: Domestic Violence in India, A Summary Report of three studies available at http:/www.org/docs/domviol.pdf

12 See, Dr. R. Revathi, *Law Relating to Domestic Violence* (2 Ed.) Asia Law House, 2009 at 18.

women from bearing wanted children are violations[13]. Pregnancy is a time when a woman may be vulnerable to abuse. As a result, right to autonomy, right to make choices and procreation rights are in jeopardy. If woman is forced to act as surrogate, it is a challenge to her reproductive health. Reproductive health is a human right issue. Indian women are being exploited as surrogates by foreign childless couples. As a result commercial surrogacy has become reproductive trafficking in India and women being movable property. These are all the consequences of medical biotechnology that promotes medical tourism in the country[14].

Many women are forced into prostitution either by their parents, husbands or boyfriends as a result of the difficult economic and social conditions in which they find themselves. Since prostitution is illegal in many countries, it is difficult for a prostitute to come forward and ask for protection[15]. The extent of trafficking in women and girl children has reached alarming proportions especially in Asian countries. Just like medical tourism in India, sex tourism of developing countries are a well-organized industry in several European and other industrialized countries.

If wife is subjected to isolation, her right to association and expression is violated. She is reduced to the level of animal due to her solitary confinement which is unconstitutional.[16] It has devastating effect on her physical and mental well being. It is a deprivation of basic amenities like access to health, medical care, proper food and education etc. It takes away her right to dignity and individuality. One should not forget that each person

---

13 See, *Sareetha* v. *Venkata Subbiah,* AIR (1983) AP 356.

14 Patricia L Cross, "Woman's Rights are Human Rights", *Sunshine for Women* Oct 5, 2001 at http://www.pinn.net/

15 Recently the Supreme Court advised the government to legalize prostitution on the count that present laws continue to be insensitive. Once legalized, commercial sex workers will benefit from insurance and health cover and suffer less from law enforcers. Others countering this demand worried that legalization may result in further trafficking of children into the trade – See, *The Hindu,* 19.01.10, Metro Plus 5.

16 *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1575; See also *Sunil Batra-II,* AIR 1980 SC 1579.

is valuable to himself / herself and is capable of being valuable to others[17]. Women are critical agents of development and actors of change. It is submitted that if they are not allowed to participate in the development process by selective elimination, exclusion and isolation the inclusive growth of the nation and development process is retarded.

1.4 Child Abuse

Child abuse is a part of wider gamut of violence. A child at a tender age is sexually abused. It is common in abusive relationships. Popular wisdom holds that sexual abuse takes place when children are in environments outside the safe confines of their homes and schools. However, most of the children not going to school have been sexually abused in their family environment.[18] Most of the time, the abuse was perpetrated by some one known to the child or in a position of trust and responsibility.[19] It is submitted that the child in the stage of flowering is not allowed to blossom. The helpless abused child victim never reveals her untold misery nor does an incidence of incest come out. She is voiceless and breach of her rights is endless. The link between child abuse and domestic violence is now well established.[20] Incest, rape and domestic violence would lead to trauma, physical handicap or death.

In 2005 a fourteen year girl was raped by her father, Saleem Khan at his house and she had concealed it because of fear. Mother filed a case against the husband when her daughter became pregnant. The aborted foetus was sent to DNA test, which confirmed that Saleem Khan is the biological father. The Supreme Court affirmed the life imprisonment imposed by the

---

17 See J.S. Mill, *On Liberty,-Utilitarianism, on Liberty, Essay on Bentham* (Ed.) and Intro Mary Warnock, 1962.

18 See, *the Study on Child Abuse in India* released by the Union Ministry of Women and Child Development - 2007 and also Praveen Swami, *Our Crimes Against our Children* appeared in *The Hindu*, Editorial, 2010.

19 See Ananthapriya Subramanian, "Where is the Law to Protect our Children from Sexual Abuse", *The Hindu-Op-ED*, 2010.

20 Mullender, A., Kelly, L., Hague, G., Malos, E. and Iman, U. (2002) *Children's Perspectives on Domestic Violence,* London: Routledge ; Calder, M., 2005.

High Court of Andhra Pradesh and observed that the accused does not deserve any sympathy on the commission of such a heinous crime[21]. The Court has further observed that the father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. The father is the fortress and refuge of his daughter in whom the daughter reposes trust to protect her. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted and there will be no difference between human beings and animals.

1.5 Selective Elimination of Girl Child and Declining Sex Ratio

In a *Son-preference* society like ours, the journey of a girl child from womb to tomb is riddled with unsavory events with deep-rooted social taboos which transformed into social-evils[22]. It is pitiable that even her womb is not spared as it is readily available for rent. There is commercialization of mother's womb and commodification of her genetic organs. Some women fall pray to violence before they are born. In some societies, girls are subjected to traditional practices as circumcision, and in other societies they are compelled to marry at an early age before they are physically, mentally and emotionally matured. There is no doubt that child marriage is violation of a human right.

Female foeticide, infanticide, sale and abandonment of girl child threaten the very existence of women race. As a result there is a declining sex ratio. Their right to life is in jeopardy. Domestic violence is perpetrated in the form of forced termination of female foetuses otherwise called as female foeticide. The decline of sex ratio is an indicator of the low status of women. The question would be is not declining sex-ratio causing social imbalance? Does it not amount to social disability? The concern is about missing women. Foeticide is a challenge on the very question of right to be

---

21 See, *The Hindu,* 14 December 2009, p. 9; Incest was made an offence in Sri Lanka, See, section 364 A of the Penal Code of Srilanka; See also *Shri Lal* v. *State of MP,* 2008 (8) *SCC* 72.

22 See, Malvika Karlekar, *Domestic Violence, EPW* Vol. No. XXXIII, 1998.

born. It has an implication on the health of the mother. At the wider level, it affects the status of women and has serious ecological and demographical ramification. It may lead to serious social problems like increase in sexual offences, sharing of women within and outside wedlock and greater insecurity to women.

The dwindling sex ratio bears eloquent testimony to violence against women even in the mother's womb. With the dramatic advancement of technology, the sex determination of foetus-*amniocentesis* is done at mass scale, not for diagnosis of sex-linked genetic disorder of the foetus, but for abortion of selective female foetus[23]. Genetic testing for sex selection has become a booming business in India. News reports say that female infanticide has reached one-crore mark in the last decade. If this trend continues, there is a possibility of women becoming an extinct species. They are the only species in the entire world who do not want to give birth to their own kind and have an instinct to kill their own kind.

Female genital mutilation adversely affects health of women. Every year an estimated 2 million young girls undergo this procedure. This procedure had been performed on the infant at home. Fear of being forced to undergo circumcision can be grounds for asylum. Refusal to inflict genital mutilation on her baby daughter might be ground for persecution and refugee status.[24]

1.6 Honour Killings

There are acts of violence usually murder, mostly committed by male family members predominantly against female relatives who are perceived to have brought dishonour upon the family. A woman can be targeted by individuals within her family for a variety of reasons including – refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking

---

23 See, *50 years of Indian Parliamentary Democracy (1947-1997) Chap-13* "Gender Issues" at 149. Also see, R Vasavi "When Women Become Rare Species" , *The Hindu*, Open Page, 2009.

24 Legal Service India.com – File://G:\Gender Justice\, Women and Violence.htm, pg. 4 dt 01/18/2010.

divorce or committing adultery. The mere perception that a woman has behaved in a specific way to dishonour her family is sufficient to trigger an attack. They are notoriously called honour killings[25]. Honour killings are wide spread in some of the economically advanced countries and in Islamic nations.[26]

The traditional concept of honour killings is rooted in the perception of women being the property of male members of the family. It is, thus, their 'honour' which is affected if women violate cultural codes or social norms. The idea is rooted in the cultural notion that women are the custodians of family honour and by entering into an illicit relationship, they tarnish the family's reputation. In India different societies are increasingly facing the problem of honour killings.[27] Honour suicides occur in an effort to avoid legal penalties for killing, a woman is ordered or pressured into killing herself. Crimes of honour are crimes indeed and are violations of human rights. .

The Supreme Court of India recorded in the strongest terms its horror against honour killings. The Court[28] termed the practice an act of barbarism. The Court observed that, "once a person becomes a major he or she can marry whom so ever he or she likes ..... the parents cannot harass the person who undergoes such inter-caste or inter-religious marriages". In a

---

25 Siddarth Banke, *Violence Against Woman – Issue of Honor Killings*, Siddarth_banke @legalserviceindia .com

26 Killings of women in the name of honour take place all over Pakistan. It is a part of tribal custom in certain areas of Pakistan. In Sindh province the custom is known as *Karo Kari.* See Savitri Gunasekere (ed.) *Violence, Law and Human Rights in South Asia,* (2007) 152-3; A Turkey girl was buried alive by the family members just because she had boy friends. The crime report in Turkey also revealed that every year nearly half of the crimes committed against women are honour killings–See *The Hindu,* 06-02-2010 at 12.

27 The Varied Contours of Violence Against Women in South Asia; Coomaraswamy, Radhika @ legalserviceindia.com.

28 In *Lata Singh* v. *State of U.P.* (2006) 5 *SCC* 475 - a two judge bench observed that there is nothing honourable in such killings, as infact, they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons, who deserve harsh punishment. For details see S. Viswanathan, Honour Killings: What Needs to be done: *The Hindu,* 26 April, 2010 OP-Ed. at 11.

landmark judgment Karnal Additional District and Sessions court awarded death penalty to five and life to one person for murdering a couple by the diktats of khap panchayat (caste based council) for marrying against social norms in 2007.[29] The panchayat felt that marrying a girl from the neighbouring village was incest. As a result the boy was killed by a mob. It is submitted that Karnal court verdict will prove a strong deterrent. Such medieval thinking is a serious threat to society. It shows their disrespect for the rule of law. They violate the rights of women and young people to lead their lives as they choose to.

Further, no caste panchayat could take the law into its own hands. In Punjab, Haryana, Rajasthan, U.P. and New Delhi region, as estimated 100 young men and women are killed every year on the orders of khap panchyats. It is astonishing to note that khap panchyats demanded amendment to the *Hindu Marriage Act*, 1955 facilitating a ban on marrying in the same gotra. Honour killings are not confined to the northern States. In the South, Tamilnadu has seen similar incidents in the recent past[30]. It is most unfortunate that the thriving of khap panchayats is the logical outcome of caste and gender relations in Indian society. It is time to ban khap panchayats.

It is submitted that honour killing is definitely the most heinous crime against women committed by her kith and kin. However, the action cannot be taken against the accused under the new Act as the very essence of such an act is criminal in nature. Protection of women under *Domestic Violence Act,* a women friendly legislation is lauded. The Act is well drafted so as to cover wide range of instances that occur against women within their own home. The very objective of the Act is to provide civil remedy to the victim. If such violent behaviour aggravates and results in death, criminal action would be taken against the offender but not under the Act. Obviously a case

---

29 Manoj and Babli married outside their gotra(sub-caste). All the five who have been given death sentence are relatives of the girl. Khap panchayat leader was awarded the life sentence. For details see *The Hindu,* 31 March and 2 April, 2010.

30 See, *Supra note* 28.

is to be registered under Section 300 of IPC where the burden lies on the prosecution. This gives ample scope for the accused to go scot free.

1.7 Marital Rape

Marital rape is yet another form of domestic violence. It occurs when a man has sexual intercourse with his wife forcibly without her consent. The provision for marital rape has specifically been exempted. The criminal law presumes that the husband cannot be guilty of rape committed by himself upon his lawful wife, because by their mutual matrimonial consent the wife has given up this right which one cannot retract. The rationale behind this exemption was the doctrine of unity in marriage[31]. The exemption to Section 375 of the Indian Penal Code explicitly says that sexual intercourse by a man with his own wife not being under fifteen years is not rape. Thus, if wife is above fifteen years then forcible intercourse even without her consent is not rape. It is submitted that this is unreasonable and undoubtedly a human right violation. This is a major legal lacuna in India whereas countries like America, Russia, Sweden and Australia allow prosecution of husband for marital rape.

1.8 Dowry Deaths

During 1980s the feminist groups by their demonstrations throughout the country showed that many official suicides were in fact murders or forced suicides. *Sudha Goel*[32] is the first case in which the Supreme Court in 1985 sentenced the husband and mother-in-law of the deceased to life imprisonment for the bride burning. As a result, to combat the increasing menace of dowry deaths/suicides, a new Section 304-B[33] to IPC was added. It is unfortunate that the cruelty under this section is referable to dowry harassment and not to any other type of cruelty. Thus, if a death is caused to

---

31 See, Shobha Saxena, *Crimes Against Women and Protective Laws*, 1995.

32 AIR 1986 SC 250.

33 Section 304-B of IPC is inserted by Act No. 43 of 1986. This section deals with the death of a woman as dowry death, if such death occurs by any burns or bodily injuries or other than normal circumstances within seven years of marriage.

women due to harassment by the husband and in-laws for other than dowry related issues like suspecting her fidelity or giving birth only to female children etc., this provision is not attracted. Consequently, the case is to be dealt with Section 302 of IPC where the burden of proof lies with the prosecution. The burden of proof under Section 304-B is on the accused. This benefit is not available to the victim due to the deficiency as discussed above.

There is a link between domestic violence and maternal mortality because some pregnant women die from domestic violence. There are studies that have highlighted the existence of maternal deaths due to domestic violence[34]. High rates of domestic violence and disproportionately high maternal mortality ratios in developing countries are recognized as public health problems. In most developed countries pregnancy - related suicide are rare.[35] Amongst abused women depression, post - traumatic stress, suicide and self-harm are so prevalent that they can be referred to as 'symptoms of abuse'[36]

Every human being has a right to lead a healthy life[37]. Since, mental and physical health is of prime importance in marriage, any person suffering from a venereal disease communicable in nature like AIDS may not claim a right to marry as an absolute rights. Hence, if a person suffering from the dreadful disease like AIDS knowingly marries a woman and thereby transmits infection not only to such woman, but also to the children begotten is considered as gross violation of human right. The point how the health hazard of a person causes domestic violence was highlighted by the

---

34 Ganatra B R, Coyaji K J, *Too far, Too little, Too late*: A Community based case control study of Maternal Mortality in Rural West Maharashtra, India, *Bull. World Health Organization*, 1998, 76 (6), p. 591.

