CENTRAL UNIVERSITY OF KASHMIR LAW REVIEW
(CUKLR)

eISSN: 2583-6935 **Vol. 1 (2021)**

Open Access, Peer Reviewed, & Refereed Journal

Department of Law, School of Legal Studies
Central University of Kashmir, Ganderbal, J&K, India
191131

CUKLR is an annual, blind peer-reviewed and refereed journal. It aims to publish quality research on contemporary legal issues, having a multi-disciplinary approach, resonating with the spirit of National Education Policy – 2020 (India).

CUKLR
Vol. 1
2021

eISSN: 2583-6935

Online available at:
https://publications.cukashmir.ac.in/index.php/CUKLR

Frequency: *Annual*
Print Subscription: *India: INR 500.00*
Foreign: USD 20.00

Editorial Board

CENTRAL UNIVERSITY OF KASHMIR LAW REVIEW

CUKLR (2021) **Vol. 1**

CONTENTS

Editorial

The Central University of Kashmir Law Review (CUKLR) provides a platform for scholars interested in quality research and aims to focus on multidisciplinary research in contemporary legal issues that resonates the spirit of NEP, 2020. The object is to encourage holistic approach to legal research that transcends traditional boundaries. It is necessitated by the increasing appreciation of pervasiveness of legal principles to areas hitherto considered as non- legal domains.

Justice Mukundkum Sharma, Hon'ble Judge of the Supreme Court of India in his paper *'Criminal Justice System in 21st Century: A Way Forward'* has raised a host of current issues. This paper is a mixture of experience and thought. The paper sharply traverses through different issues confronting criminal justice system and the offers solutions as a way forward.

Francis X. Shen, Professor of Law, & McKnight Presidential Fellow, University of Minessota; Instructor in Psychology, Harvard Medical School, MGH Department of Psychiatry in his paper ***'Law and Neurosciences'*** has discussed very interesting co-relation between law and neurosciences. This is a subject about which little literature is available in Asian sub-content. Prof Shen has, with the help of medical technology, proved that a man cannot think rationally when his/her brain is not in a proper order. He argues that human flesh be not inflicted pain by way of punishment when it is not in sync with the signals that it receives from its brain which is reeling because of its defects. He also argues that juvenile brain matures only after attaining the age of twenty and in some cases beyond. Once this thesis of Prof Shen is further clarified and refined, it is bound to bring radical changes in the criminal justice system, more particularly in Juvenile justice and the sentencing of the accused.

Prof. Farooq Ahmad Mir, Dean School of legal Studies, Central University of Kashmir, in his research paper captioned, *'Legal Validity of the Pre-nuptial Contracts: An Analysis'* argues that it is

not correct to contend that the Pre-nuptial Contracts are against public policy or there is a need to have separate legislation to declare that the prenups are legally valid. These agreements are legally valid and indeed will promote public policy, if properly constructed. The paper discusses relevant laws on the subject in detail, together with the newly created fundamental rights of 'right to privacy and right to choose', and holds the opinion that Prenups are natural corollaries of the constitutionally protected rights and thus promotes constitutional spirits and constitutionalism.

Prof. Mohammad Ashraf, Chairman and Dean, Faculty of Law and **Absar Aftab Absar,** Research Scholar, AMU, in their research paper titled *'An Insight into the Applicability of Plea Bargaining in India in Light of Judicial Pronouncements*' have discussed in detailed how courts India have changed their approach before and after the introduction of Plea Bargaining in the criminal justice system. The courts had initially shown reluctance in accepting the doctrine of Plea Bargaining for bargaining the punishment as it was considered unethical to trade in punishment. It was viewed with great circumspect and also against Article 21. The courts then changed their approach and started applying Plea Bargain doctrine and did not even wait for amendment in the Criminal Procedure Code, once it was made clear that the Plea Bargaining will be now a part of the Criminal Justice system in India. The authors are of the opinion that the initial fervour shown at the time of introduction of Plea bargaining in the Criminal Justice system in India did not last long. It not only lost the direction but also the purposes because of which it was made part of the system. The authors argue that there is dire need to revisit the application of doctrine so that the ills of the system can be addressed.

Dr. Mudasir Bhat, Assistant Professor, Department of Law, School of Legal Studies, Central University of Kashmir and **Mainaaz Qadir** Judicial Magistrate, Jammu and Kashmir Judiciary in their paper bearing title, *'An Analysis of Victim Compensation Law in India: Acid Attack Victims in Context'* have developed an argument that

acid victims area separate species of victims who deserve separate treatment. These victims do not have any statutory role in a criminal trial in which she/he should have been a pivot. The recent developments in the area of victim compensation have been discussed in detail. The authors have pleaded that the money compensation to the acid victims must be supplemented by their social, psychological and lasting economic rehabilitation.

Dr. Purnima Khanna, Assistant Professor, Khalsa College of Law, Amritsar and **Dr. Pawandeep Kaur**, Assistant Professor, Department of Laws, Guru Nanak Dev University, Amritsar in their paper captioned, *'Legalisation of Passive Euthanasia in India: Right to Die with Dignity with Special Reference to Advance Medical Directive'* have discussed at length why votaries of Euthanasia are increasingly gaining support world over and how Scandinavian countries are coping with this problem as some of them have legalized it, some have partly legalised it and some have outrightly rejected this idea. Indian legal position, in light of Judicial decisions of the apex court in which passive euthanasia with legal safeguards have been enunciated, have been discussed but legislative intervention has been found as the alternative to remove any mist of confusion.

Dr. S. Ali Nawaz Zaidi, Associate Professor, Department of Law, Aligarh Muslim University, Aligarh and **Samiya Khan,** Research Scholar, Department of Law, Aligarh Muslim University, Aligarh in their paper carrying the titled **'***Recent Trends in Banking Sector with Special Reference to E-Banking Frauds in India: An Analysis'* traverses through diverse E-banking frauds, analyses them and finds that the present law is struggling to meet their challenges. E-banking frauds not only require legal measures but non legal measures are equally important for which governmental as well as non- governmental measures have to be undertaken.

Shailja Shukla, Dept. of Law, School for Legal Studies Babasaheb Bhimrao Ambedkar Central University and **Dr. Sufiya Ahmad,** Assistant Professor, Dept. of Law, School for Legal Studies Babasaheb Bhimrao Ambedkar Central University in their paper,

'Rape in Marriage: A Socio-Legal Analysis of Perception and Attitude of Wife', has made an empirical analysis of martial rape for which data has been collected through a questionnaire administered to the women respondents residing in Lucknow and has come up with a strong finding in favour of law penalizing marital rape. The paper was submitted before the split verdict of Delhi High Court on marital rape which has been included by the Chief Editor, along with his comment.

Amit Ghosh, Assistant Professor**,** Surendranath Law College, University of Calcutta and **Dr. Mohammadi Tarannum,** Vice-Principal, Surendranath Law College, University of Calcutta in their paper, *'A Curious Case of Radio-Taxi Market under Indian Competition Law- An Analysis',* have discussed issues pertaining to common consumers failing within the Domain of the Competition Act. Three cases have been discussed in detailed because of their conflicting opinions and it has been suggested that the present approach of the competition commission that does not taken into account 'collective dominance' is not tenable. Section 27(b) read with Section 4 of the Competition Act may be revisited by the legislature.

Syed Shahid Rashid in his paper titled, *"Jurisprudential Analysis of Constitutional Interpretation in India: Some Hindsights*" traces the evolution of constitutional interpretation that went through many phase influenced by the emancipation of the judges on the given bench, social awakening about the rights of individuals and changing role of a welfare state. The author has argued that the constitutional letters are the articles of faith, they remained mostly unchanged but their meaning and ambit changed through judicial gloss that made the constitution of India a living and organic document that has stood the challenges of changing times.

Chief Editor

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 1-10

Criminal Justice System in 21st Century: A Way Forward

Justice Mukundkum Sharma*

Abstract

The newer crimes have adversely affected justice delivery system and age old Criminal justice system is facing challenges that were hitherto unheard of Malimath committee has come up suggestions of seminal importance but all those suggestions have not given effect. This address discusses host of issues that need urgent attention of the policy planners, lawyers, judges and other stakeholders so that the constitutional vision of justice to all is made a reality.

Keywords: Criminal Justice system, Malimath Committee Report, Correction

Note: This paper is based on the address of Hon'ble Justice Mukundkum Sharma, Judge Supreme Court of India, which was delivered in the workshop on "Juvenile Justice, Policy, Police and Practice" organised by the Department of Law, School of Legal Studies on 3rd November 2020.

It is indeed an honour to deliver the valedictory address in this webinar which is organised by the Central University of Kashmir on the theme, "Criminal Justice System in 21st Century: A Way Forward."

Since this Webinar is organised by the University for the benefit of its students undergoing intensive learning and training in law, I would like to speak to them first and then discuss the relevance of today's theme.

My advice to these young students is that criminal law is a great career option for them. But in order to become a good criminal lawyer, one has to study all the branches of law and not only the criminal law. Besides dedication, hard work, stamina and perseverance are necessary not only for a good criminal lawyer, but for any kind of successful career in law. Good criminal law work has increased with the commission of many white-collar

*Hon'ble Judge, Supreme Court of India. email: mukundakam@gmail.com

crimes. Every now and then, we hear about cases of corruption, scams and cases of fraud. We need good lawyers to be able to ably handle these types of cases which are complicated in nature.

From my practical experience in the courts, I have also found that there is definitely dearth of good criminal lawyers, not only at the appellate stage, but also at the trial stage. Unless and until, the trial of a case is competently prepared and argued by the trial lawyer; it is difficult for a lawyer arguing on the appellate side to improve upon the case, at a later stage. The responsibility of a criminal trial lawyer is, therefore, very heavy and they must be conscious of that fact and realize their responsibility.

Criminal practice involves an analytical mind, presence of mind and most importantly when to stop at the time of cross examination. As said by somebody, a criminal lawyer must be conscious of the fact that any wrong question on his part could amount to digging of a grave for his client. He must also learn and have an understanding of forensic scientific tests and technologies which have now become a part of investigation of crimes. I wish all of you well and a bright future ahead. This is the stage and age of learning and try to acquire knowledge on law as much as is possible.

Having said so, let me now address the others who are also students of law like us, but are following various vocations of life, and are desirous to know about the developments in the legal field. The best way to know the people of a country is to read the Constitution of that country which reveals the aspirations, ideas and dreams of the people. We have in our Constitution, a Preamble which contains the basis and foundation of our Constitution. This preamble is like a preface or key to open the Constitution and is like a mirror through which one can see and understand the people and their Constitution. In the Preamble of our Constitution, we find the word ‘justice’ is mentioned as one of the objectives and goals of our Constitution. The vision which is outlined in the Constitution is when it says that the country ensures to all its citizens justice which is social, economic and

political and so on and so forth. Now, when we speak of justice here, it is not the justice delivery system that we speak of, but we speak of justice to be made available to the people, which is in the nature of social, economic and political.

It is correct that we are not speaking of dispensation of justice or justice delivery system in this but our Constitution envisages provisions for guaranteeing basic rights and liberties to the people and also speaks of availability of criminal justice delivery system for which reference is made in Article 134 of the Constitution of India which deals with the appellate jurisdiction of the Supreme Court in relation to criminal matters.

The Constitution also envisages as to who would discharge the responsibilities of dispensation of criminal justice. In this is included the Supreme Court, the High Court and the District Judiciary. However, in the Constitution, the District Judiciary is referred to as subordinate courts. Professor Upendar Bakhsi has raised his objections to the use of word "subordinate judiciary" because according to him each judicial officer and all the constituents of judiciary are independent in their own capacity and therefore, the officers of the District Courts should not be considered as - subordinate judiciary but they should be considered as District Courts. He has also suggested that this word 'subordinate' should be replaced by Word 'District Judiciary' in our Constitution.

Having referred to that we find enough provisions in our Constitution as to how justice is to be delivered by the judiciary consisting of the Supreme Court, High Courts and the District Courts which also includes the delivery of the criminal justice to the people. Delivery of criminal justice system protects the people by guaranteeing enforcement of criminal laws and for providing punishment to the offenders as per the law. Number of laws dealing with criminal matters have been enacted that provide for provisions, both for substantive law and procedure law.

There are few limbs and constituents of the Criminal Justice Delivery System like:

(i) Crime prevention, (ii) Investigation of Crimes, (iii) Prosecution in Court, (iv) Punishment and (v) Correction

When we speak of 'correction', we mean reformative justice in place of inflicting corporeal punishment. Punishment to accused is mainly twofold, one is deterrent and the other one is for reforming the offender, Unless and until, a person is reformed, he will keep on committing one crime or the other, In order to prevent him from repeating crimes, the only way out is to reform him during his stay in the prison. For that purpose, various modes have been found out and are being utilized in several jails today, including Tihar Jail in Delhi by way of teaching them the art of meditation, yoga and such other methods which help the offender or the criminal to reform himself and then become a useful citizen of the country.

When we speak of criminal justice delivery system in India, we come across various problems that are troubling the system, of not only in relation to criminal justice system but also the entire judicial system as a whole. There has been the problem of number of areas in the Courts. There is the problem of shortage of manpower in the courts and then shortage of infrastructure and its accessories. This has created accumulation of cases and delay in conducting and in concluding the trials which in turn has created many other problems. Let me put before you some hard facts which we face today. We must recognize that India only has about 16 percent of people who are booked for criminal offences and are finally convicted. Low rate of conviction points to inefficiency in the whole system and the responsibility for the same must be shared by the police and the prosecutors and to some extent by the judiciary also.

We find from our experience that the system has become ineffective to an extent due to the century old out-dated laws. Whatever be the reason there has to be protection of the rights of the innocent and punishment to the guilty. The second important factor for the system having become ineffective is because rates of crime have increased rapidly and the nature of crime committed

becoming more and more complex due to technical innovations by the offenders. The other reason, probably, is and may be due to delay or haphazard investigation of crimes which greatly contribute to the delay in dispensing prompt justice. Therefore, we need to eradicate all these problems by making ourselves aware of all the problems that are faced by the criminal justice delivery system. This can be done only through this kind of discussions and debates after which it could be possible to reach the destination of having a fool proof criminal justice delivery system.

This Seminar has discussed a sub-theme of the nature of emerging issues like Sedition Law and Contempt of Court. These sub-themes deal with very sensitive issues and burning problems. All these concepts of Sedition law and Contempt of Court law have become very sensitive in recent times due to their use by the concerned authority. In 1962, the Constitution Bench of the Supreme Court has laid down a defining point as to what is free speech. The said judgment declares that someone's statement criticizing the government does not invoke an offence of sedition or defamation. This vision of invoking sedition law on flimsy grounds was seen a retrograde step as far back as in 1962 and even today we are groping in dark as to what actually is sedition law. This question is being relooked and being answered by the Supreme Court as it has taken notice of a petition filed by Major General S.G. Bombatkere in this regard. In the said petition, the petitioner has argued that the 1962 judgment in the Kedarnath's case which upheld the constitutional validity of Section 124A which is sedition is a relic of the colonial legacy. According to him, it is in conflict to the concept of free speech. This, therefore, is a very burning issue which was discussed in this Seminar and I am glad that these discussions have led to some conclusions with regard to the effect of this sedition law and whether right to criticize is taken away totally by the sedition law which is enacted as Section 124A of the Criminal Procedure Code. The same is the Case with the contempt of court law. The law of Contempt of Court concerns with the fair administration of justice with the intent to punish the acts of

hurting the dignity and authority of the courts. Unless some power is given to the courts of drawing up contempt proceedings, the orders passed by the court could be totally made ineffective for if someone refuses to comply with the orders passed by the court what is the remedy left to the court to get the orders enforced and made effective? It should not be thought that the judiciary is not conscious of its rights and also duties. It is conscious of its lakshman rekha that is prescribed by the Constitution itself.

This Seminar I find has also discussed some other very important issues like challenges faced in investigating process and use of medical science and technology in such process. So far as the investigation of the crime is concerned, the powers and duties of a court are laid down in Sections 154 to 173 of the Criminal Procedure Code. In a very famous, case of H.N Rishbud v. State of Delhi, the Hon'ble Supreme Court has held that the investigation generally consists of the steps like proceeding to the place of crime, ascertainment of the facts and circumstances of the case, trace out and arrest the suspected offender, collection of evidence relating to the Commission of the offence and then lastly formation of the opinion as to whether on the material collected there is a clear case to place the accused before the court like Magisterial courts for trial. In order to ably discharge all these responsibilities, the police officers must be properly trained. They must be made aware that improper investigation will always benefit the accused as it is the prosecutor who has to prove the case beyond all reasonable doubts. Law clearly lays down that benefit arising out of faulty investigation would always go to the accused and not to prosecution. Therefore, it is necessary to conduct investigation impartially and within a reasonable time.

It is very true that the number of challenges is being faced by the police officers during crime investigation like budgetary constraints and sometimes also lack -of public cooperation. Use of the forensic sciences in the matter of investigation like taking finger prints, foot prints etc. The scene and situation of the crime have are most necessary which could however be destroyed or contaminated, if

there is any delay in conducting the inspection of the scene of crime. There are number of precautions to be taken by the investigating officer while collecting the materials from the scene of crime and sending the same for analysis to an expert.

On top of this, we find that during investigation the police officers are transferred frequently which also create impediment in timely investigation. At times and at least in some of the criminal cases media starts a trial and they keep on showing live on television the entire incident taking place after the main incident had happened. That does not help the investigation rather destroys and sometimes it helps the culprit to get away.

Next important issue is that there has to be bifurcation of the investigating authority of a crime and the police maintaining the law and order situation. Investigation of a crime is a very responsible job involving speedier investigation and better expertise. We have also witnessed a very recent factor which is happening of the eye witness turning hostile. This could be due to the factor that they are influenced, coerced, unduly remunerated by culprit or his party. It is applicable even to the victim also. So these are some of the problems which are required to be rectified and necessarily the recent innovations in the technologies and medical sciences should be utilized to the utmost for which better training has to be made available to the police officers and the investigating authority.

In the criminal justice delivery system, we have challenges of use of black money in the society, commission of socio economic offences, and commission of scams. Illegal activities in the society includes criminal component of black money involving a host of activities of anti-social in nature, as smuggling of goods, forgery, embezzlement, counterfeit currency, other financial frauds and similar other illegal activities. Number of scams and cases of fraud have been discovered recently which has practically the effect of overturning the economy of the country.

Some of these scams involve rich people and they use all sorts of game plans to evade arrest and to delay the trial by engaging the

best of the people in the legal field. These are some of the challenges that are being faced by both the prosecution and the judiciary.

So far as the sub-theme with regard to critical evaluation of specialized legislations for weaker and marginalized section of the society issue is concerned, we may refer to the provisions of Articles 15 and 16 of our Constitution. These provisions enable the State to provide the benefits of reservation on preferential basis to the economically weaker sections in civil posts and services in the Govt. of India and admission in educational institutions.

The other very relevant aspect that is dealt in the seminar is the revisiting challenge of the Covid-19 to criminal justice system. The pandemic has radically altered criminal justice system across the world. It has impacted all patterns of crime as well as justice system's response to the effect of the pandemic. There is delay in continuation of trial because the courts are practically functioning through the virtual mode and prosecution is unable to carry out the investigation properly due to the hard time being faced by them. Even the administration in the jails has been affected. All jails are overcrowded. Orders are passed by the Supreme Court so as to prevent transmission of the disease. Steps are to be taken to curtail the number of prisoners in the jail for which reason bails were directed to be given to persons who could be so released. One of the objectives of the criminal justice system is to rehabilitate and facilitate social re-entry of those who are processed by the system. The experience of punishment and how one is treated inside the jail is linked to their rehabilitation and re-entry into the society. Therefore, these sub-themes and the main theme are very relevant in today's context and it was really good of organizers to arrange this webinar on such a wide ranging subjects.

