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EDITORIAL

It is a matter of immense pride for the RGNUL Law Review Editorial Team that it is coming forth with the July-December 2019 issue of RLR. This issue offers the readers an insight into various contemporary issues. In the paper on "Financial Provisions for Environmental Liabilities" the author has discussed options of financial provisions and Bank Guarantees as corporate social responsibility which may be incorporated as new legislative measures. In the paper on the Sociological study of interplay of Dowry system and Inheritance rights the author indicates how little the society has changed and the fact that deep impact of patriarchy, socialisation and social learning have not allowed education to have a major impact on attitude toward dowry and inheritance and therefore we as part of the academic society need to rethink our perspectives. In the paper on the significance and application of DNA fingerprinting technology in criminal identification, the author lists its benefits like exoneration of persons wrongly accused of crimes, mass Disasters Identification, parentage identification, identification of children in child swapping cases in hospitals and has discussed some - landmark cases on use of DNA evidence which make an interesting read on the use of DNA fingerprint technology in administration of justice.

The paper on honor killings highlights the gross violation of human rights and brings to light the fact that the general patriarchal mindset must give way to gender equality and that the freedom of choice of marriage forms a part of A. 21 of the Constitution and that the State is duty bound to protect this right of the citizens. The debate on Enthanasia continues with the author of the paper rightly stressing on the fact that the time has come to respect the advance directives of the patient and to respect the autonomy of the person to make decisions regarding his/her own life when he was in his composmentis, however it being a sensitive issue, legislation may not be an easy task.

In the research paper on sexual content and autonomy of people with disabilities the researcher has highlighted how the denial of sexual citizenship to people with disabilities results in compromising their dignity and autonomy and drives home the point that we need to realize the significance of diversity in our conscious and only then formulating laws and policies towards protecting the sexual rights of persons with disabilities is going to serve the purpose.

Lastly the paper on prospects of efficient and speedy Justice in Family Courts suggests a harmonious construction of S. 21B and S. 23 of the Hindu Marriage 1953, drawing an interlinkage between reconciliations and speedy Justice, highlighting the social legal preclusions and empirical inadequacies and providing feasible alternatives by socio-legal measures. The RLR Editorial team sincerely thanks all the contributors for their efforts and hopes that the readers enjoy the intellectual treat.

Dr. Kamaljit Kaur

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CONTENTS

FINANCIAL PROVISIONS FOR ENVIRONMENTAL LIABILITIES

Sabina Salim*

1. Introduction

The challenges in regulating the conduct of actors (private or state) so that it is environmentally benign have been addressed at different phases of development of environmental jurisprudence, applying new and diverse principles and strategies in various legal regimes. The environmental jurisprudence is rich in innovating legal rules and procedures for effective environmental protection. The principle of prevention continues to be an obvious step required at initial stage of proposed activity, which requires the operators to project the information about the proposed activity, safeguards and best available technologies the operators intend to put to use in case of casualty. The polluter pays principle brought in the concept of placing the liability for restoration of damaged environment on the entities that are responsible for it rather than leaving it to the state to take care of it from public exchequer. The anti- pollution laws primarily aim to address the prevention, control and abatement of environmental pollution and degradation through administrative regulation backed by criminal sanctions when the authorities complained against the defaulter in criminal courts.

Yet persistent and increasing environmental degradation continues to defy the efficacy of the laws and the administrative authorities thereunder in maintaining and restoring the wholesomeness of environment. So the preventive aspect of environmental regulation ordains exploration of alternative strategies besides licensing/ permit system provided under the anti pollution laws like the Water Act, 1974, Air Act, 1981, the Environment Protection Act, 1986 and the requirement of Environment Clearances before operator undertakes any activity or project like mining, dams, industries etc. Environmental regulation in almost all other legal systems in the world including India make certain activities as licensed/ consent based activities. Statutory powers are vested in the regulating authorities to require licensees/operators under the various regimes like the Water Act, Air Act or the Environment Protection Act to make adequate provisions to prevent and manage any

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environmental damage. Traditionally, such provisions include mechanisms to control the discharges and its hazardous components by laying down standards by the Pollution Control Boards or the governments, prescribe safeguards against accidental discharges, installation of treatment or disposal plants etc.[1]

Over the last decade the environmental authorities all over the world, including Indian agencies have tried to apply alternative strategies to deal with prevention and remediation of environmental pollution and degradation. Financial measures or provisions are one such strategy which carries a robust rationale for both securing good environmental conduct and resources for remediation and restoration from the appropriate party in case when required. In context of environmental liabilities, financial securities make huge sense as through them availability of resources for environmental restoration and rehabilitation would be easily available.

Financial provision "is basically a requirement to put in place a financial instrument to cover the full cost of response and remedial measures if an incident occurs on licensed facility and/or the costs of closure/decommissioning/ restoration/aftercare/ management at a licensed facility".[2] It essentially operates in the field of licensed activities i.e. those activities which require under the provisions of any law the consent or permits from state agencies before they can be undertaken. This entails upon the operator an obligation to provide and maintain adequate financial resources to meet the costs of restoration. This in turn helps to overcome the quite usual situation of insolvency or financial incapacity of the industry, where- after, environmental restoration becomes impossible or comes at the cost of public exchequer.

2. Environmental Regulation in India and the Scope for Financial Security under the Present Scheme

In India, operators undertaking polluting/hazardous activities are covered under various environmental laws which require that the operator should get the consent or permits from the pollution control boards or other such authorities before the operator's can establish any process, operation or industry . Almost all the environmental laws impose such a kind of obligation on the actors. The regulators

[1] Sections 25-27 *Water (Prevention and Control) Act*, 1974; Section 21 *Air (Prevention and Control) Act*, 1981.

[2] Guidance on Financial Provision for Environmental Liabilities © Environmental Protection Agency 2015 https://www.epa.ie/pubs/advice/licensee/financiaprovisionsreport.pdf; Financial Provision – Protecting the Environment and the Public Purse Report number: 2016/20, European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) 2016 at *http://ec.europa.eu/environment/legal/liability/pdf/*.

under the anti-pollution laws like the Water Act, 1974 and the Air Act, 1981, are the Central Pollution Control Board or State Pollution Control Boards, or the Central Government under the Environment Protection Act, 1986 and the Forest Conservation Act, 1980. Environment Clearance needs to be taken from various authorities constituted by the State and Central government for proposed activities of projects like mining, infrastructure and construction activities or the use of new technologies like biotechnology. However, none of these laws in India empowers expressly any environmental authority to seek for financial provisions either as general regulatory measure or specifically to deal with certain situations of non compliance. Recently the CPCB adopted 'Guidelines on Implementing Liabilities for Environmental Damages due to Handling and Disposal of Hazardous Waste and Penalty, 2016, which makes a "potential polluter liable for all damages caused to the environment or third parties due to improper handling of the hazardous wastes or disposal of the hazardous wastes".[3] As per the Guidelines the PCBs are to require furnishing of bank guarantee for estimated assessment for remediation cost liabilities within three weeks of the incidence.[4] In fact, the Public Liability Insurance Act, 1991 provides for interim relief for environmental victims in of an incident involving hazardous activity through the financial instrument of insurance and Environment Relief Fund. The requirement of furnishing of bank guarantee by polluting industry came as a step from the State Pollution Control Boards (SPCB) after their experience with defaulting industries causing pollution and not bearing the costs of compliance or remediation measures. This financial tool has been frequently invoked by PCBs to achieve compliance with environmental norms.

2.1 The Bank Guarantee System

It was West Bengal Pollution Control Board which introduced the concept of bank guarantee in environmental regulation in India as a policy measure in exercise of their administrative powers in performance of their functions under the Water Act, 1974. Emulating the WBPCB, the State Pollution Control Board of Odisha, adopted bank guarantee system through a resolution in August, 2003.[5] The Board categorically laid out their state of helplessness in finding the measures of closure

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3 *http://cpcb.nic.in/uploads/hwmd/Guidelines_Environmenal_Damages_Costs_200116.pdf.*

4 "The SPCB/PCC shall obtain bank guarantee, equivalent to estimated assessment (including risk assessment) and remediation cost liabilities or for the amount as decided by SPCB/PCC, from the responsible party as early as possible as but not later than three weeks from day of the incidence. The cost in this regard may be estimated separately (i.e. for assessment and remediation work) by the SPCB/PCC on case to case basis. However, an indicative cost in this regard is given in Section 5.1 which may be helpful". *Id at p 28.*

5 Resolution No. 17617 dated 18th August, 2003.

and stoppage of electricity supply as ineffective in bringing the defaulting industry to install or upgrade the pollution control equipment. In fact such measures led to aggravating the plight of the workers in such defaulting industries.

Thereafter, the Central Pollution Control Board approved this strategy at its 126th meeting and "fixed the amount of bank guarantee to be furnished by a non-compliant industrial unit to the State Board at a minimum of 10% or more in specific cases of the cost of pollution control equipment."[6] Therefore, the financial guarantee can be asked by the Boards for cost of pollution control equipment to prevent further damage.

On the other hand, the power to 'issue any directions' under Sections 33-A Water Act, 31-A Air Act and Section 5 of Environment Protection Act has expressions like closure, prohibition and regulation. And the Boards have exercised their power under these provisions to impose bank guarantees on defaulting operators.

2.2 Environmental Principles and Financial Provisions

The need to restore and improve the degraded environment has been a major concern for nations and humanity. To achieve this goal, Principle 16 the Rio Declaration (UNCED) 1992 states :

> National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution with due regard to public interest and without distorting international trade and investment.[7]

The 'polluter pays principle' has judicial as well as statutory recognition in India.[8]The Supreme Court of India has also held,

> The polluter pays principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development.[9]

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6 Directions issued to SPCBs under section 18 (1)(b) of Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act, 1974 in the year 2004; See also Letter no. 192 dated 9.02.2017 "Regarding pollution control in 17 Categories of Industries & Regarding self monitoring of Compliance" takes the minimum 25 percent of cost of online monitoring system. available at *http://cpcb.nic.in/cpcb-directions.php*

7 available at *https://www.un.org/geninfo/bp/enviro.html*

8 *M.C. Mehta* v. *Union of India* AIR 1986 SC 1086; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *M.C. Mehta* v. *Union of India*, AIR 1997 SC 73., Section 20 of the National Green Tribunal Act, 2010.

9 *Indian Council for Enviro-Legal Action* v. *UOI & Ors.* AIR 1996 SC 1446 .

3. The Nature of Financial Guarantees in Law

The PCBs in India are regulating agencies under the anti-pollution laws. The power to regulate the conduct of operators so as to prevent, control and abate water and air pollution in India is statutory power as well as function of the PCBs. Similar are the provisions for requirement of Environmental Clearance from the central and state governments under the Forest laws and Environment Protection Act, 1986. However, whether the imposition of furnishing financial securities for non compliance with prescribed environmental standards is within the scope of these statutory powers is a matter for interpretation. As an obvious sentiment financial measures do strike a strong note of resentment especially when the laws are silent on them. In the case of *Hindustan Coco-Cola Beverages Pvt Ltd v. Member Secretary, West Bengal Pollution Control Board,* the Board in May, 2011 issued directions to the soft drink manufacturers Hindustan Coca Cola Beverages to submit a Bank Guarantee of Rupees five lakhs only, valid for twelve months within fifteen days from the date of issuance of the direction as an assurance to comply with the allowed norms of discharge and requirement of establishing a treatment disposal plant.[10] This direction was challenged by the appellants as they contested the power of the WBPCB to impose pollution cost or direct the appellant to furnish a Bank Guarantee. According to the appellant such an exercise of powers were not contemplated under the statutory scheme, hence are outside the jurisdiction of the authorities. Further such an imposition of bank guarantee is penal in nature.

Thus, the act of imposition of costs of environmental pollution and other financial liabilities like bank guarantees by the environmental authorities need to be understood in its legal perspective. If environmental pollution and degradation is caused due to violation of the norms prescribed under law, then it is a civil wrong and therefore liable for damages and compensation. This has been well settled by the Supreme Court in the case of *M C Mehta v Kamal Nath.*[11] Therefore, if the Board's rationale is based on this concept read along with the principle of polluter should pay, it makes a valid case for considering the requirement of bank guarantee as a tool for ensuring compliance of environmental norms as regulatory in nature.

The resolutions adopted by various SPCBs and the CPCB endorse and promote this concept. Further requiring the furnishing of bank guarantee for restoring the environmental damage caused by the defaulting industry can only be described as compensatory measure. The PCBs introduced the Bank guarantee system for the

[10] Appeal No. 10 of 2011 decided on 19th March, 2012, available at *http://www.greentribunal.gov.in/.*
[11] AIR 2000 SC 1997.

defaulting industries as is obvious from the resolution adopted by them. The resolution states,

Direction to furnish bank guarantee can be issued by the Boards in following cases:

a) Industry that fails to install necessary pollution control equipment so as to meet the prescribed standard.
b) Industries whose pollution control equipment are inadequate to meet the prescribed standard.[12]

To satisfy principles of natural justice a show cause notice is served on the defaulting industry as to the "intention of issuing direction for closure and a time bound action plan for installation of pollution control equipment or up gradation of the existing pollution control system."[13] Bank Guarantee of a fixed amount for execution of the action plan is to be furnished at the same time. Non compliance of the time bound action plan would lead to forfeiture of Bank Guarantee and the same would be used for pollution control and abatement. In case of compliance within time frame, the amount will be released. The decision as to which industry shall be asked to furnish the bank guarantee and the amount shall be decided on "case by case basis by a committee constituted by the Board. However, the minimum Bank Guarantee should not be less than 10% of the pollution control equipment necessary for the purpose."[14] Thus the procedure very clearly indicates that the purpose of seeking bank guarantee from polluting industries is to invoke compliance and restoration. These acts are thus part of regulatory regime.

The NGT also by taking into consideration the relevant provisions of the Water and Air Act the NGT came to the conclusion that

> 'regulation' is a generic term and would take within its ambit other regulatory factors or directions which may not amount to prohibition or closure. It may be something short of these expressions and would still achieve the object of ensuring prevention and control of pollution and taking steps necessary for that purpose. Such an approach would be in consonance with the maxim *noscitur a sociis*.[15]

Therefore, measures falling short of the power of closure or prohibition, with an object to prevent and control pollution, are within scope of the statutory power under legislative scheme. Furnishing a bank guarantee, works both as incentive to an

12 *M.C. Mehta* v. *Union of India* AIR 2002 SC 1515
13 *Supra note* 6.
14 *Ibid.*
15 *State Pollution Control Board, Odisha* v. *M/s. Swastik Ispat Pvt. Ltd. and others* ,2014 SCC Online NGT 13.

industry for compliance so as to avoid forfeiture of the bank guarantee, and where non compliance leads to pollution, resources would be available with the Board for response and remedial measures to address environmental degradation or damage caused by such non compliance.[16]

3.1 Legality of Power to Require Furnishing of Bank Guarantee

The resolution of the Boards requiring a defaulting industry to furnish a bank guarantee was challenged as not being in consonance of the power vested under the law, being outside their jurisdiction. The fact that bank guarantee has been sought from the defaulting industries has been alleged by the aggrieved industries as a penal action, which the Boards are not empowered with under the provisions of the Air Act and the Water Act. Section s 33-A Water Act, 1974 and 31-A of Air Act, 1981 states the power of issuing any direction to include the power of closure, regulation or prohibition of an industry and does not refer to any financial measures to control and prevent pollution. Therefore, the action of requiring the industry to furnish a bank guarantee continued to be challenged by the industry. With no express rule on financial provisions in any of these environmental statutes, the matter became therefore a question for judicial interpretation.

The imposition of financial measures by the PCBs on the defaulting industries were challenged before the NGT in the *Hindustan Coca Cola Beverages case* wherein the power to issue any directions under Section 33-A of Water Act and 31-A of Air Act for alleged violation of environmental standards and the consent granted to the industry was found to be punitive and penal in nature and therefore beyond the jurisdiction of the Boards. This was a case where the Boards have not been particular about the procedure to be followed and the decision of the NGT was impacted by these facts also. However, the later decisions of the NGT have held the power of the Boards to issue any directions under Sections 33-A and the *pari materia* provision 31-A of Air Act to be 'inclusive' and not exhaustive[17]. According to the Tribunal "an inclusive definition or explanation would take within its ambit the power to do things besides what has been spelt out and such inclusion is specific and must not be restricted by undue limitations".[18] Therefore, the Boards can take other measures for the performance of their functions under the law other than those specifically mentioned in the provisions. Thus, the "power to impose condition for furnishing of

16 *Ibid.*
17 *Id para* 46-48.
18 *Ibid.*

Bank guarantee is not penal but is regulatory and compensatory in nature and in consonance with the scheme of the law".[19]

In *M/s. Munjal Showa Limited v. The Appellate Authority Haryana State Pollution Control Board* [20] the power of State Pollution Control Board under the provisions of the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environmental Protection Act, 1986 to impose any conditions including requiring a bank guarantee while permitting any industrial unit to carry on its manufacturing activity generating emission or trade effluent was upheld by the NGT. However, the Tribunal cautioned that "the Bank guarantee or any part thereof could not be forfeited unilaterally without there being any specific term incorporated under any mutual agreement as the sole purpose is to secure due compliance of the terms and conditions which are mutually agreed by the parties."[21] The forfeiture of part of the Bank guarantee by HSPCB, in this case was found to be without any legal basis and arbitrary.

3.2 Procedure for Imposition of Requirement of Furnishing of Bank Guarantees

The Boards have been following the practice of securing bank guarantees from defaulting industries. Various cases pleaded before the NGT have shown following factors leading to imposition of such financial measure:

a) Where there evidence of non compliance with prescribed norms or consent conditions.

b) Where the statutory requirement of advance consent from Boards was not taken and the industry as operational and polluting.

c) Where after show cause for non compliance the industry became compliant but there are evidences of history of previous conduct of causing pollution i.e. to show cause notice for closure.

In such a situation the Boards are under a procedural obligation that, before applying the principle of "polluter should pay", assessment and determination of the damage caused by the polluter and the amount which is required to remedy the damage is a must. Otherwise the directions to deposit pollution cost and as well to submit a bank

19 *Ibid.*

20 3rd November, 2016, *http://www.greentribunal.gov.in/Writereaddata/Downloads/3-2013(PB-I-Judg)_APL3-11-2016.pdf.*

21 *Id* para 24.

guarantee as a lump sum would be arbitrary being devoid of any basis for the conclusion reached by the Board for violation of terms of consent or prescribed norms. The NGT highlighted these requirements as necessary for the action of the WBPCB in requiring Rupees five lakh as pollution costs and a bank guarantee of Rupees five lakh from *Hindustan Coca Cola Beverages Pvt Ltd* before it can be sustained in the eye of law.[22]

d) The defaulting industry is allowed to carry on its operations for a fixed period once Bank Guarantee is furnished for compliance and compensation. This interim period gives the industry an opportunity to mend its ways by complying with the directions and the conditions of the consent order including setting up of anti-pollution equipment. Thus the procedure stands the test of reasonability and also promoting sustainable development by not closing or prohibiting the industrial activity in the first instance rather giving a time frame to carry on while adhering to the consent conditions.

4. Financial Provisions: Tools for Improving the Prevention, Control and Remediation of Environmental Pollution and Degradation

Several Member States of European Union have adopted financial provisions in their environmental regimes. The Irish Environmental Protection Agency requires the furnishing of "financial provision for unforeseen environmental damage as well as the costs of closure and restoration or aftercare with an obligatory annual review and revision of the amount of the financial provision".[23]

Finland came up with reformed Waste Act in 2012, requiring financial guarantee for waste-related operations for environmental compliance from "waste carriers and suppliers; those involved in international waste transfers; and entities engaged in waste treatment"[24]. The law very clearly provides for the forms of financial guarantee approved for various wastes and the parties responsible to provide the guarantee. A report submitted by IMPEL, an international NGO having representatives of the EU Member States provides a vivid detail on working of financial provision in addressing environmental risks and liabilities. According to the study "there are cases where financial provision worked and which show that it is a potential protection against the problem of abandoned liabilities and cases

22 *Supra note* 10.
23 *Supra note* 2.
24 *http://ec.europa.eu/environment/waste/mining/pdf/EU_Final_Report_30.04.08.pdf.*

where financial provision failed to cover the costs of restoration or pollution remediation because it was not secure, sufficient or available when required showing the importance of adhering to these principles when implementing financial provision."[25]

To integrate economic activity with environmental integrity, we have to work towards bringing efficiency to governance systems. In environmental governance economic instruments may have a cutting edge in bringing compliance of defaulters who are basically into an economic activity. There are bound to be practical difficulties in evaluating and quantifying the financial provisions for different kinds of industries. For example the environmental damage caused by mining activities have been posing a major challenge to the policy makers all over the world .In India, the mining laws do require reclamation and rehabilitation of the excavated area by the mining lease holder after the mining operations end.[26] But rarely is this environmental obligation discharged. In cases where matter has been taken to the courts for such environmental damage, then only the mining lease holders were held liable for compensation and restoration of the land[27]. The broad and vague requirements of providing for 'rehabilitation' and 'remediation' without any specificity, gives an opportunity to all the mine operators to escape liability. Similar were the mining laws in Australia till the environmental deterioration forced the government to come up with concrete and detailed new financial provision regulations under its National Environmental Management Act for environmental damage caused by mining activities. The new regulations provide detailed methods as to calculation of the "'financial provision' required of all mining and prospecting rights applicants or rights holders in Australia."[28] Dividing the lists into specific heads, the new financial provisions provide clarity and certainty to all stakeholders. However, some of the provisions of the 2015 Regulations have faced critique for their regulatory uncertainties leading to a new set of Proposed Regulations pertaining to the Financial Provision for Prospecting,

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25 European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) '*Financial Provision – Protecting the Environment and the Public* Purse' Report number: 2016/20, at *http://ec.europa.eu/environment/legal/liability/pdf/.*

26 Section 34 –" Reclamation and rehabilitation of lands: Every holder of prospecting license or mining lease shall undertake the phased restoration, reclamation and rehabilitation of lands affected by prospecting or mining operations and shall complete this work before the conclusion of such operations and the abandonment of prospector mine." *The Mineral Conservation and Development Rules, 1988* available at *https://ibm.gov.in/index.php.*

27 *Common Cause* v. *Union of India and others* MANU/SC/0491/2014.

28 'Financial Provision Regulations for Prospecting, Exploration, Mining or Production Operations by the Minister of Environmental Affairs' on 20 November 2015 (2015 Regulations) available at *https://www.environment.gov.za/*

Exploration, Mining or Production Operations by the Environmental Minister on 10 November 2017.[29]

Thus, for prevention, control and remediation of environmental pollution financial provisions do seem to offer an advantage. Though the Indian environmental authorities and the judiciary has already started to incorporate, endorse and promote financial securities, yet a system needs to put in place through a legislation on financial provisions with emphasis on assessment of the environmental liabilities, their costs and a list of approved comprehensive packages of financial provisions. There are a variety of financial instruments which the developed countries like the U.S.A, European Union member states, Australia etc have experimented with for their utility and effectiveness in protecting and restoring the environment. These include cash funds subject to security in favour of the environmental authorities, direct guarantees from parent company of the operator, charge on property in favour of the regulating authority and appropriate insurance policies. What needs to be ensured for maximizing the effectiveness of financial provisions is that in all cases they must be secure, sufficient and available.

5. Conclusion

To save the environment, it is imperative to adopt innovative strategies alternative or complementary to that of government regulation. This requires formalizing and validating certain financial measures through appropriate mechanisms of legislations and administrative rule making. Having passed the test of judicial scrutiny, the use of financial securities as tools of regulating environmental pollution and degradation should now be followed by consolidating these measures through express and comprehensive legal provisions and rules.

Financial measures do assist in making the industries compliant towards their environmental obligations. They are in consonance with the environmental principles and laws of the land. However, the contexts and circumstances in which financial provisions might be used towards sustainable development need to be delineated with the help of the experience of the Boards which are a statutory expert body dealing with the regulatory issues on a daily basis. Governmental regulation nowadays is more than ever required towards facilitating, encouraging or otherwise ensuring that the regulated are accountable and participative in preventing and remediating environmental pollution. Some of these measures could be financial in nature needs

[29] "Minister Edna Molewa publishes an amendment to the financial provisioning regulations pertaining to mining in terms of environmental legislation" 20 April 2018, available at *https://www.environment.gov.za/mediarelease/*.

to be explored and streamlined for bringing efficiency in environmental regulation. It would make a significant reform to include more specifically the following suggestions in the laws:

5.1 Options of financial provisions

Since bank guarantees have now been accepted as tools of regulatory and compensatory measures, the Indian practice of a fixed amount of bank guarantees for the fixed period of activity can be improved by opting alternatively for a bond that is re-evaluated after audit of the environmental measures adopted by the firm. Companies do not always have incentives to implement better prevention when the fixed value model is applied as it may be reluctant thereafter to invest more in prevention. Whereas environmental bonds open to review have the potential to increase the industry's participation while conducting their operations thereby improving the level of prevention.