35 See Frautschi S Cerulli A, Maine D. *Suicide During Pregnancy and its neglect as component of Maternal Mortality, Int. Journal Gynaecol Obstet,* 1994, 47(3), p. 275.

36 Humphreys, "Domestic Violence" in *The Blackwell Companion to Social Work,* Martin Davies (Ed.) Blackwell Publishers, 2008, p. 31.

37 Article 21 of the Indian Constitution.

Supreme Court in *X v. Hospital Z* case[38]. The Court in the instant case discussed the issue of the right to marriage of AIDS patients.

The marriage of an AIDS patient if permitted with a woman who is otherwise healthy would end up with disastrous consequences on future generations. Hence, in the case of a conflict between the right to privacy of an AIDS patient and right to healthy life of fiancee, the right advancing the public morality or public interest alone would be enforced through the process of the Court. The Court emphatically declared in the above case that if there is a clash between fundamental rights of two parties, public welfare is paramount.

1.9 New Law on Domestic Violence

The *Protection of Women from Domestic Violence Act*, 2005 has come into force. The Act is in keeping with CEDAW. The strict implementation of the Act would result in gender justice and gender equity. Domestic Violence is defined as actual abuse or threat to abuse, whether physical, sexual, verbal, emotional or economic[39]. Besides physical violence such as beating, slapping, hitting, pushing, kicking etc., it also covers sexual violence like any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women. Economic abuse includes deprivation of financial resources to which the aggrieved party is entitled to, denial of household necessities to her and to the children, disposal or any alienation of assets (movable/immovable) valuables, shares, securities, bonds or the like and the property in which the aggrieved person has an interest or is entitled to use by virtue of domestic relationship.

The aggrieved person under this Act will only be women. This Act is enacted to eliminate all forms of discrimination against women. The Act

---

38 (1998) 8 SCC 296.

39 Section 3 of the Protection of Women from *the Domestic Violence Act*, 2005 provides a comprehensive definition of domestic violence. Definition of domestic violence is based on UN framework model legislation on domestic violence and UN Declaration of Elimination of Violence Against Women (General Assembly Resolution 48/104 of 1993).

recognizes women's right to live free from violence. The important feature of this landmark law is immediate relief to the victim in cases of emergency and right to reside in shared household. The idea of residence orders, therefore, has a dual purpose. The Supreme Court in *Batra*[40] case observed that in order to become a shared household it has to be a house owned or taken on rent by the husband or a house which belongs to joint family of which the husband is a member. In the instant case the Court maintained that the property belonged to mother-in-law and therefore, it cannot be called a shared household.

It is submitted that *Batra* case is rightly decided and that in a country where the joint family pattern of residence is the norm, any other judgment virtually gives a license to women to throw our senior citizens with the help of a defective law. There is another apprehension that the victim's wife may be deceived and denied to reside in the shared household just by showing that the property belongs to the mother-in-law. In such circumstances, the wife has no immediate remedy from the abusive husband and the very purpose for which the Act is passed would be defeated. However, the right of shared household must be provided depending upon the facts and circumstances of each and every case. Therefore, the law needs to be suitably amended.

The Act introduces the Protection Officer as the interface between the women and the court. This Act is enacted keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to protect women from domestic violence. The Act covers all women who come under the live-in relationship with the perpetrator. The Act considers long-term live-in relationships as legally binding as marriage. It provides protection to women who suffer abuse at the hands of their husbands as well as live in partners and their relatives. The law does not distinguish between the women who is married and the woman who is in a live-in relationship. Therefore, it protects mothers, daughters, sisters, widows, relations through adoptions etc.

---

40 *S.R. Batra* v. *Tarun Batra,* AIR 2007 SC 1118.

Further, the Supreme Court in *Koppisetti Subba Rao @ Subramanian v. State of Andhra Pradesh*[41] has held that the dowry law will apply to live-in relationships also. Otherwise, it would encourage harassment of women who are in live-in relationship, over demand for dowry. The recent Supreme Court ruling[42] upheld the legality of living together. The Court observed that "when two adult people want to live together, what is the wrong? Does it amount to an offence? Living together is not an offence and it cannot be an offence". The Khushboo Court encourages live-in relations as well as premarital sex by defending that there is no law to restrict or prohibit either live-in relations or premarital sex.

It is submitted that a high-pressure lifestyle and economic independence of women have contributed to more and younger people choosing to live together rather than marry. The question would be - is live-in relation intrinsically more equitable than marriage? The Court ruling has put live-in relationship on par with marriages. However, live-in relations are alien to our culture. Live-in though legal is immoral. They arise out of liberal western life styles. It is nugatory and unholy of Indian ethos. In India, still marriage is sacrosanct and cohabitation is natural corollary of wedlock. It is an institution. It is a social ceremony. Entering into a bond where there are no vows or values is something that cannot be endorsed, for these are relationships of convenience.

The Supreme Court opinion could embolden more young men and women as they would now be convinced that there is no breach of law in the live-in relationships[43]. Encouraging this type of relations could be extremely dangerous not just from the point of unwanted pregnancies but also from the fact that either partner could contact sexually transmitted diseases. Further,

---

41 CDJ 2009 SC 868.

42 See, *Khusboo* v. *Kanniammal & Another, Crimes,* VI-2010 (2) at 240- A Three judge Bench of the Supreme Court of India, delivering the judgment on actress Khusboo who reportedly endorsed pre- marital sex in an interview. See Live in Aaj Kal, Kankana Basu, *The Hindu, Sunday Magazine,* 2010.

43 C V Aravind, "An Alien Culture we can do Without", *The Hindu, Open Page,* 18 April, 2010 at p. 10.

the question of legitimacy of the children born out of such relations would remain an unsolved problem. In a morally chaotic world, India should set an example by promoting morality and integrity not permisiness in sexuality. There is likeness of more domestic violence in live-in relationships than in legal wed-locks.

The very purpose of the law is actually to introduce a lot of civil remedies within the realm of magisterial court.[44] It is a two stage law. In the first stage the Magistrate passes civil order on application[45] with intent to give an opportunity to the respondent to correct himself. In the second stage when the violence persists or there is a breach of protection order by the respondent, he has to face penal consequences. If the perpetrator of domestic violence disobeys the protection order, criminal action will be taken against him which is punishable up to 1 year imprisonment and a fine of Rs. 20,000. It is submitted that the legislators instead of using the word 'fine', they would have used the word 'compensation' because, the pecuniary jurisdiction of the magistrate is only 5000/- and how can a magistrate impose a fine of Rs. 20000/-.

The novel features of the Act are that persons against whom domestic violence is attributed are regarded as 'respondents' only not as 'accused'. Further, the information given by the victim is not by way of 'complaint' but 'report'. On receipt of a complaint of domestic violence the protection officer/service provider shall prepare a Domestic Incident Report (DIR) and submit the same to the magistrate. Magistrate in turn will pass the protection orders providing right of residence with interim monitory relief.

1.10 Problems in the Implementation of Law

After three years of implementation of the Act, the women activists and complainants realized that there are yawning gaps between the promise in print and the situation on ground. Though the victim got some favourable

---

44 See, Gita Ramaseshan, Advocate, *The Hindu*, 29-10-2006 at p. 10.

45 See, Section 12 of the *Protection of Women from the Domestic Violence Act*, 2005.

orders under the Act, poor infrastructure and funding, lack of co-ordination between departments and judicial delay are proving big deterrents. Lawyer's collective[46] also pointed out huge disparities in implementation among States. The provisions of the Act place key responsibilities on State Governments. But it is the major lacunae that the governments are not appointing protection officers (PO) with independent charge. In very few States the POs are accessible to women and because they are not full time appointees and have other responsibilities, they can hardly devote any time to their duties under the Act.

The judicial delay is another major cause for ineffective implementation. The Act requires the court to complete the proceedings within 60 days. However, in majority of the cases this time line is not being met. Delhi attempted to address this by transferring all cases under the Act to certain designated Mahila Courts[47]. Though it was well intended, however, this move has resulted in overburdening of mahila courts.

1.11 Conclusions and Suggestions

From the above it is concluded that the human rights of women including girl child are inalienable, integral and indivisible part of universal human rights. Human Rights are gender neutral. All forms of domestic violence are violative of fundamental freedoms and human rights. In fact, they de-empower women.

The Act if implemented effectively is a sunshine that dispels darkness within a family. The Act strikes at the roots of grief stricken within a family. As a result, the family would become a heaven. An important feature of the Act is a women's right to secure housing.

---

46 The Second Annual Evaluation Report of the Act by Women's Rights Initiative of Lawyer's Collective which is associated with the legislation since inception.

47 See, Indira Jaisingh, *We cannot Ignore the Reality of Violence*, *The Hindu*, Magazine, See, 2 August, 2009 at p. 1.

The following suggestions are mooted for the effective implementation so as to protect women's human rights:

- Section 304-B of IPC needs to be amended so as to cover all types of cruelty and not dowry related harassment alone.
- Section 375 of IPC is to be amended to cover marital rape.
- We need a legislation that specifically addresses the issue of child sexual abuse as it is not covered either under the IPC or Juvenile Justice Act
- A comprehensive legislation banning 'honour killings' is the need of the hour.
- The concerned State Government must allocate budget to appoint Protection Officers exclusively for the purpose.
- People with the proper training need to be appointed as protection officers.
- There should be proper and effective monitoring system at the time of execution of magisterial orders.
- Awareness campaigns must be conducted for the magistrates, police officers, protection officers/service providers etc about the new law.
- There must be attitudinal change in the society. Parenting plays a crucial role in determining behavioural patterns.
- Finally, the girl child is to be taught not to cow down to abuse. They must develop the attitude to ***own and give*** rather than ***surrender and ask.***

DISSOLUTION OF NUPTIAL CONTRACTS UNDER HINDU MARRIAGE ACT, 1955 : LESSONS INDIA NEEDS TO LEARN FOR IRRETRIEVABLE BREAKDOWN OF MARRIAGES AS A GROUND FOR DIVORCE*

Aman A. Cheema**

1.1 Introduction

"There is no branch of law more important, in any point of view, to the great interests of society, and to the personal comforts of its members, than that which regulates the formation and the dissolution of the nuptial contract. No institution indeed more nearly concerns the very foundations of society, or more distinctly marks by its existence the transition from a rude to a civilized state than that of marriage."[1]

The basic moral and cultural values of any society are revealed in its attitude towards the breakdown and dissolution of marriage. Historically speaking no court had the power to grant a decree of divorce which would terminate a marriage. But with the advent of time, the concept of divorce laws emerged. We find the origin of divorce laws in the western counties before its emergence in India. So it becomes imperative to study the historical background, development and provisions of the divorce laws in various countries.

---

* This paper is the modified version of the paper presented at *National Seminar*, organized by the Rajiv Gandhi National University of Law, Punjab at Patiala, September 8, 2007.

** Lecturer, University Institute of Laws, Panjab University Regional Centre, Extension Library, Civil Lines, Ludhiana.

1 Walker, J., *Divorce Reforms and Family Law Act*, 1996 [online]. Department of Constitutional Affairs. Available from: www.dca.gov.uk/family/fla/chap2.pdf [accessed on 13 August 2007].

1.2 Divorce Law in UK

Before 1857 no English court had the power to grant a decree of divorce which would terminate a marriage. From 1690 onwards, very rich husbands could obtain a divorce from an adulterous wife by private Act of parliament. Since very few could afford this, there was no legal way with people to remarry.[2] The first law which emerged in 1857 was *The Matrimonial Causes Act*. This Act revolved around the fault theory of divorce. This Act permitted divorce for the innocent party where their spouse had committed adultery. One of the objectives of the Act was to shore up the family by restricting adulterous behaviour. Later the *Matrimonial Causes Act 1937* did extend the grounds for divorce to desertion, cruelty and incurable insanity but fault had to be proven. It was argued that to allow divorce by consent would destroy the institution of marriage and undermine the sanctity of marriage and family life. During the passage of the 1937 Act, some reformers had put forward the radical view that once love and companionship had withered away, the quicker the marriage is dissolved the better. Due to increase in the number of divorces and in order to reform the divorce laws, in 1956 the *Royal Commission on Marriage and Divorce* was set up. The commission was split up, with some members advocating a more liberal divorce process and others unwilling to relax the grounds for divorce because they wanted to promote stability in marriage. But it was only in 1966 that the two committees i.e. a committee appointed by the Archbishop of Canterbury and the newly appointed Law Commission called for a radical reform. The committees viewed that the offence based on fault theory of divorce firstly terminates the dead marriages by channelising them into contestatory litigation, thus creating bitterness and hostility and minimizing any chance of reconciliation and secondly, it denied divorce to many people whose spouse refused a divorce, thereby condemning them to live in illegitimate second unions. Despite the proposals of the committees, the fault divorce theory was not

---

2 *Ibid.*

repealed. The irretrievable breakdown of a marriage was to be proved by reference to one or more of the five facts that constitute old fault-base grounds.

Nevertheless, the *Divorce Reform Act, 1969* was enacted. It was based on the belief that the court would need to be satisfied that the fact or facts on which irretrievable breakdown was claimed was or were so serious that further married life would be intolerable. *The Divorce Reform Act* restated the three existing fault grounds of adultery, desertion and cruelty (widened to unreasonable behaviour) and added the two no fault separation grounds. Vide the *Matrimonial Causes Act of 1973*, by a special procedure, divorce could be conducted through post. Thereafter the 1996 *Family Law Act* replaced the *Divorce Reform Act.* The Law[3] currently provides that divorce may be granted on the basis of irretrievable breakdown, which in turn is shown by one or more of the following fault or no fault basis:

1. The respondent having committed adultery and the petitioner finding it intolerable to live with the respondent.
2. The respondent having behaved in such a manner that the petitioner cannot reasonably be expected to live with the respondent.
3. The respondent having deserted the petitioner for at least two years.
4. Parties to the marriage having lived apart for at least two years and respondent consenting to the divorce.
5. The parties having lived apart for at least five years.