Malimath Committee has also given some important recommendations for enabling expeditious investigation as also expeditious disposal of criminal trials. The suggestions, include need for more judges in the country, the higher courts should have

a separate criminal division, consisting of judges who have specialized in criminal law, making aware the accused of his rights and ways and means to enforce them. Malimath Committee has also recommended that there should be bifurcation of the investigation wheel as against maintenance of law and order by the police. Another suggestion given by the said committee is that a new post in the cadre of Director of prosecution should be created in every State to facilitate effective coordination between the investigating and prosecuting officers. Another very material suggestion given by the committee is that there should be a strong witness protection mechanism. The committee also suggested to settle those cases which are pending for more than two years through Lok Adalat on a priority basis.

Subsequent thereto, the government has also taken some steps for bringing in improvement in the matter of investigation and prosecution. The government has now permitted videography of statements. The definition of rape has been expanded and new offences for providing security of women have been added. The victim compensation is also now a part of the law. The government has given its approval for implementation of an umbrella scheme of modernization of police forces.

The Supreme Court on its own has also taken steps for bringing improvement in the criminal justice delivery system. The Supreme Court in the interest of better administration of criminal justice and to ushering in a certain amount on uniformity and acceptance of best practices prevailing over various parts of India, has passed an order in the year 2017, issuing general directions and guidelines to be followed across the board by all criminal courts in the country. Such areas have been identified and so stated in the order dated 30 March 2017. A Committee was also constituted by the Supreme Court with three members Mr. Siddharth Luthra, Mr. R Basant, both Senior Counsels and Mr. K Parmeshwar, Advocate who has since made a wide study, discussed the same and has prepared a draft rules for criminal practice, 2020. These draft rules are divided into various chapters like conduct of investigation, the

manner in which charge is to be framed. It has also suggested as to how to conduct charge, how to conduct the trial and how to exhibit the material objects and evidence and the manner in which the judgment is to be delivered and what should be its contents. These draft rules when implemented by the competent and authorized authority would definitely help in prompt investigation and also conclusion of trial in a speedier manner.

With these comments, I conclude my speech today with the hope of meeting such groups once again for this cannot be the end effect but should be considered as a continuing process. I believe the organizers of this webinar would continue with the endeavour of discussing, debating and giving suggestions as to how a civil case or a criminal case could be expedited and concluded at an early stage. That will definitely help our society and that would be a very responsible contribution of the organizers to our society.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 11-21

Law and Neurosciences: Some Reflections

Francis X. Shen*

Abstract

Prof. Shen in his keynote address explained the interrelationship of the developing brain and criminal justice with special emphasis on the juvenile justice system. He gave an overview of the field of law and neuroscience, which includes not only the developing brain but ageing brain, and how adolescent and adolescent brain decisions are addressed by law. Prof.Shen has established and directs the Shen Neurolaw lab[1]. The motto of this lab. is highly interesting which reads as *"Every story is a brain story."* Thus, emphasising that the brain is involved in every act, including crimes. The functioning of the brain is involuntary, and that it never rests. Living brains never shuts down. This address argues that since brain never rests even when a person is asleep, one has to understand functioning of brain at a given point of commission of crime before pronouncing on the culpability of the accused. The neurosciences are allowing us to understand better with more precision why our minds do so that a cognisable relationship is established between thinking of brain and actions of man.

Keywords: Brain, Neurosciences, Juvenile Justice, Evidence of Chance

Note: This article is based on the keynote address of Prof. Shen in a workshop which was recorded and is now reproduced for the benefit of the readers as it is an emerging area of research (Chief Editor). The workshop was organised by Legal Aid Clinic for Juveniles in Srinagar (J&K, India) on 3rd November, 2020. The Legal Aid Clinic was established in School of Legal Studies, Central University of Kashmir (J&K, India) under the auspices of Department of Justice, Ministry of Law & Justice, Government of India. For full report visit university website www.cukashmir.ac.in

* Professor of Law, & McKnight Presidential Fellow, University of Minnesota, USA; Instructor in Psychology, Harvard Medical School, MGH Department of Psychiatry, USA. email: fxshen@umn.edu

[1]The research and other news items can be accessed by clicking at www.fxshen.com. Prof. Shen shared a slide of brain function developed by Terrem, WW Ni, M. Goubran, M. Salmani Rahimi, G. Zaharchuk, K W Yeom, M W Moeley, M. Kurl, S.J. Hordsworth, revealing sub-voxel brain tissue using phase-based amplified MRI (aMRI) Magnetic Resonance in Medicine, 2018.

We have to understand that it is the same brain that works among the people of developing and developed nations. The brain structure is the same that we share. This could be a unifying point among us for studying behaviour of a person at given point of time.

The speaker, while shedding light on neuroscience and how it will lead us to improvements, particularly in criminal justice system, divided his speech into three parts viz., (i) Learning from the history of brain sciences and law i.e., what we have learned in the past (ii) The recent and rapid rise of law and neuroscience i.e., what is presently happening and (iii) Criminal Justice and Developing brain i.e., where it is going.

Dwelling on the past relationship of science and law, the speaker expressed his deep interest in the area and said that "he is enthusiastic but not over enthusiastic" about the field because there are historical examples where science has caused more harm than good to the criminal justice system. The speaker referred to his paper published in the Fordham Law Review titled *"The Overlooked History of Neurolaw*". He said that although in this century we are raising a question as to what makes one violent, these questions were also asked in previous years, but were answered unsatisfactorily. The Portuguese scientist Egas Moniz, won the Nobel Prize for development of a tool to perform the prefrontal lobotomy. In present era, that approach has been rejected as highly dangerous and ineffective. However, eighty years ago it won a Nobel prize-, and some legal thinkers felt that the lobotomy could have profound influence on the criminal law.

What is happening now? About twenty to thirty years before, philosophers were thinking about the question: did my brain make me to do it? Did my neuron make me to do it? But what used to be the domain of subject of philosophy is now increasingly becoming the subject of the court room. The ethicists, legal scholars, and scientists are considering the place of neuroscience in the courtroom. A defence now put forth in courts is that my brain made me to do it. There are many other ways in which

neuroscience is making inroads in the law, said the speaker. The speaker referred to his publication with a co-author Professor Owen. D. Jones, titled *"Law & Neurosciences: What, Why and Where to Begin"* (2016) published by MacArthur Foundation Research Network on Law and Neurosciences where they discussed that a lot in law hinges on how brains work. He also showed a graph showing that there are thousands of publications on law and neuroscience, and more and more scholarly discussion is happening. The speaker shared slide highlighting research from Nita Farahany showing how courts are looking at neuroscientific evidence. He also shared the photos of first ever legal casebook published on law & neuroscience, which he has co-authored with Owen- Jones and Jeffery Schall, originally published in 2014 with a second edition published in 2020

The speaker referred to some recent important cases in the United States juvenile justice system where courts have discussed and partially relied on the developments in neuroscience in reaching to the decision. The first case he referred to is *Roper* v*. Simmons* (2005) where Christopher Simons murdered Shirley Crook. He was 17 years old at the time of crime. The question before the US Supreme Court was whether, under the Eighth Amendment of the US Constitutions, it was cruel and unusual to punish a juvenile of 17 years with a death sentence. The court outlawed the death for youth under age 18, noting that because of their immaturity, juveniles are less culpable than adults, and second that juveniles are more amenable to treatment. In 2010, the US Supreme Court was confronted with the constitutionality of life imprisonment without the possibility of parole in cases involving juveniles in *Graham* v*. Florida* (2010). The Court banned life imprisonment without parole for juvenile offenders in non-homicide cases. In the third case, *Miller* v *Alabama* (2012), the US Supreme Court banned mandatory life imprisonment without parole for juvenile offenders convicted of homicide. The Court said that there can be no automatic life imprisonment without parole even for non-homicide offenders. This series of cases changed the landscape of

juvenile justice in United States and in each of these cases, especially in *Graham* and *Miller,* the briefs submitted to the court contained neuroscience. Since 2012, U.S. courts continued to hear arguments that the brains of adolescents are not fully developed, especially the decision-making architecture that may develop until early twenties.

The learned speaker cited an important case to explain how this plays out. On August, 2017, in the city of Charlottesville, a car was driven by James Fields (accused) into protestors killing a woman. The question in his case was whether he should be sentenced to life without parole. The unique and interesting fact of this case is that the accused at the time of commission of crime was 20 years old. The question was does a youth of age 20 receive same protection? The defence argument in Sentencing Memorandum was that:

> "Contemporary neuroscience proves that the constitutionally distinct status of juveniles must extend at least up to the age of 21. As a result, it would be unconstitutional, cruel and unusual to sentence someone who was 20 at the time of an offence to a sentence of life imprisonment….
>
> Further, [a]s more research confirming this conclusion accumulated by 2015, the notion that brain maturation continues into late adolescence became widely accepted among neuroscientist."

This research was further strengthened by the advent of functional Magnetic Resonance Imaging (MRI) which permits observation of the brains of living individuals.

The learned speaker expressed his reservation with respect to expression that "**contemporary neuroscience proves**", rather he stated that it is difficult to study the brain which is behind the skull but it is also true that neuroscience with the help of MRI and other methods has greatly advanced knowledge of the brain in the last three decades, still much cannot be said with exact precision.

In the above case, the prosecution response in its Sentencing Memorandum was:

> "Dr. Steinberg, who did not interview the defendant or conduct any tests or evaluations-and who almost certainly was not informed of the defendants stunning callous and unremorseful statements months after the incident, opines that Field was 20 years old at the time of his terrorist acts, he should not be assigned the same degree of culpability as more mature or responsible adult. This opinion is non-persuasive for myriad reasons. First, although the Supreme Court has cited studies regarding adolescents' development in striking down, on constitutional grounds, the death penalty and mandatory life sentences for juveniles, the court has never extended this reasoning to overturn similar sentences for adults. Second, Field actions simply do not fit into Steinberg's paradigm regarding the common traits of adolescent offenders."

In this case, although neuroscience was utilized by the defence, it was not effective in mitigating Field's sentence.

The learned speaker cited many more examples where neuroscience seems to be prominent viz., in a case determining whether states could prohibit the sale of violent video-games to youth.

In *Brown v. Entertainment Merchants Assoc.* (2011), Hon'ble Stephen G. Breyer observed:

> "cutting edge neuroscience has shown that playing of 'virtual violence in video game results in those neural patterns that are considered characteristic for aggressive cognition and behaviour."

Likewise, the role of neuroscience is depicted in plea bargaining. It is also being used in other cases that concern criminal responsibility. One striking case is *People v. Weinstein* (1992). In

this case the accused Herbert Weinstein comes home one night, strangles his wife, and then throws her from their twelfth storey apartment building to make it look like a suicide. There was no previous history of violence for Mr. Weinstein. He argued for lack of criminal responsibility due to mental disease or defect. He introduced PET scan evidence showing an arachnoid cyst pressing against the frontal lobes of his brain. The question was whether this is admissible. Weinstein's PET scan revealed the following points:

(a) Cross-section of brain structure obtained through magnetic resonance imaging. The right and left side of the brain are indicated as per the convention used in medical imaging. The large black area in the left frontal lobe reveals the presence of a large cyst that has damaged and displaced the brain tissue.

(b) Cross-section of brain at the same level obtained through PET with flu-deoxyglucose revealed that the colors map the level of glucose metabolism with hot colors indicating high levels and cool colors indicating low levels. Glucose metabolism is clearly absent in the cyst and reduced around it[2].

Thus, Weinstein argued that the cyst in the brain made him to do it. He was pleading the defence of insanity. The courts are now increasingly confronting such pleas and they are not yet prepared to handle such situations[3].

The speaker said that the new and more detailed images of the brain are possible today using new technologies that were not quite possible 40 years before. The neurosciences, like instant replay in sports, may become more frequently used in future.

The speaker raised a pertinent question, can brain evidence persuade jurors? He himself answered it in affirmative with a firm belief that YES it can. To substantiate his answer, he cited the

[2]The speaker had shown the MRI and PET images of Weinstein brain with different colours during his online ppt presentation.

[3]The learned speaker has published a paper on this topic titled "Neuroscientific Evidence as Instant Reply" in the Journal of Law and the Biosciences.

important case of Mr. Grady Nelson. Nelson had a very traumatic childhood. He then committed a series of very serious crimes. He was convicted of multiple crimes, following his stabbing his wife 60 times, then slashing her throat; also sexually assaulting his step-children. He has multiple prior convictions, including raping a 7-year-old girl. He was proved guilty. The question was whether he could be awarded the death sentence or not? At the sentencing phase, Nelson's defence team produced Quantitative Electroencephalography (QEEG) "brain maps". His lawyer argued that he had a "broken brain". Several Jury members who saw this evidence changed their minds. One said that it changed his mind altogether and awarded, instead of death penalty, life imprisonment without parole.

The guest speaker stated that another important area to study is how alcohol and drugs affect the brain? But having paucity of time, learned speaker moved forward without discussing it in detail but it is a food for thought for future researchers in this area.

He again emphasised that presently the neurosciences are advancing but the evidence is not perfect.

The eminent speaker discussed the future of the Criminal Justice System and Developing Brain. He suggested that there are three bedrock principles for understanding how law and neurosciences will develop.

1. First, we should take a broad definition of both "law" and "neuroscience".
2. Second, we should consider both, the roles that neuroscience play in law, and the roles that law plays in governing neuroscience research and technology development.
3. Third, we should be patient and expect significant variations along many dimensions of "law" and "neuroscience".

The learned speaker highlighted a number of areas where neuroscience plays its role in law viz., Immigration Law(Trauma and memory in asylum cases), Cross-over with related fields (Law

and genetics; Law and artificial intelligence; Law and biology), Health Law (Brain Screening), Privacy Law (What to do when brain biomarkers are positive in asymptomatic individuals?), Disability, Social security law (The neuroscience of pain), Education Law (Brain science and special education), Elder law, Wills trusts and estates (aging, Dementia and the law), Environment law and Food Law (Effect of various toxins on the brain), Evidence Law (Re-examining assumptions about how fact-finder's process testimony), Constitutional Law (regulating abortion and foetal pain) and Contract Law (Capacity to contract).

The speaker spoke about the intersection of neuroscience with health law and environmental law. The speaker also referred to the research work of his colleagues on pre-natal and early childhood brain development in India. The actions that may take place later in one's life may be related to the early brain development. Thinking pro-actively about early life conditions and interventions is important. Also important is the environment in which one grows up as invisible toxins in the environment can have a significant negative effect on brain development.

There is also a lot of work on artificial intelligence which has relation with law and neuroscience. Law and Artificial intelligence are growing at a fast rate. Topics in this arena include how law should anticipate and respond to liability in areas of self-learning machines, AI and Labour Market Disruption, AI in Medicine, AI in Law, Robot Rights, Intellectual Property, AI in Warfare and Weapons, Governing Robots, Autonomous Vehicles, AI-based Algorithms etc.

The speaker also cautioned about the ominous implication of law and neurosciences. For instance, what are the legal implications of early detection of elevated risk for autism spectrum disorder by using brain images? In India, as well as in USA, the researchers may one day study the brain images of six-month-old babies to determine whether the baby is going to develop autism spectrum disorder in future. The idea is that the early detections and then interventions may prevent later disorder. This may, however, raise

a lot of ethical issues involving stigma, access to care, inequality and inequity etc. As the time passes, the technologies will continue to emerge, but they will offer a mixed bag of great opportunities and also great perils.

The learned speaker cautioned that there are new technologies which can be harvested for public good, but there is an earnest need to maintain high standards for use of brain images in all criminal and civil matters. We must also not blindly adhere to the precedents if the scientific evidence suggests a different course forward. The speaker quoted Oliver Wendell Holmes, Jr.

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[4]

The learned scholar opined that we justify relics of past without paying heed to the present. We have to be careful for future also. We have to critically examine our assumptions more particularly about youth. Do those assumptions line up with current scientific knowledge? Maybe they do. But if they don't, then we need to rethink about the law and policy.

There are presently many limitations to law and neuroscience but looking ahead to the future, there are following reasons for being optimistic:

(a) Influx of new information: From 2009 to 2013 approximately 1.79 million articles were published that fall within the area of brain and neuroscience research, representing approximately 16% of the world's scholarly output in this period. This wealth of information is bound to bring quality changes in understanding and appreciation of neuroscience for its proper application in future.

[4]Oliver Wendell Holmes, Jr. "The Path of the Law." 10 Harvard Law Review 457 (1897). In the Public Domain. Available at http://www.constitution.org/lrev/owh/path_law.htm

(b) Evidence of chance: He gave examples for his work of evidence of chance. The Center he directs has held workshop on 'Science-Informed Decision Making'. He referenced what he said at the outset of his talk: 'Better decisions aligned with science can produce better outcome aligned with justice'. In these programmes, the judges and their staff are trained about science and neuroscience to understand how they might do sentencing differently to produce better outcomes. Instead of saying what did you do, the youth can be asked what happened to you or what is your story. It is not to excuse youthful offenders, but to understand the trajectory of youth and devise a better individualised treatment for them. In these workshops the judges are informed about science of addiction, science of memory and science of trauma. Quoting one of the judges namely, Judge Esther Salas, United States District Judge of the US District Court for the District of New Jersey who said:

> "Because of [the CLBB] program… I learned about neuroscience, I learned about what it takes to understand … trauma … we have to try to understand the individual we are dealing with, and we have to try to come up with an individual approach, not only on sentencing but also on supervising, pre-trial and post."

The Center has also run programs related to justice and the developing brain. The programme is conducted with prosecutors, defence attorneys, judges and youth themselves.

At the outset, the learned scholar mentioned that I told neuroscience does not have all the answers for the law. But as neuroscience insights advance, answers may come. In the arena of juvenile justice, we need to work with patience and develop partnership between law and neurosciences slowly and steadily.

Conclusion*

The subject of Neuroscience is likely to offer many opportunities in

* written by Chief Editor

future that will have profound impact on crime and its punishment. It is, therefore, all the more necessary to appraise its interplay with law that is bound to redefine crime and its punishment. It is quite possible that the future offender may, instead of being visited by punishment, be visited by treatment, instead of being inflicted with pain, he may be rewarded by pleasure that may be considered his treatment for his ailing brain that had lost its control at a critical point of time that resulted in unwanted action. The researchers have to take up different facets of neuro science for future studies that are bound to break the outdated traditional principles on which the edifice of present criminal justice system rests.

Author Biography

The speaker, Francis X. Shen, is an expert in criminal law is teaching Neuroscience and the Law, the Law of Evidence, Introduction to American Law, Neuro-ethics, Law and Artificial intelligence, Sports Concussions and the Law, and Education, Law and Policy. He cited his paper which was published in the Arizona State Law Journal titled "Law and Neurosciences2.0" in which he had mentioned that bulk of scholarships in law & neuroscience is highly US and European centric. More scholarship needs to be written from scholars in the developing world.

The speaker said that those interested in doing research in neuroscience might be interested in exploring the following sources viz., www.lawnero.org established by The MacArthur Foundation Research Network on Law & Neuroscience. There are thousands of papers on the topic and a number of videos and other items available via that website. The other centre which is run by the speaker is the Center for Law, Brain & Behaviour at Massachusetts General Hospital, a teaching hospital of Harvard Medical School. The mission of the centre is that the better decisions aligned with science will produce better outcomes aligned with justice. He stated that ultimately, we are interested in justice and that today we will talk about juvenile justice. In order to improve the administration of justice, we need to draw on what we are learning in neuroscience and related fields.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 22-59

Legal Validity of Pre-nuptial Agreements in India: An Analysis

Farooq Ahmad Mir*

Abstract

Agreements between marriage partners, either before or during the continuance of marriage for effecting generally, thus far uncommon promises, made in exceptional circumstances, have a long history. Their validity was determined on the basis of personal laws of the parties and these agreements were generally declared against public policy. This created an impression that these pre or postnuptial agreements are not legally valid as the marriage is a sacrosanct in nature (especially in Hindu law), and it cannot be modified or changed by an agreement. This sacrosanct nature of marriage has considerably been diluted by codified laws and pre or postnuptial agreements are now increasingly being executed. It will be against the interest of the parties to make these agreements legally unenforceable. The stakeholders have made several meetings with the concerned ministry for a legislation to make these agreements legally valid, but no step has been taken in this direction.