5.2. Bank Guarantee/ Financial Provisions as Corporate Social Responsibility

A requirement of financial security can also ensure that CSR becomes a vehicle for companies to invest in environmental protection. India was the first country to introduce mandatory requirements on corporate social responsibility (CSR) for companies, under Section 135 of the Companies Act, 2013.The CSR obligation of a company can be achieved by bringing in best practices for ensuring availability of funds for meeting liability for the environmental risks created them while benefitting from such activities. Most importantly, making financial provisions as an integral component of CSR would provide support and accountability to all industries, whether they have a large or a small CSR budget, allowing all parties to contribute to large scale impact.

The environmental jurisprudence of India is based on the precautionary pays principle; the polluter pays principle and sustainable development. Therefore, the environmental pollution laws in India have both a punitive and compensatory regime under them. Whereas the penalties are to be determined by a court of competent jurisdiction on the complaint by the competent authorities or a person, the prevention and control of pollution and restoration of environment is entrusted with the environmental authorities. There is a need for covering more comprehensively the financial provisions for compliance, compensation and rehabilitation in case of environmental incidents and activities. Providing legislations for financial provisions would make them more acceptable strategies for ensuring fulfillment of environmental liabilities and help avoid the transfer of costs from the polluter to the public.

A SOCIOLOGICAL STUDY OF INTERPLAY OF DOWRY SYSTEM AND INHERITANCE RIGHTS

Mr. Mangla Bhardwaj *

1. Introduction

In India, all religions and classes consider marriage as an essential social function of the society. It is regarded as an important religious duty and taken as a sacred act to be performed by man and woman for the sake of procreation. The system of marriage institution is established to control and regulate sexual behaviour of an individual in the society. Many emotions are involved in Marriage Institution which are deeper and complex in nature. It is the most important institution of any society. It is a belief that a civil society can only exist if marriage is considered to be an essential part of the social order. It leads to the moral and valued society having love and affection towards the people living together. In early Vedic literature, *Brahma Vvah* was considered to be best form of marriage, where a girl is given to a meritorious boy in a same caste or in a caste of equal status. Both bride and bridegroom in this marriage are supposed to be mutually agreeable for the marriage. Present day society also considers *Brahma Vivah* as the most preferable one in which the father gifts his daughter to a suitable bridegroom through a ritual of *Kanyadhana*.

The roots of the practice of dowry could be found in the Vedic literature. In earlier times, dowry was given to the bride at the time of marriage. It includes gifts, clothes and ornaments. It was believed as an act of charity (Dhan). Along with it, *Kanyadhan*a was performed by the father of the bride. There was no compulsion of dowry as it was given to bride voluntarily out of love. Bride had full control over the jewellery. It constitutes her Stridhan but in a present scenario, the dowry has become a social evil which is disturbing the life of lakhs of people. The groom's family demand heavy dowry from bride's parents. The trend of dowry is responsible for lowering the status of girls. Girls are considered as liability. Dowry has been a major cause of inferior status of women in India. There is cultural biasness towards son because of the custom of dowry. To understand the importance of son in the Indian family set up, dowry has a major role to play. In India, the custom of dowry is one of the crucial factors which add to preference given to sons. (Diamond-Smith et al, 2008)

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Custom of dowry puts enormous pressure on the parents of the girl child. It is due to this evil custom that daughters are regarded as "burden." There is an enormous discrimination in the upbringing of boys and girls. It is responsible for the lowering the status of girl child. There has been much news in the media about dowry deaths and murders. Dowry has always been linked with the inheritance. There was an argument that daughters are not given share in the property as big dowries are given to them in marriage. Due to culture and traditions of the society, it is believed that dowry is given to daughters at the time of marriage and property is passed to the sons. It also has been seen that people sell off their properties to marry off their daughter in a good family.

There are many social as well as cultural factors which are responsible for making the practice of dowry worse day by day. The caste system which is the prominent feature of the Indian society has a huge and deep impact on initiating the tradition of dowry. Parental interference can be witnessed in the selection of suitable match. Due to the higher standard of living, religious as well as social pressure is put on the parents of girl to give high dowry if they want better, rich, qualified and suitable partner for their daughters.

In general, the society's perception towards the tradition of dowry has changed from a simple custom to a social evil by making dowry as a mark of their prestige and social status. From being one of the major features of marriage with change in the society, it turned out to be a major dysfunction. William J. Goody had an opinion that dowry is a kind of pre-mortem inheritance as share in the father's property is not given to female instead heavy dowry is paid to her in marriage. In Hinduism, Mitakshara law also supports this notion. So as per this notion girls are entitled gifts which has been named as dowry but no share in the property.

Legal definition of dowry according to the *Dowry Prohibition Act*, 1961: "Dowry means any property or valuable security given or agreed to be given either directly or indirectly-

a. By the party to a marriage to the other party to the marriage: or
b. By the parents of either party to a marriage or by any other person to either party to the marriage or to any other person;

   At or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (shariat) applies."

It can be said that dowry is a kind of economic transaction which a groom receives from his bride or bride's family. It includes gifts and valuables from the bride's parents for the groom, his family and relatives. This practice of dowry is now considered as a social evil as the dowry given by the bride's family is not a sign of willingness, happiness or affection but a compulsion. It is a kind of bargain which is ruining the lives of bride's and their family resulting into misery and unhappiness all around. If the huge amount of money and valuables demanded by the groom and his family are not fulfilled, then bride and her family are harassed to an extent that it leads to a miserable and horrible life. In a society, there are large number of boys who are well settled in life as chartered accountants, doctors, advocates, civil servants, and college university professions etc. So, it is expected that if the girl wants to marry a highly educated and well settled men then she has to fulfil all the demands of the groom and his family. However, if the higher education is given to the daughters, it is expected that the dowry system in India will soon diminish.

Thus, the dowry system is a business deal in which bargaining in done leading to the destruction of ethical values and a path towards a destructive society. It is nothing more than a stigma on an Indian marital system. It has made the young women think not to marry as the system of dowry has put burden on their parents. The society can flourish only if this practice is abolished. There is a rapid need of changing the mind set of people. Raising the conscious morally and socially, giving higher education to women, empowering the women, allowing the inter caste marriages, establishing powerful laws against dowry system, and working voluntarily against the dowry system will help to abolish the practice of dowry in India. The sooner it ends; the better will be the life of the women.

In India, the government laws and policies are made and rights are given to increase the status of women. But law fails to provide equality. To improve the status of women, many laws have been amended by the Government of India but have failed in providing equality. With the amendment, the *Hindu Succession Amendment Act,* 2005 married daughters have got rights in the joint property of their father. Efforts have been made by the legislature to make the gender equal. It is a crucial step taken up by law to provide equality to both son and daughter in matter of inheritance of property. Attitude plays a major role in the social transformation of the society. The legislature can make laws and bring amendments in it. The law cannot yield changes in the society till the time people are not ready to accept the change. Attitude of people can determine if the law is going to be successful or not. The *Hindu Succession Amendment Act* was passed in 2005.

With the amendment in the *Hindu Succession Act*, 1956 the government of India has tried to end the discrimination. It has tried to end the long going discrimination on the basis of sex, marital status, dwelling house and agricultural land. With the passing of the *Hindu succession Amendment Act*, 2005, a daughter has got the title of coparcener in the Hindu joint family property irrespective of whether she is married or not. It is a most significant change in the history that coparcener title is given to daughters too whether married or unmarried. Daughters have got independent birth rights as coparceners in the joint family property. In the past, the married daughters had no right in the joint family property. It was a notion that once a girl got married, she has no right in the parental property.

At the present time, the marital status of daughters does not matter. In former times, discrimination was done on the basis of whether a daughter is married or not. At this stage, equal rights are given to married daughters at par with unmarried daughters and sons. Historically, the daughters were not given the title. As system of patrilineage is adopted, son was regarded as coparcener. Son was entitled to birth rights in the property but nowadays as the Act is gender neutral where it tries to bring equality and daughter too has got title of coparcener.

Currently, daughters have got right in the parental dwelling house. It does not matter whether she is married, unmarried, separated, widowed or deserted. These days, she can reside and claim partition in the dwelling house. Back in the day, daughters had right to residence only if she is unmarried, separated, widowed or deserted. Presently, married daughters have got right equal to sons. Article 23 if the Indian Constitution was got deleted. In these days and age, daughters have got equal rights in the agricultural land. Section 4 of the *Hindu Succession Act*, 1956 was also deleted. Today, state laws cannot over ride Hindu Succession Amendment Act, 2005. Major reforms have tried to bring gender equality.

Modifications have been done in Section 6. As of now, daughters got title of coparcener and they have got independent birth rights as Coparceners. Specification of Class 1 heirs (male and female) has been changed with the amendment. Section 4 (2), Section 23 and Section 24 the *Hindu Succession Act*, 1956 have got deleted. With the deletion of section 4 (2) daughters has got equal inheritance rights in agricultural land and Hindu Succession Amendment Act, 1956 override the state tenurial laws and issue of survivorship has been abolished. With the deletion of section 23, daughters got right to reside and claim partition irrespective of their marital status. The female Hindu heir can dispose-off the property by making will. With the deletion of section 24, certain modification has been done in Section 30.

This time, "disposed off by him or her" is written, earlier, "disposed by him" was mentioned in the Act. Change has been done to class I heir category. Now, four new heirs have been added. The Amendment has no effect on the partitions and testamentary done before 20 Dec, 2004.

The system of inheritance and its interplay with dowry makes the social system more complex as it is showcasing the emotional, cultural, economic and political life. The society in India is going through transition. It is at a place where there is intermixing of traditions and modernity. Due to the latest developments in the society, the status of women is changing to a great extent. Laws have been made to make the position of women powerful but India is still in a grasp of meaningless cultural norms and traditions. Indian women are not able to take the privilege and benefits from the reforms and amendments that have been done to improve their status and condition in Indian society. When the dowry is given to the bride, it is morally accepted by the society though it is illegal from legal point of view. On the flip side, the girls' right in her father's property is treated morally wrong but it is legally acceptable. Therefore, the women are not benefitted either legally or culturally. There is a constant struggle between culture and laws. As a result of this confusion, women are suffering as they are unable to get the desired and clear benefits from the society. Due to this dichotomy, women are paying heavy prices. There should be a balance between culture, mind set of people and legal steps or reforms done by the government. Only if the attitude of people towards dowry practice and inheritance changes then only the reforms taken for the benefits of women can be successful. This will result in healthy and prosperous society to live in.

2. Review of the Literature

Kishwar M. (1986) *in an article mentioned that from the past many decades much effort has been made in eradicating the practice of dowry in the society. However, the practice still continued in the society and gained the most attention in spite of other issues in the society. Many campaigns were conducted to abolish the dowry system but it is unfortunate that the practice of dowry is gaining momentum day by day. Therefore, the expected results were not achieved. The exact reason could not be found why people enthusiastically give and receive dowry. So until and unless, we understand the working of dowry system, we will not be able to do the needful.* One of the arguments which was emphasised again and again that people became very greedy under the influence of westernization. This leads to growth of consumer culture which puts emphasis on consumption of goods on large scale. There is constant increase in the greed of the people for dowry. The daughter and her father

are both are harassed if they are unable to fulfil the demands of the in-laws. The number of cases of harassment are increasing day by day. The argument which was discussed is that, why the practice dowry has increased even if this Act is considered morally wrong? The way parents of son receives the dowry from another party, in a same way it is expected that they will be giving dowry on their daughter's marriage. If greed is the actual reason then the groom's family would not spend heavily too on reception and other relatives' gifts. For example, the author noticed in one of the marriages that occurred recently, the expenditure laid down by boy's family on arrangements of marriage was not less than the amount spent by them on dowry. Any unsuccessful marriage in which the girl faces a lot of humiliation and harassment, it gives rise to the notion that girls can live happily in the society even if they are not marriage. It passes wrong notion. There are too much obsession in the society regarding the marriage of a girl as it is considered the most necessary and inevitable step in women's life. It is not possible to raise independent and free women until and unless the obsession of getting the women married is not eradicated from the society. The women can resist maltreatment if they are not compelled to get married and to adjust there at any cost. It is necessary to create a healthy environment in which the women can lead a life full of freedom, confidence and dignity.

Dalmia S. and Lawrence P. (2005) in the article "The Institution of Dowry in India: Why It Continues to Prevail" stated that there are number of factors which are responsible for the practice of dowry occurring in India, For example, the system of stratification, marriage, kinship, production, inheritance rights and it's relation with residence's nature and the role of women in these. The system of dowry has prevailed in India because it works as an economic exchange and as an institution in itself. Data was used from marriage transaction. The dowry given during the marriage decided an individual status so if the dowry is given on the higher level than the bride will be able to get married in a higher status family and to a promising partner. On the other side, if the dowry given is not sufficient than the bride will not get a suitable match. Thus, the results revealed that for getting perfect match for the daughter, a father has to pay heavy price. The findings also revealed that the gender ratio, inheritance system and the bride's residence after marriage do not affect the incidents of dowry.

Shivani A. (2011) in "Dowry and property rights in Jammu district" mentioned that the study dealt with the issue of dowry and property rights of Hindu women in Jammu district of Jammu and Kashmir (JandK) state. In Contemporary India, dowry being an essential component of the Hindu marriage, it has negatively affected women. Cold blooded incidents like bride burning and emotional as well as physical

harassments can be witnessed. On the contrary, The *Hindu Succession Act*, 1956 provides share in the parental property. Though there are very few women who claim their right. The studies focus on how independent these are dowry and property from each other. It also highlighted that dowry which is illegal is practiced by people and property right which is legal right is still ignored by people. 200 households were selected as sample. They were selected from two localities and also 10 case studies related to property and dowry were taken. Help from secondary sources was also taken. The findings revealed that awareness of property rights and dowry laws has no direct relation with the practice of dowry and claiming property rights.

Banerjee R. (2014) *mentioned that World Health Organisation 2009 considers that the major influencing factors in creating violence towards women are cultural and social norms. The oppression, torture and murder of women are due to the deeply rooted dowry system in India. In arranged marriages, dowry is an obvious part. It may lead to violence if the dowry is not sufficient as expected by in-laws. In 2011, 8616 females death have been occurred as per* the National Crime Records Bureau of India. It is also revealed that 25000 deaths occurred due to dowry as per Asian Women's Human Rights Council (2009). Despite the efforts taken by the government, social activists and female organisations nothing much has changed in the past decade but instead it has been noticed that problems have increased. It mentioned that there is tremendous amount of mortality and morbidity among women in India.

Jeyaseelan *V.*, Kumar S., Jeyaseelan L., Shankar *V.*, Yadav B. K., and Bangdiwala S. I. (2015) in "Dowry demand and harassment: Prevalence and risk factors in India" mentioned that in India, it is trend that payment of cash or gifts are given by the bride's family to the groom's family before the marriage, it is a widespread practice of dowry. Although, it is strictly banned by the law, still the dowry system is practiced by most of the people. It results in domestic violence or gives rise to the extreme cases like death of women. The study investigated the risk factors responsible for demand of dowry and harassment and also its psychosocial correlates among different social classes in India and the factors related to husband and mother-in-law. In the year, 1998-1999, cross sectional survey was done on 9938 rural women, and sites of urban and non-slum urban throughout India. The p value was less than 0.0001 which shows that dowry demand was significantly higher in the urban non slum (26%) and rural areas (23%). On the other hand, in the urban slum areas, it was found out to be 18 %. Results revealed that that 17 % of the bridegrooms' families were not at all happy with the dowry given by the bride's family which is 21 % in rural areas and 14 % in urban slum and non slum areas. It

was revealed that 13.3 % group of women were harassed due to dowry. Even mothers-in-law themselves experienced the harassment due to dowry demand. The status of mothers-in-law came out to be one of the major factors responsible for dowry demand. It has been mentioned by the researchers that if the society's support the women than the dowry demands could be decreased.

Roy S. (2015) in "Empowering women, Inheritance rights, female education and dowry payments in India" reveals the effect of reforms related to the laws in bringing gender equality in relation to the outcomes of women. Researcher examined that the reforms failed in providing daughters the equal shares in ancestral property of father as of the sons. The parents preferred to pass on the ancestral property to their sons as gift so that the law could be circumvented. The parents give their daughters either high education or a large some amount of dowry as a compensation to their share in the property.

Bhalotra S., Brule R. and Roy S. (2018) in "Women's inheritance rights reform and the preference for sons in India" .The researchers explored that whether the equality provided through inheritance rights for girls changes the favouritism towards the birth of son in India. They explored that there is increase in the sufferings of females after the reforms done in the inheritance rights of women. After reforms in the law, it has been noticed by the researchers that there are very less chances of girls being first child born. They had noticed that there is huge increase in the female foeticide as birth of son is preferred. They also mentioned that female infant mortality cases have also increased. The findings revealed that change in the reforms lead to the increase in the daughter's cost which further results in increase in the cases of female infanticide. Therefore, the legal reforms could not be much successful due to the norms created by the society and its culture.

Makino M. (2019) in "Dowry in the absence of the legal protection of women's inheritance rights" reflected that the biased behaviour towards girls in India is due to the practice of dowry which can be seen through sex selective abortion and female infanticide. It is due to the burden of payments of dowry which is supposed to be given in future and thus unwelcoming the birth of a girl child. Therefore, the women believes that without inheritance rights only dowry will protect her. This study focuses on Women empowerment in relation to dowry in India. It is a kind of society in which women do not inherit rights, so dowry enhances women's status in her in-laws. If the women have same rights as their brothers then the relationship reverses. The findings suggested that ban on dowry may not result towards the benefit of

women. It also reveals that if the women become assured of inheritance rights than there is no need of dowry.

Kaur G., Kaur L. and Tiwari D. (2019) in "Scenario of Dowry in Rural Punjab-Perceptions and Suggestions" investigated by taking three main zones of Punjab i.e. Majha, Malwa and Doaba. In total, 360 families were taken as sample. 360 mothers-in-law were taken as G 1and 360 daughters-in-law were taken as G2. The findings show that there were difference in the opinion of mothers-in-law group (G1 group) and daughters-in-law (group G2). G1 group had an opinion that good nature made them happy in their in-laws house, on the other side G2 group had an opinion that dowry made them happy i.e. 60 %. Dowry is considered to be a social evil by the society but still people consider dowry as a foundation of healthy relationship with husband and in-laws. A new trend also noticed by the researchers which highlighted that heavy dowry is paid to brides who are settled abroad by the grooms. It was also mentioned that G1 had an opinion that awareness drives and interventions by government can control practice of dowry and G2 had an opinion that NGO, panchayats and education of girls can play big role in controlling dowry.

Pallikadavath S. and Bradley T. (2019) in "Dowry, 'dowry autonomy' and domestic violence among young married women in India." A study was conducted in which domestic violence in relation to women's power to use the dowry given by her parents. For this, a sample of women who were married in the age group of 15-24 years was taken. It was found out that three fourth of the women had received dowry in their marriage. 66 % of the women had a right to use dowry as per their choice. When the woman has no right to use her dowry then there is an increased chance of domestic violence. On the other side, if the woman is highly educated and getting married after 18 years then there is decreased chance of domestic violence.

3. Significance of the study

In former times, dowry was a ritual but with change in the society, it emerged as an evil. Dowry was paid by the parents to ensure happiness and prosperity in daughter's life. It was assumed that heavy dowry would guarantee happiness but it has been observed that tradition of dowry turned out to be a curse and not a blessing. The government of India made amendments in the *Dowry Acts*. The *Hindu Succession Amendment Act*, 2005 also gives equal rights to her joint family property. The researcher wanted to see the interplay of both. How has the attitude of women changed with so many amendments in their favour? Are the women ready to accept the latest trends? Dowry is also considered as a pre mortem inheritance as in the state of Punjab, patrimonial system is followed. Property is passed from father to son and

heavy dowry is paid to daughters. The researcher wanted to see whether the women accept dowry as pre-mortem inheritance. How has social learning and socialisation impacted their opinion. The researcher wanted to know the sociological aspect of interplay of dowry and inheritance practices. Though many studies have been done but none has covered the sociological part.

4. Objectives of the study

- To study what women have received in dowry in Sangrur district of Punjab?
- To study whether women are satisfied and happy with the dowry being given.
- To study who has the authority over the dowry items?
- To study opinion of women regarding the trend of dowry system after the implementation of *Indian Succession (Amendment) Act*, 2005.
- To study the value of dowry received and share in their father's property.
- To know their opinion about dowry being pre-mortem inheritance.

5. Delimitation

- Sample is delimited to state of Punjab.
- Sample is delimited to one district of Punjab.
- Sample is delimited to rural set-up.

6. Methodology and procedure

Descriptive survey method is implied in the present study. Descriptive survey method is process of gathering information about the present conditions or situations. It is done to analyse and interpret the present situation. It is not only tabulating facts but includes comparisons, identification of trends and relationships. Interview schedule was made to collect data. In the present study, purposive random sampling technique was employed in which 10 blocks in the Sangrur district of Punjab were selected. Sample of 100 married women was taken. One village from each block was randomly selected. 10 married women respondents in the age group of 20 to 35 years from each village were interviewed. Those women were selected who belonged to landlord families, are graduates and have brother/s. Snowball sampling technique was employed. Interview schedule was prepared to collect data.

7. Analysis

In the present study, the researcher analysed the interplay of dowry and inheritance rights.

7.1 Women have received in dowry from their paternal family in their marriage in Sangrur district.

Table 1 Women have received in dowry from their paternal family in their marriage in Sangrur district.

Type	Number	Percent
Cash	95	95
Kind	97	97
Share in the property	0	0
Cash and kind both	95	95
Total	100	100.0

The above table 1 highlights that majority of the respondents answered that they had received kind as form of dowry i.e. 97 %, when women questioned about what they had got from paternal family in their marriage. In Punjab, there is a tradition of giving huge dowry to daughters. Punjabis are known for "Big fat weddings." People start preparing for dowry since the daughter is toddler. It also came as a major factor, why people were not in the favour of giving property to daughters. Dowry is one of the factors, why people are against passing property to married daughters. 95% respondents told that they had got both cash and kind in their marriage. With the advent of modernisation trend of giving cash came into being. People are giving huge amount to their daughters in marriage. A respondent told that 12 lakhs were given to her in marriage. Proud could be seen in the respondents who had got huge amount and plenty of items as dowry. A respondent boasted, *"Sub kuch saada hi ditta hoe aa hai."* All the respondents did not get share of property as dowry. In Punjab, property is passed from son to son. System of lineage is patrilineal. Handsome dowry is given to daughter but there was not even a single case where property is being passed to daughter as a part of dowry. While doing the matrimonial alliance, it is seen that the respective groom's property should be better than the natal.

7.2 Women are satisfied and happy with the dowry being given.

Table 2. Women are satisfied and happy with the dowry being given.		
Response	**Number**	**Percent**
Yes	93.5	93.5
No	6.5	6.5
Total	100	100.0

Above table 2 shows that majority of the respondents asserted that they are happy with the dowry that they had received in marriage i.e. 93.5 % A respondent rejoiced, *"Maa peo ne bade chawa naal viah kitta, khush kyo na howa."* , Another boomed, *"Jinna saar sakde si us toh vadd ke kitta khushi taa hundi hi hai."* Another added, *"Badi dhoom dham nal viah kitta si mera, sare rishtedaar hun tak yaad karde ne." It was amusing for researcher to know that respondents with graduation qualification were happy and satisfied with the dowry being given. Just 6.5 % respondents had problem with it. Women are raised with the notion that dowry is an essential element of marriage.*

7.3 Who has the authority over the given dowry items?

7.3.1 Authority over cash

Table 3.1 Authority over cash		
Relationship	**Number**	**Percent**
Have not got cash	5	5
Husband	90	90
Mother-in-law	2	2
Self	1	1
Father-in-law	1	1
Husband and his joint family	1	1
Total	100	100.0

Above table 3.1 mentions that overwhelming majority of the respondents admitted that cash is with husband i.e. 90 %. 5 % respondents stated that they have not got any cash. There was only one respondent who had cash in her custody. The cash was given to a daughter in marriage. In this research, it can be seen that just one respondent had a control over the cash that has been given to her by parents. Researcher noticed that there is trend of giving heavy cash among the rich families. A respondent boasted, *"14 lakh cash ditta car lai."* Huge amount of rupees was given to the respondents in marriages. The respondents had no control over the cash. 90 % respondents disclosed that cash is with husband. Again, patriarchal set up could be seen where male has supremacy over the finances. Even educated woman does not have control over the amount that has been gifted to her in marriage. A respondent shared her viewpoint, *"Eh soch ke dinde ne paise ki khush reh gia kudia, par eh ni pata ki bhukke sher de muh nu lahu laga dita, mang ta wad dia rehn gia."* This respondent was pointing towards evil nature of dowry and its effect on greed levels of in-laws.