The first three grounds are faults that can be committed by one spouse against the other, allowing the innocent spouse to apply for divorce. Next two grounds are no-fault grounds requiring evidence of separation.

---

[3] Great Britain : the *Family Law Act,* 1996 (C.27) London: HMSO.

1.3 Divorce Law in Australia

The commonwealth of Australia Constitution Act 1900 gives the power to the Parliament of Australia to make laws about marriage and matrimonial causes[4]. Prior to 1959 there were varying State laws about divorce. *The Matrimonial Causes Act 1959* introduced the first uniform divorce laws for Australia. About the same time as uniform divorce laws were passed, uniform laws about marriage were also enacted by the Federal Parliament.[5] In the year 1975, the *Family Law Act* was enacted to reform the law governing the dissolution of a marriage and was a response by the government at the time to what it saw as widespread public dissatisfaction with the existing law. The Act was vigorously debated and finally came into force on 5 January 1976. It replaced the *Matrimonial Causes Act 1959* and superseded State and Territory laws about 'guardianship, custody, access and maintenance of children of a marriage'. The *Family Law Act 1975* introduced changes to the way divorce was dealt with including:

1. Fourteen grounds for divorce were replaced with one no-fault ground which was the irretrievable breakdown of the marriage.
2. The parties to the marriage claiming irretrievable breakdown of marriage must show that there has been minimum period of 12 months of separation.
3. No need to give evidence to the court that one party has been guilty of misconduct such as adultery or cruelty, habitual alcoholism, desertion or insanity, or that there has been a five year separation.

---

4 Section 51 (xxi) and Section 51 (xxii) of the *Commonwealth of Australia Constitution Act*, 1900.

5 Family Court of Australia, *Australian Family Law* [online]. Available from: www.familycourt.gov.au/presence/connect/www/home/about/for_legal_studies_students/student_resource_family_law [Accessed 18 August 2007].

4. Fault or guilt was no longer to be a consideration in deciding with whom the children should reside or what maintenance might be paid.

The Family Law Act 1975 provision allowing divorce on the sole ground of irretrievable breakdown of marriage as shown by 12 months separation had become subject to criticism. The operation of the *Family Law Act 1975* was first examined by a *Parliamentary Joint Select Committee*. Its area of inquiry was the grounds for divorce and whether there should be other grounds. This committee in its report in 1980 recommended that the ground for divorce should not be changed. Later in the year 1992 *Second Joint Select Committee,* examined the Act but did not deliberate or examine the ground for divorce.

Hence the substantive law as regards dissolution has not changed in Australia since 1976, although several procedural aspects have made divorce some what easier to obtain:

1. Divorces were previously granted by judges, which attached some symbolic weight and significance; this power has now been delegated by judges to senior registrars.
2. Joint applications are permitted, which further reduces the sense of contest between the parties.
3. Applications may be heard in the absence of the parties where there are no children of the marriage, and the respondent does not object.
4. The Court has redesigned the divorce application form to make it more easily understood and straightforward.

1.4 Divorce Law in USA

On September 5, 1969, with the stroke of his pen, California governor Ronald Reagan wiped out the moral basis for marriage in America. Within five years, 44 states had followed California's lead in instituting some form of no-fault divorce reform. Oklahoma and Maryland already had no-fault laws on the books, but the Golden State is credited with

igniting a national wildfire.[6] Today, every State in the nation permits at least one of two no-fault mechanisms for dissolving a marriage:

1. One or both spouses can sue for divorce because of incompatibility, irreconcilable differences or irretrievable breakdown of marriage.
2. A couple can request a divorce after obtaining a legal separation and waiting a certain period of time.

No longer must a spouse prove cruelty, desertion or adultery, the traditional grounds for divorce.

1.5 Divorce Law in India

India meaning unity in diversity is the home of people propagating various religions. Many of them are governed by their personal laws. But Hindus which include Hindu by religion, Buddhist, Jaina, Sikhs and any other person who is domiciled in the territories of India but not a Muslim, Christian, Parsi or Jew by religion, are governed by the *Hindu Marriage Act, 1955*. This Act not only incorporates the law relating to marriage but also provides for judicial separation, nullity of marriage and divorce. The ethics of marriage differs from community to community. While the Hindus consider it as the sacrament sanctifying the body and an essential pre-requisite for the attainment of *moksa,* the Muslims take it as a contract.

As marriage from the Hindu point of view was not merely a sacrosanct and inviolable union, but also an eternal union-aunion which subsits not merely during this life but for all lives to come. The husband is declared to be one with the wife. Neither by sale nor by created an indissoluble tie between the husband and the wife,

---

6 Schoenfeld, E., "Drumbeats for Divorce Reform" [online]. Hoover Institution. Available from: www.hoover.org/publications/policyreview/3583026. html [Accessed on 15 August 2007].

divorce was not known to the general Hindu law. Neither party to a marriage could, therefore, divorce the other unless divorce was allowed by custom. *The Indian Divorce Act 1869* provided *inter alia* for dissolution of marriage, but it applied only to cases where the petitioner or respondent professed the Christian religion.[7] The Muslims in India are governed by their personal laws and a woman married under muslim rites has been given nine special grounds of divorce in India.[8] *The Parsi Marriage and Divorce Act 1936* govern the dissolution of marriage among Parsi.[9] However, according to the *Hindu Marriage Act, 1955*, relief by way of judicial separation[10], declaration of nullity of marriage[11] and divorce[12] are recognized.

1.6 Hindu Marriage Act, 1955: Provisions for grant of Divorce

The *Hindu Marriage Act, 1955* enshrines vide Section 13 that either party to the marriage may file a petition for dissolution of marriage on one or more of the following grounds:

1. That the other party has committed adultery
2. That the other party has treated the petitioner with cruelty
3. That the other party has deserted the petitioner without any reasonable cause and without the consent or against the wish of the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.
4. That the other party has ceased to be a Hindu by conversion to another religion.
5. That the other party has been incurably of unsound mind or has been suffering from such a mental disorder that the

---

7 *The Indian Divorce Act,* 1869, section 2.
8 *The Dissolution of Muslim Marriage Act,* 1939, section 2.
9 *The Parsi Marriage and Divorce Act,* 1936, section 32.
10 *The Hindu Marriage Act,* 1955, section 10.
11 *Id.,* section 11 and 12.
12 *Id.,* section 13.

petitioner cannot reasonable be expected to live with the respondent.

6. That the other party has been suffering from a virulent and incurable form of leprosy.
7. That the other party has been suffering from venereal disease in a communicable form.
8. That the other party has renounced the world by entering any religious order
9. That the other party has not been heard of as being alive for a period of seven years or more.

In the year 1964, Clause (1A) was inserted in Section 13 vide which more grounds were added, which are as follows:

1. That there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation.
2. That there has been no restitution of conjugal rights between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights.

The *Hindu Marriage Act* also provides for special grounds for dissolution of marriage to the wife:

1. That the husband had married again before the commencement of the Act 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.
2. That the husband has since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.
3. That since the passing of the decree for award of maintenance by the husband to the wife, cohabitation

between the parties had not been resumed for one year or upwards.

4. That her marriage was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

The *Hindu Marriage Act* also incorporates another important provision that is "Divorce by Mutual Consent". This provision was inserted in the year 1976. According to Section 13B of the Act, both the parties to the marriage may present a petitioner for dissolution of marriage on the ground:

1. That they have been living separately for a period of one year or more;
2. That they have not been able to live together and
3. That they have mutually agreed that the marriage should be dissolved.

Another major requirement of section 13B is that the court may pass the decree for dissolution of marriage only on the motion of both the parties made not earlier than six months after the date of the presentation of the petition and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime. The period of 6 to 18 months provided in section 13B is a period of interregnum which is intended to give time and opportunity to the parties to reflect on their move. In this transitional period the parties or either of them may have second thoughts[13].

No petition for dissolution of marriage is to be presented in the court under *Hindu Marriage Act*, 1955 before one year has elapsed since the date of marriage but in exceptional cases the court may

---

[13] *Suman v. Surinder Kumar*, AIR 2003 Raj 155.

entertain the petitioner before one year since the date of marriage, on the ground:

1. That the case is one of exceptional hardship to the petitioner or
2. That the case is one of the exceptional depravity on the part of the respondent[14].

However, it is to be noted that none of the grounds made available for seeking divorce by either the husband or the wife, speak of irretrievable breakdown of a marriage as a ground of divorce as United Kingdom, Australia and United States of America have.

1.7 Judicial Activism vis-à-vis Dissolution of Marriage

Due to various reasons in India it is becoming more and more difficult for disgruntled couples to live together, on the ground of incompatibility. The need for separation where parties to the marriage cannot live together, has been recognized to certain extent in section 13B of the *Hindu Marriage Act* whereby the right to apply for divorce by mutual consent has been conferred by the Act. Mutual consent is not always forthcoming and in many a case, there is much of dilly-dallying by one or the other party. Sometimes anxious couples needing separation cannot avail of the remedy of divorce by mutual consent, merely because one of the parties tries to bargain in the matter or put conditions which may even be against public policy. It has been noticed that where a wife is keen to seek divorce her husband tries to harass her or dictate terms compelling her at times even to surrender her right to maintenance - a paramount right under the law. This unhappy situation could be

---

[14] Section 14 of the *Hindu Marriage Act*, 1955.

avoided if the law is changed in tune with the changed values of our society[15].

The judiciary way back in 1978 stressed upon the need of the introduction of the irretrievable breakdown of marriage as a ground for divorce. The court held that the authorities should amend the law to enable parties to obtain a divorce when the marriage is apparently broken down. With such an amendment the law would come in line with the English law.

The *Law Commission of India* in its Seventy-First Report submitted in 1978 on the *Hindu Marriage Act, 1955* mentioned that restricting the ground for divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties are at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a façade, when the emotional and other bounds which are the essence of marriage have disappeared[16].

Almost three decades have passed but the legislature is yet to act upon the suggestions of the Law Commission and the Judiciary. The Judiciary time and again in various cases,[17] has strongly recommended the Union of India to seriously consider bringing an amendment in the *Hindu Marriage Act, 1955* to incorporate

---

15 Aggarwala, B.D. "Irretrievable Breakdown of Marriage' as ground of Divorce-Need for Inclusion" (1997) 8 SCC (Jour) 11.

16 *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675 (1687).

17 *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226 at p. 240;,*Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675; *Chandrakal Menon v. Vipin Menon*, (1993) 2 SCC 6; *V. Bhagat v. D. Bhagat*, (1994) 1 SCC 337; *Chanderkal Trivedi v. Dr. S.P. Trivedi*, (1993) 4 SCC 232; *Romesh Chander v. Savitri*, (1995) 2 SCC 7.

irretrievable breakdown of marriage as a ground for the grant of divorce. The court laid down that when matrimonial relations have, in fact, ceased to exist; it is not in the interests of the parties or in the interest of the public to keep a man and woman bound as husband and wife in law. According to the Court, a long period of separation could be taken to surmise that the matrimonial bond is beyond repair and that the marriage has become a "fiction though supported by a legal tie".

1.8 Irretrievable breakdown of Marriage as a ground for Divorce: Points of Concern

Some scholars, jurists and academicians propound that the inclusion of irretrievable breakdown of marriage as a ground for divorce may further aggravate the societal and marital problems. There are eight central concerns regarding it:

1. Marriage relationship is accorded sanctity in our society, which would be treated with levity if this ground of divorce is available;
2. Divorce carries social stigma, especially to the wife;
3. This ground permits husband to terminate a marriage relationship at will as already large number of women are deserted by their husbands;
4. This ground can be misused by an errant husband i.e. taking advantage of his own wrong;
5. That subjective element exists in the understanding of "irretrievability" and "breakdown".
6. With the insertion of this ground for divorce, an oral contract with 2 years old is more binding than the contract of marriage; it at least binds one party, the adult. A marriage contract is binding on no one;
7. It would harm the innocent parties as under the no-fault regime, innocent party is stripped off their legal protection;

8. This ground will make divorce law easier, hence it would lead to increase in the divorce rate.

1.9 . Critical Analysis and Sub monitions

There is no doubt that marriage is accorded sanctity and considered a sacrament under Hindu rites and customs. It is holy and has special religious importance. But the sanctity of relationship of husband and wife arises only from the exceptional sharing and trust ....such relationship involves. This has to be internal. Love and respect cannot be sustained on external notions of unity and obligation. Refusal to sever a tie in a case where marriage is dead and there is no scope of reconciliation, does not sever the sanctity of marriage but it shows scant regard for the feelings and emotions of the parties.

Socially speaking, divorce does carry stigma and especially for the wife. But instead of living in a marriage that has broken down irretrievably, where love is lost and it has become difficult in all cases to stay with one another, it is better to be free of.... those clutches. Here is the need to overcome the dependency of the wife on marriage relationship. Here is the need to make her independent and inculcate confidence in her which would encourage her to survive even after the end of her marriage. Moreover, we are evidence to the fact that with changing times the mind set of the human being also changes. It will not be long before divorce is not considered a stigma anymore.