This paper argues that these agreements are in no way different from other agreements, and are covered under the Indian Contract Act. There is no express provision in the Indian Contract Act that prohibits pre or post nuptial agreements and their validity has to be determined on the basis of the stipulations provided in these agreements. These agreements are not against public policy, but are in favour of it, as these agreements can be used for resolving amicably often contentious issues like residence, custody of child, polygamy, adultery, distribution of property, joint investments, insurance policies, nominations, pension, gratuity or arbitration/ mediation, etc. in case of disputes. These agreements can be used by the courts as guides to resolve parties' marital disputes which they have executed at the time when they were in good and sweet relations and seeds of animosity had not been sowed yet. There is also constitutional support for these agreements as the parties or their guardians are choosing these prenuptial agreements by their free will by exercising their fundamental right to choose.

Keywords: Prenuptial Agreements, Prenups, Public Policy, Personal Laws, Right to choose

* Professor & Dean, School of Legal Studies, Central University of Kashmir, J&K, India. email: deanlaw@cukashmir.ac.in

1. Introduction

Late twentieth century witnessed prominently emergence of two different sets of agreements; one driven by technology and commonly referred to as e-commerce and the other by universal craving[1] for securing gender justice through economic rights by executing private arrangements popularly called as pre or post-nuptial agreements[2].

Pre- nuptial Agreements[3] (prenups) have come in prominence by their use by the celebrities[4] world over, though they were being

[1]See for instance; CEDAW (Convention on the Elimination of All forms of Discrimination Against Women), 1989, The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged and promoted gender equality.

[2]According to Business Insider and the American Academy of Matrimonial Lawyers, millennials are requesting prenups more than ever before. In America, there was initially opposition to prenups. available at: https://www.apartmenttherapy.com/what-to-put-in-prenup-36873506 but a survey shows that the number of millennia's requesting prenuptial agreements has jumped. According to Johannes, citing the American Academy of Matrimonial Lawyers, more than half of lawyers surveyed saw an increase in prenups among millennials, and 62% saw a rise in prenups overall from 2013 to 2016. available at: https://www.businessinsider.in/personal-finance/prenups-arent-just-for-the-rich-or-famous-more-millennials-are-signing-them-before-getting-married-and-you-probably-should-too/articleshow/66018811.cms

[3]Sometimes used in abbreviated form as Prenupt or prenup.

[4]Indulekha Aravind & Priyanka Sharma, Legally bound: Pre-nuptial agreements have no legal sanctity in India yet a few rich and affluent insist on signing them, Business Standard. Available at: https://www.business-standard.com/article/beyond-business/legally-bound-112072100025_1.html (retrieved on 25 December, 2020). When Facebook founder and billionaire Mark Zuckerberg surprise-wed girlfriend Priscilla Chan, celebrity-watchers were agog to know whether the two had signed a prenuptial agreement, or prenup. A few days before the wedding, much-married fellow-billionaire Donald Trump had advised him to do so on CNBC, while a celebrity divorce lawyer was quoted as saying that if Zuckerberg hadn't, he should consult a psychiatrist. More recently, the Tom Cruise-Katie Holmes split sparked similar talk about what the terms of their prenuptial agreement would

used in one form or the other earlier also[5]. The pre-nuptial agreement[6] commonly refers to a written agreement that is executed by the marriage partners by or before solemnizing their marriage or during its continuance to pre-determine issues relating to marriage and post marriage in case of death of any one of them or divorce or separation[7]. The prenuptial agreements may contain

---

have been and what Holmes would walk away with (not much, as it turns out).

[5]Ante-nuptial. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/antenuptial (accessed 25 December 2020). It is contended that first recorded prenup goes back two millennia and was written with hieroglyphs. The prenup agreements have roots in ancient civilization, though they were not always as fair and exhaustive as they are now. See http://legalservicesindia.com/

See also Shubhangi Nangunoori, Pre-Nuptial Agreements: An Approach Towards Togetherness, September 9, 2020 available at: https://lexforti.com/legal-news/pre-nuptial-agreements-an-approach-towards-togetherness/

It said that the concept though is popular in west but it is about 1000 years old and has origin in old Egyptian culture when the women insisted to have prenup so that she is not left alone in the event of divorce or death of her husband. it has come to be recognized in the countries like Germany, Italy, France and Canada Austria, Netherlands, Portugal being a party to The Hague Convention on the Law Applicable to Matrimonial Property Regimes, accord legal recognition to prenuptial agreements as the Convention specifically authorizes prenups. It has now assumed much importance in the countries like Australia and the United states where more than 50% of the population is willing to enter into pre-nuptial agreements and even the attorneys are of the opinion that these agreements will help solve divorce cases to a good extent.

[6]Ante-nuptial agreement refers to a written agreement executed after the marriage is solemnized with the same or similar objective as that of prenuptial agreement. Ibid.

[7]An agreement made between a couple before marrying in which they give up future rights to each other's property in the event of divorce or death supra note 4

diverse stipulations[8] which may supplement existing legal provisions or may provide which is not otherwise provided in the existing law.[9] Increasingly, newer subjects are covered in prenups unheard earlier.[10] There is neither any express legal provision nor unanimity in judicial opinion on the legal validity of pre-nuptial agreements in India. The Government of India has also not made any consistent stand on this issue. The legal validity of these contracts is making rounds in academic circles with conflicting arguments. Most of these arguments tend to believe that these contracts are not valid[11] because marriage contracts are considered sacrosanct in India, especially Hindu marriages and pre-nups are antithesis to this spirit. They also consider these agreements against public policy[12] and based on uncertain

[8]These may include marital rights, place of residence or separate residence, custody and maintenance of children including step children, maintenance of wife, higher education, Job and transfer of Job location, division of property, Joint business, prevention of polygamy, adultery, retaining of respective faiths in case off inter religious or inter caste faiths, additional rights in event of divorce.

[9]See *Cheryl Winokur Munk*, Millennials Embrace Prenups—but Through a Very Different Lens Than in the Past, The Wall Street Journal Jan. 21, 2021. Today, younger adults of all income levels are drafting them, not only to protect assets accumulated before and during marriage but to address societal realities that weren't necessarily present or common years ago, such as a desire to keep finances separate, student debt, social-media use, embryo ownership and even pet care.

[10]New stipulations may contain embryo rights, surrogacy issues, frozen egg/sperm rights, pet sharing, Heirloom Jewellery, students loan, credit card debts, Intellectual property rights, social media accounts. See Christianna Silva Published in February 2021. Practical Things Anyone Can Put in a Prenup (Like, Um, Even Your Debt) available at: https://www.apartmenttherapy.com/what-to-put-in-prenup-36873506

[11]Jeremy D. Morely, Prenuptial Agreements in India, it is not possible to assure -- or even to expect -- that such agreed terms will be upheld in an Indian court. Available at: https://www.international-divorce.com/prenuptial-agreements-in-india

[12]Mousmi Panda Prenuptial Agreements: Presence, Judicial Attitude and Roadblocks, Jus Dicere & Co. Volume 1 Issue 1, March, 2018 p.70 The courts in India in a series of judgments have ruled that prenuptial

contingencies[13] and thus void under sections 23 and 24 of the Indian Contract Act[14].

The present paper argues that the prenuptial agreements are like other contracts and their validity has to be determined on the existing established principles and there is no need of express declaration from the Govt. or legislature to validate these contracts. All these agreements are not against public policy as have been so viewed, but will promote it by providing economic security to the marriage partners, check rising incidences of divorce and other ill practices and help in securing gender justice by making spouses at par with each other. These agreements will conform to constitutional journey from dependence to autonomy of choice and decision (right to leave alone and right to choose)

2. Women Initiatives for Women Rights

Women have been given preferential treatment in Indian legal jurisprudence, both in formal legislative frameworks and judicial pronouncements since independence of India. The framers of the India constitution accorded preferential treatment[15]to women by

agreement controlling the marital rights of the other party to be against public policy.

[13]See Ramanuj Mukerjee; Prenuptial Agreements are not valid in India and new law has to be created to give validity and to delineate matters that can be governed by such agreements. www.quora.com. Last visited on 03-01-2021 See also Mayank Rai; Contracts shall not be based on future and uncertain contingencies. Prenups are of uncertain nature, hence void under the Indian Contract Act. www.quora .com. Last visited on 03-01-2021.

[14]Raghav Ohri, Prenuptial agreement now on government's radar, The Economic Times, E-paper 27 Feb., 2018. It is contended that according to officials familiar with the matter, the Indian Contract Act, 1872, acts as a roadblock in the implementation of prenuptial agreements, with Sections 23 and 26 rendering such pacts as void. https://economictimes.indiatimes.com/news/politics-and-nation/prenuptial-agreement-now-on-governments radar/articleshow/63088773.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[15]Article 15(3)

enjoining states to ensure their interests are well safeguarded and made it a constitutional duty to renounce practices derogatory to the dignity of women.[16] This constitutional spirit encouraged different stakeholders to converge on a common goal to ameliorate plight of women. Their social, political and economic, including health issues were given due place in legislative schemes, with or without any women initiatives.

In India, late seventies and early eighties saw women groups asserting their rights[17] and making their voices heard[18] but it was mainly against preventing violence against women[19]. These movements also fought for economic rights of women; first for their mere survival[20] and then for their dignified survival[21]. The property right of a Hindu woman in ancestral property in India was recognised in 2005 by making amendment in section 6 of the Hindus Succession Act, 1956 and the Supreme Court has now elevated a daughter equivalent to the status of son in Hindu undivided family. In the words of Justice Arun Kumar Misra,

> "once a daughter is always a daughter and son is son till he is married. The daughter shall remain retrospectively a coparcener throughout life, irrespective of whether her father is alive or not."[22]

---

[16]Article 51 A(e)

[17]lawyerscollective.org

[18]*ibid*

[19]Section 498 A was introduced in Indian Penal Code to prevent dowry demand and dowry relating to violence

[20]Provisions for bare maintenance were provided in Criminal Procedure Code, 1973 and Muslim Women (Protection on Divorce) Act, 1986 now renamed as the Muslim Women (Protection of Rights on Marriage) Act, 2019

[21]Prevention of Domestic Violence Act, 2005 ensuring prevention for all types of abuses (section 3) right of residence (sections 17 and 19), monetary relief (section 20), compensation (section 22) with surveillance through protection officers (sections 9 and 18)

[22]Aneesha Mathur, "Once a daughter, always a daughter: Supreme Court bats for women's right in parental property", India Today (August 11,

This judgment was hailed by Amnesty India as a step towards promoting equality for women as property rights are fundamental to women's social, economic and legal security.[23] As against this, Muslim women's limited property right was recognized since the advent of Islam.

Presently, women's full social and political participation in nation building has been recognized, but their economic participation based on their status is gradually being accepted. It is irony that a woman in a Hindu undivided family is considered rightful own of the joint property but her right to strike a contractual arrangement with her husband is not being recognized. This issue was taken up by the women activists with the Government, but without any headway.

3. Inconsistent Stand of the Central Government

Women organisations have taken up the issue of prenuptial agreements with the Central Government under a mistaken belief that these agreements have to be expressly protected under existing law or Government has to make a formal declaration that these agreements are henceforth legally valid. The Government has adopted a flip-flop approach to the legal backing to these agreements. In 2015, the Ministry of Women & Child Development initiated a move to formally recognize prenuptial agreements, but could not make any head way due to lack of consensus at the ministry level. Main opposition was that there is a doubt about the practicability of these agreements and they may lead to break down of the families. The marriages cannot be reduced to mere

2020). Accessed at: https://www.indiatoday.in/india/story/daughter-supreme-court-women-s-right-parental-property-hindu-succession-act-1710058-2020-08-11 [Vineeta Sharma v. Rakesh Sharma & Ors, Civil Appeal No. Diary No. 32601 of 2018, SLP nos. 1766-1767 of 2020, decided on 11 August, 2020]

[23]Tweeted on 11-8-2020 at 8.14 pm (Amnesty India Twitter handle: @AIIndia)

contracts[24]. Unfazed by the Government's stand, women activists again mobilized the support and convinced the Ministry to convened a broad-based meeting of the stake holders. The meeting was convened in 2019 and Ministry took a stand that making prenuptial agreements legally binding would help to save marriages from divorce. Once the distribution of assets, liabilities, and responsibilities have been voluntarily, in advance, agreed to by the parties to marriage, either spouse would be free from the worry of a callous dissolution. This would also considerably reduce the injustice caused to women who are deserted by their NRI grooms.[25] The meeting ended with a resolution to hold wider consultations with stakeholders[26] in order to come up with a broader frame work. In the next meeting of stakeholders called by the Ministry, a completely opposite stand was taken and any possibility of legal framework was ruled out on the ground that time is not yet ripe for such initiative, calling prenuptial

[24]The Ministry of Women & Child Development had initiated a similar move in 2015 as well — as first reported but failed to make much headway. One of the major reasons at the time was the opposition from a secretary at the ministry, who raised doubts about the practicability of such agreements. Available at: https://economictimes.indiatimes.com/news/politics-and-nation/prenuptial-agreement-now-on-governments-radar/articleshow/63088773.cms?from=mdr

[25] *Ibid*

[26]Representatives from the ministries of home affairs, law & justice and women & child development were expected to attend, along with those from bodies like the National Commission for Women and legal luminaries. The meeting was expected to consider inclusion of a provision for prenuptial agreements into existing laws so that they can be legally enforced. .Ibid

"The objections recorded were extremely orthodox and far from reality. It was contended that introducing prenuptials may lead to breakdown of marriage."

https://economictimes.indiatimes.com//news/politics-and-nation/prenuptial-agreement-now-on-governments-radar/articleshow/63088773.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

agreements as "an urban concept and too early to give it legal backing".[27]

The reservation of the Government is that these pre-nuptial agreements are against public policy and personal laws, and it will increase incidence of divorce. These apprehensions are discussed on the basis of relevant laws and Judicial decisions.

4. Public Policy in Pre-nuptial Agreements

Any public policy debate must be invariably prefaced by celebrated words of caution sounded by Borrough J. He advises that "[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you.[28] It has been called a vague and unsatisfactory term[29] and unsafe and treacherous ground for legal decisions.[30] It was advised by Lord Atkin's that "the doctrine of public policy should be invoked only in clear cases in which harm to the public is substantially incontestable and does not depend upon idiosyncratic inferences of a few judicial minds."[31]

---

[27]See Moushumi Das Gupta, Too early to give prenuptial agreement legal backing: Govt. Ruling out any immediate change in law to recognise prenuptial agreement, the government has taken a view that it's an "urban concept" and "too early" to give it a legal backing.

The government's position emerged from a stakeholders' meeting on Monday called by the Union women and child development ministry to deliberate on whether such agreement should have a legal standing. Officials who attended the meeting said the law ministry's representatives also were not in favour of legalising prenup agreements.

[28]Richardson v. Mellish, (124) 2 Bing 229,252

[29]Per Parker B; Egerton v. Bromnlow, (1853) 4HLC1, 123

[30]Per Lord Davy; Janson v. Driefontein Consolidated Mines, (1902) AC 484,500

[31]Finder v. John Mildman, 1938 AI. See Also Hill v. William Hill, (1949) 2 All E.R. 452, it was laid down that The doctrine of public policy was only a branch of the Common Law and just like any other branch, it was governed by precedents; its principles had been crystallised under different heads and though it was permissible to expound and apply them to different situations, it could be applied only to clear and undeniable cases of harm to the public.

Lord Halsbury has suggested that no court can invent new heads of public policy as its categories are now closed. This line of reasoning was echoed by the Supreme Court of India in *Gherulal* v. *Mahadeodas Maiya*[32] by holding that the public policy is an amorphous concept, which cannot be put in straitjackets. It varies from place to place and time to time and that is why courts have cautioned not to invent new heads but mould a given situation to fit in any one of the existing subheadings of public policy.[33] The Supreme Court of India in *ONGC Ltd. v. Saw Pies Ltd*[34] ruled that the concept of public policy is ambiguous and varies from generation to generation and its exact meaning will depend upon the circumstances in which it is applied. In a similar vein, the Apex Court in *Central Inland water transport corporation Ltd v. Broja Nath Gunguly*[35] opined that what would be good for public or what would be injurious to public will vary from time to time and what may be considered against public policy at one stage may not be considered so at another stage.

Pre-nuptial contracts are considered against public policy. It is based on the misreading of some of the judicial opinions without appreciating the context and the time when those opinions were expressed.

The decision of Calcutta High court in *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*[36] is considered as an authority on prenuptial agreements that they are opposite to public policy. This opinion of the court cannot be properly appreciated unless the facts of the case and the context of judicial opinion is not understood in its proper perspective. In this case, the plaintiff and defendant were minors at the time of their marriage. Their

[32]AIR 1959 SC 71. The apex court held that theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

[33]Ibid.

[34](2005)5 SCC 705

[35](1986)3 SSC 156

[36](1901) ILR 28 Cal 751

guardians executed *pratijnapatra*[37] through which it was agreed that the husband will stay in the house of her in laws forever and will never take his wife to his home. The couple stayed together for 15 years and then differences arose between them and husband left in-laws house. He demanded that his wife should also live with him in his parental house. The wife refused to live with her husband which resulted in to present suit by the husband. (plaintiff). In defence to the plaintiff's application for restitution of conjugal rights, the defendant among other contentions, pleaded that there is a custom in their *Rajah family* that their daughters live with their husbands in their paternal home and not in in-laws house and the claim of the husband was against ekrarnama (agreement) which his guardian executed on his behalf.

The court focussed its attention to one main point i.e., the parties being Hindus, they will be governed by the Hindu Law and their mutual rights, flowing from the marriage, are based on Hindu Law, unless it is proved that they have executed a valid and lawful contract by virtue of which the plaintiff has himself contracted out

[37]The agreement reads as follows: "That we solemnly promise that you, having decided to keep my eldest son Sriman Rai Basanta Kumar Singh Babajiban in your own house, after having married your eldest daughter to him, and having asked for my permission and that of my wife thereto, we both give our consent thereto and execute this pratijnapatra, to the effect that neither I nor my wife shall ever propose to take our said son to our own house, nor shall we be competent to take him there. He will live forever at your qarh (house) at Kuttikari, and will very happily continue to carry on the business of the Raj. To this effect we, of our own accord, execute this pratijnapatra (deed of promise in the presence of respectable and other men of this place. Finis. Dated the 9th of Falgun 1292." The plaintiff being bound by this deed of promise, do promise that I shall not be competent to take my wife from this place to my own father's house or to any other place. I shall always carry out your orders, and I shall not be competent to do any act or to go to any place without your permission. This document was signed by the plaintiff's parents, and by the plaintiff". Ibid

the rights conferred upon him by the said marriage, the contract is not valid.[38]

The court invoked Manu[39] and Dayabhaga[40] School on the sacrosanct nature of the Hindu marriage, though admitted that it has contractual characteristics also. It was held that the Hindu marriage is indissoluble and continues for eternity. It is a union of souls, flesh with flesh and bone with bone. Wife regards her husband as God and partner of all pure and impure acts and half of the body of the husband and even after the death of her husband, she is regarded as the surviving half of his body.[41]

Citing different religious texts, the Court concluded that

> "it is the bounden duty of the wife to live with her husband, wherever he may choose to reside, to submit herself to his authority, never to separate from him and to attend upon him and in his religious ceremonies, and that the violation of such duty is a great sin, which results in terrible punishment in the next world." [42]

Similarly, the court concludes on the basis of Hindu law that a wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection[43] which is not only a moral duty, but a rule of Hindu Law.[44]

The court invoked section 23 of the Indian Contract Act which declares a contract void if it is against public policy or defeats the provisions of law and opined that a contract that prevents a husband from choosing his place of residence for his wife is a

[38]Sm. Sandhya Chatterjee v. Salil Chandra Chatterjee decided on 15 April, 1980, it was held that even an agreement to live separately in future is against Hindu Law.