7.3.2 Authority over kind

Table 3.2 Authority over kind

Relationship	Number	Percent
Have not got kind	3	3
All members	95	95
Myself	2	2
Total	100	100.0

Above table 3.2 displays that majority of the respondents revealed that they are sharing the kind with all the family members i.e. 95 %. There was only 2% respondent whose items of kind are with her. In a Punjabi society, the feminine characteristics of caring, sharing, and nurturing are highly valued and passed on. Girls are raised with the sense of sharing. Through social learning and socialisation girls learn to share things. "*Bachpan toh hi share karde ha asii taa."*, "*Parivaar taa mill bannt ke hi chalda hai." respondents expressed.* There were respondents who were very proud of the heavy dowry that they had received in marriage *"Sub kuch saada hi ditta hoe hai, jithe marji dekh leo."*

7.4 Any change in the trend of dowry after the implementation of Hindu Succession (Amendment) Act, 2005.

Table 4 Any change in the trend of dowry after the implementation of *Hindu Succession (Amendment) Act,* 2005.		
Response	**Number**	**Percent**
Yes	73	73.0
No	27	27.0
Total	100	100.0

Above table revealed that majority of the respondents agreed that change in the trend of dowry after the implementation of *Hindu Succession (Amendment) Act,* 2005 can be seen i.e. 73 %. 27 % of the respondents did not agree that change in the trend of dowry after the implementation of *Hindu Succession (Amendment) Act,* 2005 can be seen.

7.4.1 How has the trend of dowry changed after the implementation of Hindu Succession (Amendment) Act, 2005.

Table 4.1 How has the trend of dowry changed after the implementation of *Hindu Succession (Amendment) Act,* 2005		
Response	**Number**	**Percent**
Dowry practice is same	3	3.0
Dowry practice has increased	64	64.0
Dowry practice has come down	6	3.0
Did not see change	27	27.0
Total	100	100.0

Above table 4.1 exhibits that majority of the respondents acknowledged that the trend of dowry practice has increased after the implementation of *Hindu Succession (Amendment) Act,* 2005 i.e. 64 %. 3 % of the respondents expressed that dowry practice is same. Only 6 % of the respondents added that dowry practice has come down.

7.5 Assessment of the value of things received in their marriage in comparison with share in their father's property.

Table 5. Assessment of the value of things received in their marriage in comparison with share in their father's property.		
Response	**Number**	**Percent**
Less than the value of equal share in their father's property	97	97
Equal to the value of equal share in their father's property	2	2
More than the value of equal share in their father's property	1	1
Total	100	100.0

Above table 5 presented that overwhelming majority of the respondents assessed the value of things; they had received in their marriage less than the value of the equal share in the property i.e. 97 %. The respondents were giving emotional answers like *"Saade lai ta wadd hi ha."* On the request of the researcher, they understood the question that they have to assess economically, not emotionally. Only 1 % respondents agreed that the value is equal to the value of share in the property.

7.6 Dowry as pre-mortem inheritance.

Table 6 Dowry as pre-mortem inheritance.		
Response	**Number**	**Percent**
Yes	76	76.0
No	24	24.0
Total	100	100.0

Above table 6 indicated that majority of the respondents considered dowry as pre-mortem inheritance i.e. 76 %. Many respondents expressed that their parents have given them dowry and the property of the father will go to their brother/s. Few respondents acknowledged that there is no trend of passing the property to the

daughters. Married daughters get the dowry and sons get the share in the property. The impact of social learning, socialization could be seen on the respondents. The Hindu Succession Amendment Act, 2005 has failed to change the opinions of the people as still women who are graduates consider dowry as a pre mortem inheritance and are happy with the practice of dowry. It has been noticed by the researcher that 97 % respondents agreed that the dowry they had got in marriage was less than the value of their share in the father's property but still 76 % respondents considered dowry as pre-mortem inheritance.

8. Conclusion

Dowry remains a significant part in marriages in Punjab. Though amendments have been introduced in laws yet the amendments have failed in changing the mind-set of the people. Deep impact of patriarchy, socialisation and social learning was visible among the respondents. The impact was so strong that even the level of education could not change their belief system. Education level had no major effect on their attitude towards dowry and inheritance. It was still traditional in nature. With the amendment in the *Hindu Succession (Amendment) Act,* 2005, certain rights have been given to married daughters. Now, married daughters too have rights in the joint property of the father equal to their brothers. Dowry has always been linked with the inheritance. There was an argument that daughters are not given share in the property as big dowry is given to them in marriage. Due to culture and traditions of the society, it is believed that dowry is given to daughters at the time of marriage and property is passed to sons. The findings revealed that respondents were happy with the dowry that they had received in marriage. Moreover, it was also found out that respondents had no authority over the dowry items and cash. None had got property as a gift in marriage. The respondents did not see change in the trend of dowry after the implementation of the *Hindu Succession (Amendment) Act,* 2005. The respondents equated the dowry they had received less than their share in the father's property. In addition to it, respondents regarded dowry as pre-mortem inheritance.

APPLICATIONS OF DNA FINGERPRINTING

*Ms. Deepti Singla**

1. Introduction

DNA is an abbreviation for "deoxyribonucleic acid". It is the chemical name for a gene which is found in every cell in the body and which carries genetic information from one generation to the next. A human being is made up of millions of cells, and DNA is present in all cells. In living organisms, DNA is organised chromosomes within the nucleus of each cell. An average human body has trillion of cells of different sizes. DNA is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion.[1] *Sir Alec Jefferys* discovered the use of DNA for forensic analysis in 1984. The structure of DNA is different in every individual and except identical twins; no two individuals can have the same DNA. DNA is found in blood, semen, saliva, hair, tooth, finger nail pairings, skin cells, perspiration, brain cells, mucus, urine as well as other body fluids. Further, it is a very stable molecule and can be obtained from as old as 5 years old semen stains and 4 years old blood stains. The biggest advantage of this technique is its ability to analyse small and environmentally exposed samples to establish their origin with high degree of certainty. Due to the advent of amplification of material clues through cell generation technology-Polymerase Chain Reaction, the quantity required for test has further lessened.[2]

2. DNA Fingerprinting

DNA fingerprinting is a method to identify and evaluate genetic information in a person's cells. The complete analysis of DNA is known as 'DNA fingerprinting', 'DNA profiling' or 'DNA typing'. The DNA of every human being on this planet is 99.9% the same. Only one-tenth of a percent of DNA differs from one human to the next, but that still leaves millions of bases to analyze for differences. Importantly, DNA does not change throughout a person's life and this is what makes DNA profiling such

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1 (2014) 2 SCC 576.

2 Anshu Jain, "DNA Technology and its Impact on Law", *Nalsar Law Review*, Vol. 3, No. 1, 2006-2007, p. 42.

an invaluable tool in investigative procedures. DNA fingerprinting is essentially a biological tool which reveals the genetic profile of a person and when this is compared with the samples obtained from scene of crime or in case of proving paternity, with the sample of the other person, it provides a sufficient proof of connection or relation.[3]

3. Significance of DNA Fingerprinting Technology

In the new scientific era, the emergence of DNA testing changes the role of forensic science in the legal system from passive spectator to the main key player. This technology is utilised as a new form of circumstantial evidence, which is placed on a higher footing than the direct and ocular evidence because of its objectivity, infallibility and impartial character.[4] The chemical structure of DNA in the cells of each individual is the sole determining factor to identify one person separately from another except the "monozygotic twins". The discovery of techniques such as DNA fingerprinting can be used in identification of criminals in criminal cases by analysing various objects recovered from the crime spot like hair, skin cells, saliva, fibres, any body fluid, etc. which are associated with the crime and linked to the perpetrator of the crime. Moreover, this new technology is also extensively applied in civil cases in order to determine paternity or maternity disputes, missing person's cases, property inheritance and immigration cases, etc.

For instance, in civil case of disputed paternity of a child, mere comparison of DNA obtained from the body fluid or body tissues of the child with his father and mother can offer convincing evidence of biological parentage within a short time. No other evidence of corroboration is required. Similarly, in criminal cases, like rape, murder etc. timely medical examination and proper sampling of body fluids followed by quality forensic examination can offer irrefutable evidence, circumventing the need of prolonged argument in courts of law.[5]

4. Application of DNA Fingerprinting Technology

DNA technology has played an important role in the administration of justice and has been used extensively criminal investigation as well as paternity testing. No area in human life has left untouched by the use of DNA test. In fact, it has an array of applications. Some of the areas of applications of DNA fingerprint are discussed as follows:

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3 *Ibid.*

4 Ajit Namdev and Jitendra Parmar , 'DNA Technology and Its Application in the Administration of Justice', *National Law Institute Universty, Bhopal*. Available at *http://www.goforthelaw.com/articles/fromlawstu/article44.htm* (last assessed 03 January 2018).

5 *Ibid.*

4.1 Criminal Identification

Identification of crime suspects is possible from a variety of clues, which are left at the scene of crime like blood, semen, hair roots, body tissue, bone marrow, saliva, etc. DNA in human cell is the same, regardless of the body fluid or tissue from which it is obtained. Therefore, DNA obtained from a semen stain from an evidentiary item can be compared to that from a suspect's blood sample. The DNA profile of each individual is highly specific. The chances of two people having the same DNA profile are 30,000 million to 1 except for monozygotic twins. DNA isolated from the evidence sample is useful in solving number of crimes particularly it is increasingly and successfully being used to identify culprits in sexual assault, rape and murder cases. If DNA of a suspect matches DNA found at a crime scene, then the DNA fingerprint can be used to prove someone guilty or innocent. Since 1980s, innumerable cases have been solved with the help of DNA fingerprint evidence.

For example:

The famous case of Naina Sahani Murder was the first case in India where DNA fingerprinting was used for investigation of crime and also to establish the identity of the victim.

4.2 Exoneration of Persons Wrongly Accused of Crimes

A DNA test plays an effective role to convict the criminals as well as exonerate the innocent when biological tissues are left at scene of crime. Since the advent of DNA fingerprinting, a number of persons wrongfully convicted of crimes have been exonerated. In 1996, the National Institute of Justice published a book titled, 'Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial' which cited the use of DNA technology not only for the conviction of offenders, but also for the exoneration of the wrongly charged or convicted individual in criminal cases.[6]

For example:

The famous case of Colin Pitchfork was the first case to use DNA fingerprinting to convict a criminal (Colin Pitchfork) as well as was the first case to exonerate Richard Buckland (the prime suspect) who was wrongly convicted of crime.

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[6] Subhash Chandra Singh, "DNA Profiling and the Forensic Use of DNA evidence in Criminal Proceedings", The *Indian Law Institute*; Vol. 53 No. 2, April-June 2011, pp. 195-226, at p. 207.

4.3 Mass Disasters Identification

DNA evidence may be the best way in identifying the persons died in riots, floods, earthquakes, train accidents, air-crashes and other disasters. It has been long used to identify the remains of war dead. The U.S. Armed Forces has identified the remains of soldiers from the Second World War and the Korean and Vietnam Wars *via* using MtDNA testing (taking DNA samples from families of service members). The identity of a person can also be established with the help of DNA fingerprinting even when recovered human remains are fragmented or decomposed or in very small quantity. Such identifications are made by comparing DNA samples from human remains to DNA samples from personal items used by the victim (e.g., toothbrush, hairbrush, razor, etc.) or DNA samples of close relatives of the victim, etc.

For example:

DNA evidence was used to establish the identity of missing victims who died in the World Trade Centre bomb attacks in September 2001. WTC was destroyed when two jets high jacked by terrorists deliberately crashed into both towers and killed many people. To identify victims, forensic scientists compared profiles of recovered bodies with profiles of victim's family members or DNA obtained from victim's personal items, such as, toothbrushes, etc.

4.4 Parentage Identification

Parentage identification means paternity and maternity identification. A DNA test plays an important role in parentage identification which is necessary to prove the legitimacy of child. DNA is the hereditary material passed on from generation to generation. Parent-child DNA pattern can be used to determine whether a particular person is the parent of the child. A child's paternity (father) and maternity (mother) can be established by the use of this scientific method very easily. Each child inherits one copy of DNA from his mother and one from his father. If the DNA samples from offspring matched to that of the suspected parents, then there is a strong possibility that they are closely related.

For Example:

In 2002 Elizabeth Hurley, an English model and actress, was a struggling actress when, in 1987, she met Hugh Grant. After 13 years together, Hurley and Grant announced an "amicable" split in May 2000. In 2002, Hurley gave birth to a son, Damian Charles Hurley. The baby's father Steve Bing denied paternity by alleging that he and Hurley had a brief, non exclusive relationship in 2001. Hurley used DNA

profiling to prove that Steve Bing was the father of her child Damien. The DNA test, however, proved Bing as the child's father.[7]

4.5 Identification of Children in Child Swapping Cases in Hospitals

The practice of new born child exchanging is prevailing in different parts of the country. Generally a female child is swapped with a male child and the real parents get deprived of their original children. In such cases, the actual parents of the disputed child can be ascertained by the DNA technology. Therefore, in today's world this technique has become an indispensable part of our life.

4.6 Diagnosis and Treatment of Genetically Inherited Diseases

Many genetic disorders result from gene changes are present essentially in every cell in the body. As a result, these disorders often affect body systems, and most of them cannot be cured.[8] Some diseases are entirely genetic and may include cystic fibrosis, haemophilia, Huntington's disease, familial Alzheimer's, sickle cell anaemia, and many others. The DNA test is useful in diagnosis and treatment of patients with diseases that may be genetically inherited. So the technology of studying DNA fingerprints is used in these situations which are kind of a life-or-death situation.

For example:

A genetic disorder associated with a heart defect might be treated with surgery to repair the defect or with a heart transplant. Conditions that are characterized by defective blood cell formation, such as sickle cell disease, can sometimes be treated with a bone marrow transplant. Bone marrow transplantation can allow the formation of normal blood cells and, if done early in life, may help prevent episodes of pain and other future complications.[9]

4.7 Identifying endangered and protected species

DNA fingerprinting of endangered species, such as, whale, hyacinth Macaw, etc. is proving to be invaluable. Poaching and stealing of animals increased threat to the survival of an endangered species. It helps to identify endangered and protected species as an aid to wildlife officials. It could be used to solve cases where animals are killed illegally, cases of poaching, trafficking of endangered species and the use

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7 *http://en.wikipedia.org/wiki/Elizabeth_Hurley* (last assessed 26 November 2018).
8 *http://ghr.nlm.nih.gov/handbook/consult/treatment* (last assessed 06 November 2018).
9 *Ibid.*

of endangered species in products. DNA fingerprinting is done by comparing DNA samples taken from animals with DNA samples that recovered from poacher's possession.

4.8 Determining pedigree for seed or livestock

Breeders conventionally use the phenotype to determine the genotype of a plant or an animal. As it is difficult to make out homozygous or heterozygous superiority from appearance, the DNA fingerprinting allows a precise determination of genotype. Offspring from the discerning mating of superior animals are expected to inherit desirable characters like strong cardiopulmonary capacity and speed. It is basically useful in *confirming the pedigrees for breeding race horses and hunting dogs.*

5. Relevant Cases on use of DNA Evidence

Though DNA evidence is not in itself proof of guilt, the use of DNA fingerprint technology has rapidly gained popularity over the last few years in the countries like United States, the UK, the Canada and now even in India. Since 1980s, DNA identification is already proven to play crucial role in investigations and have been used as a tool of investigation in innumerable cases both at national and international level and some of them are discussed as follows:

5.1 Landmark DNA cases

Colin Pitchfork case[10]

In 1986, police were investigating the rape and murder of two girls, Lynda Mann and Dawn Ashworth. Richard Buckland, a 17-year-old man, was in custody of police. Buckland suffered from learning disabilities and had confessed to the murder of Dawn Ashworth but denied murdering Lynda Mann. The police called in *Sir Alec Jeffreys* to perform a DNA test to link Buckland to the Mann murder and DNA test was performed by matching semen from the crime scenes to Buckland. The test results revealed that the same man had murdered both girls, but this man was not Buckland. Buckland had given a false confession and the real killer was still at large. Colin Pitchfork, a 27 years old baker, was the first criminal caught based on DNA fingerprinting evidence. It was the first case to use DNA fingerprinting to convict the real murderer, Colin Pitchfork as well as to exonerate the innocent, Richard Buckland who was previously convicted wrongly.

[10] Available at *http://en.wikipedia.org/wiki/Colin_Pitchfork* (last assessed 24 December 2018).

O.J. Simpson murder case (People of the State of California v. Oranthal James Simpson)[11]

The former professional football star and actor O. J. Simpson was tried on two counts of murder after the deaths of his ex-wife, Nicole Brown Simpson, and waiter Ronald Lyle Goldman in 1994. DNA forensic evidence was collected in form of blood, skin, and semen samples taken from the scene of the crime and was analyzed and compared to O.J. Simpson's DNA taken from a cheek swab sample. Although the blood sample and the swab sample matched, this evidence was not used in court due to it nature. In this case, forensic evidence was considered circumstantial, and did not prove absolute guilt. There was reasonable doubt about the DNA evidence (a relatively new form of evidence in trials at the time) – including that the blood sample evidence had allegedly been contaminated and mishandled by laboratory scientists. This case highlighted lab difficulties. He was cleared of a double murder charge in 1994, which relied heavily on DNA evidence. In 1997, a jury unanimously found there was a preponderance of evidence to hold Simpson liable for damages in the wrongful death of Goldman and battery of Brown.

Andrews v. State[12]

In 1987, Tommy Lee Andrews became the first American ever convicted in a case on the basis of DNA evidence. In this case, accused broke into a Florida woman's home in the middle of the night and burglarized and raped the woman at knife-point. DNA samples of semen retrieved from the crime scene matched blood drawn from Andrews, a serial rapist, who is now serving a twenty-two year prison sentence for rape, aggravated burglary and burglary.[13]

5.2 Other Cases where DNA Tests have been used directly or indirectly

Naina Sahani/Tandoor murder case (State v. Sushil Sharma)[14]

This was the first case in India where DNA fingerprinting was used for investigation of crime and also to establish the identity of the victim. Naina Sahani was the victim of Tandoor murder case. In 1995, Mrs. Naina Sahani was murdered by her husband Sushil Sharma. The body was tried to char in tandoor. The incident was revealed by a police

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11 Available at *http://en.wikipedia.org/wiki/O._J._Simpson_murder_case* (last assessed 05 January 2019).

12 Fla. Dist. Ct. App. 1988.

13 Michelle Hibbert, 'State and Federal DNA Database Laws Examined', available at: *http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/databases.html* (last accessed15 February 2019).

14 2007 CriLJ 4008.

constable. The charred body was connected to the victim by using DNA profile. On that basis her husband was convicted for the murder and awarded life imprisonment by the Supreme Court. The case also involved the use of DNA evidence to establish the identity of the victim.

Priyadarshini Mattoo rape and murder case (Santosh Kumar Singh v. State through CBI)[15]

Priyadarshini matto was a 25-year-old law student who was found raped and murdered at her house in 1996. In this case the defence argued and challenged the scientific procedure adopted in DNA probe. The trial court gave the accused benefit of doubt on the basis of tampering of the evidence. The acquittal was turned into conviction by the High Court, amongst other grounds on the basis of the DNA Test conducted in the case by The Centre for Cellular and Molecular Biology, Hyderabad, which had clearly established the fact of rape even though the surgeon who had conducted the post mortem had ruled out rape. DNA test was conducted and test confirmed and connected the crime with the criminal. In 2006, the Delhi High Court sentenced the accused, the son of a Police Inspector-General, to death for the rape and murder of a law student. However, the Supreme Court of India commuted the death sentence to life imprisonment. Therefore, it is necessary to keep in mind that any procedure adopted in the scientific DNA process should have no scope left to benefit the accused giving him the benefit of doubt at all. Any benefit of doubt arising from malpractices or irregularities in the scientific process involved ought to go to the accused.

Villainy v. Kunhiraman[16]

This case was the first paternity dispute which required DNA testing and court had accepted the DNA evidence. To sort out the paternity dispute to an unmarried woman, Vilasini, the High Court ordered for the DNA test. When the DNA profile of Manoj was compared with those of Kunhiraman, the court found Kunhiraman is the biological father of the child, Manoj.

Gautam Kundu v. State of West Bengal[17]

The Supreme Court expressed the most reluctant attitude in the application of DNA evidence in resolving the paternity dispute arising out of a maintenance proceeding. In the said case, the father disputed paternity of the child and demanded blood grouping test to determine parentage for the purpose of deciding whether a child is entitled to get

15 (2010) 9 SCC 747.
16 (1991) 3 Crimes 860 (Ker).
17 (1993) 3 SCC 418.

maintenance from him under Section 125 of the *Code of Criminal Procedure*. The Supreme Court held that where purpose of the application was nothing more than to avoid payment of maintenance, without making out any ground whatsoever to have recourse to the test, the application for blood test couldn't be accepted.

The court has laid down certain guidelines regarding DNA tests and their admissibility to prove parentage as follows:[18]

- That the courts in India cannot order blood test as a matter of routine.
- Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- No one can be compelled to give sample of blood for analysis.

Kamti Devi v. Poshi Ram[19]

The Supreme Court of India in this case refused to rely on the result of a DNA test and held that under Section 112 of the *Evidence Act* non- access between the man and woman is the only way to raise the presumption against legitimacy. The Court gave priority to social parentage over biological parentage and thereby rejected DNA evidence by observing that though the result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, for example, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.[20]

Sharda v. Dharmpal[21]

In this case the Supreme Court took a very positive view regarding importance as well as admissibility of *DNA* evidence in matrimonial cases. The Supreme Court

18 *Ibid.*
19 (2001) 5 SCC 311.
20 *Ibid.* para 10.
21 (2003) 4 SCC 493.

categorically observed that[22]:

> "1. A matrimonial court has the power to order a person to undergo medical test.
> 2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
> 3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

In the same case it was further held that the right to privacy under Article 21 of the Constitution is not an absolute right and in a case of conflict between the fundamental rights of the two parties, the court has to strike balance between the competing rights.

Banarsi Dass v. Teeku Dutta[23]

It was held in the case that Section 112 of *the Evidence Act* was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of *the Evidence Act,* for example, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.[24]

This Court was concerned with a case arising out of succession certificate for the inheritance of property of the deceased and the trial court directed to conduct DNA test to determine the paternity of the alleged daughter. The High Court set aside the trial court's direction for DNA test and held that trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test.

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22 *Ibid.*
23 (2005) 4 SCC 449.
24 *Ibid.* para 13.

Rohit Shekhar v. Narayan Dutt Tiwari[25]

It was the case relating to *declaration of paternity and grant of perpetual injunction against denial of paternity*. The Delhi High Court held that once a matrimonial or civil court exercises its inherent power to order a person to submit to a medical examination or it directs holding of a scientific, technical or expert investigation, which is resisted or refused by a party, the Court is entitled to enforce such direction and not simply take the refusal on record to draw an adverse inference there from. The Court also settled the issue that such mandatory testing upon an unwilling person is not violative of the Right to Life under Article 20 (3) or Right to Privacy of a person under Article 21 of the Constitution though the power to direct a DNA test should be exercised after weighing all "pros and cons" and satisfying the "test of eminent need". However, this right has been restricted to the Civil Courts only by holding that the same reasoning cannot be applied in the context of criminal cases as the Supreme Court in *Selvi v. State of Karnataka*[26] has held that Narco-analysis, Polygraph test and Brain Mapping conducted against the will of a person are impermissible under criminal law where an accused cannot be compelled to make self-incriminating statements against himself.[27]

Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik[28]

The issue involved in the case was of establishment of the paternity of a child. It was held in this case that Section 112 of *the Evidence Act* was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter ought to prevail over the former.[29]

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[25] (2012) 12 SCC 554.
[26] (2010) 7 SCC 263.
[27] Anil Malhotra, 'DNA Profiling – Comes of Age', September 2012, available at *http://www.lawyersupdate.co.in/LU/8/965.asp* (last assessed 22 February 2019).
[28] (2014) 2 SCC 576.
[29] *Ibid.* para 13.