It is submitted that there is a viable need to introduce irretrievable breakdown of marriage as a ground for divorce to find a solution and escape route of a difficult situation but it is strongly recommended that the following safeguards need to be undertaken in all circumstances before the grant of divorce:

1. An identification and distinction is to be made between marriages which could be saved and those which were irretrievable.
2. The Court should make available every opportunity to explore reconciliation between the parties even after the divorce process has started.
3. Every effort should be made by the Court and the family to facilitate conciliation among the spouses.
4. The Court should take ample steps to ensure that there is adequate time period to test whether the marriage has genuinely broken down.
5. For couples with dependent children, eliminate no-fault system and have fault based system with the alternative of a five year waiting period.
6. The Court should ensure that the spouse and the children are sufficiently financially supported.
7. To increase the maintenance amount where the spouse filing petition has himself committed a wrong.
8. The Court should make necessary arrangements on the custody of the children.
9. Help and protect children by encouraging parents to focus on their joint responsibility to support and care for their children.
10. Minimize conflict and reduce the worst effects of separation and divorce on children.
11. Allow couples to make workable arrangements through family mediation in respect of their children, home and other matters following separation or divorce.
12. Distribution of the matrimonial property of the spouses.
13. To undertake every measure for promoting conciliatory divorce or divorce by mutual consent.
14. Imposing five years waiting period for contesting no-fault divorces would serve the ends of both justice and prudence;

> raising the number of marriages that ultimately succeed, while at the very least ensuring that those who want a quick and easy divorce will have to negotiate with their marriage partner in order to get it.

By no fault theory there is no denying the personal responsibility for the breakdown of a relationship. It is not to deny the place of human fault and sin in the process of marital breakdown. It is to say that a human court of justice is too blunt an instrument for apportioning blame in so complex an area of human behaviour. What is the point of apportioning blame. Take the case of *Naveen Kohli* in which multiple allegations and counter allegations were made by both the spouses, husband filed divorce petition and wife not ready to give `divorce, though she had filed various cases even criminal cases against him. They had been living separately for so many years and husband had even married in the mean time and had children. Court held that there was no chance of conciliation and there was no point of apportioning blame as it would just cause distress and distaste further deteriorating the dead relationship. So there was no point in keeping them in a loveless tie forever.

Sometimes even though the marriage has broken down irretrievably, still one spouse is not ready to consent for divorce just due to the revengeful feelings. The feeling looms large that if I am unhappy, I will prolong your unhappiness too. This revengeful attitude is not going to lead anywhere. Moreover, even criminologists have moved to reformative theory of punishment rather than retributive.

Western countries did see dramatic surge in the number of divorces granted each year after inclusion of irretrievable marriage as a ground for divorce but *Michael Ramsey* somewhat rightly asserts, "The reasons for divorce and marital breakdown lie deep in culture

and personalities society produces rather than in the substantial provisions of an Act of Parliament."[18]

Moreover

> "No statue, no matter how cleverly and carefully drafted can make two people love each other, like and respect each other, help, understand and be tolerant of each other or force them to live together in peace and harmony, while they are married and living together as husband and wife."[19]

---

18 Ramsey, M., *Putting Asunder : A Divorce Law for Contemporary Society*. London: S.P.C.K., 1966.

19 Lord Chancellor's Department, *Looking to the Future: Mediation and the Ground for Divorce : A Consultation Paper*. Cm 2424. London: HMSO.

ALTERNATIVE DISPUTE RESOLUTION IN MATRIMONIAL DISPUTES

Dr. Kamaljit Kaur*

> *Discourage litigation. Persuade your neighbor to compromise whenever you can ... As a peacemaker the Lawyer has a superior opportunity of being a good man. There will be business enough.*[1]

In the same vein Judge Learned Hand commented

> *"I must say that as a litigant, I should dread a law suit beyond almost anything else short of sickness and of death".*

The discontentment of people over the inordinate delay in dispensation of justice today makes it not only important but imperative to evolve new juristic principles for dispute resolution. The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition to delay, costs, and procedure speak out the need for better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

Alternative Dispute Resolution (ADR)[2] comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multiparty negotiation, through

---

* Assistant Professor of Law, Army Institute of Law, Mohali.

1 Abraham Lincoln, American President, 1861-1865, Pine, J. (ed.), *Wit and Wisdom of American Presidents*, Dover Publications, Inc., Mineola, New York, 2002, p. 27. *President Lincoln, himself a lawyer, was addressing his peers, but courts also have the opportunity to encourage settlements. Not only do judges have the opportunity, but they also have a source of motivation, since dockets are increasingly overloaded.*

2 "A procedure for settling a dispute by means other than litigation, such as arbitration or mediation." Black's Law Dictionary – Eighth Edition, 2004, p. 86.

mediation, consensus building, to arbitration and adjudication. Conflict is endemic to human society, among individuals and groups, and it is important to manage it.

We find stories in the Bible[3], in the Islamic culture[4], in Mahabharata[5], instances like when Athenian courts became overcrowded, the city-state introduced the position of a public arbitrator around 400 B.C[6]. The classical Greek epic poem *The Iliad,* contains several examples of mediation and arbitration in Greek culture, [7]Among Native Americans, First Nations in Canada, and many other traditions that describe processes that have been used from the earliest times to find peaceful solutions to various disputes, and much can be learned from the past. Dealing with conflicts – *"conflict management,"* or *"conflict resolution"* as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.

The field of *"conflict resolution"* has matured as a multidisciplinary field involving psychology, sociology, social studies, law, business, anthropology, gender studies, political sciences, and international relations. The discipline is complex because it deals with conflicts at

---

3 The first negotiation in The Bible was between the snake and Eve, over the apple in the Garden of Eden., the story of Abraham and Lot negotiating, where Abraham, in order to avoid a fight, offers Lot a deal that Lot cannot refuse. God also acted as a mediator between Abraham and Sara when she wanted Abraham to expel Hagar and her son

4 In the Muslim tradition we find the story of Muhammad who negotiated with God over the number of times that the followers will pray. Muhammad managed to reduce the number from the initial fifty times a day down to five, using as his main argument the necessity to leave enough time for people to do things other than pray. Further holy quran says " if you fear a breach between them (husband and wife) appoint two arbiters, if they feel for peace allah will cause conciliation: (IV : 35)

5 In Hindu Mythology Lord Krishna negotiated with Kauravans for Indraprastha.

6 Barrett *A History of Alternative Dispute Resolution*, Jossey-Bass San Francisco, 2004, p. 7.

7 Nelson, *Adapting ADR to Different Cultures* 15 December, 2001. Online article available at *http://gowlings.com/resources/publications.asp?Pubid=776#N_2_.*

different stages of their existence, and also because it is a mix of theory and practice, and of art and science, as Howard Raiffa demonstrated so brilliantly in his book ***The Art and Science of Negotiation (1982).*** The "science is the systematic analysis of problem solving, and the "art" is the skills, personal abilities, and wisdom."

Alternative Dispute Resolution is a general term used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. ADR has been accepted and is now regarded as respectable within the legal profession[8] The large number of lawyers having undertaken mediation and other ADR training is recognition of the changes that the profession has been grappling with.[9] Russian federation provides for ADR courts called *"arbitrazhnye sudy" for dispute resolutions in family cases*[10] It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies *"mediation,"* a process by which a third party aids the disputants to reach a mutually agreed solution.

1.1 Negotiation, Mediation, Collaborative Law, Arbitration and Conciliation in General

ADR is generally classified into 5 types: Negotiation, Mediation, Collaborative law, Arbitration and Conciliation.

---

8 D Spencer, *'Interview with Dr Tom Altobelli, Federal Magistrate'* (2007) 9 (7) *ADR Bulletin* 121, 121; J Gleeson, *'Should the New South Wales Bar Remain Agnostic to Mediation?'*, Winter Bar News, 2007, p. 38.

9 J Pollard, *'Collaborative Law Gaining Momentum'*, 45(5), Law Society Journal, Australian, 2007, pp. 68-72.
Pollard notes that 20 000 lawyers have undertaken mediation training since the 1980s, although few practice as mediators.

10 Bulletin, *"General Overview of the Judicial System of the Russian Federation"*, BBH Legal, September 2006 , *http://www.bbhlegal.ru/Documents/Publications/general_overview_of_the_judicial_system_in_the_russian_feder ation.pdf (last accessed 22 September, 2009).*

Negotiation: Goldberg, Sander, and Rogers **in *Dispute Resolution: Negotiation, Mediation, and Other Processes* (1992)** define negotiation as *"communication for the purpose of persuasion."* In negotiations there are three approaches to resolving the dispute, each with a different orientation and focus – interest-based[11], rights-based, and power-based – and they can result in different outcomes.

Examples: Nicaragua— negotiation training; South Africa Case Study— negotiation of community disputes; Indonesia— environmental conflict

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted solution. Mediation is a process close in its premises to negotiation: *"mediation is an assisted and facilitated negotiation carried out by a third party"*[12]

Examples: Malaysia— inter-ethnic disputes India— civil and criminal; USA— community mediation.

In family law this is a process of negotiation between a couple, assisted by professionals who may be lawyers; it runs alongside the advice given by lawyers but offers a different way for couples to resolve

---

[11] To provide an historical example of the difference between positions and interests, consider the issue of the Sinai in the dealings between President Anwar Sadat of Egypt and Prime Minister Menahem Begin of Israel, in the wake of the 1967 Six Day War. Each leader claimed that the territory of the Sinai, taken over by Israel in the war, belonged to his nation. This was their stated position. President Jimmy Carter, acting as mediator, interrogated the two leaders as to their interests, and identified them as follows: Egypt wanted sovereignty over the territory, in line with the national position that Egypt would not yield control over the territory which it considered to be its own; Israel's interest was to have guarantees of security on its border with Egypt, in view of the threat it had been facing on this border previously. President Carter then proposed that the Sinai would be returned to sovereign Egyptian rule, but would remain a demilitarized zone. This creative solution satisfied the interests of both sides, and was therefore agreed.

[12] Goldberg, S. B. Sander, F. E. A. and Rogers, N. H., *Dispute Resolution: Negotiation, Mediation, and other Processes.* Boston, Mass., Little Brown, 1992.

themselves the issues they face. It is not to be confused with counseling. In orthodox mediation, the mediators can say if a proposed outcome is unlikely to be upheld by a court.

Arbitration can be defined as a method by which parties to a dispute get the same settled through the intervention of a third person. Parties can also settle their disputes through a permanent arbitral Institutions like, Indian Council of Arbitration, Chamber of Commerces, etc.

Examples: USA— used in federal and state courts, mainly in small and moderate-sized tort and contract cases, where the costs of litigation are often much greater than the amounts at stake; Japan— appellate ADR.

This is a form of independent adjudication but outside the court system and with the opportunity to agree timetables, choice of arbitrator, procedures, location of hearings etc. It can be for all issues in a case or just a narrow point in dispute. At present it is yet binding in English family law.

Collaborative Law[13] is very prevalent in other countries.[14] Collaborative lawyering is an emerging method of dispute resolution for separating or divorcing couples, where the parties and their lawyers agree to resolve the issues without litigation. The essence of the process is that the best interest of the spouses and their families is served by trying to resolve these disputes in a non confrontational way. This is achieved by way of informal discussions with each party,

---

13 Commonly known as collaborative practice because the service may involve other professionals) is a dispute resolution method in which the clients and their lawyers agree by way of a limited retainer agreement to negotiate settlement without resort to the courts. The agreement specifies that the solicitor/client relationship is restricted to settlement negotiations and is automatically terminated if the matter proceeds to court. The lawyer and the lawyer's firm are disqualified from litigation representation.

14 P Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation,* American Bar Association, , gives a detailed account of the collaborative process, 2001.

ensuring their direct influence on the outcome. The ultimate aim is to avoid the use of court in family law cases.[15]

The International Academy of Collaborative Professionals (IACP) is an international body promoting the practice of collaborative law internationally. It has 2,458 members drawn from 9 countries and sets out training standards for those involved in collaborative law.[16] Whilst the highest concentration of collaborative lawyers is in family law, the collaborative process is also used in other areas of law. For example, in Massachusetts it is used in resolving commercial disputes. Similarly, Texas is considering extending the practice of collaborative law into other areas of civil law.[17]

Although collaborative law is an emerging ADR process, it has the capacity to provide another method to assist in the resolution of family disputes in certain circumstances. Given that it is a relatively new process, the need to ensure that those engaged in the process are trained in the collaborative process. This involves learning not only the collaborative model, but also the new skills needed to work with clients and the lawyer representing the other spouse to try and get the best result for both spouses and the family. At present the basic issues stemming from collaborative lawyering are the ethical and professional

---

15 Bryan, *Collaborative Divorce: Meaningful Reform or Another Quick Fix?* (1999) 5(4) *Psychology, Public Policy, and Law 1001*; Gamache — *"Collaborative practice: a new opportunity to address children's best interests in divorce"* (2005) 65 Louisiana Law Review 1455; Lande and Gregg — *"Fitting the forum to the family fuss: choosing mediation, collaborative law, or cooperative law for negotiating divorce cases"* (2004) 42(2) Family Court Review 280; and Schwab — *"Collaborative Lawyering: A Closer Look at an Emerging Practice"* (2003) 4 Pepp Disp Resol L J 351.

16 As of 2007, IACP *members include lawyers from the USA (2,304 members), Canada (91 members), England (25 members), Ireland (6 members), Scotland (6 members), Australia (21 members), New Zealand (1member), Austria (3 members) and Switzerland (1member). See www.collaborativepractice.com and Minimum standards for a collaborative basic training, www.collaborativepractice .com/articles/IACP_Training_Standards.pdf.*

17 Pirrie, *Collaborative Divorce*, New Law Journal, 156, 2006, pp. 898-899.

problems which may arise and whether the parties best interests are fully served by the solicitors.[18]

Conciliation is a process in which a third party brings together all sides of the conflict for discussion among themselves. Conciliators do not usually take an active role in resolving the dispute but may help with agenda setting, record keeping, and other administrative concerns. A conciliator may act as a go between when parties do not meet directly and act as a moderator when joint meetings are held.

Japanese law makes extensive use of conciliation in civil disputes. The most common forms are civil conciliation and domestic conciliation. Civil conciliation is a form of dispute resolution for small lawsuits, and provides a simpler and cheaper alternative to litigation. Domestic conciliation is most commonly used to handle contentious divorces, but may apply to other domestic disputes such as the annulment of a marriage or acknowledgment of paternity.

1.2 A Brief History of ADR

The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve disputes.

The US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help "communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin"[19].