[39]See Manu, Ch. II, v. 67; Ch. Ill, v. 43; Ch. V, vv. 154, 155, 156, 157, 158, 160, 165; Ch. IX. v. 29;

[40]Dayabhaga Ch. IV, v. 14; Ch. XI, Section 1, v. 2;

[41]Supra note 39

[42]Para 20

[43]Para 28

[44]Para 30

contract that would defeat the provisions of law and hence void.[45] The court interpreted English cases in such way as to distinguish them from the present case in-spite of clear ruling by English court in *Wilson v. Wilson*[46], wherein it was held that an agreement preventing institution of suit of restitution of conjugal rights is not against public policy. The court followed subsequent rulings of the English courts laying down that the present agreements for separation are valid and are furthering public policy but agreements for future separation are against public policy.[47] On the basis of the English decisions, the court attempted to differentiate two types of the agreements; one where during the continuance of the marriage an agreement for separate living is executed and another where a contract either before or during the continuance of marriage is determining the rights of the parties conferred upon them after marriage, which have potential to make marriage nugatory or in-fructuous, if enforced. The court ruled that the contract which is presently in question falls in the latter category. It is executed before marriage and defines the rights of the husband during marriage. It takes away his rights lead to the separation of the Law, and it is an agreement which, if enforced, might practically lead to the separation of the husband and wife in future and this is against public policy.[48]

The *Tekait Mon Mohini* ratio was followed in *Krishna Aiyar v. Balamma*[49]. The husband in this case had filed a suit for restitution

[45]Para 31 Supra 31 33. The court quoted with approval the decision in Paigi v. Sheonarain (1886) I.L.R. 8 All. 78 where, in a suit of conjugal rights by a Hindu husband against his wife was contested on an agreement similar to that which has been relied upon in this case, the Court held that the plea cannot be accepted and seriously maintained.

[46](1864) 1 H.L.C. 538 I

[47]Westmeath v. Westmeath (1821) 1 Jac. 142; Merry weather v. Jones (1868) 4 Giff. 509 It was laid down: contracts providing for the future separation of husband and wife are contrary to public policy. But a contract between the husband and a trustee on behalf of the wife, providing for the terms of present separation, will be enforced.

[48]Para 39

[49](1911) ILR 34 Mad 398

and that was compromised by executing the agreement which reads: "If on any day subsequent to this and for any reason whatever you (the wife) would not like to live with me but want to go away from me, I agree to give you Rs. 350." The wife did not join the company of her husband and again suit for restitution was filed. The court declared this agreement against public policy and not enforceable. The court affirmed that the decision of the case will not be in any way different even if English Law is applied to them, in-spite of the exception created by *Wilson* decision. The court laid down that the parties are Hindu Brahamans and their martial obligations are governed by the Hindu law.[50]The Hindu law envisages union of souls and not their separation. It is doubted that an agreement between husband and wife to live separately is valid. It may be well deemed to be forbidden by the Hindu Law[51]. Similarly, Bombay and J&K High Courts in *Bai Fatima* v. *Ali Mahomed Aiyab*[52] and *Mst Jani* v. *Mohd Khan*[53], respectively declared prenuptial agreements invalid. In the former case, the agreement was that in case of separation of couple the wife will be provided maintenance by the husband. The court objected it on the ground that it encourages separation and maintenance after separation is against the tenants of personal Law. In the latter case, the agreement was that son-in-law will live like a servant in the house of his father -in-law and this agreement was declared unenforceable by the court being forbidden by law. A contrary stand was also witnessed in *Bhai Appibai Khimji* v. *Cooverji Mohd Abas Ali* v. *Nazumunissa Begum*[54], *Mohummad Muinud-din v. Musammat Jamal Fatima*[55] *and Mohd Khan Shamali*[56] and agreements providing for separate maintenance, or maintenance for future separation and even an agreement for payment of

[50] The court invoked Section 16 of Madras Act; III of 1873.
[51] Para 2 supra note 45
[52] ILR 1913 37 Bom. 280 AIR 1936 Bom. 138
[53] AIR1970 J&K 154
[54] 43CWN1059
[55] (1921)ILR 43ALL.650
[56] 1959SCR111

money and divorce to wife for leaving house of the father-in law were all respectively held enforceable by law and not against public policy.

The Calcutta High Court in *Lenga Lalung v. Pengur iLalungani and Ors*[57] did not follow *Tekait Mon Mohini (supra)* when it found that there is a family custom permitting wife to stay with parents after marriage and husband has free access to the society of his wife. The court ruled that Hindu law will not be applicable to the parties, but will be governed by their custom which the court regarded neither forbidden by law nor against public policy. The court expressly declared that custom invoked is not immoral. The court came down heavily on public policy doctrines and concurred with the criticism of public policy being unruly horse.[58]

The sacrosanct nature of Hindu marriage has not precluded Indian courts from declaring prenuptial agreements enforceable. The courts have ruled that gift of House,[59] promise to provide separate residence and maintenance in case husband deserts his wife are valid.[60]

The public policy debate in prenuptial agreements cannot be stretched to the extent of holding all prenuptial agreements against public policy. Prenuptial agreements are not in any way different from general contracts, except that they are agreements executed by specified parties (by a couple), either before or during

[57]Decided on 28 May, 1915; 30 Ind. Cas. 796

[58]Mr. Justice Burrough observed in Richardson v. Mellish (1824) 2 Bing. 229 at p. 252: 9 Moore 435: I Car. & P. 241: R. & M. 66: 3 L.J. (o.s.) C.P. 265: 27 R.R. 603: 130 E.R. 542 public policy is a very unruly horse and when once you get astride of it you never know where it will carry you. Followed by Lord Esher, M.R. in Cleaver v. Mutual Reserve Fund Life Association (1892) 1 Q.B. 147: 16 L.J.Q.B. 128: 66 L.T. 220: 40 W.R. 230: 56 J.P. 180. The court quoted with approval the observations of Cave, J., in Official Receiver, Ex parte, Mirams In re (1891) 1 Q.B. 594: 60 L.J.Q. B. 397: 64 L.T. 117: 39 W.R. 464: 8 Morrell 59. 'Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."

[59]Pran Mohan Das v. Hari Mohan Das, AIR 1925 Cal. 856

[60] Bai Appibai v. Khimji Coorveji, AIR 1936 Bom.138

the continuance of their marriage, agreeing to resolve marriage resulted issues amicably. The prenuptial agreements cannot be equated with private law which applies uniformly to all the stakeholders covered under it and cannot be changed at the will of the parties. Surely, pre-nuptial agreements contain diverse stipulations. if challenged, each stipulation has to stand the test of public policy. Thus, pre-nuptial condition, for instance, not to have a child after marriage is against public policy, but to share property raised after marriage is not. The prenuptial contracts may even further the public policy. These agreements may considerably reduce the rate of divorce, and in case of dispute, they may prove useful guides for arbitration or judicial resolution.

There is an increasing use and growing acceptance of pre-nuptial agreements. The relic of 19th century public policy doctrine cannot be made applicable to the 21st century developments of gender equality, individual autonomy, economic empowerment, etc. The public policy doctrine has to be re-moulded to accommodate this change. There is no inherent vice in the prenuptial agreements for which a blanket public policy doctrine has to be invoked. Without laying down any blanket rule, validity of each pre-nuptial agreement has to be decided on the basis of its contents.

The judicial decisions decreeing that the prenuptial agreements are against the spirit of Hindu law and thus against public policy are based on the old un-codified Hindu law that holds Hindu marriage indissoluble that has now altogether changed after the enactment of Hindu Marriage Act, 1955. The Supreme Court has very rightly summed up the spirit of public policy doctrine in *Himachal Pradesh Financial Corporation* v. *Anil Garg*[61] by opining that it

> "…mean[s] what is in the larger interest of the society involving questions of righteousness, good conscience and equity upholding the low and not a retrograde interpretation."

[61] AIR 2017 SC 1953

5. Personal Laws and Pre-nuptial Agreements

Validity of pre-nuptial agreements has been challenged mostly on the basis of Hindu law which treats Hindu marriage sacrosanct and not a contract. The religious sanctity of Hindu marriage is largely attributed to *Manu* who said: "In childhood must a female be dependent on her father, in youth on her husband, her lord being dead, on her son. A woman must never seek independence. Never let her wish to separate herself from her father, her husband or her sons, for by a separation from them, she exposes both families to contempt."[62] The independent existence of wife has not been conceived. Husband is elevated to the status of god and wife his subject. The marriage is permanent union of two souls which merge together to make a common soul. The duties of wife have been enumerated in *Vishnu* in the following words:

> "Accompanying of her husband, reverence of his father, of spiritual parents, of duties and guests, great cleanliness in regard to the domestic furniture and care of the household vessels, avoiding the use of philters and charms, attention to auspicious customs, austerities after the death of her husband, no frequenting of strange houses, no standing at the door or window, dependence in all affairs, subjection to her father, husband and son in childhood, youth and age: such are the duties of a woman" [63]. "Neither by sale nor desertion can a wife be released from her husband".[64]

This subjugated position of women in the Hindu mythology is largely responsible for holding pre-nuptial agreements against public policy. This religious concept of Hindu marriage has now altogether changed by the enactment of Hindu Marriage Act, 1955 which though has not directly changed sacrosanct nature of Hindu

[62]Colebrooke's Digest of Hindu Law, Vol. II, p. 137, Ed. 1871
[63]Colebrooke, Vol. II, p. 138, v. 92.
[64]Manu (Ch. IX, v. 102)

Marriage, yet permanency traditionally attached to Hindu marriages has been greatly affected. This Act overrides all the text rules, interpretations of Hindu law, any custom or usage or any other Act.[65] It moves further and provides provisions for divorce[66], Judicial separation,[67] divorce by mutual consent.[68] The eternal union has been reduced only to one year of marriage after which a petition for divorce can be presented by either of the party[69]. The provisions of registration of Hindu marriage have supplemented ritualistic "agni" (fire) as a witness[70]. This law applies to all the communities domiciled in India, except Muslims, Christians, Paris and Jews, as these communities have their personal laws.[71] This strictly religious affair has been transformed into a mundane one. Thus, the judicial precedents, holding prenuptial agreements against public policy, being opposed to the concept of permanent union of Hindu marriage and subjugated position of Hindu wife, no longer holds water.

As against the above position, the courts have not experienced much difficulty in finding place of pre-nuptial contracts in Muslim marriages, because Muslim marriages are largely considered by the courts as civil contracts and their sacrosanct nature has been mostly overlooked. The nikahnama is considered as a written contract for executing marriage. The dower required to be given by the bride groom to the bride is nowadays considered as a part of pre-nuptial agreement for consummation of marriage among the Muslim communities and is not viewed as such against Muslim Law.[72]

---

[65]Section 4 of the Hindu Marriage Act, 1955

[66]Section 13

[67]Section 10

[68]Section 13B

[69]Section 14

[70]Section 8

[71]Section 2

[72]In Islam, marriage is treated as a contract and the parties to a marriage are free to make certain agreements and even put conditions regulating their marriage. It is due to the nature of marriage in Islam,

It is to be noted that payment of dower among Muslim communities cannot be strictly equated with the modern day prenuptial agreements. The payment of dower has been the hallmark of Muslim marriages since the advent of Islam, when the property right of women in the western countries was unheard. The dower is considered as a token of love and affection for a bride and consideration for consummation of marriage which can be given in cash or kind that can be paid immediately or be deferred or partly paid or partly deferred but its absence does not render marriage void. The dower is generally negotiated by the parents or guardians of a bride and there is no element of reciprocity in it, except the bride submits herself to the company of her bridegroom.[73] It is, generally agreed before or at the time of marriage but not at the time of divorce[74], if not earlier fixed. If dower is not paid, wife may refuse marital obligations or even refuse to co-habit.

---

agreements like Mahr and Mutah could be found. All the conditions of marriage such as the amount of dower, mode of payment, questions relating to custody of children, dissolution of marriage, maintenance and any other conditions which the contracting Parties desire to lie down are incorporated in a deed of marriage called Kabin Namah or Nikah-Namah. See Kecia Ali, Senior Research Analyst, FSE, Marriage Contract in Islamic Jurisprudence, https://www.brandeis.edu/projects/fse/muslim/marriage.html Last visited on 03-01-2020

[73]Husband gets what is referred to as milkal-nikah, milkal-'aqd, or milk al bud', ownership (or control) of marriage(or intercourse) .Ibid

[74]Mohammad Ahmed Khan v. Shah Bano Begum,1985 (1) SCALE 767; 1985 (3) SCR 844 ; 1985 (2) SCC 556, AIR 1985 SC 945, The apex court very rightly said: It is true under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called 'prompt" which is payable on demand, and the other is called "deferred", which is payable on the dissolution of the marriage by death or by divorce. But, the fact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify that it is payable 'on divorce'. even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. [863B-D]

These characteristic features do not make Muslim law in any way different from Hindu Law so far as validity of prenuptial agreements is considered. The prenuptial agreements are not per se valid under Muslim Law nor are these agreements mandatory in marriage contract but Muslim law is not in any way averse to executing a contract by Muslim spouses so long it is in harmony with the tenets of Islam.[75]

In *Mydeen Beevi Ammal* v *T.N. Mydeen Rowther and ors*,[76] the plaintiff and defendant were married in or about the year 1916. A few days prior to their marriage, the plaintiff (husband) executed an agreement in favour of the defendant's father where under he agreed to execute a document within a week of the marriage conveying some properties mentioned therein for her life (wife) as a provision for her maintenance. But no agreement was made within a week of the marriage, as promised. Subsequently, misunderstandings arose between the wife and the husband which led to the plaintiff (husband) taking a second wife. Consequent upon this, the defendant (wife) prevailed upon the plaintiff (husband) to execute an agreement under which some properties were gifted to her for life for her maintenance. Ever since she was living separately and enjoying the suit lands.

[75]There is no consensus among the jurists on whether the rights established by the marriage contract can be modified by the inclusion of stipulations. Most often these stipulations are aimed at securing certain rights or privileges for the wife. The commonly debated provisions specify that the husband will not take additional wives or will not relocate his wife from her home town. Among the four Sunni schools, the Hanbalis grant the most recognition to these stipulations. This school holds that if the husband violates either stipulation, the wife has a right to dissolve her marriage. It does not however mean that the second marriage will be void but it means that she can leave her husband if he marries again. Jurists of other three schools (Hanafi, Maliki and Shafi) do not consider these stipulations binding on husband. Supra note 73

[75]Nanda Chiranjeevi Rao; "Marriage agreements under Muslim Law-A weapon in the hands of Muslim Women", JILI, (2013) Vol 55:1 P.94

[76]AIR 1951 Mad 992

The present defendant (wife) sought an injunction from the court for preventing her husband from interfering her peaceful enjoyment of the property gifted to her, recovery of the price of the paddy carried away by her husband and damages for removal of the crops. The case was contested by her husband on the ground that she was divorced by him and she is not entitled to hold the possession of his property. The court held that there is a well-marked distinction between a case where a wife seeks to recover maintenance from her husband after forfeiting that right for some reason or the other and a case where the husband seeks to get back possession of the property given to her for her life on the ground that she is not entitled to any maintenance on account of divorce. It is clear that the right to receive maintenance is very different from vested interest in the property. The court opined that if this distinction is properly understood, there will be absolutely no difficulty in answering the question arising in this case. The court ruled that the property was given to the defendant by the plaintiff for her life without any condition attaching thereto. The plaintiff cannot recover possession of the property from his wife during her life time.

These agreements are gaining currency in both Muslim communities[77] and Muslim Governments.[78] It is even hoped that

[77]The inclusion of stipulations in marriage contract is discussed by many Muslims today as the best way to protect women's rights within marriage. In majority -Muslim societies, current legal codes determine how stipulations will be enforced. Supra note 73

[78]General notions that an prenuptial agreement restraining husband from contract another marriage during the continuance of the present marriage is against Quranic text provided in Chapter 4 verse 129 allowing Muslim husband to marry "two or three or four women but ask them to have single wife if they fear they cannot treat them all with equal fairness. In Muslim Countries Polygamy has been prohibited. In Turkey polygamy has been outlawed in 1926. In Tunisa, prohibits plurality of wives. Algeria allows polygamy with certain stringent conditions, including consent of wife to second marriage. In Morocco, prenuptial agreement disallowing the man to take another wife is binding on him. In Somalia, a man can contract another marriage only

the pre-nupes will empower Muslim women and love, kindness and mercy for spouse emphasised in Islam will become a reality.[79] In England Muslim Institute Trustee re-launched new Muslim Marriage Contract which contains stipulation that can be equated with pre-nuptial agreements.[80]

Section 40 of the Divorce Act, 1869 (one of the personal law codes that deals with the marriages involving Christian partners) allows District Court to examine the presence of ante-nuptial or post-nuptial agreements before making any decision on the dissolution of a marriage. The State of Goa is the only State in India that has Uniform Civil Code in place (on the lines of the Portuguese Civil Code, 1867). This Code makes a provision for prenuptial agreements under family law for distribution of property between the marriage partners.

The Parsi Marriage and Divorce Act, 1936 provides provision for dissolution of marriage as well as remarriage. The marriage is not considered sacrosanct and permanent union the way Hindu marriage is considered under old Hindu testaments.

6. Right to Leave alone: A Negative Fundamental Right

Indian constitution is the culmination of scarifies given for long fought battle for independence and represents aspirations and dreams of mass population. Understandably, constitution is considered as a sacred and revered document. In the initial years

---

for specified reasons. In Iraq and Syria has to give legal justification and has to show financial capacity to the satisfaction of the court for getting permission for second marriage. In Egypt wife has to be informed about the second marriage of her husband and she is free to take divorce from her husband and the same is true about Bahrain and Jordan. See Ajaz Ashraf, As Supreme Court decided on banning polygamy, a look at how Muslim Countries deal with practice, google.com/ amp.scroll.in. Last visited on 03-01-2021

[79]Tehmina Kazi, The Guardian, 8th July, 2011 last visited on 03-01-2021

[80]The main features include removing the requirement of wali (marriage guardian) for bride who is an adult, can make up her own mind about whom to marry; enabling the wife to initiate divorce and retain all her financial rights agreed in the marriage contract.

of post-independence, importation of any concept for constitutional interpretation was considered as good as blasphemy and this is the reasons that even concepts like "reasonableness" or "due process" were out-rightly rejected in *A K Goplan*[81] because these concepts were not expressly mentioned in the constitutional letters and were not representing the then understood constitutionalism. This unconditional allegiance to constitutional letters continued in *M.P Shrama*[82] and *Kharak Singh*[83] where nine and six judge benches, respectively could not locate 'right to privacy' in the provisions of constitution only because it was not expressly mentioned. It took more than a quarter century to Indian courts, after independence, to come out of the shackles of blind following. The fundamental reasoning of *A K Goplan* was overturned by eleven judge bench in *Rustom Cavasjee Cooper.*[84] Comparatively, smaller bench in Govbind[85] declared right to privacy as a fundamental right and then the minority opinion expressed by J. Suba Rao in *Kharak Sing* was specifically approved in *Maneka Gandhi*[86]*.* This was followed by two successive judgments in *R Rajagopa*[87] and *PUCL*[88] upholding right to privacy. The ratio of these judgements was doubted on the ground that decisions in these cases were handed down by the benches smaller in number than that of the benches which decided *M.P Shrama*and *Kharak Singh (supra)*.

K.S Puttaswamy v Union of India[89] marks a watershed in the privacy jurisprudence in many respects. This authoritative

[81]AIR 1950 SC 27
[82]AIR 1954 SC300
[83]AIR 1963 SC1295
[84]AIR (1970) 1SSC24
[85](1975) 2 SCC148
[86](1978) I SCC 248
[87](1994) 6 SCC 632 see also *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260
[88](1997) 1SSC 301 See also State of Maharashtra v. Bharat Shanti Lal Shah [(2008) 13 SCC 5]
[89](2017) 10 SCC1

judgment was handed down by nine judge bench. This judgment has specifically overruled *M.P Shrama* and *Kharak Singh (supra)* and has extended privacy protection to cyberspace as well by coining new phrase of "informational privacy". These judgments have laid down foundation of privacy right which can be called in the language of jurisprudence a negative right.[90] This fundamental right to privacy secures "right to leave alone" so far as external interference is prevented. This fundamental right, like other such rights, is not absolute but is limited by due process of law. This "right to leave alone" being a negative right will preclude any external interfere to the parties who have executed any contract by their free will so long it stands the scrutiny of relevant laws. On this analogy, prenuptial contracts fall on the core of "right to leave alone" and without external interference and there cannot be any general rule against the validity of prenuptial agreements.