We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of *the Evidence Act* does not create a legal fiction but provides for presumption. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it; we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.[30]

The court held that the proof based on a DNA test would be sufficient to dislodge a presumption u/*s.* 112 of the *Indian Evidence Act*. Indian courts have time and again held that the evidence for proving non-access must be strong, distinct, satisfactory and conclusive. DNA tests can be strong evidence as they are correct up to 99% if positive and 100% if negative.[31]

The Lewinsky scandal case was a political sex scandal emerging in 1998, from a sexual relationship between 49-year-old United States president Bill Clinton and a 22-year-old White House intern, Monica Lewinsky. In the United States, DNA evidence obtained from Monica Lewinsky's dress which matches the President's DNA conclusively established that the President and Ms. Lewinsky had a sexual relationship.

6. Conclusion

These are quite a number of instances of the application of DNA fingerprint technology in the administration of justice. The introduction of DNA technique is increasingly being used in various kinds of investigations, particularly in crime detection. Even though the DNA fingerprint technology presently is used in less than a percent of criminal cases, it has helped the court to acquit or convict suspects in many of the most violent crimes such as rape and murder. DNA plays great role in solving cases, even when the crime occurred decades ago. We hope that the advent of DNA fingerprint technology will facilitate immense help in the administration of justice in the near times to come.

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30 *Ibid.* para 14.

31 *http://www.legalserviceindia.com/article/l153-Forensic-Evidence.html* (last assessed 18 February 2019).

KILLINGS IN THE NAME OF HONOUR : A HUMAN RIGHTS PERSPECTIVE

Dr. Sharanjit*
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"Liberty, taking the word in its concrete sense consists in the ability to choose."

Simone Weil, French Philosopher and Thinker

1. Introduction

Rights of women are protected and promoted world wide. The Universal Declaration of Human Rights, 1948 declared that all human beings are born free and equal. Likewise various international documents from time to time stressed upon the need for a safer world for women and children. However, the present times may not be the best of times for the women folk. This is evident from the ever increasing crime and violence against women. One such grim reality of the present times is honour killings. Though this crime is gender neutral, still women bear the brunt of not obeying the family norms, marrying outside their caste, refusing a forced marriage etc. In Afghanistan and many other Muslim dominated countries, women are often stoned to death for bringing disrespect or dishonor to their families. Pakistan has the highest number of honour killing deaths in the world, where recently a model Qandeel Balooch was killed for bringing disrespect to her community.

Killing for honour of the family or honour killing as it is popularly called has emerged as a heinous crime. Killing for the honour of the family or clan has been prevalent since ages, however even in the modern times where human rights are protected and promoted throughout the world such nefarious acts are still practiced. It owes its origin to the patriarchal mindset where women are still treated as chattels or property of their parents or husband. It is more prevalent in Northern India, particularly in the states of Punjab and Haryana. It is a gender neutral offence as both young men and women have lost their lives due to honour killings. Reasons for honour killing are diverse, for instance a love affair, marriage outside the clan or caste, extra-marital affair, going against the rigid

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norms of the community, and rejection of a marriage proposal. Honour killings are not only tolerated but they are considered as a medium of imposing the dictates of the Khap Panchayats as well.

It is an unfortunate reality that even after decades of the clarion call for equality and liberty for all, the patriarchal mindset is still a harsh reality, women throughout the country are treated as chattels or property of the men and even the right to marry a person of her choice is negated when she is killed for honour of her immediate family or the clan. Right to marry which is an integral part of the right to life and personel liberty as enshrined in our Constitution is negated to her when she is forced to marry according to her parents choice or when she cannot live life according to her free will. No doubt that the northern states of Haryana, Punjab, Uttar Pradesh and Rajasthan are more notorious when it comes to killing for honour, however similar cases have also been reported in the southern parts of India. Thus the right to equality and freedom of choice remain only in the books for such unfortunate couples who are killed on account of bringing dishonour to their families.

But whatever be the cause and factor responsible for honour killings, it is undoubtedly a gross violation of human rights of the victim. It is a direct blow on an individual's right to freedom, right to equality, right to choose one's life partner and most pertinently the right to life and personal liberty. There is nothing 'honourable' in 'honour' killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds.

Crimes committed to uphold honour are fairly widely spread not only across India, but also in the entire Asian sub-continent. These crimes are however erroneously referred to as " honour crimes" . Such a usage rationalizes and legitimizes the crime by creating the notion that the crime is committed to save one's honour – a highly elusive and indefinable notion – and the society is bound by tradition to protect this.[1]

One of the most visible manifestation of the operation of the concept of honour in India is in relation to the marriage of women. As marriage provides the structural link up between kinship and caste, a closer surveillance is accorded to the martial alliances. Kinship linkages provided by marriage, and relations established through marriage, gives a caste group its strength, recognition and liverage in

[1] Prem Choudhary, The Concept of Honour in Honour Crimes, The Tribune, Bathinda, 3rd October, 2013.

wider society and polity. Any breach in these caste linkages brings down the honour and status of not only the immediate family, but also the clan and finally the entire caste group. Those who infringe the specified 'code of honour' relating to caste and kinship in marriage are dealt with extreme violence- leading to the so called honour killings.[2]

Honor killing is an act of taking the life of a family or clan member in order to restore honour of that family or clan. Hence honour killing are acts of vengeance, usually death, committed by male family members against female family members, who are held to have brought dishonour to the family. 'Dishonour' is normally the result of desiring to marry by own choice and refusing arranged marriage, having extramarital and premarital relationship, marrying within the same gotra or outside once caste or marrying a cousin, dress up in a manner which is unacceptable to the family or community, engaging in homosexual acts etc.[3]

2. Honour Killings – Violative of Rights

It is felt and widely accepted that honour killings is a gross violation of human rights.It infringes upon a person's right to marry, right of freedom, right to move around without fear and most importantly the right to life.

In the case of *Latha Singh v. State of Uttar Pradesh*,[4] the Apex Court made the observation that the honour killings are nothing but cold blooded murder and no honour is involved in such killings. The Supreme Court further observed that "inter caste and inter-religious marriages should be encouraged to strengthen the social fabric of the society."

At the international level, Article 1 of the Universal Declaration of Human Rights, 1948 provides that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 provide that

> Everyone is entitled to all the rights and freedoms set forth in the declaration,

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2 *Ibid*

3 Dr. Sukhwinder Kaur Virk, *Honour Killing : A Violation of Human Rights,* Prof. (Dr.) Paramjit S. Jaswal, Prof. (Dr.) G.I.S. Sandhu, Dr. Shilpa Jain (Editors), Gender Issues in India: Sensitisation, Reflection and Solutions, Centre for Advanced Studies in Human Rights, Rajiv Gandhi National University of Law, Punjab, 2012, p.60.

4 (2006) 5 SCC 475

> without distinction of any kind, such as race, colour ,sex language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 provides that

> *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.*

Article 3 of the International Covenant for Civil and Political Rights (ICCPR) and International Covenant for Economic, Social and Cultural Rights expressly obligates the state parties to ensure the equal right of men and women to the enjoyment of all the rights mentioned in each of the covenants. Under *article 14* of the ICCPR,

> *All persons shall be equal before the courts and tribunals"* and under *article 26 " all persons are equal under the law and are entitled without any discrimination to the equal protection of the law…..*

The framers of the Constitution were well conscious of the discrimination and unequal treatment meted out to the fairer sex, from time immemorial. They included certain general as well as specific provisions for upliftment of the status of women. They provided equality of status and of opportunities to all citizens of India. [5]

The fundamental rights are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.[6] In *M. Nagaraj v. Union of India,*[7] the Supreme Court rightly observed that the fundamental rights are not the gift from the state to its citizens. The individuals posses basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race.

Article 14

Article 14 provides that the state shall not deny to any person equality before the law or equal protection of the laws. When applied to women, this article is very significant as it brings the women on an equal footing with their male counterparts. This article is highly important in the Indian patriarchal society

5 Dr. S.R. Myneni, Women and Law, Asia Law House, Hyderabad, 2002, p.14
6 *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248, AIR 1978 SC 597.
7 AIR 2007 SC 71

where women have always been considered inferior to men.

Article 15

Article 15 of the Constitution of India states that:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –
    a) access to shops, public restaurants, hotels and places of public entertainment; or
    b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. Nothing in this Article shall prevent the State from making any special provision for women and children.
4. Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

Article 15 (3) is one of the two exceptions to the general rule laid down in clauses (1) and (2) of Article 15. It says that nothing in Article 15 shall prevent the State from making any special provision for women and children. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the State to make special provisions for them. The reason is that "women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigour of the race.[8] Thus under Article 42, women workers can be given special maternity relief and a law to this effect will not infringe Article 15 (1). Again it would not be violation of Article 15 if educational institutions are established by the state exclusively for women. The reservation of seats for women in a college does not

[8] *Muller* v. *Oregon*, 52 L.Ed. 551

offend against Article 15 (1).[9]

Article 21

The right to life and personal liberty has been given a very wide construction by the judiciary. In *Maneka Gandhi v. Union of India*[10], it was held that the right to life includes all those aspects of life which go to make a man's life meaningful, worth living and complete. In the case of *Francis v. Union Territory,*[11] it was held that the right to life should be taken to mean the right to live with human dignity.

Fundamental duties

Part IV A which consists of only one Article 51 A was newly added to the Constitution by the 42nd Amendment, 1976. This Article for the first time specifies a code often fundamental duties for citizens. Article 51 A (e) is related to women. It states that it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women".

3. The Law Commission of India

The Law Commission of India in its 242nd report entitled " Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of honour and tradition)" suggested that legal framework made concrete suggestions in the form of a proposed Bill to prevent honour killings in the country. The law entitled "Prohibition of Unlawful Assembly (Interference with the freedom of matrimonial alliances) Bill (2011) was intended to curb the social evil of caste councils/panchayats interfering with the endangering of the life and liberty of young persons marrying partners belonging to the same gotra/ caste or a different caste/ religion. These offending acts imperiling the liberty of young persons marrying or intending to marry according to their wishes are perpetrated in certain parts of the country in the name of honour and tradition. The so called honour killings or honour crimes are not pecuilar to our country. It is an evil which haunts many other societies also. The belief that the victim has brought dishonour upon the family or the community is the root cause of such crimes. Such violent crimes are directed especially against women. Men also become targets of attacks by

9 *Dattatraya* v. *State*, AIR 1953 Bom 311
10 (1978) 1 SCC 248, AIR 1978 SC 597
11 AIR 1981 SC 746

members of the family of a woman with whom they are perceived to have an 'inappropriate relationship'. In some western cultures, honour killings often arise from women seeking greater independence and choosing their own way of life. In some cultures honour killings are considered less serious then other murders because they arise from long standing cultural traditions and are thus deemed appropriate or justifiable. The report of the Special Rappourteur of the United Nations of the year 2002 concerning cultural practices in the family that are violent towards women indicated that honour killings have been reported in Jordan, Lebanon, Morocco, Pakistan, United Arab Republic, Turkey, Yemen and other Persian and Gulf countries and they have also taken place in western countries like France, Germany, U.K mostly within migrant communities. In 2010, Britain saw a 47% rise in honour related crimes.

3.1 Key Recommendations by the Law Commisiion of India

1. There should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage/ intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e. for condemning the marriage with a view to take necessary consequential action, are to be treated as members of the unlawful assembly for which a mandatory minimum punishment is prescribed.

2. So also acts of endangerment of liberty including social boycott, harassment, criminal intimidation etc. of the couple or the family members are to be treated as offences punishable with mandatory minimum sentence.

3. A presumption that a person participating in Unlawful Assembly shall be presumed to have also intended to commit or abet the commission of the offences under the proposed Bill.

4. The power to prohibit the Unlawful Assembly and to take preventive measures are conferred on the sub-divisional /district magistrate.

5. The provisions of the proposed Bill are without prejudice to the provisions of the Indian Penal Code, 1860.

6. The offences under this Bill will be tried by the Court of Session and the offences will be cognizable, non-bailable and non-compoundable.

4. Case Study on Honour Killings in India

Manoj and Babli from Karora village in Kaithal district were murdered by the latter's relatives in June 2007 0n the diktakts of a khap panchayat for marriage in the same gotra. In March 2010, a Karnal District court had awarded death sentence to Babli,s brother, uncles and cousins for killing the couple. A leader of the Khap panchayat was also awarded life imprisonment for hatching the plot.

In *State of UP v. Krishna Master and Ors.*,[12] three accused person killing 6 persons and wiping almost whole family on account of honour saving of family – Held, it was a rarest of rare cases to award capital punishment, but instead life imprisonment awarded – It is due to the fact that incident was 20 years old.

Hon'ble Apex Court in *Lata Singh v. State of U.P and Another*,[13] Having considered the concept of the provisions of Article 21 of the Constitution of India, viz-a-viz, inter-caste marriage, it was ruled as under:-

> "We are of the opinion that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above) the police has instead proceeded against the petitioner's husband and his relatives".

The Apex Court further observed that since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matter of great public concern, such as the present one. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter caste or inter religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

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12 Criminal Appeal No. 1180 of 2004

13 2006 (3) R.C.R (Civil) 738 : 2006 SCC 475

The Apex Court directed-

> "this is a free and democratic country and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or the girl do not approve of such inter caste marriage, the maximum they can do is that they can cut off social relations with their son or daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter religion marriage."

In Sanjay v. State of Haryana,[14] three victims two boys and one girl (all teenagers) eloped from village – They were traced by father of the girl and brought to village – All the three, were brutally murdered with sword and gandasi in open street to salvage honour of family – All the P.Ws, including fathers of the victim boys turned hostile due to threats of accused persons – They however, admitted their signatures on the statements made before Police, but stated that they were made to sign on blank papers – Accused convicted by relying on the statements of accused made before Police during investigation – Further held:-

> It is the duty of the Court to evaluate the statement of such witness before the police and before the Court, and then reach to the truth – If the Court's conscious is satisfied that the statement made by the witness before the police was correct and the statement made by him before the Court was under threat or duress, then the Court can rely upon the statement made by such witness before the police.

The court observed that so far, there is no specific law to deal with honour killings the murders come under the general categories of homicide or manslaughter. Generally in such type of killings eye witnesses are not forthcoming to support the case of the prosecution. This is a biggest problem before the investigation agency and the Court while dealing with such type of cases. In such cases where the witnesses of honour killing become hostile, a heavy duty is cast on the Court to closely scrutinize the evidence in order to reach to the truth.

In *Bhagwan Dass v. State (NCT) of Delhi*,[15] the daughter of accused had incestuous relations with her uncle – Accused felt dishonoured and killed his daughter by strangulating her – It is honour killing – Case based on circumstantial evidence Conviction can be based on circumstantial evidence – Accused, convicted on basis of following evidence- Motive established – The accused felt humiliated by act of his daughter and to avenge the family honour he murdered him. Omission by accused is not informing the police about the death of his

[14] (Criminal) Appeal No. 578-DB of 2005
[15] (2011) 6 SCC 396

daughter for about 10 hours was totally unnatural conduct on his part. The statement made by mother of accused to police that her son told her that he has killed his daughter to be accepted as extra judicial confession – Her subsequent denial in court rejected because it is obvious she wanted to save her son. Held, honour killings for whatever reasons, come within the category of rarest of rare cases deserving death punishment- It is time to stamp out these barbaric and feudal practices.

The prosecution case is that the appellant was very annoyed with his daughter, who had left her husband Raju and was living in an incestuous relationship with her uncle, Sriniwas. This infuriated the appellant as he thought this conduct of his daughter Seema had dishonoured his family, and hence he strangulated her with an electric wire. The trial court convicted the appellant and this judgment was upheld by the High Court. Hence this appeal.

Similarly, in *Trimukh Maroti Kirkan v. State of Maharashtra*,[16] this Court observed:

> "These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents of other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

Arumugam Servai. v. State of Tamil Naidu,[17] the Apex Court strongly deprecated the practice of Khap/ Katta Panchayats taking law into their own hands and indulging in offensive activities which endanger the personal lives of the person marrying according to their choice.

Shakthi Vahini v. Union of India,[18] a writ petition was preferred under article 32 of the Constitution seeking direction to the respondents – the state governments and the central governments to take preventive steps to combat honour killings and to submit a national plan of action and state plan of action to curb the crimes

16 (2006) SCC 681
17 (2011) 6SCC 405
18 W.P. (Civil) No. 231 of 2010

of the said nature and further to direct the state governments to constitute special cells in each district which can be approached by the couples for their safety and well being.

The petitioner organization was authorized for conducting a research study on 'honour killings' in Haryana, Punjab and Western Uttar Pradesh. It was averred that there has been a spate of such killings in Haryana, Punjab and Western Uttar Pradesh. The social pressure and the consequential inhuman treatment by the core groups who arrogate to themselves the position of law makers and impose punishments which are extremely cruel in still immense fear that compels the victim to commit suicide or to suffer irreparably at the hands of these groups.

It was set forth in the petition that the actions which are found to be linked with the honour based crimes are (i) loss of virginity; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships; (v) refusing an arranged marriage ;(vi) asking for divorce;(vii) demanding custody of children after divorce;(viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community ;(x) falling the victim of rape.

The court gave the following recommendations:

(i) Fast track courts for fighting against honour killing cases.

(ii) The disposal of cases to be expected within six months.

(iii) Immediate FIR against khap panchayat if they order any diktat against the run away couple.

(iv) There will be a provision of safe houses for the couples by the government along with security.

However in the case of *Amninder Kaur and Another v. State of Punjab and Others*[19], the Punjab and Haryana High Court held that if one of the couples is a minor, having married against the wishes of the parents, the court will not extend the protection of the law.

Similarly in *Kirti Goyal and Another v. State of Punjab*,[20] the court reminded the couple who were on the run, that "co-existence of the freedom of the individual and social control are *sine quo non* for the sustainable progress of the society and also the integral part of the Constitutional philosophy." The court counseled that

[19] 2010 (1) RCR (Civil) 191
[20] 2012 (3) RCR (Criminal) 172

"it is expected from the couple and other young citizens like them that before running away from their homes for performing this type of "rebellion marriages" they must think twice, besides listening carefully to their respective parents, who are not their enemies but real well- wishers. The court in the instant case was prepared to place a higher respect for social control when it said, "let us welcome the dynamic social change and evolution but only subject to the social control and moral values which are centuries old and have not lost their shine even today."

In *Sandeep Kaur and Another v. State of Punjab*,[21] the Punjab and Haryana High Court was anxious that the girl who was prepared to run away in defiance of her parents wishes along with the man, who had wedded her, is at least a person of means. It therefore directed that the boy must show his bonafide and financial stability and secure an undertaking from the boy that he would deposit Rs 5 lakhs in the name of the wife. The boy failed in the undertaking and the court observed that getting married is a commitment beyond "sharing popcorns, watching movies and going out for dinners."

In a recent case of gang rape of a woman purportedly to save honour of community and caste, *suo motu* action was taken by the Supreme Court of India on the basis of a news paper report. The gang rape of victim was ordered as a punishment by community panchayat for having relationship with a man belonging to a different community. The SC called from reports from the district judge after inspecting the place of occurrence and of chief secretary of state as regards steps taken by police against persons concerned and also directed state to place on record FIR, case diaries, result of investigation/police report, statements recorded under section 161 Cr.PC, forensic and medical reports etc. it was held that the state has bounden duty to protect fundamental rights of citizens which it failed to do. It was further held that courts and police should also be vigilant in ensuring effective implementation of amended procedural rights provided to women under Cr.PC so as to in still sense of security and confidence in them, the state machinery should work in harmony and police should work in more organized and dedicated manner. The court also held that freedom of choice of marriage forms part of Article 21 of the constitution and the state is duty bound to protect this right of the citizens.[22]

21 2014 (1) RCR (Civil) 1015
22 (2014) 4 SCC 786

5. Conclusion

Honour killings have become a common occurrence in many parts of the country, particularly in Haryana, Punjab, Western U.P, and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of khap panchayats.

The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter caste marriage, are threatened with violence, or violence is actually committed on them. Such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter caste or inter religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter caste or inter religious marriage.

Many people feel that they are dishonored by the behavior of the young man/woman, who is related to them or belonging to their caste because he/she is marrying against their wish or having an affair with someone, and hence they take the law into their own hands and kill or physically assault such person or commit some other atrocities on them. If someone is not happy with the behavior of his daughter or other person, who is his relation or of his caste, the maximum he can do is to cut off social relations with her/him, but he cannot take the law into his own hands by committing violence or giving threats of violence. As India is a dynamic country with different castes and religious beliefs, it is very important to have a tolerance towards inter-caste marriages to strengthen the social fabric, moreover with the evolution of the society, inter-caste and inter-religion marriages must be accepted.

Honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who plan to perpetrate ‘honour’ killings should know that the gallows await them.

Urgent need of the hour is to ensure that the patriarchal mindset gives way to gender equality where women can choose their lives as per their wishes without any outward control on their mind and bodies, no doubt the Indian Judiciary is playing a positive role in according protection to run away couples, however the general mindset towards such marriages need to change. The society needs to rise above the walls created by caste system and religion and ensure freedom to choose in its true essence.

EUTHANASIA: A MEDICO-LEGAL ISSUE

Dr. Simranjeet Kaur Gill*

1. Introduction

This article deals with one of the most debated topics in the world and that is euthanasia. Euthanasia literally means good death but in this context it means mercy killing. The debate is regarding the legalization of euthanasia. This debate is a continuing one as some people are of the view that life is sacred and no one has got the right to end it whereas on the other hand some say that life belongs to oneself and so each person has got the right to decide what he wants to do with it even if it amounts to dyeing. In our day to day life we often come across terminally ill patients that are bedridden and are totally dependent on others. It actually hurts their sentiments. Looking at them we would say that death will be a better option for them rather than living such a painful life; which is painful physically as well as psychologically. But if on the other hand we look at the Netherlands where euthanasia is made legal, we will see that how it is abused there. So following its example no one wants euthanasia to be legalized in India. But the question that lies before us is which will be a better option.[1]

The phenomenal advances in medical science and technology have not been without a significant impact on society. They have brought into forefront issues that are altering the pattern of human living and societal values. These changes is the upsurge of affirmation of human rights, autonomy, and freedom of choice. These issues compel us to re-evaluate our concepts of societal and medical ethics and value systems. Amongst these issues, the palliative care and quality of life issues in patients with terminal illnesses like advanced cancer and acquired immune deficiency syndrome (AIDS) have become an important area of clinical care and investigation. Significant progress has been made in extending a palliative care/quality of life research agenda to the clinical problems of patients with cancer, including efforts that focus on mental health related issues such as neuropsychiatric syndromes and psychological symptoms in patients with terminal medical illness. However, perhaps the most compelling and clinically relevant mental health issues in palliative care today concern the desire for death and physician-assisted suicide (PAS) and their relationship to depression.[2]

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1 Mohit and Aman Chibbbar, "Euthanasia and Human Rights - Euthanasia Illegal in India", available at *http://www.legalserviceindia.com/article/l118-Euthanasia-and-Human-Rights.html,* retrieved on 22nd march 201

2 Vinod. K Sinha, "Euthnaisa: An Indian Perspective", *Indian Journal of Psychiatry*, April-June, 2002, p. 177

Desire for death has been postulated as a construct that is central to a number of related issues or phenomena, including suicide and suicidal ideation, interest in PAS/euthanasia, and request for PAS/euthanasia. Society usually remain unable to accept death and physical, psychological and legal approach to death. Specially the approach towards terminally ill patients with no hope of recovering is a controversial medico-legal issue involving human rights. There is a great debate going on whether we should legalize euthanasia or not? Etymologically, the term "euthanasia" is derived from Greek word "euthanatos"[3] meaning "good death" and the word euthanasia[4] refers to the painless killing of a patient suffering from an incurable and painful disease. It means intentionally killing of patient who is suffering from terminal diseases, becomes hopeless and disappointed to an extent that he or she wants to end the life rather than to continue any further under such pathetic circumstances. The said type of practice is also known as mercy killing.[5]

Patients who are persistently in a vegetative state of condition and depend on others for day to day basic tasks like brushing teeth, feeding and taking to bathroom etc. and that is for an unlimited time period. Euthanasia, as it is known, can be interpreted in two different ways, first voluntary and second, involuntary. Voluntary euthanasia occurs when the terminally suffering patient request for his/her side to end his/her life and not let to suffer anymore. For this, he/she wants to take the help of a physician where the term assisted suicide is often used. Hence, it occurs with the fully-informed request of a legally competent adult patient or that of his or her surrogate. In involuntary or Non-voluntary euthanasia case the concerned patient is unconscious or otherwise unable to make a meaningful choice or lacks decisional capacity between life and death. In this case, euthanasia is carried out without any permission.