---

[18] Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, Ohio St J Dis Resol, 18, 2002, p. 505.

[19] Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflicts*, San Francisco, Jossey-Bass, 1996.

Internationally, the ADR movement has also taken off in both developed and developing countries. In the developing world, a number of countries are engaging in the ADR experiment, including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine and Uruguay. These countries are experiencing similar growth while continuing to develop new and creative ADR processes and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field. In the United Kingdom, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the Lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged"[20]. In response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR. In 1976, the San Francisco Community Boards program was established to further such goals. In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation.[21]

---

[20] Acland, A.F., *Managing Conflict Through Mediation.* London, Hutchinson, 1990. See also *Resolving Disputes Without Going To Court: A Consumer Guide to Alternative Dispute Resolution*, Random House, London, 1995.

[21] This history is drawn from a number of sources, including: Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers, Dispute Resolution: Negotiation,Mediation and Other Processes 2 ed., Little Brown and Co., New York: 1992, pp. 3-12; and Elizabeth Plapinger and Donna Stienstra, ADR and Settlements in the Federal District Courts: A Sourcebook for Judges and Lawyers (Federal Judicial Center and CPR Institute for Dispute Resolution) 1996, pp. 3-13.

In South Africa, India, and Bangladesh, ADR programme were developed to by-pass corrupt, biased, or otherwise discredited court systems that could not provide reasonable justice for at least certain parts of the population (blacks, the poor, or women). In Sri Lanka, the reputation of the courts is relatively good, but they were ineffective in resolving many local and small disputes because of high costs and long delays. The Mediation Boards there have evolved as a substitute for the courts, but enjoy the support of the judicial system. Bolivia, Haiti, Ecuador, and El Salvador are developing systems involving government support for independent, local, informal dispute resolution panels to serve parts of the population for whom the courts are ineffective [22]

Many studies of developing country ADR systems offer evidence that the systems have been effective in processing cases quickly, at least relative to traditional court systems. The Mediation Boards in Sri Lanka resolve 61% of cases within 30 days and 94% within 90 days Studies of programme in China, India, Costa Rica, and Puerto Rico similarly indicate that ADR systems have been successful in handling large numbers of cases quickly and efficiently.[23]

In Sri Lanka, for example, satisfaction with the Mediation Board system is quite high. Nearly 65% of all mediated cases are settled, and compliance rates, while not accurately measured, are reported to be quite high. The chairman of one Mediation Board indicated that

---

22 Davis, William and Crohn, Madeleine, "Lessons Learned: Experiences with Alternative Dispute Resolution." *Prepared for Judicial Roundtable II. Williamsburg, VA*: National Center for State Courts, 1996.

23 Blair, Harry, and Hansen, Gary. February, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programme*, USAID Program and Operations Assessment Report No. 7; Arlington, VA: USAID, Office of Evaluation, Center for Development Information and Evaluation (CDIE). (PN-AAX-280), 1994.

compliance with debtor dispute settlements, which constitute a large proportion of the cases, is nearly 95%.[24]

Likewise, in Bangladesh, almost all users indicate that they prefer mediation to the formal court system and would use the mediation process again. In South Africa, users of commercial labour-management mediation and arbitration cite the positive impact of ADR, relative to litigation, on ongoing labour management relations. And throughout Southeast Asia, disputants cite a general cultural preference for informal dispute resolution because of its ability to help reconcile and preserve personal and commercial relationships.[25]

In India, for example, the lok adalats were generally credited with resolving large numbers of cases efficiently and cheaply in the mid-1980s before the system was taken over by the government judiciary. Women, however, did not like the system, especially for family disputes, because resolution of disputes was based on local norms, which were often discriminatory towards women, rather than on more recently defined legal rights. The same was true for members of lower castes.[26]

1.3 ADR in India Specifically with Regards to Family Law

A committee was formed under Indira Gandhi government, to recommend measures at national level to secure for the people a democracy of remedies and easy access to justice. In one of such

---

24 Hanson, Gary; Said, Mary Staples; Oberst, Robert; Vavre, Jacki, "A Strategic Assessment of Legal Systems Development in Sri Lanka", USAID *Working Paper* No. 196. Washington, DC: USAID. (PN-ABT-456), 1994.

25 Othman, Wan Halim, "Community Mediation in Malaysia: A Pilot Program for the Department of National Unity". Fred E. Jandt and Paul B. Pedersen (Eds.), *Constructive Conflict Management: Asia-Pacific Cases*, Thousand Oaks, London and New Delhi: Sage Publications, 1996, pp. 29-42.

26 Whitson, Sarah Leah, "Neither Fish, Nor Flesh, Nor Good Red Herring' Lok Adalats: An Experiment in Informal Dispute Resolution in India," *Hastings International and Comparative Law Review*, vol. 15, no. 3, 1992, p. 391.

committee meetings a dialectical diagnosis of the Pathlogy of Indo Anglican Judicial Process was presented by the committee as follows:

"Where the bulk of people are backward social and economic status but the national goal is social and economic justice, the rule of law, notwithstanding its mien of magestic equality but fail its mission in the absence of a scheme to bring the system of justice near to down-trodden. Therefore it becomes a democratic obligation to make the legal process a surer means to Social Justice".

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people and such mediation was called in olden days "Panchayath".

The Indian Contract Act, 1872 and the *Specific Relief Act*, 1878 recognized the settlement of disputes by arbitration. Even the *Industrial Disputes Act*, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes.

The only field where the Courts in India have recognized ADR is in the field of arbitration. The arbitration was originally governed by the provisions of the *Indian Arbitration Act*, 1940. The scope of interference of the award passed by an arbitration was dealt with by the Apex Court in the decision reported in *Food Corporation of India v. Jogindarlal Mohindarpal*[27]. The power to decide the jurisdiction of the

---

[27] 1989 (2) SCC 347 "Arbitration as a mode for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play in action. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should

arbitrator to decide a particular issue or not was vested with the Law Courts.[28]

The thrust being on the minimization of Courts intervention in the arbitration process by adoption of the *United Nations Commission on International Trade Law (UNCITRAL).* With this in mind, the Government has given birth to a new legislation called *"The Arbitration and Conciliation Act 1996".*

Matrimonial law arbitration may be an idea whose time has come. Arbitration as a dispute resolution methodology has been around for hundreds if not thousands of years. Over the past century, arbitration has been used primarily in labour and commercial law and a tremendous body of case law has developed in those areas.

Reference to the village panchayat without court intervention, was one of the natural ways for Hindus to resolve disputes. Hindu civilization expressly encouraged dispute resolution by tribunals' chosen by the parties.[29]A study of the Muslim law during the Muslim rule and judicial administrators under Arabs, Sultans, Mughals, Vijyanagar Empire and Marathas give us useful information about the dispute resolution practices prevalent during that epoch.[30]

In present scenario, family disputes are becoming very common. Individualization, modernization, western culture and decline of joint

---

as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only doing justice between parties but by creating a sense that justice appears to have been done".

28 *Union of India v. G.S. Alwal & Co.,* 1996 (3) SCC 568; *State of Orissa and Another v.* Damodar Das. 1996 (2) SCC 216.

29 Avtar Singh, *Introduction to Jurisprudence*, 2006, p. 393

30 R.D., Rajan, *A Premier on Alternative Dispute Resolution*, 2005, p. 515.

family systems are the main causes behind family disputes. The sensitiveness involved in the family matters makes the family disputes different from others. Family disputes are difficult to settle as they are linked with emotions arising out of a relationship. It is hard to handle situation, so they enter into litigation losing their time, money and peace in reality most of the family disputes can be solved amicably by adopting ADR

Section 5 of the Family Courts Act provides provision for the Government to require the association of Social Welfare Organization to hold the family Court to arrive at a settlement. *Section 6 of the Act* provides for appointment of permanent counsellors to effect settlement in the family matters. Further *Section 9 of the Act* imposes an obligation on the Court to make effort for settlement before taking evidence in the case. In fact the practice in family Court shows that most of the cases are filed on sudden impulse between the members of the family, spouse and they are being settled in the conciliation itself. To this extent the alternate dispute resolution has got much recognition in the matter of settlement of family disputes. Similar provision has been made in *Order XXXII A of C.P.C.* which deals with family matters. *Order 32A of CPC* lays down the provision relating to "suits relating to matter concerning the family". It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. In such circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept in forefront. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.[31]

---

[31] The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession, etc.,

Exposing and ending violence against women is a pressing public policy concern in most parts of the world. This concern is expressed and supported by the United Nations Declaration on the Elimination of Violence Against Women. Addressing domestic violence is impossible when attitudes and beliefs that condone violence persist. Alternative dispute resolution may provide a venue for continued abuse after the breakdown of a relationship, and therefore safeguards must be in place. Many respondents to the review recognized the need for the Muslim community to counter traditional attitudes that may condone violence against women.

ADR programme cannot be a substitute for a formal judicial system. ADR programme are instruments for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in legal and social norms. However, ADR programme can complement and support judicial reforms. When courts are systematically biased against women, ADR may be able to improve women's access to justice, especially when discrimination against women inherent in local norms or traditional dispute resolution mechanisms can be overcome in the new ADR mechanism.

By amendment of the Code of Civil Procedure in the year 2002, Section 89 has been included in the Code, which gives importance to mediation, conciliation and arbitration.[32] This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok Adalat or other methods enumerated in that section itself.[33]

Order 23 Rule 3 of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the

---

32 *K.A. Abdul Jalees v. T.A. Sahida* (2003) 4 SCC 166.

33 Section 89, coupled with Order X Rules 1A, 1B, 1C of the CPC and allied laws, affords the judiciary the opportunity to offer the parties an array of avenues to resolve their issues in a timely and amicable manner and, in the process, reduce its backlog.

pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 proves that if the court is satisfied that a suit has been adjusted wholly or partly by and lawful agreement or compromise, the court shall pass a decree in accordance to that.

Order 27 Rule 5B confers a duty on court in suit against the government or a public officer to assist in arriving at a settlement.

The other legislation, which has given more emphasis to the alternate dispute resolution, is the *Legal Services Authority Act, 1987.*[34] Though settlements were effected by conducting Lok Nyayalayas prior to this Act, the same was not been given any statutory recognition. Now under the new Act, a settlement arrived at in the Lok Adalats has been given the force of a decree which can be executed through Court as if it were a decree passed by a Competent Court. Power has been given to the Lok Adalats constituted under the Act, to decide the dispute referred to them, to effect settlement by mediation and if settlement is arrived at between parties to draw a decree on the basis of compromise and the same will be signed by the members of the Adalat which consists of a judicial Officer working or retired, a lawyer and a person of social welfare association preferably woman and a copy of the same will be given to the parties free of costs. This has really reduced delay in getting copy of the decree by the parties. Lok Adalats have acquired wide acceptance among the public as the results are quick, less expensive and no appeal will lie against the award passed in a Lok Adalat.[35]

---

[34] Sub-section (2) of Section 89: when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute of Lok Adalats for settlement by an institution or person, the Legal Services Authorities, Act, 1987 alone shall apply.

[35] Section 19 (1) of the Legal Services Authorities Act 1987 defines that Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. (As amended vide Act no. 37 of 2002)

Realizing that in some countries trial within a reasonable time is a part of the human right legislation. But, in our country, it is a Constitutional obligation in terms of *Art.14 and 21 of the Constitution* The Delhi high court mediation and conciliation centre SAMADHAN was established in *May 2006*

Section 23(2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

In *Salem Bar Association v. Union of India*[36] ,the Supreme Court requested to prepare model rules for ADR and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rules were framed as *Alternative Dispute Resolution and Mediation Rules, 2003.*

The new law, which came into effect in July 2002, was seen to be adopted with differing enthusiasm across the nation. Some States High Courts had already put in place a Panel of trained mediators, who were being referred cases for mediation on a regular basis, and had also adopted the earlier version of the aforesaid Model Rules (recommended in an earlier Order of the Supreme Court in the same case) with or without modifications. Whereas other States High Courts had either only held Awareness Campaigns with little or no follow up action or were in the process of providing mediation training and creating a Panel of trained mediators. These ADR developments in the respective States depended largely on the inclination of their respective High Courts Chief Justice towards ADR. This not only to uneven introduction of ADR services in the different States but also led to the implementation of the ADR system gaining or losing momentum with the change of guard in each High Court. Now, after the second Order

---

36 (2005) 6 SCC 344

of the Supreme Court in the Salem Bars case, it is to be presumed that all High Courts shall be implementing the ADR system by adopting the aforesaid Model Rules in such form as they choose. They will be providing mediators training to the legal fraternity and such others as they choose, and setting up Panels of trained mediators and providing the list to the Judges, lawyers and parties for consideration whilst appointing mediators. On successful completion of the mediation process, they will take the mediated agreements on record and dispose of the cases on the basis thereof.

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003, lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

(i) *it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the dispute arising in the suit;*

(ii) *where there is no relation between the parties which requires to be presented it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec.89.*

(iii) *where there is a relationships between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of sec.89.*

The Rule also says that Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be

treated as cases where a relationship between the parties has to be preserved.

(iv) *where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section(1) of section 89.*

According to Rule 8, the provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while dealing with matrimonial, and child custody disputes.

Our lack of awareness would be tested from the fact that how many of us are aware that in terms of *Section 7(hb) of the Notaries Act,* 1952 one of the functions of a notary is to act as an arbitrator, conciliator, if so required.

The National Legal Services Authority (NALSA) a statutory body constituted under the act is responsible for providing free legal assistance to poor. There is a need to make the masses educated in law and for this NALSA is doing a yeomen service.[37]

In addition to institutional opposition stemming from bureaucratic ego and issues of control, the more powerful sources of opposition are usually economic. Judges, lawyers, and interest groups that benefit from current institutional biases may all be sources of strong opposition to ADR programme. Lawyers felt they were losing cases and fees to the lok adalat ("people's court") system in India, for example, and probably helped persuade the government to take over the system and undermine it. Although a lot have been done to

---

37 R.C., Lahoti, *" Envisioning Justice in 21st century" keynote address delivered at conference of Chief Ministers of state and Chief Justices of High Courts*, Vigyan Bhavan, New Delhi on 18 September, 2004: 2004, 7 SCC (J) 13.

improve the procedures but aggregate pendency has increased because the increase in filing has been faster than the rate of disposals in [38]general. In some countries, access is effectively denied because the formal system requires a level of literacy that many in the country do not have. In these countries, the formal legal processes are especially intimidating for large numbers of illiterate citizens.