7. Right to Choose: A Positive Fundamental Right

The "honour killings"[91] in India have assumed menacing proportions like other countries.[92] The courts have denounced

[90]In the case of negative right s, the relation between the subject and object is immediate. There is no necessity of outside help. All that is required is that others should refrain from interfering. See Fitzgerald, P. J. (ed.) Salmond on Jurisprudence, 12th Edn., Sweet and Maxwell, London, 2013 (Indian reprint) P43.

[91]In the words of the Supreme Court: We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter- religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. see Lata Singh v. State of UP and another (2006) 5 SCC 475

[92]The report of the Special Rapporteur to U.N. of the year 2002 concerning cultural practices in the family that are violent towards women indicated that honour killings had been reported in Jordon, Lebanon, Morocco, Pakistan, United Arab Republic, Turkey, Yemen and other Persian Gulf countries and that they had also taken place in western countries such as France, Germany and U.K. mostly within migrant communities.

these inhuman practices and have laid much emphasis on adult persons inherent right to choose[93]. In *K.S Puttaswamy,* the Supreme Court took a leap forward and made it clear that the "right to privacy" is not simply the "right to be left alone", but it has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice[94]. Dipak Misra, CJI in *Shakti Vahini* v *Union of India and Ors*[95] held that "assertion of choice is an in-separable facet of liberty and dignity. Reconfirming this legal stand, Justice S.K Koul of the Supreme Court in a recent judgement of *Laxmibai Chandaragi* v. *State of Karnataka*[96] held that the choice of an individual is inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice.

---

https://daccess-ods.un.org/tmp/53253.3228397369.html

[93]See Shakti Vahini v. Union of India and Ors 7(2018) 7 SCC 192 8AIR 2018 SC 1933 Where the Supreme Court held that "The choice of an individual is an inextricable part of dignity. for dignity' cannot be thought of where there is erosion of choice…When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation." and in Shafin Jahan v. Asokan K.M, it has been clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution: 2018 (5) SCALE 422 In Anuj Garg v. Hotel Assn. of India [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), it was held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life to express themselves and to choose which activities to take part .

[94]K.S. Puttaswamy & Anr. v. Union of India &Ors., (2017) 10 SCC 1

[95]Writ Petition (Civil) NO. 231 OF 2010 decided on 27 March, 2018 see also National Legal Services Authority v Union of India 145 ("NALSA")

[96]WP (Criminal) No. 359/202, decided on 08.02.2021

Dwelling on the meaning of autonomy of individuals, Ackermann J of South African Supreme Court in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*[97] lucidly observed:

> "Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. ... It is not for the state to choose or to arrange the choice."

The positive right to privacy entails an obligation of states to remove obstacles for an autonomous shaping of individual identities.[98]

The Law Commission of India has shown eagerness to sail with the wind of change by observing in its 242 Report as follows:

> "4.1 The autonomy of every person in matters concerning oneself – a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well being is deeply connected to a free social order. Coercion against

[97] 1999 (1) SA 6 (CC) 275 PART K

[98] Anna Jonsson Cornell, "Right to Privacy", Max Planck Encyclopaedia of Comparative Constitutional Law PART Q

> individual autonomy will then become least necessary."[99]

In a recent decision of the Allahabad High Court in *Smt. Safiya Sultana Thru. Husband Abhishek Kumar Pandey and anr* v. *State of U.P. Thru. Secy. Home, Lko. & Ors*. [100], J. Chaduhary sounded a word of caution by holding that it would be imprudent and unethical to force the present generation living with its current needs and expectations to follow the customs and traditions adopted by a generation living nearly 150 years back for its social needs and circumstances, which violates fundamental rights recognized by the courts of the day.

Individual's autonomy is integral to right to privacy and cannot be viewed differently, except that it is a positive right enabling an individual to make choice and decide by his own free will how best he/she can serve his interest. The right to autonomy gets coloured when there is an external interference, be it that of a state or of any Individual. The prenuptial agreements derive strength from the doctrines of 'right to leave alone' and 'right of autonomy in choice'. When the two adults are by their free will without any fraud or force scripting their destiny through prenups, they are exercising their right of autonomy and are praying that they be left alone in exercise of their free choice. Right to privacy and right to choose are now undeniably fundamental rights and there cannot be any blanket ban in the exercise of these rights. It is made clear here that by this reasoning the prenuptial agreements are not elevated to the status of fundamental rights. Nevertheless, they have roots in fundamental rights and thus cannot be *per se* declared invalid. To declare these agreements out rightly invalid without screening them through the lens of relevant laws would tantamount to denial of exercise of one's autonomy right. Even otherwise, when a sane adult can choose by his / her free will his /

[99]242nd Report submitted by the Law Commission of India, namely, "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework"

[100]Habeas Corpus No. - 16907 of 2020 decided on 12-01-21

her partner by exercising right of autonomy, why he/she cannot choose terms and conditions governing that marriage by exercising right of autonomy which do not in any way contradict the prescribed requirements of law?

8. Special Marriages Act, 1954

The Special Marriages Act is the most modern legislation facilitating marriages between the two consenting couples of any faith, caste or creed subject to conditions mentioned therein. [101] This Act attempts to mitigate the rigour of personal laws of the adult couple who want to solemnise their marriage without the conflicting religious rituals but have documentary proof in the form of registration. It was proposed in a meeting of the stakeholders with the Union Women and Child Development Ministry to amend the Special Marriage Act to allow prenuptial agreements to be registered if a couple wants their rights to be pre-determined before marriage. There was, however, no such commitment from the Government side.[102]

[101]Section 4. Conditions relating to solemnization of special marriages. - Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:— (a) neither party has a spouse living; 3 [(b) neither party— (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (iii) has been subject to recurrent attacks of insanity 4 * * *;] (c) the male has completed the age of twenty-one years and the female the age of eighteen years; 5 [(d) the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship;

[102]"It is too early to reach a conclusion on this matter. One of the suggestions given was to amend the Special Marriage Act to allow prenuptial agreements to be registered if a couple wants their rights to

This suggestion is not only devoid of any merit but it is bound to raise many more issues. First, there is a mistaken belief that prenuptial agreements are not legally valid[103]. As discussed above, there is no blanket prohibition for executing prenuptial agreements and to hold otherwise will amount to denial of exercise of fundamental right to autonomy. Second, the Special Marriages Act is not free from criticism. It is not that all marriages are contracted under this Act[104] and to bring prenuptial agreements under the banner of this Act would be viewed with great circumspect, especial by the communities that are against the adoption of Uniform Civil Code. Third, a large number of marriage partners will be left out by this move, who wish to have prenups but at the same time would like to have their marriages celebrated with traditions and religious fervour and not under the Special Marriages Act. Fourth, there is no added advantage of ease or enforceability in integrating prenups with Special Marriages Act. Fifth, there is no need to amend Special Marriages Act for paving way for registration of Penups as the Registration Act is in force for the parties interested in registering their contracts.

9. Applicability of Registration Act to Prenups

The stakeholders in a meeting with the Union Women and Child Development Ministry[105] mooted a proposal for amendment of the Special Marriages Act for facilitating registration of the Prenups, ignoring the Registration Act, 1908. This later Act, broadly

---

be pre-determined before marriage. We will have to assess its feasibility," https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legal-backing-govt/story-1AK9s4oUMRT6eGdKtDgbYM.html Updated: Mar 26, 2018, 23:07

[103] Ibid

[104] Allahabad High Court observed that only fewer numbers of marriages are taking place under the special Harringss Act, 1954 Supra note 100

[105] Supra note 102

[106] Section 10 reads: All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

speaking, makes registration of some documents compulsory and some optional. Section 17 provides a long list of documents which have to be compulsorily registered. Section 18 makes registration of listed documents optional. Clause (f) of section 18 is a residual clause which expressly provides that all other documents which are not required to be registered under section 17 can also be registered. The registration of documents not falling under section 17 is optional and parties are free to get them registered. There is no bar of registration of any document and registration of pre-nuptial agreement is possible under the Registration Act. There is no need to amend any law for facilitating registration of prenuptial agreements for their record and proof in case of dispute of the parties.

10. Scope of Prenups in the Indian Contract Act

The Indian Contract Act, 1872 is a mother legislation from which all contracts derive their validity. The contractual capacity of women has been recognized by the Indian Contract Act by making conditions of a valid contract gender neutral. This Act lays down minimum requirements for a contract to satisfy[106] so as to be enforceable by law which includes (a) free consent of the parties (b) parties competent to contract (c) lawful consideration and (d) lawful object and declares that every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.[107]

These requirements equally apply to pre-nuptial agreements and when these requirements are satisfied in a given prenup, it is valid and binding upon the parties. The first condition to satisfy is the free consent of the parties and the consent is said to be free when

[106]Section 10 reads: All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

[107]Section 11 of the Indian Contract.

it is free from coercion, fraud, undue influence, misrepresentation and mistake.[108] These expressions have been explained by the courts from time to time and have now well settled meaning free from any ambiguity. The second condition is that the parties must be competent to contract. Section 3 of the Indian majority Act, 1875 provides that a every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before. However, in case of a minor for whose person or property or both a guardian has been appointed by a court, or of whose property the superintendence is assumed by a court of wards, before the minor has attained the age of eighteen years, when he has completed age of 21 years. This provision is not in harmony[109] with *Section 60(1) of the Indian Christian Marriage Act, 1872; Section 3(1)(c) of the Parsi Marriage and Divorce Act, 1936[110]; Section 4(c) of the Special Marriage Act, 1954; Section 5(iii) of the Hindu Marriage Act, 1955; Section 2(a) of the Prohibition of Child Marriage Act, 2006. In all these enactments, the marriageable age for male is 21 years and for female 18 years and in case of Muslim Law it is the age of puberty that is considered as an age for valid marriage.*

Where marriage partners satisfy both these Acts, (Indian Contract Act and the Act Governing their marriage) the prenuptial agreement executed by them is valid, subject to the satisfaction of

[108] Section 13 of the Indian Contract Act

[109]Two petitions have been filed in Rajasthan and Delhi High Courts about this age difference between male and female and now another petition has been filed before the apex court for common order on the ground that while men are permitted to get married at the age of 21, women are married when they are just 18. The distinction is based on patriarchal stereotypes, has no scientific backing, perpetrates de jure and de facto inequality against women, and goes completely against the global trends.

https://www.indialegallive.com/constitutional-law-news/supreme-court-news/uniform-marriage-age-supreme-court-ashwini-kumar-upadhyay/ last visited on 02-02-21

[110]This Act declares marriage between the parties below than the prescribed age is not valid .

other conditions. The question arises about the male who is below 21 years of age and has entered into marriage contract with pre-nuptial agreement. Will this prenuptial agreement be valid? The Indian Contract Act will become a general Act as against the enactments governing personal laws. In such cases, the validity of prenuptial agreement has to be determined on the basis of the personal laws in addition to Indian Contract Act. Pertinently, all these enactments, accept Parsi Act[111], either prevent or punish solemnizing of marriage below the prescribed age but does not declare it void or illegal and underage marriages are irregular under Muslim Law and child begotten out of this wedlock is legitimate. It can be argued that when the marriage itself is not void so should not be any contract incidental to it (prenups) However, there may be still an argument that a prenuptial agreement relating to marriage that is in contravention of the Act be not considered as valid as it implies or defeats provisions of law. This may hold true for prenuptial agreements only and not for post nuptial agreements because in the latter case the marriage is already contracted and only then post-nuptial agreement is executed. It can be further argued that the prenup in such case will not be for facilitating 'child marriage' but as usual to address post marital issues.

The third condition for the validity of a contract is that consideration or object must be lawful and it is declared so unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral or opposed to public policy.[112]

The doctrine of public policy has been discussed above in detail. The changing nature of morality as a ground for vitiating validity of the contract is in no way different from public policy doctrine. The legal position that contracts *contra bonos mores*----contrary to

[111]See Section 3 of the Parsi Marriage and Divorce Act, 1936 which declares under age marriages invalid

[112]Section 23 of the Indian Contract Act

good morals are void was confined to sexual immorality. Today, courts may not like to adopt this traditional approach involving extra marital cohabitation[113], especially in a situation when the Supreme Court of India has already declared sections 497 and 198(2) of IPC and Cr. PC, respectively relating to adultery as unconstitutional[114] and has legalized live in relationships[115] and same sex marriages and declared section 377 of IPC unconstitutional[116] which is now gaining acceptance in the community[117]. In the words of an Australian Judge, "the social judgments of today upon matters of immorality are as different from those of the last century as is the bikini from the bustle."[118]

The analysis of these requirements (Section 10) would reveal that there is no law in India expressly forbidding prenuptial contracts. Initially, the prenups were disallowed by the courts on the plea that these agreements either are providing provision for divorce or encourage it that defeats Hindu law on marriage which considers marriage a permanent union. As discussed above, all the personal laws including the Hindu Marriage Act, 1955[119] as well as Special Marriage Act, 1954[120] provide now provisions for divorce and remarriage so this objection to prenups is now no more valid. The other above enlisted requirements cannot be said as laying any general rule of prohibition but have to be applied to a given prenuptial agreement and then to decide on case-to-case basis. For instance: A prenuptial agreement to have property raised after marriage in joint name of the couple is valid but a contract

[113]Dwyer (1977) 93 LQR 386

[114]*Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.*

[115]See for instance: *S. Khushboo* v. *Kanniammal* (2010) 5 SCC 600.; *Revanasiddappa* v. *Mallikarjun* (2011) 11 SCC 1 : (2011) 2 UJ 1342; *Madan Mohan Singh* v. *Rajni Kant*,(2010) 9 SCC 209.

[116]Navtej Singh Johar v. Union of India, Writ Petition (Criminal) no. 76 of 2016 decided on September, 2018

[117]https://en.wikipedia.org/wiki/LGBT_rights_in_India#cite_note-delhi-12

[118]Per Stable J. Andrews v. Parker (1973) Qd R93, 104

[119]Sections 10 and 13

[120]Sections 27 and 28

between couple not to procreate child or girl child[121]is against public policy and morality. Similarly, a Hindu couple agreeing that husband can live bigamous life or a dispute between them cannot be taken to any court of law will be declared against public policy.
This is the reason that the English Supreme Court in *Radmacher* v. *Granatino[122],* held that the prenuptial agreements are binding agreements and the apex court on the basis of section 34 of Matrimonial Cases Act, 1973 held that the award of maintenance by court cannot be ousted but that will not render financial arrangements void or unenforceable[123].

11. Status of Prenuptial Agreements in the Indian Contract Act

The Common Law did not insist on intention as a separate condition for creating the legal relationship until 19th Century[124] but it is now well settled in England that an agreement will not be enforceable unless it can be reasonably read as having been made in contemplation of legal consequences[125]. This is the reason that family arrangements were not enforced in England for want of required intention[126]. *Bankes L J* went a step ahead by holding that it follows as matter of course that the parties in case of arrangements regulating social relations do not intend legal consequences to follow and it equally follows as matter of course that in regulating business relations the parties intend legal consequences to follow.[127]
English authors have not shown unanimity on the separate

[121]Even this may not be considered against public policy in future. For instance, where marriage partners were having children during their live-in relationship and subsequently decided to formally marry and sign a prenup containing one of stipulations that they will not have now any child.
[122] (2010) UKSC42, (2011) 1AC 534 P.52
[123] Sutton v.Sutton (1984) Ch.14
[124] Simpson (1975) 91LQR 247, 263-5
[125] Anson's Law of Contract, (29th Ed. 2010) P.74
[126] Balfour v. Balfour (1919) 2 KB 571
[127]McGregore v. McGregor (1888) 21QBD 424

requirement of intention for enforcing a family contract. *Williston* has contended that the Common Law does not require any positive intention to create a legal obligation as an element of contract and that deliberate promise seriously made is enforced irrespective of the promisor's view regarding his legal liability[128]. *Anson* believes that this view point of *Williston,* though, commands respect, yet there are difficulties in the way of its acceptance[129]. After giving cogent reasons, the learned author concludes that an intention to create legal relation is essential to the formation of a contract in English Law and in approval cites *Radmacher* v. *Granatino*[130] wherein the English Supreme court took the view that pre-nuptial agreements are enforceable by law. *Cheshire and Fifoot* have lent their support to the opinion of *Williston* not only as emanating from a distinguished American jurist, but as illuminating the whole subject.[131]

India, being traditional aligned to Common Law jurisdiction, it has absorbed influence of Common Law principles in the judgments pronounced by the constitutional courts from time to time. The apex court in *CWT v. Abdul Hussain*[132], has expressed its reservation about the need of this separate requirement of intention to create enforceable contract and endorsed *Williston* by accepting that it was a necessity of those systems where consideration was not a requisite of enforceability. This academic debate aside, prenups cannot be called as 'claptraps' as held by the apex court in India with reference to promises made on loud speakers.[133]but they are serious stipulations between the parties who are either tied or to be tied in a marriage bond that would form their charter for their marital relations that have to sail through thick and thin. Much water has flown in river Thamas since family relations were considered bereft of legal validity.

[128] Williston on Contracts Vol. 1 para 21
[129] Supra note 124 P. 75
[130] (2010)UKSC42
[131] Cheshire and Fifoots Law of Contract 97 (10th Ed.)
[132] (1988) 3 SCC 562,569
[133]Banwari Lal v Sukhdarshan Dayal, (1973) 1 SCC 294

Today is an era of gender equality not only in terms of resource distribution but also in terms of capacity to contract and to work independently as well as autonomously. Today, family relations executed through prenups are well thought out arrangements to meet out any foreseeable eventuality.

There is no express provision in the Indian contract Act that makes prenuptial agreements unenforceable. These agreements are not in any way different from the general agreements that are covered under the Indian Contract Act and their validity has to be determined on the basis of their subject matter. The prenuptial agreements will vary in content that will make them either valid or voidable or void. The agreement to give movable or immovable property by the husband to his wife or vice-versa for contracting marriage or for marriage already contracted is valid as in first case marriage itself is a consideration and in second case a contract without consideration is valid under section 25(2) when it is made on account of love and affection. The condition that in case of dispute no party can approach to the court will be void under section 28 of the Indian contact. However, to confine jurisdiction on one court, out of two or more courts, having jurisdiction on the same matter will be valid.[134]The prenuptial agreement cannot be in derogation of law[135] but can be in addition to law.

The stipulations put in a prenuptial contract will determine its status. A prenuptial contract may be a simple contract that will take effect immediately, for instance, exchange of gifts or it may be about the sharing of proceeds of joint investment or joint property, or a contingent contract that will take effect upon the

[134]See: Raigarh Jute and Textile Mills Ltd v. New Haryana Transport Co. (1994)MPLJ 625; Dilip Kumar Ray v. Tata Finance Ltd, AIR 2002 Ori.29; Shashi Agarwal v. Chairperson Debt Recovery Appellate Tribunal, Allahabad, AIR 2009 All.189

[135] A Prenuptial Agreement in derogation of law can be said to be against public policy as the law shall be deemed to be embodiment of public policy. See Mahesh Chandra Dwivede v. State of UP AIR 2009 (NOC) 205 (All.); Chandrasshekar G.Sullad v. Tuheed Co-operative Housing Society (regd) AIR 2009 (NOC) 264 (Kar)

happening of some event, for instance, transfer of spouse from the present place of posting, superannuation, child not born, separation, divorce, death of any spouse, custody of child, division of the joint property or assets and liabilities of the couple, alimony, maintenance, etc.

The prenuptial agreements may be executed either out of bond of love and affection or when there is discord between the couple but then they have settled down and out of their respective experiences have scripted their post nuptial agreement. In both these cases, parties have *consensus d idem.* They have coolly thought over their respective interests in order realise their paramount interest of marriage or its continuance. Their mindset will be different from the mindset which they will have at the time when they will be pitted against each other with a paramount interest to serve their respective egos.

12. Application of Blue Pencil Rule to Prenups

It is quite possible that prenups may contain many stipulations. Where all the conditions are in resonance with legal provisions, prenup is valid like any other contract. Where any condition is against public policy or morality or has unlawful object and the rest conform to the prescribed legal requirements, then the established principles of severance has to be applied to such prenup. Where it is possible to separate illegal portion of the contract from the rest of the agreement, the 'blue pencil rule' can be applied which means that severance can be executed when the part severed can be excluded by running a blue pencil through it[136]. However, it is to be remembered that the illegal promise to be severed must not form main consideration[137] and should not alter the agreement.[138]

[136]Supra note 124 p.457. The blue pencil can be run through the illegal/invalid portion of the contract so that it is separated from the legal portion of the contract which will be then implemented.