In *Barber's case*[6] the physician who disconnected life support from a patient in the persistent vegetative state charged with murder. The appellate court unanimously issued a writ of prohibition that prevented criminal prosecution of the physician held no legal duty to continue life support when it would be futile. In another way, euthanasia may have different forms like active or passive. In active euthanasia, a physician directly or deliberately causes the patients' death like when a person is killed by administering a lethal drug or by another way actively ending the life. In the case of passive euthanasia, the doctor doesn't take directly the patient's life he just allows the patients to die by

3 *Eu=good, thanatos=death.*

4 Euthnasia *http://www.oxforddictionaries.com/definition/english/euthnasia* accessed on 18th March 2019

5 Dr. Susanta Shadangi, Ashish Jain, "Legalize Euthanasia Or Not: A DILEMMA?", *Indian Bar Review*, Vol.XLIII(4) 2016. P. 140

6 *Barber* v. *Superior Court* 195 Cal, Rptr. 484 (1983).

committing an omission of his duty. This process is carried out by terminating of medication that keeps a patient alive or by not performing a lifesaving procedure e.g. switch off a machine that keeps a person alive so that he dies of his disease.

In *R Vs. Adams*[7] "*If the first purpose of medicine, the restoration of health is no longer possible, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain if such measures incidentally shorten life."*

2. Euthanasia and Physician Assisted Dying

In euthanasia, a physician or third party administers it, while in physician assisted suicide it is the patient himself who does it, though on the advice of the doctor. In many countries/States the latter is legal while the former is not. Global Situation:[8]

1. **United States:** Active Euthanasia is illegal in all states in U.S.A but physician assisted dying is legal in the states of Oregon, Washington and Montana.
2. **Canada:** In Canada, Earlier Physician Assisted Suicide is illegal vide Section 241(b) of the Criminal Code of Canada, On June 17, 2016, new federal legislation came into force creating a regulatory framework for medical assistance in dying in Canada. Under this legislation, medical assistance in dying is legal if the eligibility criteria are met and the procedural safeguards are followed. The eligibility criteria are as follows:

   241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria in Canada:

   (a) They are eligible for any applicable minimum period of residence or waiting period, would be Eligible for health services funded by a government in Canada;

   (b) They are at least 18 years of age and capable of making decisions with respect to their health;

   (c) They have a grievous and irremediable medical condition;

   (d) They have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

[7] (1957) *Crim Law Rev*. 365 U.K

[8] Arsalaan F. Rashid, Euthanasia Revisited: The Aruna Shanbaug verdict, *J India Acad Forensic Med*, Apr-June, 2012, Vol 34, p.1

(e) They give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(a) They have a serious and incurable illness, disease or disability;

(b) They are in an advanced state of irreversible decline in capability;

(c) That illness, disease or disability or that state of decline causes them enduring physical or psychological

Suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and

(d) Their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.[9]

3. **Netherlands:** Euthanasia in the Netherlands is regulated by the "Termination of Life on Request and *Assisted Suicide (Review Procedures) Act*", 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. The Netherlands prescribed the liberal conditions necessary for the execution of euthanasia. First, it should be noted that the Law on the termination of life does not contain the term euthanasia, but uses the term termination of life on demand, without giving its definition, although the guidelines in the "80 of the XX century used the term euthanasia.[10]

According to the law, euthanasia is permitted upon meeting of the following requirements:

1. The request originates from the patient, and is given free and voluntary;
2. The patient suffers intolerable pain, which cannot be facilitated:

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9 End- of- life Law and policy in Canada, available at *http://eol.law.dal.ca/?page_id=238* visited in the month of November 2019

10 Groenhuijsen M, Euthanasia and the Criminal Justice System. Electronic, *Journal of Comparative Law,* Dec 2007, 11.3: 1-25.

3. Patient is aware of his medical condition and perspectives;
4. Euthanasia is last sanctuary for patients, because there are no other alternative;
5. The doctor, who has to perform an euthanasia, consulted a colleague who has experience in this field, and which has examined a patient and agreed that all conditions are met for euthanasia or assisted suicide, and
6. Euthanasia or assisted suicide is performed with the necessary care.[11] Therefore, the physician who performs euthanasia will be protected from prosecution only if he meets all substantive and procedural requirements.

4. **Euthanasia in Belgium** The idea of legalizing euthanasia in Belgium emerged at the beginning of the 80s of the XX century, in the action of two associations for the right to die with dignity. However, unlike Netherlands, Belgium did not have a long history of performing euthanasia and prosecuting doctors, and it could not establish appropriate guidelines and led the legislator to the faster reaction. In the same time, that does not mean that there were doctors who practiced in the shadows and supported the idea of euthanasia. Euthanasia law was enacted on 16 May 2002. In Belgium, before the enactment of the law, there were no guidelines or case law regarding to mercy killing. Therefore, Belgian law is much more detailed than Dutch law, which was more a result of some sort of codification of regulations.[12]

5. **Switzerland:** Switzerland has an unusual position on assisted suicide; it is legally permitted and can be performed by non physicians. However, euthanasia is illegal, the difference between assisted suicide and euthanasia being that while in the former the patient administers the lethal injection himself, in the latter a doctor or some other person administers it. 5. Belgium: Belgium became the second country in Europe after Netherlands to legalize the practice of euthanasia in September 2002. Patients wishing to end their own lives must be conscious when the demand is made and repeat their request for euthanasia. They have to be under "constant and unbearable physical or psychological pain" resulting from an accident or incurable illness.

6. **India:** It can rightly argue that in a country where the basic human rights of individual are often unattended, where illiteracy is all rampant, most of the

[11] Leenen HJJ, The Development of Euthanasia in the Netherlands. *Eur J Health Law*, 1998 (2): 125-134.

[12] Nys H, *Euthanasia in the Low Countries – A comparative analysis of the law regarding euthanasia in Belgium and Netherlands. Ethical Perspectives*, 2002 , 73–85

> population is not having access to portable water, people die every day on account of various infections and where the basic medical assistance and cares found quite inadequate, in that state of conditions, issues related to euthanasia seems quite irrelevant. Moreover, India is a sub-continent of diversities across religious groups and cultures where any discussion on euthanasia is found to be quite controversial.[13]

Now we shall discuss two important judgments: Airedale case from the House of Lords, UK and Aruna Shanbaug case from Supreme Court of India giving us a fair idea regarding the evolution of the laws pertaining to Passive Euthanasia in India and the world.

3. Brief facts about *Airedale NHS Trust vs. Bland case*[14]:

Tony Bland was injured in Hillsborough stadium, Sheffield, England on 15th April 1989 in a terrible tragedy occurred during a football match. The crush resulted in the immediate death of 94 spectators and injured another 766.[15] Tony Bland suffered serious injuries in the form of multiple ribs fractures and two punctured lungs, causing disruption in the supply of oxygen to his brain leading to irrevocable damage to the higher centers of the brain leading to Persistent Vegetative State. He was transferred to Airedale General Hospital. Neuro-radiological investigations showed that there was no cortical activity but his brain stem remained largely intact. His family considered him as dead and medically it was proven that there is no possibility of him emerging out of the coma. In August 1989, Dr. Jim Howe the Neurologist who was treating Tony Bland contacted the Sheffield Coroner to withdraw all treatment including artificial nutrition and hydration after undertaking comprehensive consultation with the family and in agreement with their wishes. Next day Dr. Howe was visited by the Police who told him that if he 'withdrew treatment and if Tony dies, that he would be charged with murder'.[16]

Then Airedale NHS Trust with the support of Tony Bland's family and Dr. Howe made an application to the court to grant permission to withdraw all life-prolonging treatment. This went on to become a milestone case as Airedale NHS Trust vs. Bland 1993. All the learned judges in the House of Lords unanimously agreed that Tony Bland must be allowed to die and passed the judgment on February 4th 1993. Mr.

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13 *Supra note 5*, 2001, p. 141

14 Airedale NHS Trust v Anthony Bland [by his guardian ad litem, the Official Solicitor of the Supreme Court] *(1993) AC 789 HL*

15 Hillsborough disaster. Available at: *http://en.wikipedia.org/wiki/Hillsbor ough_disaste*r. Accessed Mar 15, 2019.

16 Howe J. The persistent vegetative state, treatment withdrawal and the Hillsborough disaster: Airedale NHS *Trust v Bland. Pract Neurol 2006;6(4):238-46*

Bland's parents supported the doctors' court action and said they were "relieved" at the ruling. His life support machine was switched off on 22 February and he died on 3 March. In April 1994 the High Court rejected an attempt by a pro-life campaigner, Father James Morrow, to get the doctor who withdrew food and drugs from Tony Bland charged with murder. This was a benchmark case which influenced similar petitions throughout the world.

In India passive euthanasia was deliberated in Supreme Court in case, *Aruna Ramachandra Shanbaug v. Union of India* (2011).[17]

Brief facts about the ***Aruna Shanbaug case***: Miss Aruna Shanbaug was working as Junior Nurse in King Edward Memorial (KEM) Hospital, Mumbai, where in the year 1973, she was sexually assaulted by a ward boy. He strangulated her with a dog chain and sodomized her. The resultant asphyxiation caused irreversible injury to the brain causing Permanent Hypoxic Ischemic damage to her brain and since then, she has been in a persistent vegetative state. After some time her family abandoned her, but the nurses at the KEM hospital continued to take care of her.

On 17th December 2010, Pinki Virani claiming to be Aruna's friend (a social activistcum-journalist) made a plea in Supreme Court for permitting euthanasia on Aruna Shanbaug. The Honorable Supreme Court sought a report about Shanbaug's medical condition from the Govt. of Maharastra. Three member Expert Committee subsequently examined and opined that she was in a Permanent Vegetative state. On 7th March 2011, the Apex Court, while rejecting Pinki Virani's plea for active euthanasia, the court observed that "the general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained". The court also formulated guidelines for the passive euthanasia.[18]

This is important in a country like India with its vast and culturally diverse population where unfortunately the ethical standards of our society have descended to new low (as evidenced by social evil like rampant sex selective abortions, honor killings, gang rapes etc.); there is an impending possibility that people might misuse passive euthanasia in order to inherit the property etc.

Basic Guidelines issued by the Hon'ble Court for Passive Euthanasia: Whenever there is a need for passive euthanasia for some patient, permission has to be obtained by the

17 *Aruna Ramachandra Shanbaug* v. *Union of India*, (2011) 4 SCC 454.
18 *Aruna Ramachandra Shanbaug* v. *Union of India*, (2011) 4 SCC 454 s 140.

concerned High Court before life prolonging measures can be withheld. Here the court will act as 'parens patriae', a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.[19]

The idea behind parens patriae (father of the country) is that the King as the father of nation has a sacred duty to take care of those who are unable to look after themselves. This is essential as in most cases where the question of passive euthanasia arrives; the patients are often unconscious or otherwise unable to communicate their intensions. Thus in order to prevent any sort of criminality by the patient's relatives/friends or even treating doctors, courts will oversee and take the decision on behalf of the patient. It is ultimately for the Courts to decide, as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight age in formulating the decision. Hon'ble Court also laid down procedure to obtain such permission in detail.[20]

It also appreciated the entire staff of KEM Hospital, Mumbai (including the retired staff) for their noble spirit and outstanding, exemplary and unprecedented dedication in taking care of Aruna for so many long years. Having never developed a single pressure sore or fracture, in spite of the fact that she was bedridden for almost three and half decades is the standard testimonial of the same. It also opined that KEM hospital staff members are her 'true friends' and not Ms. Pinki Virani who has only visited her on few occasions and written a book on her. Hence the decision to withhold life prolonging measures rests on the hospital staff and not Ms. Pinki Virani. KEM staff members have expressed their wish that Aruna Shanbaug should be allowed to live. However in future if they change their mind, they will have to follow this procedure established by the Hon'ble Apex Court.

On 20th April, 2011 Union Law ministry taking note of this important judgment and guidelines (pro-tempore) wrote a letter to the 19th Law Commission to give a report on feasibility of making legislation on euthanasia. On 11th August 2011, Law Commission submitted their report to Government of India titled 'Passive Euthanasia- A Relook'.[21]

In the modified and revised Bill proposed by 19th Law Commission, the procedures laid down are in line with the directions of the Supreme Court in ***Aruna Ramachandra case.*** Salient features of these are as follows:

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19 Parens Patriae. *Available at: http://legaldictionary.thefreedictionary.com/Pare ns+Patriae.* Accessed May 11, 2019.

20 *Aruna Ramachandra Shanbaug* v. *Union of India*, *(2011) 4 SCC 454 s 138*

21 Law Commission of India. Available at*: http://lawcommissionofindia.nic.in/r eports/report241*.pdf. Accessed may 25, 2019

'Best interests' include the best interests of a patient:

(i) who is an incompetent patient, or

(ii) who is a competent patient but who has not taken an informed decision, and are not limited to medical interests of the patient but include ethical, social, moral, emotional and other welfare considerations. ¬

'Incompetent patient' means a patient who is a minor below the age of 18 years or person of unsound mind or a patient who is unable to –

(i) understand the information relevant to an informed J Punjab Acad Forensic Med Toxicol 2014;14(1) 63 decision about his or her medical treatment;

(ii) retain that information;

(iii) use or weigh that information as part of the process of making his or her informed decision;

(iv) make an informed decision because of impairment or a disturbance in the functioning of his or her mind or brain; or

(v) Communicate his or her informed decision (whether by speech, sign, language or any other mode) as to medical treatment. ¬

'**Competent patient'** means a patient who is not an incompetent patient. ¬ 'Informed decision' means the decision as to continuance or withholding or withdrawing medical treatment taken by a patient who is competent and who is, or has been informed about-

(i) The nature of his or her illness,

(ii) Any alternative form of treatment that may be available,

(iii) The consequences of those forms of treatment, and

(iv) The consequences of remaining untreated. A competent adult patient has the right to insist that there should be no invasive medical treatment by way of artificial life sustaining measures / treatment and such decision is binding on the doctors/hospital attending on such patient provided that the doctor is satisfied that the patient has taken an 'informed decision' based on free exercise of his or her will. The same rule will apply to a minor above 16 years of age who has expressed his or her wish not to have such treatment provided the consent has been given by the major spouse and one of the parents of such minor patient. This is in accordance with the three paramount principles in medical ethics

which are patient autonomy, beneficence and Non-malfeasance.[22]

Thus in case of any incompetent patient who is in irreversible coma or in Permanent Vegetative State and a competent patient who has not taken an 'informed decision', the relatives, next friend, or the doctors concerned/hospital management shall get the clearance from the High Court for withdrawing or withholding the life sustaining treatment. The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. As "parens patriae" the High Court will take an appropriate decision having regard to the best interests of the patient. Provisions are introduced for protection of medical practitioners and others who act according to the wishes of the competent patient or the order of the High Court from criminal or civil action. Further, a competent patient (who is terminally ill) refusing medical treatment shall not be deemed to be guilty of any offence under any law. This Bill has to pass through various stages before it becomes an Act. Until then the law laid down by Hon'ble Apex Court is to be followed whenever need for Passive Euthanasia arises in our country.[23]

4. Conclusion

In India euthanasia is considered as a crime even though there is no clear provision with respect to it. Section 309 of Indian Penal Code which deals with an attempt to commit suicide and section 306 deals with abetment of suicide both are punishable. It means both the persons i.e. patients who wish to take the recourse of euthanasia and also the doctor who performs the euthanasia will be guilty under the current criminal law. The law Commission of India has recently recommended that section 309 should be decriminalized because of the inhumane nature of the provision.

A physician-patient relationship is founded more on the rights of the latter and on the freedom of self determination meaning thereby that the complete autonomy of choices vest with the patient. This is exemplified by Justice Cardozo in the 1914 decision in *Schloendorff v. Society of NY Hospital*: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault." The patient has full moral and legal right to refuse or interrupt his physician's therapeutic actions. However this does not mean that he has the right to demand euthanasia. Now, the Hon'ble Supreme Court has paved way for execution of

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22 Fergusson A. Another GMC consultation: doctors 'assisting' suicide. Triple Helix – Spring;2012. Available at: https://*www.cmf.org.uk/publications /content.asp?context=article&id=2579* 6 Accessed May25, 2019.

23 *Ibid*

'passive euthanasia' through advance directives and has set stringent procedural guidelines for it. According to the Court, the legal representative does not have an unconditional power to decide on the health of the incompetent patient, he has to decide neither 'in the place' of the patient nor 'for' the patient, but 'with' the patient, and, hence the 'advanced directives' of an unconscious patient must be taken in account considering patient's constitution with regards to his personality and his inclinations. The time has come to respect the advance directives of the patient and to respect the autonomy of the person to make decisions regarding his/her the own life when he was in his compos mentis.

Cost of burden on the healthcare industry as well as on the family members. The judgement has further clarified that all other forms of euthanasia, except the Passive Euthanasia stand invalid till enactment of legislation in this regard. Legislation in this regard is in consideration by Law commission. The issue, being highly sensitive, drafting the legislation may not be an easy task. If it is drafted too tightly it could impede, and perhaps invalidate the existing advance directives; and, if drafted too widely, it could lead to uncertainty. The Legislation has to be in light of the fact that Section 309 IPC has been recently decriminalised by 'The Mental Healthcare Act, 2017. Deprivation of life from compassion throughout the history of humanity appears as a question that engrosses the attention of lawyers, doctors, sociologists around the worlds.

In certain stages of development of civilization it represented a permitted form of depriving another person's life, while in the other stages was strictly prohibited. Today's legislators basically occupying three positions, so, they prohibit euthanasia and equate it with ordinary or privilege murder, or allow it under the assumption of meeting of prescribed requirements. Bypassing the countries that privilege euthanasia as less serious murder, in this paper we have dealt with some legislations that this phenomenon strictly prohibit, and those that deprivation of life out of compassion treat as a permitted medical procedure. In Islamic countries, such as Iran, Turkey and part of Bosnia and Herzegovina, euthanasia is an ordinary murder, punishable by serious criminal sanctions. At the opposite pole are the Western European countries, more specifically, the Benelux countries (Netherlands and Belgium) , in which deprivation of life from the grace does not constitute a crime, if it was carried out in accordance with the clearly defined legal rules and medical procedure. we show how a life situation may be in different legal areas regulated in completely different way. Exactly this lack of harmony in the legislative solution in some European and American countries has led to the some adverse events, such as death tourism, as a phenomenon where inhabitants of one country, where euthanasia is prohibited, travel to another state where it is allowed, and where physicians can perform euthanasia. In order to avoid this, it is

necessary to achieve a certain degree of harmonization of legislations, or to set appropriate limit in the legislations that legalized euthanasia. However, how it is possible to achieve, time will show.

SEXUAL CONSENT AND AUTONOMY OF PEOPLE WITH DISABILITIES: A CRITICAL APPRAISAL

Mr. Sachin Sharma*

1. Introduction

Human beings are rational beings and therefore worthy of dignity and respect. The proposition is based on the idea of human diversity. It establishes that all human beings are equal and same within that diversity. It talks about the human integrity and its wholeness. The *wholeness* here means the oneness, not in singular sense but in sense of infinity. It is a state of being where human is identical to nature.[1] It is about understating the self-free from any material or external understanding or theory. In a same manner there is diversity in sexuality. All sexual orientations are part of the nature and henceforth natural.[2] If one may refer to Kamasutra, it recognized all sexual orientations equally good and natural.[3] As we know that sexuality is considered as the basic aspect of human life. It includes the basic right to mutual love (including both platonic and physical); staring of a family; romance etc. More importantly it talks about the opportunities of expressing individual's willingness and consent in a free manner.[4] But because of the prevalent binaries in the society, people with disabilities are considered as hypersexual or asexual. There are various prejudices, stereotypes and myths that are attached to disability and sexuality. It has resulted into the politics of bodies that governs or control the human *body, soul* and *mind*. The existing laws and interpretation is also dominated by the same stereotypical expression that denies sexual autonomy to people with disabilities. This denial of *sexual citizenship* to people with disabilities results in compromising the dignity and autonomy. In such a situation person is forced to surrender her consent or in other words she is unable to exercise her consent, the gateway for approaching individual's autonomy, liberty and dignity. It is this consent that makes an act pleasant and legal which is otherwise a wrong. The people with disabilities face attitudinal and structural

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1 The inference is drawn from *Brihadranyaka Upanishad*, the dialogue between Yagyavalkya and his wife Maitreyi- where sage tell her wife about SELF through self-realization in totality with nature. In their conversation Yagyavalkya explained her "*As when the drum is beaten, its various particular notes are not heard apart from the whole, but in the the total sound all its notes are heard, as when the conch-shell is blown, its various particular notes are not heard apart from the whole,.....so though knowledge of self, pure intelligence, all things and beings are known. There is no existence apart from self.....Oh Maitreyi individual self is, dissolved, is the eternal-pure consciousness, infinite and transcendent. Where there is consciousness of the self, individuality is no more*."
It is about A priori, transcendental (Kantian) knowledge. It is about the oneness.

2 Rig Veda- what is not natural is also natural.

3 Kamasutra, Part II, Chapter 9- recognizes homosexuality.

4 Here free manner means freedom from both physical and psychological barriers.

barriers in exercising their sexual rights including reproductive autonomy and their loving expressions. These barriers include infrastructural arrangements and societal attitudes. Infrastructural barriers primarily include lack of accessibility to buildings (including restaurants, hotels, clubs and bars etc.) and transportations (including bus-railway stations, airports and available washrooms etc.). In different studies it is found that people with disabilities are hesitant to go for outing because of these barriers. In a report – it was stated by a person that because of inaccessibility of bathroom, she was unable to take shower freely.[5] As a result of this she always feels embarrassment in *socializing* with people, because she thinks that she is dirty. There is need to understand the connection between this ordinary routine of bathing and its effect on sexual autonomy and consent of people with disabilities.[6] It is because of the eugenic attitude that law, medicine and science thinks that people with disabilities are imperfect or incapable of sexual consent. It was (still prevalent) impression among (capitalist) society that disabled people cannot contribute towards labor-market and towards enhancing the human race and therefore they were (are) burden.[7]

2. Eugenic Thinking and Strangled Sexual Autonomy

The *bourgeoisie* attitude has drawn a line between ableism and disableism. It has also its effect on the law and its interpretation – as policy makers, legislators and judges are *normalized* with this binary language. Here reference can be made to a very famous American case known as Anna Stubblefield's case, where a professor Anna was prosecuted for sexually assaulting an adult disabled boy DJ. During court proceedings, jury members had used very narrow and discriminatory language. While illustrating the same I may refer to the following statement of one member who said to Anna, '*you are leaving your husband and family for "such" a person who can't even go to washroom alone'*.[8] In one another illustration, where a "non-disabled" person had sexual interaction with "disabled" person. During court proceedings, the lawyers representing the both parties (prosecution and accused) used very narrow semantics.[9] Further, in media converge the incident was reported with stigmatized and normalized manner. It was stated that the accused was '*boy filled with hormones*' and whereas victim was depicted as '*angel*'.[10] Similarly, in one another Indian example a rape victim with

5 Richard Koenig, "Supportive Housing for Persons with Disabilities: A Framework for Evaluating Alternative Models", *Journal of Housing Studies*, 2015.

6 Generally "normal" people including law and policy experts are unable to understand such link and therefore remain ignorant about the difficulties of people with disabilities.

7 This is the primary reason of denial of sexual autonomy to people with disabilities.

8 For detail refer to *Anna Stubblefield Case*, USA.

9 The prosecution lawyer depicted the accused and victim as wolf and lamb respectively.

10 *Kalie McArthur Case*, 2006.

cerebral palsy came before a judge of a local court. She was asked to explain about the incident –while explaining the same she used the "childish" language. As she informed the court that accused has touched her with his *susu.*[11] Similarly in case of *Chandigarh Administration v. Suchitra Srivastva & Anr*., Punjab and Haryana High Court stated that pregnant rape victim with mental disabilities should go for abortion. Because of her disability she will not be able to take care for baby. Further, gradually it would be embarrassment for the child to know that he/she is fatherless. Moreover the pregnant girl herself is orphan and doesn't have any means of subsistence. Hence court concluded that delivering the baby would add more stress to her life.[12]

All these examples show that in this "progressive" "modernity" we are engaged in a dialogue about equality, which is controlled and regulated by the eugenics. It is the tag of helpfulness; goodness that one want to wear while deliberating about the rights of disabled people. In other words, it is the politics of language, where disability and sexuality have created the plethora texts or drafts, which seems soulless. We are engulfed with these texts which are never internalized in practice. In *Habermasian* sense[13] there never took place an open discourse that gives equal opportunity to all stakeholders. Further, following the words of *Sherry R. Arnstein*, we are still at the first three-four ladders of citizen participation,[14] and far away from the individual-agency in participation.