1.4 Family Mediation (Global Scenario)

Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the dispute.[39]

Proponents of family mediation argue that the traditional adversarial litigation system is unable to adapt to the needs unique to family breakdown. Where human relationships are strained, the adversarial approach may actually increase rather than reduce conflict[40]

In Australia, the *Family Law Act 1975*, as amended by the *Family Law Reform Act 1995* puts a greater emphasis on the child's best interests in the process of dispute resolution. An Australian study found that only 4% of mediators had ever consulted school age children. Following this, a four month pilot project was launched into child consultation. The results of this study reported that over 80% of parents whose

---

38 *Law Day Address to The Nation by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India, on the occasion of the Eve of National Law Day, 25th November, 2009.*

39 Irving and Benjamin *Therapeutic Family Mediation: Helping Families Resolve Conflict* (Sage Publications, 2002); *Ericksonhttp://heinonline.org/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22Erickson,%20Beth%20M.%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search —Therapeutic Mediation: A Saner Way of Disputing* (1997) 14. J. Am. Matrimonial Law 223; and Paquin and Harvey—*Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection* (2001) 3 Fla Coastal L J 167.

40 Alberta Law Reform Institute *Research Paper On Court-Connected Family Mediation Programme in Canada,* No. 20, 1994, p. 1.

children were consulted as part of the mediation process felt that they had benefited a great deal from it[41].

According to the American Model Standards for Family and Divorce Mediation —Except in extraordinary circumstances, the children should not participate in the process without the consent of both parents and the children's court appointed representative. The use of the phrase "extraordinary circumstances" in the Model Standards sets a deliberately high barrier, and does not force a parent to involve a child if that parent is opposed to it and a child's participation is a matter for parents to decide after proper consultation and discussion.[42]

England and Wales In *Al-Khatib v Masry*[43] Thorpe LJ stated that mediation should be considered at each level of court proceedings, even at Court of Appeal level, because —... there was no family case, however conflicted, that was not potentially open to successful mediation, even if mediation had not been attempted or had failed during the trial process. There are approximately 150,000 divorces per year in England and Wales and approximately 50,000 applications concerning children. Furthermore, 3 in every 5 marriages are estimated to end in divorce, 1 in 4 children under 16 will experience their parents divorce and over 150,000 children are affected by divorce every year.[44] With 15,000 publicly funded mediations plus approximately 5,000 private mediations, this indicates a mediation population of around 20,000. Thus it would appear that there are 10% of the divorcing and

---

41 McIntosh, *Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study Mediation Quarterly* 2; and *Legal Aid and Mediation for People involved in Family Breakdown* (National Audit Office, Legal Services Commission, 18, March 2007), 2000, p. 26.

42 Schoffer, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation Family Court Review,* 43, 2005, p. 326.

43 [2004] EWCA Civ 1353.

44 *Divorcing or Separating?* National Family Mediation (2006). Available at, *http://www.nfm.org.uk/leaflets/NFM%20Leaflet%20v5.pdf. (last accessed on 20 September 2009)*

separating population who use mediation.[45] For many years, there was little official support and funding for family mediation in England and Wales. However stemming from the recommendations of the Law Commission's 1990 Report Family Law: The Ground for Divorce[46] family mediation was allotted a central role in the reform of divorce introduced by the Family Law Act 1996.

United States : In a study conducted in 2001, it was noted that 38 states in the United States had legislation that regulated family mediation.[47] Most agreements reached through mediation were not binding until approved by the court. If no agreement was reached, generally, it was found that the cases go to trial. It was also pointed out that such mandatory mediation statutes send a clear public policy message that where possible, the first level of intervention for family law disputes should be in non-adversarial processes, before proceeding to more conflict-escalating adversarial interventions.[48]

Australia : Australia has a long tradition of promoting ADR for family disputes. The Federal government issued a statement in May 1995 in which it committed itself to making dispute resolution services more widely available. Funding was allocated to 24 family mediation services throughout Australia over a four-year programmed. Funding was also allocated to expand community based family mediation

---

45 Sayers, *Family Mediation in England and Wales*, Presentation to the Committee on Legal Affairs Presidency of the Council of the European Union, See also *Mediation: Pushing the Boundaries*, 2007 and *Information Meetings and Associated Provisions within the Family Law Act 1996*, Summary of the Final Evaluation Report (Lord Chancellor's Department, London), 2001.

46 *Law Commission of England and Wales Report on Family Law*, The Ground for Divorce (Law Com. No. 192), 1990.

47 Tondo et al, "Mediation Trends: A Survey of the States", *Fam Ct Rev.*, 39, 2001, p. 431.

48 Kelly, *The United States Experience*, keynote address at the Proceedings of the International Forum on Family Relationships in Transition Legislative, Practical and Policy Responses, December 2005. Available at *http://www.aifs.gov.au/.;* and Kelly *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, Va. J. Soc. Pol'y & L. 129, 10, 2002, p. 137.

services. A National Alternative Dispute Resolution Advisory Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the expansion of alternative dispute resolution.[49]

Section 10F of the Family Law Act 1975 as amended by the Family Law Amendment (Shared Parental Responsibility) Act, 2006 defines a family dispute resolution as a process (other than a judicial process):

Also provides for **FAMILY CONSULTANTS** and **FAMILY RELATIONSHIP CENTRES**[50]

Canada : In Canada, mediation has been connected with the formal legal process for 30 years. The first court-connected family mediation service in Canada was launched in 1972 with the establishment of the Edmonton Family Court Conciliation Project. Since then, mediation services offering various programmes have been introduced in all 10 Canadian provinces[51]. In several Canadian jurisdictions, the role of mediation in assisting to resolve family law matters is recognized in legislation. Federally, the *Divorce Act, 1985 provides* that every lawyer who acts in a divorce case has the duty to inform the spouse of mediation facilities that might be able to assist the spouses in negotiating the matters that may be the subject of a support order or a custody order[52] In Ontario,[53] Newfoundland,[54] and the Yukon[55]

---

49 *www.nadrac.gov.au.*

50 Nicholls, The New Family Dispute Resolution System: Reform Under the *Family Law Amendment (Shared Parental Responsibility) Act, 2006, Bond University Student Law* Review, 3(1), 2007, p. 6.

51 Alberta Law Reform Institute *Research Paper on Court-Connected Family Mediation Programme in Canada* at 4. *(Alberta Law Reform Institute Research Paper No. 20, 1994).*

52 R.S.C. 1985 (2nd Supp.), c.3, s. 9(2).

53 *Children's Law Reform Act,* R.S.O. 1990, c.C.12, s. 31; *Family Law Act,* R.S.O. 1990, c.F.3, s.3.

54 *Children's Law Act,* R.S.Nfld. 1990, c. C-13, s. 37,41; *Family Law Act,* R.S.Nfld. 1990, c. F-2, s. 4.

55 *Children's Act,* R.S.Y. c. 22, s. 42, 1986.

legislation expressly authorizes the court to appoint a mediator to deal with any matter that the court specifies.

New Zealand : Judicial mediation conferences are available in New Zealand for parties under the Family Proceedings Act 1980 where a party has applied for a separation or maintenance order, or for a custody or access order. Mediation conferences may also be convened under section 170 of the Children, Young Persons, and their Families Act, 1989. In response to the New Zealand's Law Reform Commission Report on Dispute Resolution in the Family Court recommendation that non-judge-led mediation be introduced into the Family Court as part of a new conciliation service, the Government established a family mediation pilot. Family mediation was piloted in North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.[56]

1.5 Conclusion

Litigation is a fight unto death, with severe economic, psychological and spiritual harm done to the parties; ADR compliments compromise embedded in moral and spiritual principles[57].

It is recommended that there should be a FAMILY COURT INFORMATION CENTRE AS IN OTHER COUNTRIES and where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the proposed Family Court Information Centre, if they had not already done so, to receive information as appropriate concerning the various family support services available, including welfare service and to receive information and advice concerning the availability and purpose of mediation

---

[56] Barwick and Gray Family Mediation, *Evaluation of the Pilot: Report for the Ministry of Justice (Ministry of Justice)* 2007. Available at *http://www.justice.govt.nz/pubs/reports/2007/family-mediation-evaluation-ofpilot/ex-summary.html*

[57] Joseph Allegretti, "A Christian perspective on ADR", *Fordham Urb. L.J.*, Vol. 28, 2001, pp. 997, 1001.

This should not be compulsory, but the court would be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the proposed Information Centre to receive the relevant information and advice. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue. Where the appropriate certificate of attendance or waiver has not been obtained, the Court would have the right, at its discretion, to adjourn the case until the parties had attended the proposed Information Centre. Where one or both of the parties still refused to attend, the court would proceed with the hearing, but written information would be sent to the parties.

It is also recommended that each proposed regional family courts should have an information office providing information on all options available for the resolution of family law disputes, mediation facilities, an office of the Legal Aid Board, and family support and child assessment services.

We should give recognition to Parenting after Separation (PAS), (a carefully devised schedule which lays out how to share time with the children, how to manage responsibilities, and how to make decisions about the children. School arrangements, child care, holidays, and pocket money can all be part of a parenting plan. It is a plan that is individual to each family and takes into account everyone's needs and interests.[58] Australia[59] and New Zealand recognize it.

---

58 What is a Parenting Plan? Family Mediation Service. Available at. *http://www.fsa.ie/familymediation/parentingplan.html.*

59 Section 63B of the of the *Family Law Act*, 1975, as amended by the *Family Law Reform Act*, 1995.

In British Colombia it is a free three-hour information session for separating parents sponsored by the Ministry of the Attorney General.[60] The purpose of the sessions is to help parents make informed choices about separation and conflict, taking into account the best interests of their children. Information is presented in lectures, videos, handouts and interaction with participants in three key areas: the impact of separation on children and adults, and how parents can best help their children through this difficult time; the full range of dispute resolution options available in the justice system, including mediation and the court process; how the child support guidelines work; and how to find out more about them. Both the person making an application to court and the other parent must attend a PAS session before their first court appearance.

Research on parent education programmes in the United States, and parental response to these programmes, suggests that well-designed divorce education programme should be mandatory and early in the divorce process for all parents disputing custody or access issues as they bring children's needs and voices sharply into focus for parents in a completely nonadversarial manner, and at relatively low cost.[61]

When parents separate, children often experience distress, and their adjustment post-separation may be adversely affected when the

---

60 See *http://www.ag.gov.bc.ca/family-justice/help/pas/index.htm*. See also Kruk *Promoting Co-operative Parenting After Separation: A Therapeutic/interventionist Model of Family Mediatio, Journal of Family Therapy*, 15, 1993, p. 235.

61 Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practic*, Va J Soc Pol'y & L 129, 10, 2002, pp. 133-136. : Pollet and Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 2008 46 (2) *Family Court Review* 375. Survey provides, that parent education programmes operate in 46 States throughout the United States. 27 programme make attendance mandatory by statute. 15 states require all parents to attend, while 14 states leave it within the discretion of the court. There are two states which provide parent education programmes but do not make them mandatory.

relationship with one of their parents is severed[62] so there is a need for PAS

"We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all of the desiderata of a good justice system. With specialization in some areas...and varying claimant preferences in others... it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes."[63]

---

62 Lamb and Kelly, "Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen", (2001) 39 Family Court Review, p. 365; Catania, "Learning from the Process of Decision: The Parenting Plan", 2001 BYU L. Rev 857; Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce,* 2004; *J.M. Acad., Matrimonial Law*, 237; and Ellis, "Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes", *Wash L. Rev.*, 1994, 379 at p. 69.

63 Menkel-Meadow, "Institutions of Civil Justice". A Paper Prepared for the *Scottish Consumer Council Seminar on Civil Justice*, 15 December 2004, available at *www.scotconsumer.org.uk/civil.*

CROSS-BORDER CORPORATE INSOLVENCY - AN INDIAN PERSPECTIVE

Parvinder Singh Arora*

1.1 Introduction

Globalization is a process of an intangible unification of countries of the world to develop a Global Village in spite of presence of physical barrier of geographical boundaries. Both the electronic communication (non-physical) and transportation (physical) have woven a web of globalization owing to which the goal of global village encompassing time and space seems achievable. The expanding circle of free trade has boosted economic growth and spawned a burgeoning middle class, which, in turn, has increased consumption of globally produced goods and rise in international tourism. As globalization gathers pace, many more companies are now operating with a presence in a multitude of jurisdictions.

Company is a juridical person created under law and for all practical purposes the law views a company to be a natural person so as to enable it to hold properties in its name and to be liable for the debts it had incurred. Just as a natural person can become insolvent, a company can also become insolvent. When a company becomes insolvent it is either wound up or revived. When a company is wound up, its assets are rallied and liabilities are paid off from the realization in the manner provided by law.

With globalization where cross border investments and cross border trade rule the current economy, corporate insolvency is beset with certain issues of cross border i.e. foreign elements. When such companies get into financial difficulties one of the challenges for the global economic community is how to make sure that the cross-border issues which arise in

---

* Civil-Judge cum Judicial Magistrate, Himachal Pradesh

any resulting restructuring or liquidation can be dealt with in a coordinated and efficient manner.

Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Firms are increasingly organizing their activities on a global scale, forming production chains including inputs that cross national boundaries. With the advent of sophisticated communications and information technology, cross-border trade is no longer the preserve only of large multi-national corporations.