[137] Carney v. Herbert (1985) 1 AC301

[138]Kuenigl v. Donnersmarck (1955) 1 QB 515,538

13. Conclusion

The prenups are gaining popularity and are not now confined to elite class only. There is a mistaken belief that these agreements are unenforceable as they are against public policy and impracticable. Their opposition stems from the wrong notion that if these prenups are formally legalized they will encourage divorce. It has been found that the prenups are not different from general contracts and there is no express or implied provision of law declaring prenups as unenforceable nor can there be any judicial ruling declaring as a general rule that these agreements are invalid. Each agreement has to be tested on the principles of validity prescribed in the Indian Contract Act and relevant enactment governing personal laws.

These agreements have roots in the fundamental right of choice and right to leave alone and cannot be brushed aside by declaring all prenups unenforceable. They can promote public policy by giving equal opportunity to marriage partners to get their interests accommodated in the agreement. They can provide easy solution to the most contentious issues which take courts years together to resolve. They can provide in built mechanism of mediation, arbitration and resolution and thus will further public policy. These agreements will dissuade parties from pronouncing divorce on flimsy grounds as both the parties will be on equal footing, instead of encouraging divorce as is the general notion.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 60-79

An Insight into the Applicability of Plea Bargaining in India in Light of Judicial Pronouncements

Mohammad Ashraf [*]
Absar Aftab Absar[**]

Abstract
There has been a recent debate as to how to counter the problem of pendency of cases effectively without losing the essence of justice delivery system. In India, besides Plea Bargaining, compounding of offences is also possible. The time-tested procedure was always adopted by the stake holders, instead of the novel Plea Bargaining, which came in 2006. This paper analyses judicial approach to the procedure of Plea Bargaining, by providing a succinct account of all the major cases related to Plea Bargaining. The cases pertain to the pre amendment era, a buffer era and a post amendment era. The fact that there is very less awareness among the stake holders of the Plea-Bargaining procedure and over dependency on the compounding of offences that has really shadowed the utility of the Plea-Bargaining procedure and rendered the positive views of the judiciary in vain. The paper argues that despite the positive response from the judiciary, the procedure of Plea bargaining is heavily under-utilized which indicates towards the requirement of a major overhaul of the procedure itself.

Keywords: Plea Bargaining, Criminal Law Amendment, Malmath Committee, Law Commission Report, Mutual Satisfactory Deposition

1. Introduction

In India, since the independence, there is one persistent problem which is still haunting our justice administration system, i.e., pendency of cases. Many techniques have been tried and tested, but to no avail. The compounding of offences is one of the first and foremost step towards reducing the pendency of cases but that also did no wonders.

[*] Professor and Dean, Faculty, of Law, Aligarh Muslim University, Aligarh, Uttar Pradesh, India
[**]Research Scholar, Department of Law, Aligarh Muslim University, Aligarh, Uttar Pradesh, India. email: absaraftababsar@gmail.com

Recently, Criminal Procedure Code adopted a novel procedure of Plea Bargaining, taking cues from several nations which have somewhat established jurisprudence on the subject, one of that is United States of America. The article without delving into the depths of Plea Bargaining, shall purely reflect on the judicial pronouncements and the views of the Judiciary regarding the Plea Bargaining. The model of Plea Bargaining, though a successful procedure in itself in the United States and has an astounding rate of success, has got little or dismal progress in India. The judiciary in the United States was almost against such a bargaining procedure, where the convicts would get some sort of benefit, eventually advocated for it owing to the rising number of cases. Somewhat same was the scenario in India that due to the inherent drawbacks with the procedure and the concept of Plea Bargaining, it was heavily criticized by the Judiciary to the extent that no one really expected that it could be a part of the Criminal Procedure Code. But, owing to the lingering problem of pendency of cases, the legislature had to yield to the recommendations of the Law Commission of India to bring a model of Plea Bargaining in India 'tailored' exclusively for the Indian conditions.

The amendment was brought in 2006 and the Plea Bargaining became part of the criminal justice system. It has been more than a decade, but the problem of pendency of cases persists and the plea bargaining has not brought any appreciable change. The paper elaborates the views of the judiciary in the pre amendment phase, and then how the ground was created for making amendment and analyses the approach adopted by the judiciary in an attempt to make plea bargaining in India successful.

The conclusion includes some suggestions in brief as to how to make the Plea-Bargaining procedure in India at par with the United States model without losing the humanistic approach, i.e., victim's participation in the administration of justice.

2. Scenario before the Advent of Plea Bargaining in India

Before the advent of plea bargaining in the Indian legal system in 2005, the attitude of courts was not accommodative of plea

bargaining and in a number of judgments, it was considered against the public interest and even in violation of fundamental rights. In some of the cases, plea bargaining was considered against the fundamental principles of the law and the justice and has even been termed illegal and in complete defiance of the instructions and guidelines of the Supreme Court. The Higher Judiciary, in general, has not liked the idea of reducing the sentence to the extent that it is even less than the minimum prescribed sentence for the offence for which the accused has pleaded guilty. Most of the judgments of pre-2005 period have considered plea bargaining in violation of Article 21 of the Constitution.

Some of the cases reported below clearly indicate the attitude of the Indian judiciary towards plea bargaining in the pre-2005 period.

a) In *Madanlal Ram Chandra Daga* v. *State of Maharashtra*[1], the Supreme Court of India observed that, in our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to a bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court.
b) In *Murlidhar Meghraj Loya* v. *State of Maharashtra*[2] (1976), on the other hand, the apex court made the observations that the plea bargaining belongs to American system which does not have a place in our criminal justice system and that it does not seem logical that a tripartite agreement is arrived at with the sole motive that the accused gets a lenient punishment.

[1] 1968 3 SCR 34 (at p.39) : AIR 1968 SC 1267 at P.1270: 1968 Criminal Law Journal 1469 at P. 1472.

[2] AIR 1976 SC 1929.

c) In *Kasambhai Abdul rehmanbhai Sheikh etc*. v. *State of Gujarat*[3](1980), the accused was convicted under S 16(1) (a) (i) read with section 7 of the Prevention of Food Adulteration Act-1954 by the Magistrate on the basis of plea bargaining and he was imprisoned till the rising of court and a nominal fine. The High Court in suo moto proceeding enhanced the sentence to 3 months imprisonment and fine ₹ 500/-. That order of the High Court was challenged in the Supreme Court of India which held that plea bargaining is contrary to public policy to allow a plea of guilty in exchange of a lighter punishment and that plea bargaining is unreasonable, unfair, unjust and in violation of the ambit of Article 21 of the Constitution. The Court said that the leniency in punishing the accused would encourage corruption and conspiracy and contribute to lowering the standard of justice. The Court held the conviction based on Plea Bargaining illegal and unconstitutional.

d) In *Kachhia Patel Shantilal Koderlal* v. *State of Gujarat*[4] (1980), The Supreme Court characterized Plea Bargaining as a practice that encourages corruption and opined it as unethical as it can force innocents to accept guilt just to get rid of agonizing court trials. The expensive trial could easily be done away with by Plea Bargaining and secondly Judges may hold innocents as guilty owing to this faulty nature of the procedure and also let off the convicts with lighter punishments.

e) In *Hussainara Khatoon & Others (I)* v. *Home Secretary, State of Bihar*[5] (1979), the Court highlighted the importance of having a reasonably expeditious trial procedure which should be fair and just. In reference to the situation being faced by undertrials in country the court stressed upon that not having

[3] AIR 1980 SC 854.
[4]1980 Criminal Law Journal 553.
[5] 1979 AIR 1369, 1979 SCR (3) 532.

a trial procedure which is quick, fair and reasonable is falling foul of Article 21.

f) In *Ganeshmal Jashraj* v. *Government of Gujarat*[6], the Supreme Court had set aside the order of the High Court which had enhanced the sentence pronounced by the Magistrate on conviction under Prevention of Food Adulteration Act, 1954. The High Court enhanced the sentence citing the reason that the sentence does not fall in line with the punishment provided in the Act itself. The Supreme Court negated the High Court owing to the reason that when Plea Bargain has been entered into then evidences becomes less significant and the admission of guilt takes the centre stage.

g) In *Thippaswamy* v. *State of Karnataka*[7] (1983), the court held it to be in violation of Article 21 if an accused is lured to admit guilty on promise of handing over lighter punishment. The court of revision or appeal and the trial court should act in the best interest of justice dispensation.

h) *Kirpal Singh* v. *State of Haryana*[8] (1999) involved IPC sections 392 and 397 with provision for a minimum punishment of 7 years of rigorous imprisonment. It was held that the system of Plea Bargaining is in violation Article 21 as none of the High Court or Trial courts have power to ignore the minimum prescribed punishment as rule according to the one provided in Plea Bargaining scheme.

i) In *State of U.P.* v. *Chandrika*[9] (2000), the constitutionality of plea bargaining was evaluated by the Supreme Court in context of Article 21 of the Constitution of India and it was observed that plea bargaining was against public policy under the criminal justice system of India. The Court was of the view that the concept of negotiated settlement had no place in

[6] 1980 AIR 264, 1980 SCR (1)1114.
[7] AIR 1983 SC 747, 1983 Cri. LJ 1271, (1983) 1 SCC 194.
[8] (1999) Cri. LJ. 5031, (1999) 5 SCC 649.
[9] (2000) Cri. LJ. 384.

criminal justice and this method of short circuiting the conventional trial procedure need not be encouraged at all.

j) In *State of U.P*. v. *Nasruddin*[10] (2000), a case under section 304 IPC, the apex court expressed views against plea bargaining in context of the quantum of sentence and held that the sentence awarded was not permissible under the law.

Some High Court judgments with reference to matters related to plea bargaining may also be mentioned.

a) In *V.K. Bhatt, Provident Fund* v. *Aryodaya Ginning Mills Limited*[11]*,* the court deplored the implementation of plea bargain by lower judiciary and observed that the law and the justice have not been given due consideration in the matter of the statutory minimum sentence in total defiance of High Courts and the Supreme Court which have repeatedly denounced plea bargaining.

b) In *State of Gujarat* v. *Tha. Somaji Jamaji*[12] again the court denounced the practice of plea bargain and stated the same as illegal. It was stated that the impugned orders of sentence were illegal and perverse and suffers from the patent vice of the plea bargaining.

c) In *State of Karnataka* v. *Benoy Thomas*[13]*,* a unique judgement whereby in appeal by the State, the High Court upheld the fine imposed and also handed over a rigorous imprisonment of one year for the convicted for not opting to challenge the charge against him but opting for Plea Bargaining. The reason dominated in the minds of Judges was once again the practice of Plea Bargaining being in violation with Article 21.

[10] (2000) Cri. LJ. 4996.
[11] 1996 (2) Gujarat Law Reporter 38.
[12] 1994 Cri. LJ 3458.
[13] Indian Law Review 1997 Karnataka 186.

3. Preparing the Ground for Plea Bargaining

Although plea bargaining was introduced in the Indian legal system in 2005 through a Criminal Law Amendment Act, it was 37 years earlier in 1968 when probably for the first time bargaining for leniency in sentence in exchange of pleading guilty was argued in the Supreme Court of India. Justice M. Hidayatullah delivered the judgment in *Madanlal Ram Chandra Daga* v. *State of Maharashtra* and observed that

> "punishment should be according to the guilt of accused deduced after the trial and not based on bargains. Rejecting the very concept of plea bargaining, the judgment advised the High Court concerned for desisting from becoming a party to plea agreement**.**" [14]

Subsequently, there were a number of cases, as mentioned above, but the stand of the Supreme Court remained unchanged and it practically refused to accept the validity of the concept of plea bargaining in the Indian criminal justice system on grounds of legality, public policy and constitutionality.

From the Government's side, the first serious attempt for incorporating plea bargaining in the Indian legal system was in 1991 when the Law Commission of India submitted its 142nd Report[15] to the Government making strong recommendation for introducing plea bargaining. This report, at the outset, mentions shortcomings of the Indian legal system, such as; common delays of 3 to 4 years in disposal of criminal trials, appeals taking 5 to 8 years to be decided in High Courts and undertrials being in prisons for a period of 5 to 8 years. The report, on grounds mentioned above, has recommended introduction of plea bargaining as a mitigating measure for bringing efficiency in the administration of

[14]1968 3 SCR 34 (p.39): AIR 1968 SC 1267 at P.1270

[15]Law Commission of India, 142nd Report on Concessional Treatment for Offenders who on Their initiative choose to Plead Guilty without any Bargaining (1991) http://lawcommissionofindia.nic.in/101-169/report142.pdf, last accessed on 3rd August, 2020

criminal justice system and in this context has given example of outstanding success of plea bargaining in USA and recommendations of the Canadian Law Commission which also had favoured introduction of plea bargaining in Canada. This Report further says that there is a scope of introducing plea bargaining in India as in offences related to Cr.PC sections 206(1), 206(3) and section 208(1) of Motor Vehicle Act-1988, pleading guilty in exchange of a lighter sentence or fine is permissible though there are no provisions of any negotiations for making the accused plead guilty.

Most significant recommendation of the report is about the competent authorities for handling plea bargaining cases. For offences with provision of punishment of less than 7 years imprisonment, Metropolitan Magistrates or Magistrates of First Class may be designated as the Plea Judges. For offences with punishment of 7 years or more, the competent authority would be empowered to constitute a committee comprising two retired judges of High Court appointed by the concerned State Government in consultation with the High Court.

Recommendations of the 142nd Report were reiterated in the 154th Report of the Law Commission[16] submitted to the Government in 1996 in which plea bargaining has been discussed in Chapter XIII. That the 154th Report is in total agreement with the earlier 142nd Report is clearly indicated by the statement that "the justification for introducing plea bargaining cannot be expressed any better than what the Twelfth Law Commission in its 142nd Report had already done."

The report further says that,

> "We recommend that the concept may be made applicable as an experimental measure to offences which are liable for punishment with

[16]Law Commission of India, 154th Report on The Code of Criminal Procedure, 1973 (Act no. 2 of 1974), 1996 http://lawcommissionofindia.nic.in/101-169/index101-169.htm, last accessed on 3rd August, 2020

> imprisonment of less than 7 years and/or fine, including the offences covered by section 320 Cr.PC. Plea bargaining can also be in respect of the nature and gravity of offence and the quantum of punishment."

The Malimath Committee[17] referred to the 142nd report and enumerated various advantages of introducing plea bargaining in the Indian criminal justice system, such as; speedy trial, minimising litigation cost, and dispensing off anxiety which one develops due to prolonged trials. Further, it would provide a new life to the accused after undergoing a shorter sentence. The Malimath Committee in its report mentions that the Committee was substantially in agreement with the views and recommendations of the Law Commission in its 142nd and 154th reports for promoting settlement of criminal cases without trial. However, the Committee expressed the view that in addition to the offences prescribed in the Code as compoundable with or without the order of the court there are many other offences which deserve to be included in the list of compoundable offences. The Committee recommended that the crimes which are victim centric and does not deeply impact the society, those should be adjudged without trial. The Committee further observed that many more offences should be added to Section 320 (1) of Cr.P.C. and the offences which are made compoundable by the leave of court should also be enlisted to be compoundable without the leave of the court.

Paradigm Shift in the Approach of Plea Bargaining

After the submission of the Malimath Committee Report in 2003, the ground was clear for the introduction of plea bargaining to country's criminal justice system. In view of this, judgments in some of the cases, taken up during the period from the submission

[17]Ministry of Home Affairs, Government of India, Report of the Committee on Reforms of Criminal Justice System (Malimath Committee Report), March 2003: http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf, last accessed on 3rd August, 2020

of the Malimath Report to the introduction of the Criminal Law Amendment Act-2005 were not so critical of plea bargaining. Particularly worth mentioning in this context is *State of Gujarat* v. *Natwar Harchandji Thakor*[18], in which the Gujarat High Court indicated towards the expeditious nature of Plea Bargaining and recognizing how direly the judiciary of the country is in need of fundamental changes in the system and Plea Bargaining is one of them, providing easy, cheap and expeditious justice. The court observed that there should not be anything static and plea bargaining is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms[19].

In *Natwar Harchandji Thakor* case[20], the court, while holding and making it clear that Plea Bargaining is not permissible, interestingly, drew a distinction between Plea Bargaining and Plea of Guilt[21], and also highlighted the necessity of plea of guilt being raised by the accused at a stage which is provides in the Statute and on the basis of which the discretionary power of Trial court judge in pronouncing the sentence should not be mixed with Plea Bargaining or treated in the similar manner. The Court also added in this context that;

> "Whether, 'plea of guilty' really on facts is 'plea bargaining' or not is a matter of proof. Every plea of guilty, which is a part of statutory process in criminal trial, cannot be said to be a plea bargaining. It is a matter requiring evaluation of factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a plea bargaining and not a plea of guilty. It must be based upon facts and proof not on

[18]*State of Gujarat v. Natwar Harchandji Thakor*, (February 22,2005), 2005 Cri. LJ.2957.

[19]*Supra* note 1, 1.

[20]*Supra* note 20, 7.

[21] The case was decided on February 22, 2005, whereas the Criminal Law Amendment Act-2005 was passed on January 11, 2006 and came into effect on July 5, 2006.

> surmises without necessary factual supporting profile for that."

Section 240(2) provides for acquainting the accused with charges against him and asking whether he pleads guilty or not. Section 241 empowers the magistrate to record plea and practice his discretion in convicting him though it is not mandatory for the magistrate to hold him convict even after the accused pleads guilty and may order trial for the same. Likewise, other sections like Sections 228 (2), 240 (2), 252 and 253 should not be confused with Plea Bargaining as they contain provisions related to 'pleading guilty' to charges.[22].

4. Criminal Law Amendment for Plea Bargaining

Based on the recommendation of the Law Commission, a new chapter on plea bargaining, in cases of offences punishable with imprisonment up to seven years has been included in CrPC and the same has come into effect from 5th July, 2006[23]. The relevant portion of the Criminal Law under Section 265 of the chapter on plea bargaining have also been shown in Fig. 1.

It is worth mentioning here that the provisions for plea bargaining under Sections 265-A to 265-L are not entirely consistent and in corroboration with the scheme recommended by the Law Commission of India in its 142nd and 154th Reports and endorsed by the Malimath Committee. The most significant deviation is in the provision of competent authorities handling plea bargaining matters. The Law Commission had recommended constitution of the office of Plea Judge, who could be a Metropolitan Magistrate or a Magistrate of First Class at the district level, to handle cases related to offences for which the prescribed punishment is less than 7 years. For offences with punishments of more than 7 years,

[22]*Supra* note 1 at 1.

[23]The Criminal Law (Amendment) Act – 2005 (No. 2 of 2006 Dated 11th January, 2006)
https://hyderabadpolice.gov.in/acts/TheCriminalLaw(Amendment)Act,2005.pdf

the Commission had recommended constitution of a committee comprising two retired judges of the High Court. The Criminal Law Amendment Act-2005 does not propose creating offices of the competent authorities and, therefore, implies using existing infrastructure for the purpose.