3. Law and Sexual Consent for People with Disabilities

Although, United Nation Convention on Rights of Persons with Disabilities (UNCRPD) has ensured a full and complete capacity to people with disabilities in deciding their social, personal lives. Article 22 of the Convention speaks about respect for privacy, that no person with disability shall be deprive from her privacy, family, home or correspondence etc. Further, Article 23 talk that person with disability has capacity and autonomy to have home and family. It recognizes the full and free consent of persons in relation to marriage and to decide freely and responsibly on the number of children. But the narrow thinking has confined sexual spaces for disabled people. The UNCRPD provides certain indicators to test the capacity and free consent of people with disabilities. For example Article 31 of the convention require member state to submit the

11 The judge was reluctant to record word *susu* and asked victim and her parents to use the "adult" language. The entire episode has frustrated the victim and her mother that she thought that it was a harassment to visit court.

12 2009, Though later supreme court has reversed the decision of Punjab and Haryana High Court.

13 Jurgen Habermasian, Theory of Deliberative Democracy.

14 Sherry R. Arnstein, in "Citizen Participation" talked about eight ladders it includes: a) *manipulation- b) therapy- c) informing- d) consultation- e) placation- f) partnership- g) delegated power- h) citizen control*.

progress report regarding implementation mechanisms, which is accessed by the independent committee. But in practice these implementation mechanisms on promoting and protecting the rights including sexual rights of people with disabilities remain on paper. The *subject* and *object* of disability and sexuality is fixed by the state and its agencies. It decides its own parameters for agency and autonomy.[15] This is evident from the example of sodomy laws, where in United States law has criminalized certain sexual activities, and only allowed *penis-vagina penetrative sexual activities*. The situation was same until *Lawrence v. Texas*, 2003.[16] Similarly, within the disability-sexuality discourse the same model of "perfection" was operationalized. It is about sexual "satisfaction" in terms of longevity and dominance of sexual intercourse as portrayed in pornography.[17] But this might not be case for every individual.[18] This is found in different interviews that people with disabilities, specially those who lack movement, people with cerebral palsy and intellectual disabilities etc. don't find it comfortable to have sexual interactions in a *marketized* way. Therefore, in lack of diversity based examples or models it is difficult for a person with disability to survive in this suffocative environment. It is certain imaginative expressions that are considered as real and perfect.[19] In addition to this there are several reported incidents of forceful sterilization of persons with disabilities. Mostly people with psychosocial disabilities were/are the victim of the same.[20] In various interactions with people with disabilities and their guardians I found that there are continuous attempts to sterilize persons with psychosocial disabilities.[21]

This is because of the lack of accessibility to healthcare including reproductive facilities. In number of cases doctors and other medical professional demonstrate their skills considering the person with disability as mere subject, and never tries to get connected to her. For them it is the medical model that is operationalizing the disability discourse. Accordingly, they consider disabled body as "imperfect" body that need to be corrected. In a same context sexual desires of disabled persons are often being ignored by medial

15 Foucault explains that how state has fixed the characteristics of subject (individual). Refer: Michel Foucault, "The Subject and Power", *Critical Inquiry*, 1982, vol. 4, no. 8, University of Chicago.

16 This attitude is also evident from the example of prohibiting inter-racial marriages.

17 Where porn-stars engage in sexual discourse (&achieve orgasm) with less oral communication, without disturbing their makeup including hairstyle. Further, there are almost zero pornographic movies staring people with disabilities.

18 Paula, *Purified Sexual Expectations*.

19 The reference can be made to Jean Boudrillard's *Simulacra and Simulation*.

20 The attitude was/is same in Judicial and medical setup, where people were directed to sterilization. Refer to Morton Birnbaum, "Eugenic Sterilization A Discussion of Certain Legal, Medical and Moral Aspect of Present Practices in Our Public Mental Institutions", 1961. Further read US Judgment of *Buck* v. *Bell*.

21 This is primarily because of the poverty and lack of awareness among people.

staff and this ultimately influence the family members and guardian to believe that their ward doesn't have any sexual needs.[22] The *institutionalization* of persons with disabilities leads to the sexual violence and denial of their consent and autonomy. It is also observed that disabled persons living in institutions such as hospitals including mental hospitals, "rehabilitation" centers and family or community setup are more vulnerable to the abuses then one who is living alone. These institutions consider disabled person as a source of their profit making. There is need to sensitize people belonging to medical profession so that they can understand and practice the notion of human and sexual diversity and its inclusiveness.[23]

4. Indian Constitution and Rights of Persons with Disabilities: General to Specific

The preamble of our Constitution laid the foundation of rights that guarantees the Justice, (social, political and economic) and Equality (status, opportunity) to the people of the country. Everyone has the liberty of thought, expression, belief, worship and faith. This way people with disabilities are included in the discourse of rights jurisprudence. The rights guaranteed under Part III of the constitution including right to equality, right to opportunity and employment, right to life, including right to choice, right to health, sexual and reproductive rights, healthcare, privacy etc. are equally applicable to persons with disabilities.[24] Indian Judiciary tried interpreting the rights of persons with disabilities in several judgments. For example in *National Federation of Blind v. Union Public Service Commission*[25], a writ petition was filed against discrimination of visually impaired persons in competing the civil services, where Supreme Court has directed the government to make arrangements to write the examination in Braille or with the help of a scribe. Similarly in *B.R. Kapoor v. Union of India*[26] court has directed the government to provide the healthcare, rehabilitation facilities to mentally ill under-trials languishing in jails. In case of *Indra Sawhney & Ors, v. Union of India & Or.*[27] (Mandal commission case), SC has extended the substantive equality philosophy of Art. 14 while relying on subsequent articles 15, 16 of the constitution. This case is significant from disability rights perspective because an intervention application filed by National Federation of Blind. Advocate lawyer S.K. Rungta, representing the persons with

22 This was observed by researcher in his various interactions.
23 It is important because it is medical professionals including doctors, nurses who always interact with persons with disabilities.
24 Though citing the eugenic model of interpreting the ability, autonomy and choices can refute this assumption.
25 AIR 1993 SC 1916.
26 AIR 1990 SC 662.
27 AIR 1992 3 SC 217.

disabilities argued on the specific issue of whether 'backward classes of citizen' could also include persons with disabilities. It was examined as the sub-issue within the larger issue. It was held by majority judgment that even though 'backward classes of citizens' as used in clause (4) of Art. 15 and 16 does not expressly covered the persons with disabilities, the constitutional scheme and spirit of Articles 14, clause (1) of Art. 15 & 16 allowed for reservation and other kinds of affirmative action in favor of persons with disabilities. This judgment has upheld the opinion rendered earlier by a five-judges constitutional bench in *K.C. Vasanth Kumar v. State of Karnataka*[28] In this case J. Venkataramiah J. articulated that, several factors such as physical disability, poverty, place of habitation…might each become a sole factor for the purpose of Art. 15(4) or Art. 16(4)…while relief may be given in such cases under Art. 14, 15(1) & 16(1) by adopting a rational principle of classification.[29]

Further, it is well settled through several judgments of Supreme Court of India that fundamental right to life guaranteed under Article 21 of constitution is an overarching right under which several rights are subsumed as necessary components of life. For instance in early eighties, the SC held in Franc*is Coralie v. Union of India*[30] that right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter, facilities for reading, writing and expressing oneself in diverse forms, free movement commingling with fellow human beings. Similarly right to housing;[31] right to education;[32] right to health;[33] right to food;[34] right to clean water;[35] right to privacy[36] etc. is a unending list of basic human rights which are part and parcel of Art. 21 of Constitution. Similarly part IV of the constitution, Directive Principles of State of Policy, though not justiciable; lend immense support to the rights of Persons with Disabilities. Directive Principles have often been used by the courts to adjust and expend the ambit of fundamental rights. There are few provisions in part IV of the constitution that specifically mention about persons with disabilities. For example, Art. 41 specifically provides for effective provisions to be made by the state for securing the right to work, to educate and to public assistance in cases of 'disablement'. Art. 39A envisages equal justice, free legal

28 AIR 1985 SCC 714.

29 For detailed reading please refer to Disability and The Law, Human Rights Law Network, India, 2005, pp. 02-04 & pp. 7-22.

30 AIR 1981 SC 746.

31 *Shantistar Builders* v. *Narayan Khimala Tortame*, AIR 1990 1 SCC 520.

32 *Unnikrishnan J.P. & Ors.* v. *State of Andhra Pradesh & Ors*. AIR 1993 1 SCC 645.

33 *Consumer Education & Research Centre & Ors*. v. *Union of India & Ors*. AIR 1995 3 SCC 42.

34 *People's Union for Civil Liabilities* v. *Union of India & Ors*. Civil Writ Petition No. 196 of 2001; *Harsh Mander* v. *Union of India*, 2018.

35 *Attakoya Thangal* v. *Union of India* 1990 1 KLT 580.

36 Civil writ petition no. 40775 of 2017 & 2949 of 2018

aid to all citizens and that opportunities for securing justice are not denied to any citizen by reason of economic or 'other disabilities'. In case of *Social Jurist, a Lawyers' Group v. Government of NCT Delhi & Anr*,[37]Delhi High Court while relying upon Art. 41, 45 and 47 of the constitution, court held that all necessary facilities should be provided for children with disabilities in all the schools in Delhi. In *Javed Abidi v. Union of India*,[38] Supreme Court while considering the suffering of persons with locomotors disability that they suffer during traveling issued direction Airlines to grant persons suffering form locomotors disability to the extent of 80%. In case of *Uppala Venkat v. Divisional Railway Manager South Central Railways, Secunderabad and Ors*., it was stated by the court that in case of persons getting disabled and unfit for any employment in the establishment, he has the right of protection under disabilities laws. It is further stated in such a situation, he should be provided with the alternative employment and if such employment is not available the person should be kept in a supernumerary post till he attains the age of retirement. Recently, Supreme Court in *Navtej Singh Johar v. Union of India*[39] has decided the sexuality as integral part of individual autonomy and dignity. It has decriminalized all consensual sexual relations among adults including homosexual. Court has emphasized on the proposition that individual identity is integral to her and shall not be compromised at any account. The similar observations were made in *National Legal Services Authority v. Union of India*, where it was asserted by the court that, right to self-identification is the fundamental right, equally available to transgender.[40] Therefore, these interpretations acknowledge the disability and sexuality as diversity. Further, the seventh schedule of the Constitution that divide the powers between central and state government, has mentioned about the 'relief to the disabled and unemployable' at entry number 9 of list II. At the same time Central government has a major role in terms of protecting the rights of persons with disabilities. As India has ratified the United Nation Convention on Rights of Persons with Disabilities, 2006, it is obligatory for the government to take initiative for protecting and promoting the rights of persons with disabilities.

5. Rights of Persons with Disabilities Act: A Brief Summery

The Rights of Persons with Disability Act, 2016 is the response to the ratification of the United Nations Convention on the Rights of Person with Disabilities, 2006. It lays down the principles of empowering persons with disabilities, respecting inherent dignity and individual autonomy. It highlights the equality of opportunity, their full and effective

37 Writ petition no. 5329 of 1997.
38 AIR 1991 1 SCC 467.
39 Writ Petition (civil) no. 76 of 2016, decided on 2018.
40 Writ Petition (civil) no. 400 of 2012, decided on 2014.

participation in society, accessibility and considering disability as a part of human diversity. In fulfilling the aforementioned principles, government of India has enacted the Rights of Persons with Disability Act, 2016. The said legislation consists of XVII chapters divided into 102 sections. Following is the brief description to few specific provisions of the legislation that deals with the rights including sexual and reproductive rights of persons with disabilities.

For instance, Section 3 of the Act provides that government shall ensure that persons with disabilities enjoy the right to equality, life with dignity and respect for their integrity.[41] No person shall be deprived of her personal liberty on the ground of disability.[42] At the same time government shall make provisions for reasonable accommodation for persons with disabilities.[43] In a similar faction, section 4 specifically talks about the rights of women and children with disabilities, it provides that government shall take measures to ensure that women and children with disabilities shall have the right on equal basis with others[44], and children shall able to express their views freely.[45] Section 5 provides for the right to live in a community of their choice and government shall provide them assistance necessary to support livings.[46]

Section 6 of the Act deals with the provisions regarding protection form cruelty and inhuman treatment.[47] It further says that no person with disability shall be subjected to research without his/her free and informed consent obtained through accessible modes, means and formats of communication. Any such research is only possible if research committee constituted by the government approves the same.[48] Section 7 of the Act provides that government shall take measures to protect persons with disabilities from the abuse, violence and exploitation. It includes procedure for reporting, rehabilitation, creating awareness.[49] The Act further provides for the right to live in a home and family, it guarantees that individual is allowed to exercise her reproductive rights.[50]

Most significantly, section 12 of the Act talks about accessibility to justice including barrier free access courts premises etc. The purpose of the section is to facilitate disabled

41 Section 3(1).
42 Section 3(4).
43 Section 3(5).
44 Section 4(1).
45 Section 4(2).
46 Section 5(1)(2).
47 Section 6(1).
48 Section (2).
49 Section 7(1), Section 7 further provides that Executive Magistrate shall take appropriate steps in case of such exploitation, abuse, and violence. Section 7(4) further states the duties of police officer. (For detail kindly read section 7(2)(3) (4)(5) of Rights of Persons With Disabilities Act, 2016).
50 Section 9, 10 respectively.

person's *right to action*.[51] In a similar rigor section 13 talks about right to legal capacity. It is similar to Article 12 of UNCRPD. It is the umbrella right that provides shelter to all other rights of persons with disabilities.[52] It simply highlights the principle that persons with disabilities shall be treated equally before the law and therefore people assisting disabled persons shall not exercise undue influence and shall respect their autonomy, dignity and privacy.[53] The next important provision in this regard is section 25 of the Act deals with the provisions related to healthcare. It provides that appropriate government or local authority shall take necessary steps for promoting the healthcare facilities to persons with disabilities. It includes free healthcare services especially in rural area subject to the family income of the person. It further includes barrier-free access in all parts of the government, private hospitals and other healthcare institutions.[54] It further states that government shall take necessary steps and make schemes for promoting healthcare related schemes.[55] It also includes access to health awareness, education including reproductive and sexual health awareness and education.

While recognizing the significance of implementation measures, section 41 of the Act provides that appropriate government shall take measures to provide facilities for persons with disabilities at bus stops, railway stations and airports confirming to the accessibility standards relating to the parking spaces, toilets, ticketing counters and ticketing machines.[56] The idea is to enhance the *infrastructural citizenship* of disabled person.[57] In similar lines section 42 of the Act require government initiatives for access to information and communication technology. Section 43 of the Act further deals with provisions related to the governmental measures regarding the universal design for

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51 The expression *right to action* includes that persons with disabilities has the right to participate actively in protecting and promoting their rights.

52 Without accessibility and recognition before the law person become dependent to the system. Her rights become conditional to the whims and fancies of the system, where his consent becomes manufactured and dignity got compromised. For understanding the concept of manufactured consent please read: Antonio Gramsci, THE GRAMSCI READER: SELECTED WRITINGS 1916-1935, New York Press, 2000.

53 Section 13(1)(2) & (3) (5).

54 Section 25(1)(c) provides for the priority in attendance and treatment in hospitals.

55 Section 25(2).

56 The section further states that government shall take measures to ensure access to all modes of transport that confirm the design standards, accessible roads etc. For detail kindly refer to section 41(1)(2); Further, read Anjlee Agarwal & Andre Steele, Disability considerations for Infrastructure Programmes, available at: *http://disabilityrightsfund.org/wp-content/uploads/2016/05/Disability-Considerations-for-Infrastructure.pdf.*

57 Infrastructural citizenship includes barrier free access to infrastructures including public buildings, institutions, private buildings, hotel, restaurants, transportation etc. It also includes primary facilities such as drinking water, sanitation, hygiene, sewage facilities etc. For detail please read: Charlotte Lemanski, CITIZENSHIP AND INFRASTRUCTURE, *Infrastructural Citizenship: Practices and Identities of Citizens and the State*, pp. 8-21, 2019.

consumer goods. In order to make the above-mentioned provisions effective, section 44 operate as the teeth in the process. As it states that no establishment shall be granted permission to build any structure if the building plan doesn't adhere to the rules formulated by the central government under section 40.[58] Further, signifying the role of officials and bureaucrats, section 47 of the Act provides for human resource development. It incudes the provisions related to mandatory training about disability rights and issues to member of Panchayti Raj members, legislators, administrators, public officials, judges and lawyers. The primary reason of the same is to make them sensitive towards issues and problems faced by persons with disabilities because of the societal stereotypes. Similarly, to enhance the research in disability studies, Act provides for establishing research-teaching centers, where persons with disabilities are provided the central space in deliberation so that a *first-person perspective* may be developed and practiced.[59]

But while critiquing the Act of 2016, it maybe argued that the legislation construct an imbalance between state and people with disabilities as a main stakeholders. It is government, which is defining and interpreting the "reasonable" accommodation subject to economic capacity. Therefore, the Act is a structured "solution" offered for the constructed "problem".[60]Hence there is need to deconstruct the exiting paradigm of disability because it lack in understanding disability as diversity. Therefore instead of considering the scope of disability legislation restricted only to persons with disabilities, we may reframe or reinterpret it as an universal human rights, which acknowledges the people with *difference* as diverse and equality as diversity.

6. Factors Responsible for Restrictive Sexuality and Disabled-Self

As we know that there are several factors responsible for restrictive and narrow construct of sexual rights of persons with disabilities. It includes social, cultural, economic and political factors. The least argued or ignored among them is the economic factor that contributed significantly towards denial of sexual autonomy to the persons with disabilities. Because of their weak economic positions, disabled persons are hierarchically positioned at lower level, where they didn't have any bargain power in society. The following data substantiate the proposition. For instance, in one such example from United States Bureau of Census, it was indicated that 38% of people with

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58 Section 44 to be read with section 45that provides for the time limit of five years from the date of the notification be the central government. Also read: *Harmonized Guidelines and Space Standards for Barrier Free Built Environment for Persons with Disabilities and Elderly Persons*, February, Ministry of Urban Development, Government of India, 2016.

59 For detail kindly refer to the section 47(1)(a), (b),(c),(d),(e),(f), 47(2), 47(3)

60 For detail please read Michel Foucault, *Apparatus of Power and Problematization*.

disabilities were employed in United States; whereas the percentage of employment for non-disabled persons was 78%.[61] Further, in another report by ILO, persons with disabilities are least in preference list of multinational and other companies. In its various reports it is stated that almost 80 percent of people with disabilities are of a working age, but because of their disability the said *right to work* is frequently denied to them. In this regard, women with disabilities face immense problems in finding the opportunities for employment. The one of the reason behind the same is patriarchal setups, which discriminate women.[62] Such discrimination is more aggravated among developing countries because women often faces physical, attitudinal and informational barriers. Similarly, according to Indian Census Report the majority of disabled population in India is unemployed and working in unorganized sector. Further, the situation of unemployment and discrimination is getting sever during COVID-19 Pandemic. On the contrary Rights of persons with Disabilities Act, 2016 and Convention on the Rights of Persons with Disabilities (Article 27) provide for accommodation of persons with disabilities in employment (both public and private). But the existing situation rings the alarm bell. Because of their weak economic position, persons with disabilities lose their control in their decisions. This results in compromising the consent and surrendering their autonomy including sexual autonomy. Hence it is important to understand the connection between economic status and sexual autonomy of persons with disabilities. In this way weak economic condition is the additional vulnerability to persons with disabilities. Perhaps for this reason CRPD recognizes the relation between poverty and disability.[63] As we know poverty leads to denial of opportunities to healthcare; nutritious food; clean drinking water; proper housing; hygienic surroundings etc. This is the reason in WHO's report it is stated that majority of persons with disabilities are living in a developing and poor countries. Hence there no hesitation in admitting that denial of basic amenities contributes in denial of autonomy and dignity of persons with disabilities. This ultimately leads to the denial of their sexual citizenship.[64] The oppressions of disabled persons by "main-stream" society affect their personality (both metal and physical) in a negative way. This make them feel embarrass in societal associations and lead to *spot-light* effect, where person always feel that he has been constantly watched by others. It ultimately distorts individual confidence and his decision-making capacities, where person *act/present* his self to the word.[65] In this way person started living in a *constructed* world, where all his

61 Refer to the website of US Bureau of Census.
62 Carole Pateman, THE SEXUAL CONTRACT, 1988.
63 Preamble CRPD.
64 Because of the materialist thinking economic status plays a crucial role in searching the potential love-sex-life partner.
65 Erving Goffman, The Presentation of Self in Everyday Life, Anchor Books, 1959.

actions are considered "normal" by the society. In this *modern* world individual draws real from the artificial. This ultimately destroys the individual's Self or the real being.[66] In this way person gets *normalized*[67] to the structures and patterns of the society and started believing that he is inferior to the "main-stream" people and henceforth is "different" and dependent on the others. In such a situation if there is any interaction (including sexual) between a "disabled" and "abled" person, the mainstreamed will always dominate the disabled.

7. Conclusion

It is well evident fact that since inception of the humanity, thinkers from pre-Socrates to post-Rawls talked about human beings and their nature. Everyone tried to emphasize on the simple fact that there is always a reason behind any narrative. The said reason might be the outcome of *a priori* or *a posteriori* analysis. It might have individual bias or may be free from it. It might be *categorical imperative* or *consequential* in nature. Above all, one has to see human being as a whole and need to believe and practice the fidelity in oneness. As long as we (continuously) talk about *plurality of identities* in terms of number, we will keep constructing the narrative where one will always dominate the other.[68] The situation simply leads to friction and conflict.[69] Therefore in order to enjoy the sexual consent and autonomy, one has to dilute the sexual identity. By simply formulating laws and policies towards protecting the rights (sexual) of persons with disabilities is not going to serve the purpose. Further, as long as these laws are drafted or interpreted from the one pattern of society it will never able to achieve and practice a true human diversity. Hence I am closing my argument with the proposition that, as long as we are unable to realize the significance of diversity in our consciousness and unable to consider oneself as a part of the other, all discourse of humanity shall remain incomplete and meaningless.[70]

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66 The expression *Real Being* is drawn from Martin Heidegger, BEING AND TIME, translated by Joan Stambaugh, State University of New York Press, 1996.

67 For detail please read: Michel Foucault, DISCIPLINE AND PUNISH, Penguin Publications, 1975.

68 The proposition is self evidently and may be substantiated from historical-anthropological studies.

69 The COVID-19 Pandemic is globally demonstrating the same.

70 These lines were written at the time when I was suffocating from **stubble burning**. I consider that situation as holocaust, where our *consciousness*, our *realization*, our *respect* toward nature and its creatures are already dead. In such a situation I am thinking about *oneness* of humanity, will it be possible?

THE PROSPECTS OF EFFICIENT AND SPEEDY JUSTICE IN FAMILY COURTS – A HARMONIOUS CONSTRUCTION OF §21B AND §23 OF THE HINDU MARRIAGE ACT, 1955

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Mr. Kushagra Gupta**

1. Introduction

§21B and §23 of the Hindu Marriage Act, relate to certain provisions which are rarely used but extremely relevant to eliminate the pendency and stigma emanating from marriage trials. The Hindu Marriage Act, Under Section 21 B in the very first instance, endows on the court a duty to ensure a reconciliation between the parties. The court has the power to adjourn the proceedings, refer to mediation and all other methods it deems necessary to achieve Justice. Additionally, any trial of the petition must be held day to day and expeditiously within 6 months from date of service. Both of these provisions are not followed, since as per the National Judicial Data Grid, only 6.24% of all Marriage petitions are disposed-off. [1]

Thus, the paper shall analyse these provisions, their practical applicability and suggest improvements to ensure the ideals of Family Matters to be speedy and justice-oriented. The power of family courts to grant injunctions, and other plenary powers to resolve such disputes may also be considered, along with case laws the doctrine of *"Expeditious disposal"* shall also be analysed to devise which cases have been completed in 6 months, and which are still pending. Consideration would be given to, the Law Commission's consultation paper on "*Family Reforms in India*" which suggests that Simplifying the procedure for couples would be beneficial in curbing the false allegations against parties, often made to hasten the divorce process. Additionally, the commission has also recognised that matrimonial suits take long years to conclude.[2]

A comparative analysis shall consider the Family Law system in the United State of America and Pakistan. The impending pendency in Indian courts, make the provisions under Section 21B ineffective. Thus, the paper aims to suggest an amendment to Section 23 to enable a process of mediation considering the nature of

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1 National Judicial Data Grid, Government of India, *available at <njdg.ecourts.gov.in/njdgnew/index.php>*(last accessed 14 June 2020).