1.2 Risks of Cross-Border Insolvency

One of the risks that all businesses face is that of a trading partner's failure. Most domestic laws provide for the handling of an insolvent enterprise. Typically, in the case of corporate insolvency, domestic laws will prescribe procedures for:

a) Identifying and locating the debtors' assets;
b) 'Calling in' the assets and converting them into a monetary form;
c) Identifying and reversing any voidable or preference transactions which occurred prior to the administration;
d) Identifying creditors and the extent of their claims, including determining the appropriate priority order in which claims should be paid; and
e) Making distributions to creditors in accordance with the appropriate priority.

In a cross-border insolvency context, additional complexities that may arise include:

a) The extent to which an insolvency administrator may obtain access to assets held in a foreign country;
b) The priority of payments: whether local creditors may have access to local assets before funds go to the foreign administration, or whether they are to stand in line with all the foreign creditors;
c) Recognition of the claims of local creditors in a foreign administration;

d) Whether local priority rules (such as employee claims) receive similar treatment under a foreign administration;
e) Recognition and enforcement of local securities over local assets, where a foreign administrator is appointed; and
f) Application of transaction avoidance provisions.

The additional complexities surrounding cross-border insolvencies necessarily result in uncertainty, risk and ultimately cost to businesses. Given India's place in the world economy, it is especially important to adopt policies that promote efficiency, reduce legal uncertainties and transaction costs and enhance international trading efficiency.

1.3 Issues and Challenges in Cross-Border Insolvency

A cross-border insolvency matter would arise with regard to a company in the following scenarios:

a) A company may have dealings with parties situated in countries other than of its incorporation.
b) The company may own or have an interest in properties in other countries.
c) Liabilities may be owed to whose foreign connections with a different country than which the debtor is connected.
d) The relevant obligations may be governed by foreign law, may have been incurred outside the debtor's home country, or may be due to be performed abroad.
e) The diversified state of the debtor's activities may be such that the conditions for opening insolvency proceedings are simultaneously met with regard to more than one country, giving rise to the possibility multiple proceedings in different jurisdictions.

Given such scenarios, in the case of bankruptcy proceedings against such a company, certain difficulties arise in the adjudication of solvency of the company and if found insolvent, the consequent realization of assets and distribution of the proceeds thereof to the various creditors and contributories. Cross-border insolvency exemplifies the usual characteristics of the conflict of laws process. A number of issues arise in

dealing with cross-border insolvency and indeed most areas of law involving Private International Law. These are as follows:

a) Whether courts of a given country can legitimately exercise jurisdiction over a particular case;
b) If so, what law is to apply?
Either in the form of specially formulated provisions of the law of the forum in question or;
Through the operation of the choice of law process;
c) Whether the validity of foreign judgments may be recognized.

A Cross-Border Insolvency situation, at times, may result in following challenges:

a) Initiation of simultaneous proceedings in Courts of different jurisdictions.
b) Judgments of foreign Court having bearing on the insolvency of a Company in another Court.
c) Effect of Protective/Injunctive orders passed in one jurisdiction protecting the assets of insolvent debtor from being dissipated in other jurisdiction.
d) Need for communication and coordination among Courts and administrators belonging to different jurisdictions.

1.4 Resolving Cross-Border Issues in the absence of Statutory Provisions

The issues qua Cross-Border Insolvency or litigation can be resolved by resorting to various recognized principles, viz :

a) Comity of Jurisdiction - A rule of courtesy one jurisdiction gives by enforcing the laws of another jurisdiction. It is granted out of respect, deference, or friendship, rather than as an obligation.

Section 10 Civil Procedure Code, 1908[1] (Hereinafter referred as CPC) imbibes this rule qua separate litigations[2].

b) Forum Non Conveniens - It is a discretionary power of mostly common law courts to refuse to hear a case that has been brought before it. The doctrine is used both internationally and domestically. The underlying principles, such as basing respect given to foreign courts on reciprocal respect or comity, also apply in civil law systems (*lis alibi pendens*). This principle is almost akin to the principle of Comity of Jurisdiction[3].

c) Recognizing Foreign Judgments - Indian law gives recognition to the foreign judgments which are passed by the courts of reciprocal countries except the circumstances as mentioned in Section 13 of CPC[4].

d) Granting Anti-suit Injunction - It is also an indirect form of Comity of Jurisdiction. Comity is rule of Co-operation and can be a tool for exclusion. It means seeking stay of proceedings in one particular court for continuance of parallel proceedings in a foreign court on the ground that one court is more convenient forum than the other. The principle governing Anti-Suit Injunctions are again based on common law principles. The principle of anti suit injunction is invoked to reverse the doctrine of *Forum-Non-Conveniens*[5].

1.5 Theories of Cross-Border Insolvency

There are a number of theories revolving around cross-border insolvency:

One is the theory of Unity, which states that in the case of cross-border insolvency, all courts, foreign, national and local, must defer

---

1 Act No. 5 of 1908.

2 *Tamilnad Mercantile Bank Share Holders Welfare Association* v. *S.C. Sekar and Others*, (2009) 2 SCC 784.

3 See *Glaxosmithkline Consumer Healthcare Limited & Horlicks Limited and Anr.* v. *Heinz India (P) Limited*, MANU/DE/3273/2010D/-12.11.2010 Delhi.

4 *R. Vishwanathan & Ors.* v. *R. Gajambal Ammal & Ors.*, 1963 (SC).

5 *Modi Entertainment Network and Anr.* v. *W.S.G. Cricket PTE. Ltd.*, (2003) RD-SC 16.

to the authority having the jurisdiction over the locale where the company is situated or incorporated. Of course, this would not apply with reference to nations governed by a treaty providing for the determination of jurisdiction of the matter at hand. A variation of the theory of Unity occurs when a number of concurrent winding up proceedings are underway in different jurisdictions. There exists and is recognised a main proceeding, either dealing with the actual winding up process or with regard to the disbursement of assets and a number of other ancillary proceedings related to the same matter, usually with regard to assets owned within the jurisdiction of the peripheral authorities. This is known as the principle of Plurality as opposed to that of Unity. There is also the principle of Universality, which states that the winding up process extends not only to the assets located in the jurisdiction in which the insolvent is located or incorporated, but also its assets all over the world. This is applicable to both the theories of Unity and Plurality as with the theory of Unity, along with jurisdiction over the matter, the courts also hand over jurisdiction of the properties belonging to the company in question.

1.6 The UNCITRAL Model on Cross Border Insolvency

The UNCITRAL came out with a Model Law on Cross-Border Insolvency negotiated among more that 40 countries representing a broad spectrum of differing legal systems[6]. One of the distinguishing features of this model law is that it attempts to achieve limited but effective co-operation, compatible with all legal systems and, therefore, acceptable to all countries. Its goals are to ensure cooperation in cross-border insolvency cases through recognition of foreign decisions and access of foreign liquidators or administrators to local court proceedings. The UNCITRAL Model Law, which has as its objective the solving of the aforementioned issues, proclaims to provide effective mechanisms for dealing with cases of cross-border insolvency. The law applies in the following situations where:

---

6 Adopted by UNCITRAL on 30th May 1997 - full text available at www.uncitral.org

(a) Assistance is sought in a state by a foreign court or a foreign representative in connection with a proceeding under the domestic law of a state;

(b) Assistance is sought in a foreign state in connection with a proceeding under the domestic law of a state;

(c) A foreign proceeding and a proceeding under the domestic law of a state in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the domestic law of the state.

1.7 Need for Adopting - the UNICTRAL Model Law

Usually there are a number of conflicting claims of different jurisdictions and the alleviation of these difficulties depends upon the acknowledgement of one of the jurisdictions as the main one and the others as having an ancillary role, especially with reference to assets. The differences in national insolvency laws have important consequences in the case of enterprises with assets and liabilities in different countries. This diversity of approaches creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises.

Resultantly, a number of initiatives have been undertaken to improve recognition of foreign proceedings and cooperation in this area. In November 1995 the text of the European Union Convention on Insolvency Procedures was adopted. In addition, the International Bar Association's Insolvency and Creditor's Rights Committee (J Committee) has developed the Cross-Border Insolvency Concordat, which is also designed to provide a framework for cooperation in multi-jurisdictional insolvencies. The year 1997 noted a significant development in this area.

1.8 Advantage of UNCITRAL Model

In order to have greater co-operation between courts of various states, fair and efficient administration of cross-border insolvencies that protects the interests of creditors as well as the debtor, and other objectives, the UNCITRAL Model Law on cross-border insolvency is a mammoth step forward in removing the difficulties faced in this area law so far. The Model Law does not attempt to impose a global insolvency law or to harmonise local laws; it assists with the coordination and administration of cross-border insolvencies by enabling foreign insolvency officeholders and courts to obtain recognition of their insolvency proceedings in other jurisdictions. More than the provisions of the Model Law, it is the annexed 'Guide to Enactment' that sheds light upon the nature of the Model Law and the intention of the UN. It contains detailed explanations of the Articles of the Model Law and how they may be incorporated into a municipal, pre-existing, insolvency law regime. It also contains information about the objectives, formation and feature of the Model Law. In effect, while the text of the Model Law provides for the substantial portion for the regulation of cross border insolvency, the 'Guide to Enactment' gives us the procedural aspects of the same.

1.9 The Scheme of UNCITRAL Model

The Model Law itself is divided into five chapters, each dealing with a different aspect of cross border insolvency. The objectives of the Model Law, as enumerated in the Preamble are as follows-

- Cooperation between the courts and other competent authorities and foreign States involved in cases of cross-border insolvency,
- Greater legal certainty for trade and investment,
  Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor,
- Protection and maximization of the value of the debtor's assets and

Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Therefore, the Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. It is the collective nature of an insolvency procedure, which is the cornerstone on which the Model Law on Cross-Border Insolvency is built. Foreign insolvency proceedings will only be recognised if they fall within the definition of the term 'foreign proceeding' set out in article 2(a) of the Model Law. Use of the term 'collective' distinguishes between a regime operating for the benefit of creditors as a whole and a regime, which operates for the benefit of a particular creditor. An example of the latter is a floating charge debenture pursuant to which a secured creditor may appoint a receiver and manager over the undertaking of the debtor business.

The Regulations provide for the recognition of two types of insolvency proceedings:

- "foreign main proceedings" (proceedings taking place in the State in which the debtor has its "centre of main interests" (CoMI) – CoMI is not defines but is subject, in the case of a company, to a presumption that it is in the jurisdiction of its registered office); and
- "foreign non-main proceedings" (proceedings taking place in the State in which the debtor has an "establishment" – establishment is defined as " any place of operations where the debtor carries out a non-transitory economic activity with human means and services").

At present, only the United States of America[7], Canada, Australia, New Zealand, South Africa, Japan, Mexico, Poland, Romania,

---

[7] *The US Bankruptcy Code*, October 2005, Chapter 15.

Serbia, the British Virgin Islands, Eritrea, Great Britain[8], Colombia, Korea and Montenegro have enacted the Model Law.

1.10 The Indian Perspective

There are adequate provisions in the Indian common law regime to enable the Indian Courts to recognise and enforce the rights and claims of foreign creditors and the judgments passed by the Courts in foreign jurisdictions. The *Code of Civil Procedure (CPC),* 1908 Section 44A deals with the enforcement by Indian Courts of decrees passed by Courts in "Reciprocating Territories". A reciprocating territory is a country or territory outside India, which the Government of India has, from time to time, by notification in the Official Gazette declared to be a reciprocating territory. A decree, however, does not include an arbitration award since enforcement of foreign awards is dealt with separately under the Arbitration and Conciliation Act, 1996. The CPC Section 14 creates a legal fiction regarding the competence of foreign courts. If a document purporting to be a certified copy of a judgment by a foreign Court is produced in the Indian Court, it is presumed that a Court of competent jurisdiction pronounced such judgment, unless the contrary appears on record and proving want of jurisdiction displaces such a presumption[9]. However, a judgment or order by a foreign Court to be a valid cause of action upon it in India must be final and conclusive in the Court where it is passed.

A foreign judgment, in terms of CPC Section 13, is conclusive as to any matter directly adjudicated upon except where the judgment:

- has not been pronounced by a court of competent jurisdiction.
- has not been given on the merits of the case.
- is against International Law or based on non-recognition of Indian Law.
- Is granted in proceedings opposed to natural justice.

---

8 Cross-Border Insolvency Regulations 2006 – implemented on 4th April 2006.

9 See *Padmini Mishra v. Ramesh Chandra Mishra*, AIR 1991 Ori 263 (266).

- has been obtained by fraud.
- is founded on breach of Indian Law.

The Indian Courts can re-examine the foreign judgment if it is challenged on the basis that one or more of the pre-conditions mentioned above is not satisfied.

Another option available to a foreign creditor with a foreign judgment is to bring in the Indian Court a suit upon the original cause of action based on the said judgment. This option is exercised mostly in cases where the judgment is granted by a Court other than that of a reciprocating territory. In this case, a fresh suit[10] will have to be filed in India on the basis of such decree or judgment, which may be construed as a cause of action for the said suit. However the said decree also has to pass the test of Section 13 CPC.

1.10.1 Assisting Legislation

The Companies Act, 1956[11] deals with the liquidation of companies incorporated in India. Foreign Company[12] can carry out business as laid down in the Companies Act. Indian Law does not have any provision of cross-border corporate insolvency issues. Rather the same is dealt under provisions of 'winding up of unregistered'[13] company under the Companies Act[14]. For the purposes of winding up, a foreign company is included within the meaning of 'unregistered company'[15]. An unregistered company will windup, 'a. if, the company is dissolved, or has ceased to carry on business, or is carry up business only for the purposes of winding up its affairs; b. if the company is unable to pay

---

10 *Moloji Nar Singh Rao v. Shankar Saran*, AIR 1962 SC 1737 (1748) para14. Also see *I & G Investment Trust v. Raja of Khalikote*, AIR 1952 Cal 508 (523) para 32.

11 *The Companies Act*, 1956, Act No. 1 of 1956.

12 *Id.*, Section 591 and Sections 592-602.