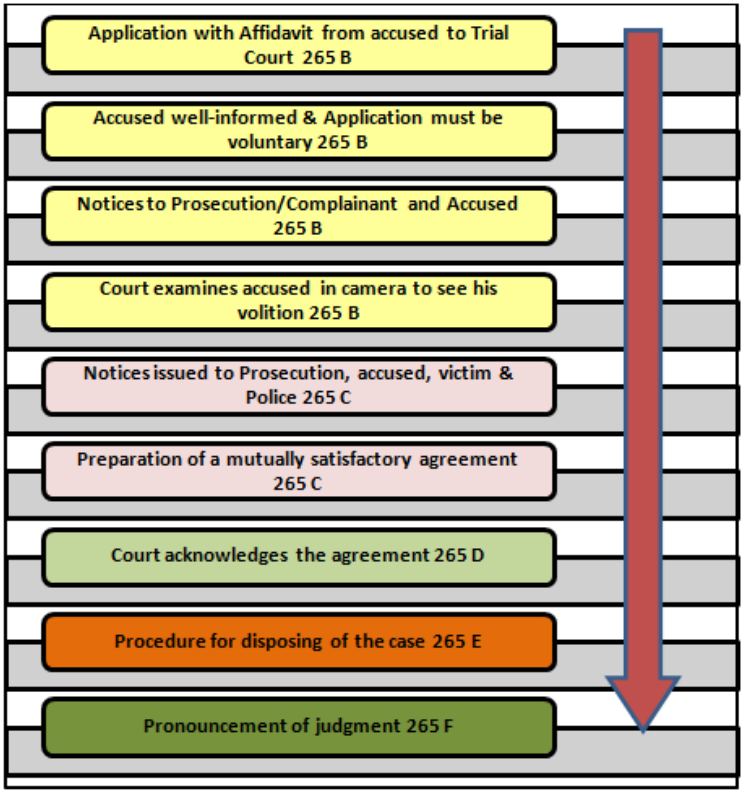

Fig. 1: Summary of Plea-Bargaining Procedure in India

5. Plea Bargaining based Judicial Pronouncements in India

State of Gujarat v. *Natwar Harchandji Thakor*[24] is a landmark case, decided after the submission of Malimath Committee Report in 2003. By this time, it was clear that Plea Bargaining would be introduced sooner than later. Gujarat High Court recognized the

[24]*Supra* note 20 at 7.

utility of Plea Bargaining to deal with huge arrears in criminal cases and observed that it shall add a new dimension in the realm of judicial reforms. Some of the cases for the period from 2007 to 2017 which have been decided after the enactment of the provisions of Plea Bargaining have been mentioned below. These are not necessarily landmark cases, but find frequent mention in the available literature.

a) After the Criminal Law Amendment Act-2005 came in to effect in July 2006, one of the first cases in the country decided on the basis of Plea Bargain was a case from Delhi, decided on 11th April, 2007[25]. The Trial Court sentenced accused to seven days in jail and fined him ₹500/- for barging into his neighbour's house ten years ago. By continuing with the trial and pleading guilty, accused could have been sentenced up to 3 years in jail. In his judgment, the Metropolitan Magistrate said, *"Since the accused has appealed voluntarily and both parties have reconciled, his sentence is reduced to seven days".*

b) Mr. Sakharam Bandekar, a senior officer of RBI, was accused of embezzling ₹1.48 crore from RBI between 1993 and 1997 and transferring the money to his personal account. He was arrested on 24th October, 1997 and later released on bail. The CBI Court took 10 years to frame charges against him finally on 2nd March, 2007. The application of the accused for plea bargaining on the ground of old age was opposed by CBI in view of the seriousness of charges to which the court agreed and he was made to face the conventional trial[26]. It needs to be pointed out here that the view of the CBI which the court accepted was not legally sound. This is because embezzling the public money (under sections 7 to 15 of

[25] *Chapter – 5, Plea Bargaining in India* http://shodhganga.inflibnet.ac.in/bitstream/10603/28181/12/12_chapter%205.pdf

[26] http://articles.timesofindia.indiatimes.com/2007-10-15/mumbai/27960117_1_plea-bargaining- application-sessions-court

Prevention of Corruption Act-1988) has maximum punishment of imprisonment of 3 to 7 years for which plea bargaining is permissible. In spite of the plea bargaining application of Sakharam Bandekar having been rejected, this case received wide publicity in print media as the public and the lawyers came to know for the first time that concessions in punishment are legally permissible after making confession as a part of plea bargaining.

c) In *Vijay Moses Das* v. *CBI*[27], V. *M. Das*, was accused of supplying poor material to ONGC at a wrong Port causing immense losses to ONGC. CBI initiated prosecution under sections 420, 468 and 471 of IPC and the accused proposed to take the benefit of Plea Bargaining to which ONGC and CBI did not object. Trial Court rejected the request due to deficiency in procedural formalities and the amount of compensation not being fixed. Moses appealed against the decision in the High Court of Uttarakhand and the appeal was disposed in his favour. In his judgment Justice Prafulla Pant observed that "V.M. Das is not previous convict. Therefore, this Court is of the view that after following the guidelines mentioned in Section 265-C of CrPC, the Magistrate should have disposed of the case after accepting the 'Plea Bargaining', as provided under Section 265E of Cr.P.C. It is pertinent to mention here that no useful purpose would be served by sending the accused / petitioner to jail by rejecting the application for 'plea bargaining' moved by the accused, who is a heart patient, aged 60 years, as mentioned in the affidavit, particularly, in view of the fact that out of the 60 witnesses only 03 witnesses could be examined after the trial began in the year 2002".

d) Another Plea Bargaining case involved three Mexicans and a Venezuelan national in a case related to stealing of diamonds. A Magistrate's Court on 25th May, 2011 accepted

[27] Criminal Misc. Application (C-482) No. 1037 of 2006, High Court of Uttarakhand at Nainital

a plea bargain application[28] from the accused persons and convicted them for stealing diamonds worth ₹ 6.6 crore. They were sentenced to 21 months rigorous imprisonment. It needs to be noted that the maximum punishment in such cases is usually seven years but in accordance with the provisions of Section 265-F of the Criminal Procedure Code, it may be reduced to 1/4th of the maximum permissible sentence for the given offence. The High Court granted bail to four convicts with bond of 1 lakh each and sureties of the same amount as the convicts underwent half of the term already. The High Court corrected the approach of the Magistrate's court which committed the convicts to 21 months of imprisonment citing the reason that Trial Courts are not provided with any discretion under the provision which provides for 1/4th of the maximum imprisonment of 7 years or 84 months.

e) The Bombay High Court's (Goa) judgment delivered on 13th July, 2011 in the matter of Mr. Okeke Nwabueze Nnabuike, a Nigerian national, is another example of Plea Bargaining in Indian courts. The High Court set aside the order of the JMFC rejecting application related to Plea Bargaining contending that it is mandatory for the courts to follow the procedures laid down related to the Plea Bargaining[29].

f) In *Ranbir Singh* v *State*[30], the sentencing of 6 months imprisonment and penalty of Rs. 5000 under section 304A IPC was pronounced for the petitioner, who challenged it on the pretext that he went for Plea Bargaining and also provided sufficient compensation to the victim. Being the sole bread winner for the family and support for the old

[28]*Four Foreigners Get 21 Months RI for Diamond Robbery* : Mumbai Mirror, May 25, 2011
https://mumbaimirror.indiatimes.com/%20mumbai/other/four-foreigners-get-21-mths-ri-for-diamond-robbery/amp_articleshow/16130277.cms

[29]*Ibid*.

[30]*Ibid.*

parents, the penalty was modified to fine of Rs. 1000/ and in default of which he would have a week's simple imprisonment.

g) The accused, Guerrero Lugo Elvia Grisselv and others were foreign nationals arrested for theft of diamond worth crores of rupees in August 2010. All the accused persons applied for Plea Bargaining under Section 265-B. The Additional Chief Metropolitan Magistrate examined the plea of the accused, as required under Section 265-B (4) of the Code, and recorded his satisfaction with respect to the application for Plea Bargaining from all points of view, such as, completion of procedural formalities, voluntary nature of the plea and mutually satisfactory disposition. As the testimonials provided by the convicted and the victim as to the satisfaction to Mutually Satisfactory Disposition, the convicted was handed over the imprisonment of 21 months which is 1/4th of maximum imprisonment of 7 years according to section 265 (F) of Code.

h) In *Guerrero Lugo Elvia Grisselv and others* v *The State of Maharashtra on 4th January, 2012*, the Bombay High Court Bench reviewed the procedure prescribed for Plea Bargaining[31]. The Court considered the question pertaining to the interpretation of Section 265 (E) of the Code and upheld that the Code does not provides any discretion to the Magistrate to commit the convicted for any sentence, except for1/4th of the maximum imprisonment prescribed and also held it to be unassailable.

i) In *Vinod Kumar Agarwal and others* v *CBI*[32], the accused in a case under the Prevention of Corruption Act, applied for availing the benefits of Plea Bargaining. The application of Vinod Kumar Agarwal and two others was, however, turned

[31]Guerrero Lugo Elvia Grissel v The State of Maharashtra http://indiankanoon.org/doc/173657747/.

[32]Vinod Kumar Agarwal and others v CBI dated May 20, 2015, Allahabad High Court, https://indiankanoon.org/doc/190475066/.

down by the Trial Court in Ghaziabad vide order dated 27th April, 2015. Feeling aggrieved by the said order the accused prayed for a revision at Allahabad High Court. It was argued by revisionists that vide order mentioned above the learned trial court rejected the application of plea bargaining on the ground that revisionists' case comes under the purview of exception clause and application for plea bargaining is not maintainable in the matter. The High Court in its decision dated 20th May, 2015 quoted various earlier judgments and turned down the prayer of defendants to provide them the opportunity of availing the benefits of plea bargaining. Major ground on which the judgement is based is that there were some glaring deficiencies with respect to the procedural formalities of Plea Bargaining application.

j) Next case is an interesting one as it originated in 1991 with the reported embezzlement in the State Bank of Travancore and the final judgment, based on plea bargaining clauses, was delivered in 2017. An FIR was filed against accused No.1 (former Manager, State Bank of Travancore) and two others by CBI Bengaluru on 31-12-1991 for offence punishable u/s 120B of IPC and u/s 420 in a matter pertaining to embezzling of over ₹ 25 lakhs from the bank through fraudulent means. On issuance of the summons to the accused, the accused No.2 and 3 appeared and were released on bail. Accused No.1 did not appear. Charges were framed against accused Nos.2 and 3 on 17th December, 2002 for offences under sections 120 B and 420 IPC. The accused persons settled the matter with the bank. An application was filed before the Court for claiming discharge of accused No.2 and 3 in view of the compromise with the Bank which, however, was rejected on 2nd April, 2004. This was followed by the filing of Criminal Revision Petition which too was dismissed as per the order dated 20th May, 2008. In the meanwhile, accused No.2 died and as such the case against Accused No.2 was closed. Accused No. 3, after the death of accused No.2, once again

filed an application before the Court for discharge but the same was rejected too on 23rd December, 2008. Application for compounding of offences was also rejected. The court said that he cannot be absolved of the criminal act just because the dues to the bank have been deposited by accused No. 2 before he died. In utter frustration, accused no. 3, filed application under Section 265(a) to (e) of Cr.P.C., for availing the benefits of plea bargaining. Accused No. 3 pleaded guilty. He mentioned about the mental agony and the financial crisis he had been through and that his daughter was physically and mentally challenged. CBI didn't oppose the plea. In the order dated 14th December, 2017, the accused No.3 was convicted under Section 229 r/w 265(e) of Cr.P.C for the offence punishable u/s 420 and 120B of I.P.C. He was sentenced to undergo simple imprisonment for one day i.e. till raising of court and to pay a fine of ₹50,000/- and in default to undergo simple imprisonment for one month for the offence punishable under Section 420 of IPC. The accused was also ordered to undergo simple imprisonment for one day and to pay a fine of ₹50,000/- in default to undergo simple imprisonment for one month for the offence punishable under Section 120B of IPC. Further, it is ordered that the substantive sentences shall run concurrently[33].

6. Conclusion

The cases mentioned above tend to indicate the mindset of the Indian judiciary with respect to the applicability of the provisions of Plea Bargaining introduced in the Indian Criminal Justice System. As we see today, the applicability of plea bargaining is slowly picking up, contrary to expectations at the time of the enactment of the law. Plea Bargaining has definitely not served the basic

[33]State by CBI/BSFC v John Joshua Mathew and others dated December 14, 2017, Bangalore District Court, https://indiankanoon.org/doc/56341538/

purpose of lessening the burden of pendency of court cases for which it was incorporated in the Indian legal system.

Different kinds of judicial responses are observed in matters related to Plea Bargaining. Most of the lower courts tend to discourage Plea Bargaining applications. High Courts, in general, tend to be not too averse to Plea Bargaining provided there are no deficiencies in procedural formalities as stipulated in Section 265 of Cr. P. C. For wider and more meaningful application of Plea Bargaining in the Indian judicial system, it is imperative that it gets publicity and support from the Government in the same way as given to Lok Adalats introduced in 1986[34]. Just in about three decades, Lok Adalats have become a most important arm of the judiciary by helping to reduce the case-loads substantially. It is also equally important that Plea Bargaining gets support from the bar too.

It is a subject matter of study as to what really went wrong in a procedure which apparently was thought to be available option to counter the pendency of cases. There may be a number of reasons which have rendered the procedure of Plea Bargaining ineffective. The very first reason could be the approach of the legislature itself which instead of introducing the Plea Bargaining procedure in a full-fledged manner relied on launching it on experimental basis. Secondly, the presence of some procedures including the compounding of offences, which confused the authorities and who preferred a time-tested compounding of offences instead of plea bargaining. Like these many more factors could be attributed to the ineffectiveness of plea bargaining in India.

The way to go forward is the reintroduction of a revamped model of Plea Bargaining, which still is one of the better models existing globally. The Indian model of Plea Bargaining can be surely said to have aspects addressing the grievance of victims much more than that present in the United States model of Plea Bargaining. The

[34] S. N. Singh, An Introduction to the Lok Adalat. https://www.polyeyes.com/Article/An-Introduction-To-The-Lok-Adalat (2012), accessed on October 15, 2020.

Mutual Satisfactory Disposition (MSD), which is the highlighting feature of the Indian Plea Bargaining model is actually the factor which distinguishes it from the infamous United States model of Plea Bargaining, which as of now does not contain provisions which would enable victims to participate in the administration of Justice. The caveat attached to the Indian model of Plea Bargaining is to exclude offences related to women and children, socio economic offences and offences attracting imprisonment of more than seven years is actually very beneficial and a positive step keeping in mind the overall security of the society. The availability of Plea Bargaining in United States for offences as minor as misdemeanor and as serious as the offences attracting death penalty is actually a center of criticism in the view of anti-Plea Bargaining lobby.

Thus, the Indian model of Plea Bargaining is actually having almost all ingredients which would render it in effective in practical scenarios but the only factor making it ineffective was the cautious approach of the legislature in introducing it and the judiciary, by not accepting it actually as an effective alternative to the usual trial system.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 80-99

An Analysis of Victim Compensation Law in India: Acid Attack Victims in Context

Mudasir Bhat[*]
Mainaaz Qadir[**]

Abstract
Administration of justice is the first promise of Constitution of India. The same is reflected even in the Universal Declaration of Human Rights, 1948. In the machinery of the administration of justice, the victim has been given minimal role to play. He/she has been a forgotten entity. However, with the emergence of victim oriented jurisprudence, some focus has been given to the victims as well. The Malimath Committee Report, Verma Committee Report and Judgments of the Hon'ble Supreme Court of India are evidences to that effect. Among the most needy victims, acid attack victims need more protection and care. Despite the law in force, magnitude of the acid attack offences is on the rise In this backdrop, this research paper analytically appraises evolving compensatory jurisprudence with reference to acid attack victims and argues that neither legislative measures nor Ministry Guidelines are not sufficient to deal with the issue and this the reason that, the supreme court had to step in, directing State/UTs to frame guidelines, for comprehensive scheme for compensation for acid attack victims.
Keywords: Administration of justice, Fair Trail, Vitriolage, Victim Compensation, Acid Attack Victims, Patriarchy, Criminal Law (Amendment) Act, 2013

1. Introduction

Administration of justice is the principal duty of an orderly and civilised society. When we speak of the criminal justice administration, what we usually mean is the complex justice delivery system devoted to the prevention and control of crimes in our society.[1] The criminal justice administration primarily consists of three main components including, police, courts, and

[*]Ph.D., Assistant Professor, Department of Law, School of Legal Studies, Central University of Kashmir, J&K, India. email: mudasirbhat@cukashmir.ac.in
[**]Judicial Magistrate, Jammu and Kashmir Judiciary, J&K, India.
[1] Donald J. Newman, *Introduction to Criminal Justice*, Random House, New York, (1986), p. 1.

correctional administration. For the smooth functioning of the criminal justice system, all the three components have to work together for maintaining the rule of law in the society. Since the dawn of the civilization, crime has been a baffling and perplexing problem of every society. There cannot be any society without the problem of crime.[2] The end product of every such violation or crime is either a person known as 'victim' or state in its larger perspective. Looking at the existing criminal law setup in our country, it seems law is more concerned with the rights of the offender. In the whole process of criminal justice system victims visibility is undetectable. Every component of the criminal justice system chiefly focuses of the punishment and reformation/rehabilitation of the offender. The person who is always at the receiving end is the victim who is getting nothing out of the whole process of criminal justice system except the satisfaction so called of seeing the offender gets punished by the instrumentality of the state.

2. Historical Perspective of the Status of Victim in Criminal Justice System

> "In the beginning, there was no space for the victims of crime in the criminal justice system. Victim was once taken as the active participant in the administration of justice. However, with the passing of time, common law systems had successfully managed to ignore the victim from the criminal justice system and victim got reduces to a mere witness to a crime against the state. Looking at the regime in the eleventh century, the victim had a strong hold in common law and was in many ways key player for the apprehension, charge and prosecution of offenders. This system was known as private prosecution and victims controlled every aspect of the judicial process including punishment. This period is considered as

[2] Emile Durkheim in his work 'Crime and Natural Phenomenon' has rightly said "even societies composed of persons with angelic qualities would not be free from the violations of the norms of that society".

> a golden period by the jurists because victims exercised such a predominant role in the criminal justice process, which centered on the reparation of the victim. Interestingly, reparation of the victim was an indication of how evolved a society was. The advent of 13th century witnessed the decline of the victim's role because the notion that crime was primarily a threat to a social order rather than a harm done against the individual, dominated this era. The King's peace and offences against the security, and public order offences marked changes that impacted the role of victims. Resultantly, the system of paying compensation to the victim was replaced by the offenders paying compensation to the state. This practice still exists today and is referred to as fine. Gradually, the state, its offices and institutions replaced the King, but power was never returned to the victim. From the 17th century onwards, parliamentary sovereignty grew and the King became less influential personally. Instead he was seen merely as a figure of sovereignty. Laws were passed by the legislature and were no longer passed by the King alone. As a result, crimes ceased to be considered a violation of the King's peace, instead were viewed as threat to civil society and social interests. This trend was further consolidated in the late 18th century with the introduction of criminological perspectives, which further moved criminal society away from the victim to the security concerns of the society. Emergence of victimology in the 1970's is credited to bring forth the plight of victim of crime by describing him as the 'forgotten entity' in the criminal justice system."[3]

When we look at the existing setup in India it is widely accepted

[3] G.S. Bajpai, *Criminal Justice System Reconsidered: Victim and Witness Perspectives*, Serials Publications, (2012), p.2 & 3.

victims do not carry many rights and protections in order to make them part of criminal proceedings in a given case. And this to result in lack of interest in the proceedings on the part of victim and consequent distortions in criminal justice administration. There is general realisation that unless victim is made part of the justice deliver system, the system is hardly restored to the concepts of fair trail and in pursuit truthfulness.

Generally, continental countries recognise rights of the victims of crime in two ways. They are, firstly, there it is victim's right to participate in criminal proceedings and secondly, the victims' right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim relief in the course of proceedings. Though, the experiences vary from nation to nation, in India, these rights have not been very expressly and prominently integrated in the criminal procedure.[4]

3. Notion of State Compensation

Hammurabi Code[5] of ancient *Babylonian II* is the first evidence where from history of payments to the victims of crime by State can be traced. It provides that:

> "If the robber is not caught, then shall he who was robbed claim under oath the amount of his loss; then shall the community, on whose ground and … territory and in whose domain it was, compensate him for the goods stolen. If persons are stolen, then … shall the community pay one mina of silver to their relatives."[6]

[4] *Id.* at 4.

[5] The Code of Hammurabi is a well-preserved Babylonian code of law of ancient Mesopotamia, dated to about 1754 BC. It is one of the oldest deciphered writings of significant length in the world. The sixth Babylonian king, Hammurabi, enacted the code. The Hammurabi code of laws is a collection of 282 rules, established standards for commercial interactions and set fines and punishments to meet the requirements of justice. Hammurabi's Code was carved onto a massive, finger-shaped black stone stele (pillar) that was looted by invaders and finally rediscovered in 1901.