2 The Law Commission of India, Consultation Paper on Reform of Family Law (2018), ¶2.35, ¶2.69.

such proceedings, to administer Justice in consideration of the wisdom as exercised by the legislature. The feasibility of making such reconciliation mandatory shall be analysed, especially to extend it to other provisions of §13.

2. The Indian Conundrum

Before we venture into discussion on this spectrum, and its successive cases, it is imperative to understand key concepts of law and Fact that are intimately convolved with the case, and have thus huge bearing upon the objective analysis of the factors contributing to such a situation, as such.

2.1 Development of Family Law In India

The enactment of the Hindu Marriage Act in 1955 had opened a new chapter in the history of Hindu Law. On the whole the new Acts are viewed with relief by modern, western-educated Hindus who generally believe that the study of the Ancient Hindu law has become a merely academic subject. However, a thorough understanding of these modern codifications, the social problems and their legal solutions involved, requires a more than superficial knowledge of Anglo-Hindu, customary law, and the *Dharmasastra*. Much of the way of life of the majority of Hindus is still intelligible with reference to these parts of Hindu law and, though it is commonplace to say that one can only assess the present and shape the future by analysing the past, this aspect tends to be ignored in a country which wants to forge ahead.[3]

If we have a cursory glance at the background of modern Hindu law, we find that the part of the dharmasastra called vyavahara, or court-law, was administered until the early British period. The British administration of justice[4] faced the problem of applying a system of law which had widely disintegrated and given way to customary law, which was administered in caste and family councils, though the sastra remained influential in the background. But more zeal for codification was voiced amongst the new western influenced classes who pressed for social legislation.

Certain social abuses had already been removed by the British administration with the introduction of the Hindu Widow's Remarriage Act, 1856, and the Caste Disabilities Removal Act, 1850. The Special Marriage Act, 1872, attempted to enable Hindus to make use of reforming tendencies to remove restraints imposed by the old

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3 Gunther-Dietz Sontheimer, *Recent Developments in Hindu Law*, 8 *Int'l & Comp. L.Q. Supp. Pub.* 32 (1964).

4 J. D. M. Derrett, "Introduction to Modern Hindu Law", *Comp. Studies in Soc. and Hist.,* Vol. IV, No. 1, November 1961, p. 10.

law, whilst still living recognisably Hindu lives. The intention to remove restrictions and improve the rights of women in property led to enactments of which the most important was the Hindu Women's Rights to Property Act, 1937. But as a consequence of this Act, a new series of conflicting decisions arose, and it became obvious that piecemeal legislation was not feasible and that a comprehensive Code was called for. The Rau Committee proposed the "Hindu Code Bill" which was however opposed by many members of the Constituent Assembly as attacking the roots of the tradition. It was finally resolved to enact the bill in stages by splitting it up, to achieve unification of laws and equality of sexes. Certainty of the law was another object to eliminate restrictive and Antique rules.

In modern times, perhaps because cases of hardship were more often heard of or because one was inclined to pay more attention to the consequences of indissoluble marriages, it was felt that the possibility of dissolving marriages had become a desideratum. The Hindu Marriage Act, 1955 took into account these aspirations. The most common objections levelled at the provisions for dissolution of marriages are that they open possibilities to give vent to difficulties and family disputes whereas previously the equilibrium had to be re-established within the family without such possibilities. The new provisions cannot be said to fit easily into the traditional pattern of the Indian high caste family which westernised classes are likely to discard whereas lower communities tend to adopt it even today. The standard set by a new western imported set of rules may appeal as fashionable and more progressive, the institution of marriage as it exists in the West frequently being understood by its more negative aspects.

2.2 Present Situation

The immediate reason for setting up of family courts was the mounting pressures from several women's associations, welfare organisations and individuals for establishment of special courts with a view to providing a forum for speedy settlement of family related disputes. Emphasis was laid on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs. In 1975, the Committee on the Status of Women recommended that all matters concerning the family should be dealt with separately.

The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings and that these courts

should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However as per a report by the National Commission for Women, the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. Hence, a great need was felt in the public interest to establish family courts for speedy settlement of family disputes.[5]

According to §7 of the Family Courts Act, 1984, all the family courts have been granted the power and jurisdiction exercisable by any District Court or subordinate civil court in suits and proceedings of the nature referred to in the explanation to section 7(1) of the Act.[6] There is also an enabling provision that the family courts may exercise such other jurisdiction as may be conferred on them by any other enactment. Provision has also been made to exclude jurisdiction of other courts in respect of matters for which the family court has been conferred jurisdiction.

Chapter IV of the Act deals with the procedure of the family court in deciding cases before it (sec. 9). It has been made incumbent on these courts to see that the parties are assisted and persuaded to come to a settlement, and for this purpose they have been authorized to follow the procedure specified by the High Court by means of rules to be made by it. If there is a possibility of settlement between the parties and there is some delay in arriving at such a settlement, the family court is empowered to adjourn the proceedings until the settlement is reached. For this purpose the State of Haryana formulated the Haryana Family Court Rules, 2007 which Under Rules 6, 10, 13 and 14 provide for Mandatory Counselling Centres, Panels of Experts and Lawyers along with flexibility to take legal advice at any stage in the proceedings, respectively.[7] The State of Punjab followed suit and enacted similar rules providing for a panel of counsellors, their working, report submission, etc.[8]

The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum, and this forum was expected to work expeditiously, in a just manner and with an approach ensuring maximum welfare of society and dignity of women. After the preliminary meeting with the marriage counsellor, the case would proceed as per the rules of the Code of Civil Procedure.

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5 National Commission for Women, *Family Court: Report on Working of Family Courts and Model Family Courts* (2002).

6 Family Courts Act, No. 66 of 1984, Laws of Parliament.

7 Haryana Family Courts Rules, 2007.

8 Punjab Family Courts Rules, 2010.

2.2.1 Issues in Procedure

The objective of a family court is diminished due to procedural lapses may be cited. Rules formulated are yet to provide a specific format for the interim applications, summons, etc. Many lawyers still use the format which is provided in the Civil Procedure Code which uses words like 'Counsel can be heard by'; 'Counsel for the Petitioner', although the lawyers are not allowed to represent clients. The rules additionally, are extremely insufficient and merely formal, without actually governing the procedure to be followed in the case. The rules do not simplify procedures but merely reproduce the Code of Civil Procedure with the minor addition that parties should be present in person.

The requirement of following the provisions of the Civil Procedure Code makes things even more difficult for the lay person who is completely unaware of the legal jargons. The Act and Rules exclude representation by lawyers, without creating any alternative and simplified Rules. Merely stating that the proceedings are conciliatory and not adversarial does not actually make them so. The situation has worsened because in the absence of lawyers, litigants are left to the mercy of court clerks and peons to help them follow the complicated rules.

2.2.3 Situation in Practice

The Family Courts generally suffer from unsatisfactory conditions. There is no proper place for the judges to be seated and working conditions, by and large, are unhygienic and poor. There is no proper space allotted for the children to meet their separated parents. An empirical in-depth extensive study in Delhi and Jaipur revealed that as many as 36 per cent felt that the Family Courts lacked essential public conveniences like drinking water, waiting room, etc. and facilities like photocopying, paid public telephone, availability of stamps, stationery etc. In the absence of basic infrastructure like a stamp office, typist and stationery, services of a notary or even adequate sitting arrangements, canteen and drinking water, the litigants are subjected to endless hardships.[9]

Overall, in the aforesaid study, more than one-half of the respondents expressed their none-too-happy experience with Family Courts and stated that their expectations had not been met. The reasons for dissatisfaction found were: procrastination and dilatory decisions, overworked counsellors, and undue pressure exercised on women litigants

[9] Namita Singh Jamwal, "Have Family Court lived up to Expectations"? *Mainstream*, Vol. XL VII, No. 12, March 7, 2009.

for reconciliation, etc. On average, a respondent had to visit the FC as many as 21 times before the case was decided. **Only 14 per cent** of the cases were decided within the statutorily laid down timeframe of six months, while the remaining large number of cases were decided within a time frame ranging between more than six months and as **long as nine years**.[10] The backlog and delays are severe in urban areas like Mumbai and Bangalore. A table below compiled by a renowned researcher explains the same:[11]

Backlog of Cases in Some Family Courts as on 1 January 2003

Court	Cases
Mumbai	8000
Pune	4700
Bangalore	4600
Jaipur	2900
Nagpur	2300
Aurangabad	1900
Hyderabad	1500

It is further highlighted that many cases are dismissed for want of completion of preliminary procedure as the lawyers are absent and the parties have to comply with procedures on their own, leading to dismissals on account of default. As per the above study, roughly 30% cases in Bangalore were dismissed for default.

The court is seen more as a court doling out maintenance orders, rather than a court deciding crucial legal and economic issues. The judges appointed to the family court do not seem to have any special experience or expertise in dealing with family matters, nor any special expertise in settling disputes through conciliation, a requirement prescribed in the Act. The provision that women judges should be appointed and that the judges should have expertise and experience in settling family disputes, have remained only on paper. In many states the family court does not have a single woman judge. As per a workshop by the National Commission for Women,

[10] Jamwal, Namita Singh, "Marital Discord: Modes and Settlement (with Special Reference to Family Courts in India)", [*Doctoral Thesis*, Jamia Millia Islamia University, 1998].

[11] Flavia Agnes, *Family Law (Volume II): Marriage, Divorce, and Matrimonial Litigation*, Oxford University Press, New Delhi, 2001.

it was noted that there were only 18 women judges till then in the Family Courts in India out of 84 judges in all the 84 courts in 2002.

The infrastructural facilities for conciliation available in the centres where family courts have been set up are poor, to say the least. Conciliation often takes place in makeshift rooms. The time available is usually limited. Counsellors deal with tens of cases every day. The time that they can spend with each party is in the maximum a couple of hours spread over three to four sittings.[12]

Litigants' new powers of engagement in the family courts are best availed of by those who have some educational and cultural power. Those with minimal literacy skills often suffer rebukes or ridicule for the way they speak as well as more tangible consequences, such as the effect of ignoring court summons that read like gibberish to them. These courts exist within a cultural and legal framework of women's economic dependence on marriage for food and shelter and male control of women's decisions and movements, and in which domestic violence is seen as a personality-related aberration and wifehood and motherhood are associated with tolerance and sacrifice. There is an underlying assumption of equality between the parties to the dispute. This does not take into consideration the basic discrepancy in power between men and women. When two unequally placed persons are brought to the negotiating table, it is only natural for the stronger of the two parties to take advantage of the situation. Further, there is, no guidance provided to either the court or counsellors operating under the court on how a settlement has to be attempted.

However, the situation is not all gloomy either. While analysing the working of Kolkata Family Courts, Basu estimated that, 20% of cases are dismissed at the preliminary stage, and 75% of the cases that continue are cleared within the first year of filing, another 13% by the second year. Only 3% of cases take more than three years. Additionally, 9.5% of cases are deemed to be reconciled, settled, or withdrawn; 13.4 percent are granted an ex parte decree; and in 33.6% cases there is a matrimonial decree.[13]

2.3 Conciliation

As per §23(2) of the Hindu Marriage Act, 1955, *"Before proceeding to grant any relief under the Act, it shall be the duty of the court* ***in the first instance****, in every*

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12 D. Nagasaila, "Family Courts: A Critique.", *Economic and Political Weekly*, 27(33), 1992, pp.1735-1737.

13 Basu, S., "Judges of Normality: Mediating Marriage in the Family Courts of Kolkata", *India. Signs*, 37(2), 2012, pp. 469-492.

case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties". The same is further explained in Sub-Section (3) as:

> For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do adjourn the proceedings for a reasonable period not **exceeding fifteen days** and refer the matter to any person named by the parties in this behalf or to any person nominated [...]

Therefore, the Act, casts a duty upon the court to effect a reconciliation between the parties. The term conciliation means to bring about a rapprochement or settlement between parties. It is a process in which a third party assists the parties to resolve their disputes by agreement.[14] Conciliation and meditation are not only cost and time effective, they preserve the relationship between the parties by encouraging communication and collaboration.[15] Additionally, the Family Courts Act, 1984 also incorporates under §9 the duty on Family Courts, which have Jurisdiction to try suits under §20 of the Hindu Marriage Act to try family matters, to assist and persuade parties in arriving at a settlement in respect of the subject-matter of the suit.

This settlement is however not absolute. The Law Commission in its 59th Report[16], had recommended amending §23(2) of the HMA[17] on the ground that, where relief is applied for on the ground of conduct not dependent on fault but on some other factor which is constituted by a disease or similar circumstance, an attempt at reconciliation would not be obligatory. Thus, §23(2) was amended by adding a proviso that:

> nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv) clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13.[18]

The Law Commission, in its Fifty Fourth report[19] on the Code of Civil Procedure strongly recommended the need for special handling of matters pertaining to divorce. Consequent to these recommendations, the Code of Civil Procedure of 1908 was

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14 Ashwine Kumar Bansal, *Arbitration and ADR*, Universal Law Publishing Co, Delhi, 2007, p. 19.

15 Vini Singh, "Compulsory Mediation for Family Disputes?", *The Indian Arbitrator*, Vol 2, issue 9, Sept. 2010.

16 Law Commission of India, *Fifty-Ninth Report on Hindu Marriage Act, 1955 And Special Marriage Act, 1954*, (March 1974).

17 *Hindu Marriage Act*, No. 25 of 1955, Laws of Parliament.

18 *Marriage Laws (Amendment) Act*, No. 68 of 1976, Laws of Parliament, §16.

19 Law Commission of India, *Fifty Fourth Report on The Code of Civil Procedure, 1908,* (February 1973).

amended, and Order 32-A was incorporated in the Civil Procedure Code in 1976. This Order seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement. The step to refer for Conciliation is a mandatory procedure and cannot be skipped by any family court, as such.[20]

As a matter of fact, counselling proceeds through two stages, the first stage is inquisitorial in nature, and the second is advisory. The first step in any counselling would be to develop a broad understanding of the case. The counsellor needs to go into the history and the circumstances of the case. The counsellor needs to identify the main and subsidiary causes of conflict, and develop a full understanding of the personalities of the parties, etc. The counsellor would then proceed to the second stage advising the client. In other words, he/she would suggest as to what course of action would be in their interest. Therefore, every family court should have a full-fledged counselling centre consisting of professionally qualified counsellors.

Since one of the main objectives of the family court system is to encourage and enable parties to go into a process of conciliation, failing which, the family court judge should be able to pass consent orders if parties are able to come to some settlement, without any formality of formal hearing or trial.[21] The system, however, is not devoid of the complexities it causes.

2.3.1 Socio-Legal Preclusions

Family courts function with a profoundly ambivalent view of divorce, and thence of power, resources, and violence in marriage. Nowhere is this ambivalence better reflected than in the very language of the legislation. According to the 1984 Act, family courts are set up "with a view to promote conciliation in, and secure speedy settlement of disputes related to marriage and family affairs". In the appointment of judges, the Family Courts Act specifies that "*every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children... are selected*". Legislator Susheela Gopalan's objection to the bill on the grounds that "conciliation might expose some women to further violence" further indicates that the connotations of "conciliation" signal "reconciliation."[22] This has often led courts to express an opinion where

[20] *Durga Prasad* v. *UOI II* (1998) DMC 45.
[21] Paras Diwan, *Modern Hindu Law*, 22nd ed., Allahabad Law Agency, Faridabad, 2013 p. 233.
[22] Family Courts Bill, 1984, Lok Sabha Debates 15th Session, Vol. 51, No. 25, 192.

reconciliation becomes the court's "Duty"[23], as has been expressed in the case of *Smt. Hina Singh v. Satya Kumar Singh*[24] :

> The matrimonial disputes are distinct from other types of disputes on account of presence of certain factors which are not found in other disputes. These factors are motivation, sentiments, social compulsion, personal liabilities and responsibilities of the parties, the views of the two parties regarding life in general and to the institution of marriage in particular, the security of the future life, so on and so forth. [. . .] The main role of the Court is to discover a solution instead of breaking the family relations. It is the mandate of law as also the social obligation of the Judge to make an earnest attempt for reconciliation. [. . .] because for the sensitive area of personal relationship special approach is needed keeping in view the forefront objective of family counselling as a method of achieving the ultimate object of preservation of Family.

This idea was also reaffirmed by the Apex Court.[25] This situation leads to the obvious conclusion where, "A procedure which marginalises the needs and interests of spouses as individuals may effectively silence those needs. Informal pattern of judgments made in the interests of children may hide the value content of these judgments".[26] Additionally, the role of the counsellors is not very clear-whether they are to counsel litigants prior to the filing of the cases or after, and whether the judge and the counsellor counsel the parties simultaneously. The Act casts a duty on the family courts to conciliate and to make efforts for settlement, does away with the formal rules of evidence, provides for the participation of social-welfare organisations, and does not permit the parties to the dispute to engage lawyers as a matter of right. The choice of a conciliator or mediator is not in the hands of the parties either. Even Conciliators exercise power over parties subject to the dispute.[27]

Notwithstanding the important role of counsellors, it has been observed that some of the family courts do not even have any counsellors, and in good number of Courts, the counsellors keep on changing frequently. Each time the woman meets a new

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23 Mathew, D., "Arriving at a Settlement Under Family Courts Act, 1984: Deconstructing the Role of the Judge of the Family Court and Counsellor", *Journal of the Indian Law Institute*, 2 56(3), 2014, pp. 376-385.

24 AIR 2007 Jhar 34, ¶16.

25 *Jagraj Singh* v. *Birpal Kaur*, AIR 2007 SC 2083.

26 Anne Bottemly, "What is Happening to Family Law? A Feminist Critique of Con- ciliation" in *Julia Brophy and Carol Smart (eds)*, Women in Law-Exploration in Law Family and Sexality, Routledge and Kegan Paul, 1985, pp 162-71.

27 Trina Grillo, 'The Mediation Alternative; Process Dangers for Women'," *Yale Law Journal*, Volume 100, Number 6, April 1991, p 1557.

counsellor, she has to explain her problems all over again, with no continuity in discussion. Many of the counsellors are just part time and are not properly trained. Proper selection and training of the counsellors is of crucial importance for efficient and competent delivery of justice. As is expected, it is the counsellors who take up the cases at the first stage, proactive role of the judge has helped in resolving the dispute. The present rules or practices, however, do not permit the judge to personally counsel the parties when the case has come up for trial.[28]

A major challenge faced by the counsellors in the Court related to a general ignorance about the nature, process and benefits of counselling among multiple stakeholders in the system, from the judges, the advocates, the clients, and the family members of the clients. This resulted in reluctance of the clients to approach the counsellor and speak openly on issues that needed to be addressed. Judges and advocates were poorly informed about the counselling process, and as a result did not see the necessity for all cases to be mandatorily seen by the counsellor. Additionally, this resulted in poor access of the counsellors to the judges to discuss sensitive cases.

2.3.2 Empirical Inadequacies

Even until 2015, Punjab, Haryana and Bihar had not appointed a marriage counsellor in place.[29] States such as West Bengal had only two functioning Family Courts, with very few counsellors available. Except Maharasthra, in all other States, litigants were directed to the counsellor or towards mediation at the discretion of the judge. It was a mere handful of cases that were referred to the counsellors, and the number of counselling sessions varied. In most states, the counsellors were employed on contract basis, for a certain fixed number of cases.

The remuneration in most cases was low, offered as an honorarium instead of a salary, and was not paid on time, adding to the frustration of the counsellor's role. In states where advocates and judges played the role of mediator and counsellor, conflict arising from the dual roles was clearly seen. This situation was considered as problematic and avoidable. A recent report published in Bangalore highlighted that there were more than 8,600 cases pending at the Bangalore Family Courts.[30] Many counsellors expressed that judges and advocates were insensitive about women's

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28 Namita Singh Jamwal, "Have Family Court lived up to Expectations"? *Mainstream*, vol XL VII, No. 12, March 7, 2009.

29 Sriram, Sujata & Duggal, Chetna, "The Family Courts Act in India: Perspectives from Marriage Counsellors", *Indian Journal of Socio Legal Studies*. IV., 2015, 97-103.

30 Saswati Mukherjee, 8,600 Cases Pending in Family Court, August 25, 2014, Times of India, Bengaluru.

issues. Many judges emphasised reconciliation rather than separation, which could be deleterious to the women in the cases. There were very few women judges, which added to the problem. The misuse of Section 498A of the IPC and combining it with the Domestic Violence Act of 2005 was mentioned as problematic. Often women were wrongly advised by their advocate to file a case under Section 498 A, irrespective of whether it was warranted or not. The counsellors gave examples of family members and advocates barging into the counsellor's room and disrupting the proceedings. This was a problem mentioned across states.[31]

2.3.3 Conflicting Legislations

Whereas, §23(2) of the Hindu Marriage Act, excludes "*No Fault"* grounds from the purview of Mandatory Reconciliation efforts by the court, pursuant to the Law Commission of India report, the duty cast on courts under the Family Courts Act to attempt reconciliation is generally inclusive in nature. The Kerala High Court while answering the Question that, whether conciliation is mandatory after the introduction of the Family Courts Act, 1984, even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy, called the Family Courts act a special statute and held that the parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. This implied that in case of an apparent conflict between the two pieces of legislation, the Family Courts Act, would prevail.[32] Hence, from a reading of the above judgment it is clear that the beholden duty cast upon the matrimonial courts to attempt mandatory reconciliation cannot be avoided and cannot be circumvented even when divorce is sought on certain exceptional grounds which under the HMA do not provide compulsory settlement action.

2.3.4 Feasible Alternatives

Mediation is a process of intervening between two parties to resolve disputes. It is an attempt made by a third party who is called a mediator. The mediator is one who is impartial, neutral towards both the parties. Mediators do not give a judgment but allow resolution of the disagreement or disputes between the parties. Under mediation, open communication is held between the parties so that both of them can clear their doubts and misunderstandings and with the help and suggestions of the

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31 Mohan Raj, Counselling Practice in Family Courts: Conflicting Interests among Key Persons, Paper presented at the National Convention on 'Changing Scenario of Marriage and Family in India: Perspectives from Family Court Marriage Counsellors' 2014, TISS, Mumbai.

32 *Bini* v. *K.*V.*Sundaran* AIR 2008 Kerala 84.

mediator, come to a common conclusion. Mediation is a part of conflict management of the Alternative Dispute Resolution method under Section 89 of the Code of Civil Procedure Code. Since, Family Courts are Civil Courts as per §7 of the Family Courts Act, 1984 and §21 of the Hindu Marriage Act. 1955, they have the power to refer the dispute to Mediation.

Mediation/Conciliation is a very effective method of family dispute resolution. It is more attractive than litigation because it empowers the parties to devise an agreement which meets their specific needs. It empowers the parties to choose alternative options which a court may not offer as a remedy, for example, separated couples arguing over custody of their children can formulate their own unique parenting plans.[33] The emphasis in mediation is to find out a workable solution, unlike adversarial system which focuses on who is right and who is wrong and generally ends up in bitterness, thereby diversifying the capacity for resolving conflicts in society.[34] Mediation, also initiates parental engagement, which prevents negative outcomes for the Children involved by virtue of otherwise destructive behaviour in the family.[35]

Mediation, through family law espouses feminism, offering a way out of the oppressiveness of trials, from interminable delays to fuzzy legal language. Inserting alternate dispute resolution into formal legal structures provides more satisfactory outcomes for marginalized subjects. In the Family Courts Acts itself, Legal expediency, it is charged, tends to take precedence over all other considerations.[36] Also, Lawyers can to some extent mitigate the power imbalance between the parties, whether in presenting a case or- arriving at a settlement. The Supreme Court has also interpreted §9 of the Family Courts Act to include a process where, Family Courts shall make all efforts to settle the matrimonial disputes through mediation. Even if the Counsellors submit a failure report, the Family Courts shall, with the consent of the parties, refer the matter to the mediation centres.[37] Mediation, unlike courts, might be conducted at a familiar environment, even homes, to tackle intimidation

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33 Drapeau S, Gagné M-H, Saint-Jacques M-C, Lépine R, Ivers H, "Post-separation conflict trajectories: a longitudinal study", *Marriage Fam Re*v. 2009, 45 (4): 353-373..

34 Cohen O, Levite Z, "High-conflict divorced couples: combining systemic and psychodynamic perspectives", *J Fam Ther*. 2012, 34 (4): 387-402.