13 *Id.*, See Part X 'Winding up of Unregistered Company'

14 *Mohan Lal v. Chawla Bank Ltd.* AIR 1949 All 778.

15 *Supra note* 11, Section 582, 'Meaning of unregistered Company'.

its debt; c. if the Tribunal is of opinion that it is just and equitable to wind up its affair... .' So, the test of insolvency under this provision, if, at all, for insolvency of foreign company is 'unable to pay its debt'[16].

Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognise the jurisdiction of foreign courts in respect of branches of foreign banks operating in India. Therefore, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is filed before an insolvency court for winding up of its branches in India. Thus, the Indian courts have a statutory jurisdiction to wind up an insolvent company not only if it is an Indian company registered under the Indian Companies Act, 1956, but also if it is an unregistered company which includes foreign companies[17]. In the latter case, the Indian courts have jurisdiction to act on various grounds, including if the company is unable to pay its debts or if it is just and equitable that the company be wound up. The Indian courts are prepared to exercise their jurisdiction in relation to a foreign company only if there are assets of the company situated in India[18], or if the company has carried on business in India through a branch or its agents, or if there is a reasonable possibility of benefit accruing to creditors of the company from the making of a winding up order in India.

If a foreign company is being liquidated outside India, its Indian business can be wound up in India on the basis of the liquidation order or other order passed by the foreign Court based on which the Indian Court can form an opinion that it is "just and equitable" that the Indian business (company) be wound up.

---

16 *Id.*, Section 583 (5).

17 *Id.*, Section 584.

18 *Re Travancore National Bank Ltd.*, AIR 1939 Mad 318.

It is a difficult task to classify the provisions in the companies Act relating to cross-border insolvency into a straitjacket. A company subject to liquidation in India is regarded as a single entity and not as a separate entity. It means that any liquidation or winding up proceedings conducted in India may have a theoretical application in relation to the company as a whole, which includes all its branches within and outside India. Liquidation in India is conducted in relation to the corporate entity as a whole enabling all the creditors, both national and international, to lodge proof of claim with the liquidator. There is no discriminative treatment of 'foreign' creditors in the sense that only the creditors of the Indian branch are able to lodge proof of claim. The claims are treated equally as per the provisions of the Companies Act, 1956, Section 530. The jurisdiction of the Indian court is 'territorial' as opposed to 'universal' in the sense that if the assets of the company are outside the jurisdiction of India, then the Indian courts and the liquidator will need to obtain the consent of the relevant courts in that jurisdiction for their actions to have effect. In the Indian context, the application of the theory of 'universality' does not mean that the courts will regard only the courts of the company's place of incorporation or principal place of business as having jurisdiction to wind up the company, nor that the Indian courts will automatically defer to apply the insolvency laws of that state alone as being able to determine the making of claims against and the distribution of the assets of that company. The approach adopted by the Indian courts involves a mixture of both the concepts with a wide degree of flexibility taking into account the existence of foreign proceedings and the interest of creditors generally.

Though there is no specific provision in the *Companies Act*, 1956 Act to deal with foreign creditors and their claim or cause of action arising outside India. However it has been held by the Hon'ble Supreme Court of India in *Rajah of Vizianagaram v. Official Receiver*[19], that the

---

[19] AIR 1962 SC 500.

foreign creditors and contributories can bring an action and file claim under the said Act.

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), which deals with the reorganization of companies also does not discriminate between Indian and foreign secured creditor as regards the rights and obligations of the creditors under SICA.

The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 are substantially along the lines of the *Bankruptcy Act*, 1914 (since repealed). Neither of these two Indian Acts make any reference to cross-border insolvencies. Both the Statutes state that all courts having jurisdiction in insolvency and the officers of such courts shall act severally in aid of, and be auxiliary to, each other in all matters of insolvency.

Where a foreign court requests aid from an Indian court in enforcing its order, the Indian court may exercise such jurisdiction as either of the courts could exercise in similar matters within their respective jurisdictions.

1.10.2 Insolvency Practice

The Indian Courts have a well-developed and predictable approach to issues of foreign claims, creditors and judgments including those involving cross-border insolvency issues. The Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognise the jurisdiction of foreign courts in respect of the branches of foreign banks operating in India. Therefore, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is field before an insolvency court for the winding-up of its branches in India. For instance, when Bank of Credit and Commerce International SA (BCCI) was taken into liquidation and liquidators were appointed by British courts, the Reserve Bank moved the High

Court in India to wind up Indian branches of that Bank. The overseas liquidator had filed his claim in respect of BCCI branches in India[20].

For the development of jurisprudence in India, the Indian Courts rely upon foreign decisions even if the matter in hand does not involve cross-border issues. The Constitution Bench of Supreme Court of India[21], has held that though the decisions of foreign courts should not be mechanically applied, there is no reason why a foreign decision should not be followed unless it is opposed to Indian ethics, traditions, jurisprudence or is otherwise unsuitable. In the light of this, Indian Courts deal with cross border issues from a truly international perspective.

Indian courts recognise and enforce judgments *in rem*, if the subject matter of the action is within the foreign country but the Courts do not deal directly or indirectly with judgments relating to the title to immovable property situated outside the jurisdiction of the foreign Court; and do not assist in the enforcement of foreign judgments in respect of penal or revenue laws. In practice, the Indian Courts have followed the principle of situs of the assets of the debtor.

Further it has been held by the Supreme Court of India that the competence of jurisdiction of foreign court is determined with reference to the principles of international law[22]. The true basis of enforcement of a foreign judgment is that the judgment imposes an obligation upon the defendant and therefore, there must be a connection between him and the forums sufficiently close to make it his duty to perform that obligation.

However, the Indian law, as it exists today, provides only for the recognition of foreign judgments. Neither the Code of Civil Procedure

---

20 *Reserve Bank of India* v. *BCCI (Overseas)*, 1991 Bom.

21 *National Textile Workers' Union* v. *P.R. Ramakrishnan* AIR 1983 SC 75.

22 *Sankaran Govindam* v. *Lakshmi Bharathi* AIR 1974 SC 1764.

1908, nor any other law deals with the recognition of foreign proceedings. The UNCITRAL Model law caters to this deficiency. The Model law defines 'foreign proceeding' as a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. In this regard, it may be added, the definition of 'foreign judgment' in the Code of Civil Procedure, 1908 is also inadequate to deal with the situation[23].

Indian courts may refuse to exercise their jurisdiction to wind up a foreign company where proceedings are already under way elsewhere or may be commenced, in some other more appropriate jurisdiction. The courts do exercise their discretion in favour of making the foreign company subject to a winding up procedure in India, it is to be noted that where the foreign company is in liquidation in its country of incorporation, any winding up in India will be regarded as ancillary thereto; as a result, the functions of the Indian liquidators will be to realise the assets of the company in India and to settle a list of creditors who have lodged claim in India.

Indian courts regard insolvency proceedings commenced in India as the primary insolvency proceedings for companies incorporated in India, as the jurisdiction of foreign courts is not recognised under the Indian insolvency regime. India is not party to any international conventions on insolvency and its laws do not provide for cross-border insolvencies. If liquidation proceedings are initiated against a company outside India, the Indian branch of such company will be treated as an independent entity and will not automatically be affected, unless a winding-up petition is filed before an Indian court.

---

[23] *Id.*, Section 2 (6).

Indian law also does not recognise a foreign insolvency official as having the locus to represent a foreign company. Indian courts thus are unlikely to give any aid and assistance to a foreign liquidator or other insolvency official if this would be prejudicial to the company's creditors on the basis of how those creditors are or would have been treated under any equivalent Indian law insolvency proceedings.

The present Indian legal system does not contain any provision on any cross-border relations. Insolvency laws do not match with international standards and also do not directly deal with cross-border relation. Justice Eradi Committee[24] has recommended that the Model Law be implemented in India. It called for amendment of Part VII of the Companies Act, 1956 in order to correspond to the provisions in the Model Law, in particular, those relating to in-bound requests for recognition of foreign proceedings, out-bound requests for recognition of foreign proceedings, co-ordination of proceedings in two or more States and the participation of foreign creditors in insolvency proceedings taking place in enacting States. The N.L. Mitra Committee[25] has also noted that Indian Laws on cross border insolvency are outdated and they are not comparable to any standards set in international legal requirements and as such stand apart and alone.

1.8 Conclusion

Globalization of economy has thrown new challenges in so far as economic laws are concerned. Since the world is shrinking in economic terms and is described as one "village", laws governing the economic activities also need to be uniform. If absolute commonality cannot be achieved by having same laws in different countries, attempts are being made to have uniform standards as far as possible.

---

[24] Reports of Justice V.B. Eradi Committee on Law Relating to Insolvency of Companies, 2000.

[25] N.L. Mitra, Report of the Advisory Group on Bankruptcy Laws, 2001.

Realizing this need, UNCITRAL has come out with model legislation on insolvency.

It is now accepted by all developing countries, including Asian countries that in order to make strides in economic development and competing globally, they have to Pen their gates for Foreign Direct Investments (FDI). In order to attract such investments confidence has to be instilled in such foreign investors that they would be able to recover their investments with proper returns.

Indian laws on cross border insolvency are outdated and do not meet standards set in international legal requirement. It is also noted that in the event of an international insolvency proceeding involving an Indian company, Indian courts are unlikely to provide any aid or assistance to a foreign liquidator or other insolvency official, if this were to be prejudicial to the companies' creditors.

Although insolvency may be described in a manner that is universally acceptable, national attitudes towards the phenomenon of insolvency vary from country to country. These variations may take the form of the manner in which insolvency proceedings may take place, or even the extent the creditor's loss is ameliorated. There is obviously an underlying balance with the debtor's predicament on one hand and the creditor's loss on the other.

The UNCITRAL Model Law on cross-border insolvency is a big step forward in removing the difficulties faced in this area of law so far. This model law, if adopted, will radically change the orientation of Indian law and make it suitable for dealing with the challenges arising from globalisation and increasing integration of Indian economy with the world economy. Since India had adopted the UNCITRAL model for arbitration and IPR legislation the Model Law on cross border insolvency should also be adopted.

Realizing this need, UNCITRAL has come out with model legislation on insolvency.

It is now accepted by all developing countries, including Asian countries that in order to make strides in economic development and competing globally, they have to Pen their gates for Foreign Direct Investments (FDI). In order to attract such investments confidence has to be instilled in such foreign investors that they would be able to recover their investments with proper returns.

Indian laws on cross border insolvency are outdated and do not meet standards set in international legal requirement. It is also noted that in the event of an international insolvency proceeding involving an Indian company, Indian courts are unlikely to provide any aid or assistance to a foreign liquidator or other insolvency official, if this were to be prejudicial to the companies' creditors.

Although insolvency may be described in a manner that is universally acceptable, national attitudes towards the phenomenon of insolvency vary from country to country. These variations may take the form of the manner in which insolvency proceedings may take place, or even the extent the creditor's loss is ameliorated. There is obviously an underlying balance with the debtor's predicament on one hand and the creditor's loss on the other.

The UNCITRAL Model Law on cross-border insolvency is a big step forward in removing the difficulties faced in this area of law so far. This model law, if adopted, will radically change the orientation of Indian law and make it suitable for dealing with the challenges arising from globalisation and increasing integration of Indian economy with the world economy. Since India had adopted the UNCITRAL model for arbitration and IPR legislation the Model Law on cross border insolvency should also be adopted.

RGNUL Law Review a half yearly publication of

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB

I want to subscribe to RGNUL Law Review (RLR) for a period of

One Year (Two Issues) ☐ Two Year (Four Issues) ☐

Three Year (Six Issues) ☐ Five Year (Ten Issues) ☐

SUBSCRIPTION RATES

One Year	Rs. 500/-	Two Year	Rs. 900/-
Three Year	Rs. 1300/-	Five Year	Rs. 2000/-
Overseas US/UK	$20 /£10	Life Membership	Rs. 10,000/-
		Corporate Member	Rs. 50,000/-

PRICE PER COPY

Individual Rs. 300/- Institution Rs. 400/- Alumni /Students Rs. 200/-

Name_____

Designation_____

Institution_____

Address_____

_____

Tel. No. (with STD Code)_____Fax _____

E-Mail_____

Enclosed Cheque / DD Number _____ Dated _____

Drawn on (Bank) _____ for Rs. _____

(For Outstation Cheques Please Add Rs. 25/-)

_____

Signature

Note: **Cheque / Draft may be drawn in favour of the Registrar, the Rajiv Gandhi National University of Law, Punjab, payable at Patiala**

Send completed form to: **The Editor, RGNUL Law Review (RLR)**
the Rajiv Gandhi National University of Law, Punjab
Mohindra Kothi, Mall Road, Patiala - 147 001

SUBSCRIPTION FORM

FORM IV

(See Rule 8 of the *Registration of News Papers (Central) Rules*, 1956 under the *Press and Registration of Books Act*, 1867)

Statement of Ownership and other particulars about the *RGNUL Law Review (RLR)*

Place of Publication	Rajiv Gandhi National University of Law, Punjab at Patiala
Language	English
Periodicity	Half-Yearly
Printer's and Publishers Name	Professor (Dr.) G.I.S. Sandhu Registrar, RGNUL
Nationality	Indian
Address	Rajiv Gandhi National University of Law, Punjab, Mohindra Kothi, The Mall Road, Patiala - 147 001
Editor's Name,	Dr. Tanya Mander Assistant Professor
Nationality	Indian
Address	Rajiv Gandhi National University of Law, Punjab, Mohindra Kothi, The Mall Road, Patiala - 147 001
Owner's Name	Rajiv Gandhi National University of Law, Punjab

I, Professor (Dr.) G.I.S. Sandhu hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
(G.I.S. Sandhu)

RGNUL Law Review (RLR)

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
Mohindra Kothi, The Mall Road, Patiala - 147 001 (Punjab)
Ph. No.: 0175-2304188, 2221002, 2304491 Telefax: 0175-2304189
e-mail: info@rgnulpatiala.org, **website** www.rgnulpatiala.org

PHULKIAN 0175-2212300, 2212400