35 Abidin RR, Brunner JF, "Development of a parenting alliance inventory", *J Clin Child Psychol*. 1995, 24 (1): 31-40.

36 D Nagasaila, 'Family Courts: A Step Backward?', The Hindu, March 24, 1991.

37 *K Srinivas Rao* v. *DA Deepa*, AIR 2013 SC 2176.

parties may witness in courts.[38]

In a very recent case, the Supreme Court has upheld the settlement of the case through the Delhi mediation centre, appreciating the effective manner in which the mediation centre of the Delhi High Court helped the parties to arrive at a settlement.[39] The Supreme Court has also made an observation regarding the disturbing phenomena of the large number of court case filings pertaining to divorce or judicial separation. The court observed that remedies should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriages should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. ADR is also an effective mechanism to resolve **cross-border disputes.**

One of the major loopholes in the legislation(s) lies in the confusion that is created in terms of the question of 'Reconciliation'. If it is just supposed to be the duty of the court, then there is no compulsion to refer it for mediation/conciliation. There is no compulsion to go for mediation before taking recourse to litigation, as it is a power of 'reference' and not a step to be taken mandatorily or as a pre-requisite to litigation. The Report of the Law commission of India, also undertakes the benefits of ADR mechanisms in the context of Family Law.[40] Since the Family Courts Act and Hindu Marriage Act, recognise mutual reconciliation as an objective of the code, it is imperative to understand that the legislation assumes that there exists an "element of settlement" which may be acceptable to parties and thus, in that regard it becomes the duty of the court to refer the terms of settlement to Alternative Dispute Resolution Mechanisms. This duty arises from §89 of the Code of Civil Procedure, 1908. This contradiction, in legislations and their practical application, needs to be redressed.

2.4 Expeditious Trial

The right to speedy trial has been held to be a part of right to life or personal liberty by the Supreme Court of India.[41] This is also one of the core objectives enshrined in the Family Courts Act, 1984. The Law Commission of India recognised the same, by

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38 F.E.A. Sander & L. Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach", *Har*v. *Negot. L. Re*v. (2006) 11.

39 *Aviral Bhatia* v. *Bhavana Bhatia*, 2009 SCC (3) 448.

40 Law Commission of India, *222nd Report of Law Commission of India- Need for Justice Dispensation through ADR,* 2009.

41 *Hussainara Khatoon (1)* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 81.

aiming to eliminate unnecessary and Long waiting periods laid down in respect of judicial separation and subsequent divorce. It was emphasised by the Legislators that there existed many young men and women, whose lives have been ruined because of the law's proverbially long delays.[42] Thus, the Law Commission considered provisions of the Representation of People Act, 1951, and recommended the insertion of §21B for the expeditious completion of trial.

Thus, by virtue of §14 of the Marriage Laws (Amendment) Act, 1976 [Which outlined enabling expeditious disposal of proceedings under the act, as it's core objectives] §21-B was added to the Hindu Marriage Act, 1955. The provision mandated the following:

> (1) The trial of a petition under this Act shall, **so far as is practicable** consistently with the interests of justice in respect of the trial, be continued from **day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary** for reasons to be recorded.
>
> (2) Every petition under this Act shall **be tried as expeditiously as possible** and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.
>
> (3) **Every appeal under this Act shall be heard as expeditiously as possible**, **and endeavour shall be made** to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

The aforementioned provisions have been relied on by the Supreme Court, where it was held that setting a period of One Year for hearing of appeal disregarded §21-B and hence was not permissible. The petition was to be decided in the 6 months period only.[43]

2.4.1 Inherent Predicaments

At present, India has a total of 535 Family Courts across the Country exercising original jurisdiction over family matters as such.[44] However, the success cannot only be attributable to Number. Even as recently as 2018, A woman's appeal against a divorce decree which was granted by the family court was allowed by the Delhi High Court almost a decade after the death of her husband, highlighting the vice of

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42 Suggestion dated 19th December 1970 from Shri Madhu Limaye, MP; Legislative Department File No. 14(4)68-Leg. 2.

43 *Neelam Mann* v. *Charanjit Singh Mann*, (2006) 13 SCC 281.

44 Family Courts in India, Department of Justice. *available at* <https://doj.gov.in/sites/default/files/Family%20Courts%20pdf.pdf.> (last accessed 14 June 2020).

Pendency in the Indian Justice System.[45]

Additionally, there is ambiguity as to the word "Trial" used in the aforementioned provision. This is so because it is left to analysis, if the "Trial" would include the time persons are aiming to reconcile their differences through any of the mechanisms as imparted in the CPC. This also may lead to an abuse of process, where parties may drag the case for ages and in cases where the Judgement is yet to be pronounced, parties may request for amicable settlement procedures to drag the time, since it is not covered under the framework of its definition. The case of *Love Kumar Vs. Sunita Puri* which highlights this conflict in this process.[46] The court in the Judgement categorically states that:

> The State is interested in the security and preservation of the institution of marriage and […] attempt to bring about a reconciliation between the parties. However, omission to make attempts at reconciliation will not take away the jurisdiction of the Court to pass any decree under the Act. This is not correct to say that in a divorce case, reconciliation efforts have to be timed immediately preceding the grant of decree and not at any other stage of the proceedings of the trial. Such an attempt can be and should be made at any stage. The matrimonial Court is required to call parties and make a genuine effort for their reconciliation, there is not even a whisper in this provision that the matrimonial Court has the power to strike off the defence of that spouse, who after being given opportunities for reconciliation fails to appear[**…**] Even before delivering judgment and decree, the Court can make effort for reconciliation. **Thus, the stage of trial for calling the parties for reconciliation is left to the discretion of the Court**.

The problem does not stop there, it also encapsulates itself in the way courts deal with the issues at hand. The Bombay HC[47] in its judgement, held that:

> It is worthwhile for us to refer to the plea made before us by both the learned counsel appearing for the respective parties, requesting that this appeal be disposed of immediately. It was pointed out to the Bench that an appeal from a decision of the Family Courts lies to a Division Bench of the High Court and in the event of the Bench being satisfied that the decision requires reconsideration that the appeal could only be admitted and that it would undoubtedly take several years for disposal having regard to the heavy backlog. Taking into account the human factor and that the delay

45 Pandey R. & Bist P., 'Remedy to pendency problem will help expedite disposal of cases and speedy justice to people'*, Firstpost*, November 14, 2018.

46 AIR 1997 Punjab and Haryana 189: 1997(1) HLR 179.

47 *Leela Mahdeo Joshi* v. *Dr. Mahadeo Sitaram Joshi*, AIR 1991 Bom 105.

> would be extremely harsh to the parties, a request was made that the case be disposed of immediately. We have acceded to this request and disposed of the appeal at the first hearing itself, being conscious of the fact that matrimonial litigation constitutes a class of cases where expediency is of paramount necessity. The learned counsel appearing before us used the expression "instant justice" which, though ideal, is not always possible since procedural requirements have also to be complied with. It would, however, be very useful if the Family Court were to bear in mind the need for utmost expediency while dealing with this branch of litigation."

While the Court is to be lauded for its efforts in disposing the cases, the recognition of the fact that the appeal and case would take huge amount of time, is to be considered due to backlog of cases. Hence, a viable solution to this issue is the transfer of cases from courts to ADR mechanism pre-litigation to take off burden of the court. This also helps in filtering cases which arose due to minor shortcomings and communication gaps without wasting the court's time as such. There is also the possibility and exposure to a greater number of people in a court system as opposed to a single or at maximum a panel of 3 mediators. Another issue which extends in the aforementioned legislation is the usage of the word "*Endeavour shall* be made to dispose appeals in 3 months*"*. This makes it a recommendatory provision taking into consideration the pendency in cases acting as a major hindrance to progress of law in India.

2.4.2 Interlinkages of Reconciliation and Speedy Justice

An interlinkage between Speedy Justice and the conditions for conciliation can be devised from the working of ADR mechanisms, like mediation, arbitration, conciliation and even lok adalats. As per the National Legal Services Authority (NALSA), Lok Adalats across the country mostly on Labour and Family matters wherein about 2,40,000 cases were settled out of the courts. The total value of settlement reached in these Lok Adalats is over Rs. 40 crores. Of the cases settled, about 9625 are pending matters and 2,26,017 are pre-litigation matters. Cases at pre-litigation stage and those pending in courts are being taken up for settlement in these National Lok Adalats. The aim is to reduce pendency, by resolving issues wherever settlements are possible to prevent additional litigation swathing the courts. Through the National Lok Adalats, the attention of the public has been drawn to the efficacious Alternative Dispute Resolution method of Lok Adalat. [48]

[48] Press Information Bureau, *Large Number of Family Matters & Labour Isssues Settled in Lok Adalats held Across the Country Today*, Government of India, (11th April 2015).

Additionally, as per the National Judicial Data Grid for district courts, it is estimated that 39.8% and 38.21 cases amounting to roughly 1,509,851 and 1,449,251 (Total 2,959,102 **78%)** are pending at the Hearing and Evidence stages.[49] This implies that it is at these future stages that pendency arises due to time lag, which can be eliminated by pre-litigation mediation, as those processes would not be followed accordingly. This is evidenced by the Delhi High court reporting a 76% disposal rate of Mediation Centres by virtue of the Family Courts Mediation drives, respectively.[50]

A combined analysis of mediation centres in Delhi has revealed that so far 2.1 lakh cases had been referred to them, out of which over 1.3 lakh were settled amicably. To make the mediation process short, there is a three-month period for a case referred for mediation to get settled. Otherwise the matter is treated as unsettled. A failed first attempt at mediation also does not mean the end of road.[51]

Mediation proceedings are strictly private and confidential in India. Section 75 of the ACA provides that, notwithstanding anything contained in any other law in force in India, the conciliator and the parties shall keep all matters relating to the mediation proceedings confidential, and that confidentiality extends to the settlement agreement except where its disclosure is necessary for implementation and enforcement. A 2016 Report by Vidhi Centre for Legal Policy on the mediation regime in India revealed that 41,503 cases out of a total of 46,000 cases (approx.) of court-referred mediation were family disputes (the report collects this data from the Bombay High Court and Supreme Court). Over a period of five years (2011-2015) more than 25,000 family law cases were referred to mediation. The report further suggests a settlement rate of 80% in Divorce matters in India, through mediation.[52] This implies that family matters are possible to be mediated and hence a pre-litigation mediation reference could be considered to ensure Speedy and effective dispensation of Justice.

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49 National Judicial Data Grid, Government of India, *available at* < https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard>, (last accessed 14 June 2020).

50 Aditi Singh, "Delhi HC celebrates the success of Family Courts Mediation Drive, reports disposal rate of 75.27%", *Bar and Bench*, December 11, 2019.

51 Kumar A. & Singh S.R., "Mediation: an overlooked way to access justice", *The Hindu*, December 17, 2018.

52 Alok Prasanna Kumar and Others, "Strengthening Mediation in India: A Report on Court-Connected Mediations", *Vidhi Centre for Legal Policy*, 2016, *available at* <https://doj.gov.in/sites/default/files/Final%20Report%20of%20Vidhi%20Centre%20for%20%20Legal%20Policy.pdf >, (last accessed 14 June 2020).

3. Comparative Analysis

Marital disputes, could arise out of expression of Human emotions of angst, confusion, misunderstanding or other ephemeral barriers which could threaten the perpetuity of relationships.[53] Cognizant of these underlying premonitions, countries have adopted different approaches to redress marital discord, by ensuring minimum interference of the State in private issues, unless the same is imperative to secure an equitable remedy.[54] Thus, the authors aim to divulge in analysing the practice in different countries to address such complicated disputes and the correlative effects on the institution of Marriage.

3.1 England and Wales

It was by way of the Marriage Act of 1836 in England and Wales, that marriage was recognised as a result of Mutual Consent and not Religious Ceremony.[55] This marked an increase in the number of marriages in that period[56], as opposed to 200,000 parents getting separated every year.[57]

England's divorce law is characterised to be dependent on a single ground, the *irretrievable breakdown of marriage*.[58] This ground, while composes of further grounds of adultery, desertion, etc., emphasises on how divorce is the result of a 'Fault' by one party. The idea of *fault*, is similar to the barred provisions for reconciliation under the Proviso to §23(2) of the HMA. However, England treats the same in a distinct process.

Family law disputes have been divided into *Public* and *Private* disputes.[59] While the former govern Child Care and other interests of the state, the latter cover the main proceedings of divorce by virtue of a decree effecting the same. However,

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53 Hawkins, David and Lloyd, Karen, "The negative effects of divorce on the behavior of children" (1976). Dissertations and Theses. Paper 1862.

54 Smith, I 2002, European divorce laws, divorce rates, and their consequences. in AW Dnes & R Rowthorn (eds), *The Law and Economics of Marriage and Divorce.* Cambridge University Press, pp. 212-229.

55 Olive Anderson, "The Incidence of Civil Marriage in Victorian England and Wales," *Past and Present* 69, (Nov. 1965): 50–87, at 50.

56 Gillis J R, "For Better or Worse: British marriages, 1600 to the present", Oxford University Press. 1985.

57 Punton Li, Finch, D. and Burke, D., "Separated families and child maintenance arrangements", *London: Department for Work and Pensions* , Great Britain 2011.

58 Matrimonial Causes Act 1973, c.18; Marriage, Divorce and Adoption Statistics, Series FM2, no. 33, Office for National Statistics 2008, *available at* <http://www.statistics.gov.uk/downloads/theme_population/FM2no33/FM2_no_33.pdf>, (last accessed 14 June 2020).

59 Julie Doughty, *The Functions of Family Courts,* PhD Thesis, Cardiff University, 2011, p66.

pursuant to recommendations[60] and directions[61] by the EU, the English amended their law to inculcate attendance to a *"Family Mediation Information and Assessment Meeting*" (**MIAM)** stage, pre-requisite for all Family Disputes, except in cases of Child Protection or Domestic Violence.[62] The process is ideally self regulated with minimum interference by the courts, however, parties are free to opt out of the same and approach courts in cases of unsuccessful Mediation process.[63]

However, making an attempt to settle the dispute is the mandate of law leading to refusal of applications with imposition of costs on the contravening party, unless in exceptional circumstances. This process is informational in nature, and cannot compel the respondent or passive party to attend these mediation sessions. The law also provides for Legal aid in Mediation proceedings to eligible parties[64] and a mode for resolving financial claims through the process of Arbitration.[65] Officials have considered mediation to be an integrated part of the divorce process.[66]

The MIAM stage is usually a qualificator to verify if the dispute can be referred to mediation. After its introduction, 63% MIAM processes have converted into Mediations, with 79% ending in full or partial agreement in 2015.[67] The aftermath of this Mediation process has witnessed an increase in outcomes by 13%, along with the decrease in cases by 5% in a single quarter in 2019.[68]

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60 Council of Europe Committee of Ministers, Recommendation. R (98)1 on Family Mediation (Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies).

61 EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J L. 136, 24.5.2008, p. 3–8.

62 Children and Families Act 2014, c.6, s 10; Rule 3.8, Family Procedure Rules 2010, Ministry of Justice, available at: *<https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03>,* (last accessed 14 June 2020).

63 Riveros, Carolina, & Coester-Waltjen, Dagmar. (2019). Alternative dispute resolution in family disputes in Europe and Chile: mediation. Revista Direito GV, 15(2), e1914. Epub June 10, 2019. DOI 10.1590/2317-6172201914.

64 Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10.

65 Arbitration Act 1996, c. 23.

66 Lord Chancellor's Department, Looking to the Future: Mediation and the Ground for Divorce, Command Paper Cm 2799 (London: HMSO, 1995), p.42.

67 Hamlyn, B., Et. al., "Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes Quantitative research findings", *Ministry of Justice Analytical Series*, 2015, *available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/399573/miams-report.pdf,* (last accessed 14 June 2020).

68 John Bolch., "Family courts and mediation: The latest statistics from the Ministry of Justice, Stowe Family Law", 2019, *available at <https://www.stowefamilylaw.co.uk/blog/2019/10/01/family-courts-mediation/>*, (last accessed 14 June 2020).

While there were higher resolution rates, the process has been criticized on grounds of: inadequate screening; mediation even in cases of alleged violence; lack of awareness among parties; the High Costs coupled with inadequacy of Public funding; dearth of attendance due to MIAM being in the nature of *education*; gender Bias against men; and a longer duration in settlement.[69] Requirements of legal aid and advice might lead to exploitation during these proceedings, which comes down to higher expenses.[70]

These predicaments while relevant, cannot discount the efficiency of the Mediation process, which might still be lax owing to a legislative direction on discord arising out of a 'Fault', rather than the interpersonal complex relationship between parties. Thus, a harmonious construction is imperative through adequate state intervention in the form of regulating mediator training, provisions for legal aid and introduction of modes like digital centres to facilitate attendance by passive parties.[71]

3.2 Australia

In response to High levels of reported Violence (30%), Verbal and Emotional Abuse (50%) and Threats (19%) in Family disputes, the Australian government introduced policy reforms to remedy the situation.[72] A paradigm shift from adversarial litigation, to Alternate Dispute Resolution in the form of Mediation and Counselling was conceptualized.[73]

The rationale behind choosing this Jurisdiction owes to the revolutionary reforms inculcated in the family system, which dawned from creating a national network of 65 community-based Family Relationship Centres **(FRCs)**, for dispensation of information on relationship and separation issues at the first instance.[74] Further, the

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69 Barlow,A., Hunter, R., Smithson, J. and Ewing, J., *Mapping Paths to Family Justice*, University of Exeter, 2014.

70 Batagol, B. and Brown, T,. *Bargaining in the Shadow of the Law: The Case of Family Mediation.* Sydney: Themis Press, 2011.

71 Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, Judiciary of England And Wales, 2016, *available at* <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (last accessed 14 June 2020).

72 Moloney L, Smyth B, Weston R, Richardson N, Qu L, Gray M., "Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study", Research Report No. 15., 2007, *available at* < https://aifs.gov.au/sites/default/files/publication-documents/aifsreport15.pdf> (last accessed 14 June 2020).

73 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

74 Rathus Z, "Shifting the gaze: will past violence be silenced by a further shift of the gaze to the future under the new family law system?", *Aust J Fam Law*. 2007, 21: 87-112.

law has established a requirement to make *genuine efforts* at reconciliation and adduced proof for the same, before filing an application for divorce, in largely all situations.[75]

These mediation services may be provided on a free of cost basis by the FRCs , or parties may opt for Private Mediation by certified mediators with minimum experience , qualified in the Act.[76] A general concern which arose in the UK Court of Appeals, in the *Halsey*[77] case, is the dispute of *'Mandatory Mediation'*, which is an oxymoron, since mediation cannot be compulsory as it is a *voluntary* process.

However, the authors aim to clarify here that the *compulsion* implied is in terms of subscription to the process, not the outcome. Every outcome of a counselling process is voluntarily achieved by parties, the *mandate* only lies in the parties having to partake in the process preliminarily.[78]

Without prejudice to its merits, the non-exclusive nature of mediation, except in cases of Child protection and *Family Violence*, had in fact led to an increase in continued partner violence during and post proceedings, acting as a dual-edged sword.[79] However, for this, a preliminary duty's to screen, segregate and refer to court violent or unsuited couples, is casted on counsellors by law, leading to even further possibilities of couples achieving an agreement, despite violent histories.[80]

Further, the ambiguity surrounding the meaning and implications of "*Genuine Efforts"* have been heavily criticised.[81] This requirement also further makes litigations more time consuming as a whole, in cases where the mediation process fails. Some have even argued that a mandate makes parties vulnerable to unfair and

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75 *Family Law Act 1975* (Cth), ss 44(1B), 60I.

76 Cleak, H., Schofield, M. & Bickerdike, A., "Efficacy of family mediation and the role of family violence: study protocol", *BMC Public Health*, 14, 57 (2014).

77 *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

78 Alan Limbury, "Compulsory Mediation – The Australian Experience" (2018) *Kluwer Arbitration Blog, available* at http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/?doing_wp_cron=1592368221.1884338855743408203125 (last accessed 14 June 2020).

79 Beck CJA, Walsh ME, Mechanic MB, Taylor CS, "Mediator assessment, documentation, and disposition of child custody cases involving intimate partner abuse: A naturalistic evaluation of one county's practices.", *Law Hum Behav*, 2010, 34 (3): 227-240.

80 Tishler CL, Bartholomae S, Katz BL, Landry-Meyer L, "Is domestic violence relevant?: an exploratory analysis of couples referred for mediation in family court." *J Interpers Violence*, 2004, 19 (9): 1042-1062.; Mathis RD, Tanner Z, "Effects of unscreened spouse violence on mediated agreements", *Am J Fam Ther*. 1998, 26 (3): 251-260.

81 Astor, H., "Making a 'Genuine Effort' in Family Mediation: What Does it Mean?", Legal Studies Research Paper No. 08/132. University of Sydney, 2008.

inequitable child protection agreements owing to dominance.[82] Finally Compulsory ADR is critiqued on it's inability to recognise cultural, religious and ethnical issues which may arise, where parties in Turkish, Lebanese and other cultures face traditional and linguistic barriers in seeking solutions through ADR.[83]

Despite this critique, courts in Australia recognises this process as a flexible process, getting around entrenched legal positions.[84] The benefits of this system were witnessed by a 57% increase in the use of Family Dispute Resolution (FDR) services, along with expansion by 336% in the FRC network.[85] A majority of 40% participants achieved a settlement through these methods.[86]

It was also noted that the process helped many reached their ends, who could not have afforded court proceedings otherwise.[87] 80% of the participants also expressed satisfaction at the process and outcome of Pre-Dispute mediation.[88] This suggests not only a decrease in pendency, but also preservation of cordial family relations to ensure harmony, as is the objective behind family legislations.

4. Conclusion

The experiences from aforementioned countries reveal the virtues of a mediation process in reducing the burden bestowed upon the Judiciary. However, in the same process, tendencies of violence, bias, fault, and other loopholes tend to persist. India too, in the past has relied on Mediation and achieved successful result. In *Mohd. Mushtaq Ahmad v. State*[89], the court even allowed quashing of FIR by the wife, after reconciliation was reached pursuant to court directions. The court's intention is to achieve speedy and equitable justice, a value promoted by §21B and §23 of the

82 Boyarin, Y., "Court-Connected ADR – A time of crisis, A Time of Change." *Family Court Review*, 50(3), 2012, pp. 377–404.

83 Smyth, B., Bonython, W., Rodgers, B., Keogh, E., Chisholm, R., Butler, R., Parker, R., Stubbs, M., Temple, J., & Vnuk, M., *Certifying mediation: A study of section 601 certificates*. Canberra: ANU Centre for Social Research and Methods, 2017.

84 *Yoseph* v *Mammo & Ors* [2002] NSWSC 585.

85 Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms*, Melbourne: Australian Institute of Family Studies, 2009.

86 Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J., *Post-separation parenting, property and relationship dynamics after five years*. Canberra: Attorney-General's Department, 2014.

87 Productivity Commission, *Access to Justice Arrangements. Productivity Commission Inquiry Report*, No. 72 Australian Government, 2014.

88 De Maio, J., Kaspiew, R., Smart, D., Dunstan, J., & Moore, S., "A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011", *Australian Institute of Family Studies*, 2012.

89 (2015) 3 AIR Kant R 363.

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In conclusion it is important to highlight the major issue with the mediation process in India as it stands today: the lack of a statutory control over the mediation process. To ensure the efficient and effective use of the mediation process with all the benefits it encapsulates, a statutorily regulated framework that addresses the abovementioned concerns is necessary. The authors however express, that the nuances of Mediation should also be considered in the ultimate interest of the Family and especially, Children.[90] In this regard, the authors recommend the following amendments to the legislation:

I. Amending the Proviso to §23(2) to exclude bars from §13(ii) and (vi), as reconciliation can be achieved in these situations.
II. Making Special Provisions to *reconciliation* measures in cases of allegations or evidence of Domestic Violence or Child Abuse.
III. Inculcating a pre-dispute stage, to *"participate"* in state sponsored ADR mechanisms, on a **time-bound basis** to ensure the provisions of §21B and §23 are harmoniously constructed.
IV. Facilitating Mediation Drives and Training Programmes, creating awareness, establishing Special Counselling Centres and enriching quality of counsellors.
V. Outlining standards of confidentiality and transparency during proceedings.
VI. Creating a screening process where unsuitable parties can be referred to the court by the counsellor, along with Post-Mediation scrutiny and remedies.

[90] Amato PR., "The consequences of divorce for adults and children.", *J Marriage Fam*. 2000, 62 (4): 1269-1287.

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