[6] https://avalon.law.yale.edu/ancient/hamframe.asp (Accessed on 05/08/2021)

Even in the Anglo Saxon period of the 17th century this principle had got acceptance

> "The Kentish laws of Ethelbest contained specified amounts of compensation for a large number of crimes ranging from murder to adultery. In the early Common Law of Middle England, if a man was murdered, the victim's family was entitled to a wergild of four pounds. However when the criminal justice system was separated from the civil system with growing principle of sovereign immunity in criminal law, the offences like murder, robbery and rape did not remain within the category of tort to be settled by compensation but were regarded as crimes against society and were punishable as such. Hence, state compensation disappeared and the state played a punitive role, imposing punishment for not only the harm done to individual victims but also harm done to the king or feudal lord. But the doctrine of state compensation to victim again attracted attention of socioligists [sociologists] and jurists. Jeremy Bentham, has said that due to the presence of the social contract between the state and the citizen, victims of crime should be compensated when their property or person was violated. It is the role of the state to prevent crime and protect people and property. If the state is unable to prevent a crime it falls upon the state to support the victim"[7]

Thus, modern approach of victimology acknowledges that

> "a crime victim has right to be adequately compensated, rehabilitated and repaired irrespective of identification and prosecution of offender and the payment of such compensation should be made by state."[8]

---

[7] Om Prakash. "Status of the Victim in the Criminal Justice System" 12 December 2013. Available at: http://omprakash1984.blogspot.com/2013/12/crime-victims.html

[8] H. K. Tripathi & V. Singh, "Jurisprudential Analysis of Victimization: Need of Restorative Theory and State Compensation in Indian Criminal Justice System" 1 International Journal of Law and Legal Jurisprudence

4. Rationale of Victim Compensation

The expression 'victim' or 'victim of crime' was not defined in any Indian law. It seems Indian parliament for long was much concerned about the plight of the offender than the victim. The term victim, generally, means any person who has suffered any wrongful loss or injury at the hands of other, including the State and nature. Thus, victims of crime can no longer be only limited to victims of penal offences but whose certain invaluable and inalienable rights are being violated by person in authority.[9]

> "The plight of victims of crimes has always been of interest to society. This is evidenced by the importance given to the victim by the media, which attempts to highlight the trauma that the victim suffers, sensationalizing the same in the process. However, when one examines the role of the victim in the criminal justice system, especially in countries that follow the adversarial system, it appears that the society seeks to sympathize with the victim, but does not consider it important enough to give the victim a role in the prosecution of the crime committed against him or her. It is in this context that examining the role of the victim in the criminal justice system becomes relevant, especially in a country like India, which prides itself on the fact that its Constitution embodies a plethora of rights, most of which are accused-centric."[10]

Before analysing the issue of the victim's role in the criminal justice system, one needs to ask a question why there emphasis is being made to the victims of crime. It has to be recognised that

> "the victim is one of the pillars of the criminal justice system and that without the cooperation of the victim the whole system will collapse. … The

---

Studies (2014). Available at: http://ijlljs.in/wp-content/uploads/2014/10/paper1.pdf

[9] *Supra* note 3 at 67.

[10] Wing-Cheoung Chan, *Support for Victims of Crime in Asia*, Routledge, (2007), 160.

> Justice Mallimath Committee,[11] which was established by the Government of India to suggest reforms to the criminal justice system, states that support of victims and witnesses will not be forthcoming unless their status is considerably improved and hence there is a need to reform the law to this extent. Similarly, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of 1985 by the UN General Assembly states that victims of crime and their families are unjustly subjected to loss, damage or injury and they may suffer hardship when assisting

---

[11] The Malimath Committee on Reforms of the Criminal Justice System was constituted by the Government of India, Ministry of Home Affairs by its order dated 24th November 2000, to consider measures for revamping the Criminal Justice System. The terms of reference for the Committee were:

i. To examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence and see if any modifications or amendments are required thereto;
ii. To examine in the light of findings on fundamental principles and aspects of criminal jurisprudence as to whether there is a need to re-write the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act to bring them in tune with the demand of the times and in harmony with the aspirations of the people of India;
iii. To make specific recommendations on simplifying judicial procedures and practices and making the delivery of justice to the common man closer, faster, uncomplicated and inexpensive;
iv. To suggest ways and means of developing such synergy among the judiciary, the Prosecution and the Police as restores the confidence of the common man in the Criminal Justice System by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal;
v. To suggest sound system of managing, on professional lines, the pendency of cases at investigation and trial stages and making the Police, the Prosecution and the Judiciary accountable for delays in their respective domains;
vi. To examine the feasibility of introducing the concept of "Federal Crime" which can be put on List I in the Seventh Schedule to the Constitution.

> in the prosecution of offenders. Keeping this in mind, the United Nations envisaged a more prominent role for the victim."[12]

In the context of filing the first information report (FIR) under Section 154 of the Cr.P.C., it appears that law puts full onus on the victims of crime.

> "If the case is non-cognizable one, the police are required to refer the informant to the magistrate. Hence, there arises a scope for misuse by the police, which have been empirically recorded in India. The Mallimath Committee report records that informants are treated indifferently by police and sometimes threatened when they go to them with their grievances. [At times,] the facts are distorted in order to make cognizable cases non-cognizable... Hence, it becomes important to explore the alternatives available to the present system, especially in the context, where most of the population in India believe that if a crime is committed, they can only approach the police. If the police tell the victim that he or she has to approach the magistrate, the victim will not be able to understand the rationale of this requirement."[13]

"The Cr.P.C. does not seem to give any role to the victim during investigation. The statement of the victim, if he or she also happens to be the informant, is recorded in the first information report. If the victim is not informant, then the victim will be independently questioned by the police. … [Police] practice [in India] reveals that once the statement of the victim is recorded, the case is completely within the control of the police and they do not involve the victim in the investigative process at all. [To fill this gap] the Malimath Committee Report [2003] suggests that the victim should play an active part in during investigation."[14] However, there are certain areas where the role of the victim

[12] *Supra* note 10.
[13] *Id*. at 162.
[14] *Id.* at 163.

comes into picture like where CrPC. permits a premature end to the trial by way compounding of offences under Section 320.

From the last several years, some rights to the crime victims have been provided by bringing some amendments in Indian criminal laws[15]. However, such rights are still found to be inadequate requiring further legislative attention.

> "Except in few matters, he is not a necessary party in criminal revisions, appeals or writs filed by accused. A crime victim has right to oppose the release of accused on bail but he has no right or status to be informed if bail is filed. His evidence is necessary for recording conviction of accused but he need not be informed for hearing on the point of sentence. He is entitled to get compensation, but before determination of compensation, he has no vested right to be heard". [16]

Therefore, it can be rightly said that victim of crime in the criminal justice system has no place to watch the trail even if every stakeholder be it judge, prosecutor, defence lawyer or even accused has a place, victim does not have one.

5. Victims of Crime: International Perspective

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims of crime as:

> "1. Victims means persons who individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operating within member states.
>
> 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial

[15] The Code of Criminal Procedure (Amendment) Act, 2008, The Criminal Law (Amendment) Act, 2013.

[16] *Supra* note 8.

> relationship between the perpetrator and the victim." [17]

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly in its resolution no. 40/34 dated 29th November, 1985 is a magna carta for the protection of rights of the victims of crime. This document provides broad definition of the expression 'victim' which has been adopted and recognised by the various nations in their respective victim oriented laws.[18]

It may be noted that

> "Criminal Injuries Compensation Act, 1995 passed in U.K. provides that the Secretary of State shall make arrangements for the payment of compensation to or in respect of persons who have sustained criminal injury. Section 9(4) of the Act stipulates that sums required for the payment of compensation in accordance with the scheme shall be provided by the Secretary of State out of money provided by Parliament. So, the funding is by the State and not by the offender. Consequently, the Criminal Injuries Compensation Scheme (2001) was framed in U.K which, *inter alia,* specifies the standard amount of compensation payable in respect of each type of injury and compensation is payable irrespective of the criminal being apprehended or not and independent of the trial of the accused."[19]

Similarly in the USA the passage of Victims of Crime Act, 1985

> "established the Crime Victims-Fund made up of federal criminal fines, penalties and bond forfeitures to support State victim compensation and local victim service programmes."[20]

---

[17] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the United Nations General Assembly Resolution No. 40/34 of 29th November 1985.

[18] For more details, see: http://www.un-documents.net/a40r34.htm

[19] *Ibid.*

[20] *Supra* note 3 at 71.

6. Victims of Crime: National Perspective

The international trends for the compensation towards victims of crime were not followed in India. It was essential to have identification and prosecution of the offender in order to give relief to the victims of crime. If one looks at the International regimes pertaining to the liability to compensate the crime victim, it is the responsibility of the state. Thus identification of the victim is essential rather than identification of accused person. However, in India, the accused person has to compensate the victims of crime and hence successful prosecution has remained essential. As per the Code of Criminal Procedure (Amendment), 2008

> "Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime." [21]

Section 2(wa) of Cr.P.C provides that 'victim'

> "means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir;'"[22]

Under the Code of Criminal Procedure specific provisions for the victim compensation were inserted in carrying out of the recommendation of the Law Commission in its Forty-first Report (1969).

> "This provision states that 'Court may award compensation to victims of crime at the time of passing of the judgment, if it considers it appropriate in a particular case, in the interest of justice'. A similar provision in the **The Probation of Offenders Act, 1958** [Section 5] may be found though it is applicable only in cases where offenders are directed to be released on probation. However, awarding compensation under these provision depends on conviction of

[21] The Code of Criminal Procedure (Amendment) Act, 2008 [Act 5 of 2009]
[22] *ibid*

> accused and we all are aware that rate of conviction in India is quite low, i.e, about [40-45%] only due to various reasons and the convictions are subject to appeals and revisions which is a time taking process. Thus section 357 [of] Cr.P.C or similar provision in **Probation of Offenders Act** are quite inadequate and the delay in making it available to the crime victim would itself defeat the purpose. The other statutes in India making provisions for compensation to victims are **Works Man Compensation Act, Fatal Accidents Act, Moter [Motor] Vehicles Act** and **Domestic Violence Act,** which provides that wrong doer or his master should pay compensation to victims." [23]

However, insertion of Section 357(A)[24]in the Code of Criminal Procedure (Amendment) Act, 2008[25] is a victim oriented step

[23] Om Prakash. "Status of the Victim in the Criminal Justice System" 12 December 2013. Available at: http://omprakash1984.blogspot.com/2013/12/crime-victims.html

[24] Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation.

1. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)
2. If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
3. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
4. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

which puts state under the obligation to compensate and rehabilitate the victims of crime and the bring the perpetrators of crimes to the doors of justice.

7. Acid Attacks and Compensatory Jurisprudence

There are different ways to commit a wrong against an individual or the society. However, with the passage of time ways to commit the wrongs/crimes have also changed. Among the recent trends, crimes against the women by way of throwing acid is a violent way of committing a crime.

> "Acid attack, more formally known as vitriolage, is an act of intimate terrorism that involves the premeditated throwing of sulfuric, nitric, or hydrochloric acid onto another with the main intention of disfigurement. These acids are mainly used as they are cheaply and readily available. This sadistic, cruel and heinous crime is on rise now-a-days and innocent girls/women are becoming victims of acid attack."[26]

The pain and sufferings on account of this gruesome attack to the victim of crime are unending. The victims of these crimes not only suffer physically but mentally and emotionally as well. Such type of attacks are absolute violation of the basic and human rights of such victims.

Acid attack, as a way of resorting to gruesome violence, has not only been used by the perpetrators of crime, but Police in India is also known to have used acid on individuals, particularly on their eyes, causing blindness to the victims. The infamous Bhagalpur

---

5. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

[25] The Amendment came into effect from 31st December 2009.

[26] Nargis Yasmin, "Acid Attack in the Back Drop of India and Criminal Amendment Act, 2013", 4 *International Journal of Humanities and Social Science Invention, (2015).* Available at: https://www.ijhssi.org/papers/v4(1)/Version-1/C0410106013.pdf.

blinding case[27] merit mention here which represent high handedness of state through its police machinery. In a series of incidents in 1979 and 1980 police blinded "31 under-trial (or convicted criminals, according to some versions) by pouring acid into their eyes. The incident was widely discussed, debated and acutely criticized by several human rights organizations".[28]

The confrontation of acid attack has been an increasing phenomena in India where most of the victims of the offence are women.

> "Victims of the Acid violence face marginalization from society after the attack. Additionally, acid violence tends to create fear amongst women in society, as some women may feel that they might get attacked, if they failed to conform to traditional subordinate gender roles. In order to emancipate and empower women in the society, it is this fear which the law is supposed to address. Deterrence by means of strict laws dealing with crimes against women is one way of addressing the issue. However, prior to 2013, there was no specific provision in law punishing acid attacks as an offence per se. The amendment in 2013[29] inserted various sections in the Indian Penal Code, the Criminal Procedure Code and the Indian

[27]Farzand Ahmed, Bhagalpur Blindings represents one of the darkest chapters in India's history available at: https://www.indiatoday.in/magazine/special-report/story/19801231-bhagalpur-blindings-represents-one-of-the-darkest-chapters-in-indias-history-773650-2013-11-29, (Last modified on: 19/05/2020).

[28]Chemistry: Acid attack. Available at https://handwiki.org/wiki/index.php?title=Chemistry%3AAcid_attack

[29] The Criminal Law (Amendment), Act, 2013 happened after the gruesome rape and murder of a young physiotherapist in Delhi. The Amendment is the outcome of Justice Verma Committee which was constituted to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its report on January 23, 2013.

> Evidence Act in order to tackle the menace of acid attacks."[30]

Acid attacks prior to the amendment of 2013 were dealt under Section 320 of the Indian Penal Code and for the purpose of this research paper newly inserted provisions in the Indian Penal Code are Section 326A and 326B.

The Section 326 A deals with the cases where permanent or partial damage or deformity is caused by throwing the acid on the victim and 326 B deals with the attempt to throw the acid on any person.[31]

In order to curb the menace of acid attacks and sale of acid and other corrosive substances in the country, Ministry of Home Affairs

---

[30]Alok Rawat and Saadiya, "Anatomy of Acid Attacks in India: Recommendations for Deterrence", *3 Jamia Law Journal*, p.20.

[31] 326A. Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

326B. Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or bums or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation I. For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2. For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.

(Grih Mentralaya), Government of India on 30th August 2013 issued the following directions to the States/UTs where rule to regulate the sale of acid/corrosive substances is not operational[32]:

> "(i) Banning over the counter sale of acid/corrosives unless the seller maintains a logbook/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall also contain the address of the person to whom it is sold.
>
> (ii) A sale will be made only when the buyer produces a photo ID issued by the Government which also has the address of the person and proves that he/she is above 18 years of age.
>
> (iii) The logbook/register should also specify the reason/purpose for procuring acid.
>
> (iv) All stocks of acid must be declared by the seller with the concerned Sub-Divisional Magistrate (SDM) within 15 days and in case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose a fine on such seller up to Rs. 50,000/-.
>
> (v) The concerned SDM may impose a fine up to Rs.50,000/- on any person who commits breach of any of the above directions. Educational institutions, research laboratories, hospitals, Government Departments and the departments of Public Sector Undertakings, who are required to keep and store acid/corrosive shall maintain a register of usage of acid and the same shall be filed with the concerned SDM.

(vi) A person shall be made accountable for the possession and safe keeping of acid in their premises. The acid shall be stored

[32] Ministry of Home Affairs, Govt. of India, Measures to be taken to prevent acid attacks on people and for treatment and rehabilitation of survivors. Available at: https://www.mha.gov.in/sites/default/files/AdvisoryAfterSupremeCourtOrderInLaxmCase_Short.pdf (Last modified on 20/05/2020).

under the supervision of this person and there shall be compulsory checking of the students/ personnel leaving the laboratories/place of storage where acid is used."

Again by way of 20th April 2015 advisory[33] of the Ministry of Home Affairs, Govt. of India, the States/UTs are directed to take proactive measures to expedite investigation, trial of the acid attack cases and bring them under a definite time frame. The States/UTs were also directed:

> "No acid attack victim will be denied treatment by any hospital, public or private under any pretext and any erring hospital/clinic violating the legislative provisions shall be dealt sternly **(Sec. 166B of IPC and Sec. 357C of Cr. P.C)**
> The administrative machinery of the States/UTs will ensure treatment of acid attack victims.
> Full and free treatment to be provided to the acid attack victims **(Section 357C of Cr.PC)**
> Minimum compensation of Rs. Three Lakh must be provided to acid attack victim under Victim Compensation Scheme **(Sec. 357A of Cr. P.C)**"[34]

8. Supreme Court on Acid Attack Victim Compensation

For any democratic society rule of law has a pivotal role to play and the judiciary has been entrusted as the guardian of the rule of law. Therefore, it is, undoubtedly accepted that the success of a democracy depends upon an impartial, strong and independent judiciary.[35] The Apex court of India has played a decisive rule in the protection and rehabilitation of people in general and women in particular from the attacks of acids and other corrosive

[33] Ministry of Home Affairs, Govt. of India, Advisory on expediting cases of acid attack on women, available at: https://www.mha.gov.in/Division_of_MHA/Women_Safety_Division/acid-attack, (Accessed on 20/05/2020).

[34] See https://www.mha.gov.in/sites/default/files/AdvisoryAcidAttackWomen_220415.pdf

[35] Rajnesh Kumar Patel, *Administration of Justice in India: Ethics and Accountability*, Deep and Deep Publications, (2011), 116.

substances. In a landmark judgement of *Laxmi vs. Union of India (UOI) and Ors,* the Apex Court has issued directions that

> "the State Governments/Union Territories should seriously discuss and take up the matter [of acid attacks] with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.
>
> …the hospital, where the victim of an acid attack is first treated, should give a certificate that the patient/person is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be."[36]

In another important *case*

> "the petitioner has prayed for issuance of writ of mandamus to the State of Bihar to reimburse Rs. 5 lakh to the victim's family which is the amount spent on her treatment so far and for any other expenditure incurred on the treatment of the minor sister [another victim in the same incident] and to provide compensation of at least Rs.10 Lakhs to the victims' family in lieu of their pain and suffering. The petitioner has also, inter alia prayed for issuance of writ of mandamus or directions to develop a standard Treatment and Management Guidelines for the treatment and handling of acid attack victims by constituting a panel of experts; to direct all private hospitals to provide free treatment in acid attack cases and to have pictorial

[36] (2014)4 SCC 427.

> displays with the first aid and primary care protocols and guidelines to neutralize the acid and stabilize the survivor in the all Public Health Centres, sub-centres and government hospitals."[37]

The Court has said that victim Chanchal deserves to be awarded a compensation more than what has been prescribed by this Court in the *Laxmi's case*[38] and accordingly compensation of 10 lakh rupees to the victim and 3 lakh to her younger sister, who also suffered minor injuries, was awarded. The Court further said that of the

> "total amount of Rs. 13 Lakhs, a sum of Rs. 5 lakhs shall be paid to the victim and her family within a period of one month and the remaining sum of Rs. 8 lakhs shall be paid to the victims within a period of three months from the date of this order."[39]

From the above discussed cases, it seems that judiciary has taken an action oriented approach for the protection and rehabilitation of acid attack victims. However, there is a need to evaluate how far the victim compensation schemes in general and acid attack victim compensation schemes in particular are being implemented in letter and spirit by the States and Union Territories across the country.

9. Conclusion

Administration of justice is the first promise of the Constitution of India. However, the role of a victim has been neglected. In the administration of justice, the victim has been left as a forgotten entity in the whole process. There is a dire need to recreate the role of victim in every stage of the case as he/she is the ulterior sufferer and casualty of the crime. The Acid attack victims in particular suffer in many ways including, socially, psychologically and economically. The compensatory schemes framed by the government or as directed by the judiciary from time to time are not enough. These victims have to be rehabilitated socially, psychologically and economically. The victims of acid attacks

[37] *Parivartan Kendra & Anr v. Union of India & Ors AIR.* 2015.
[38] *Laxmi v. Union of India* (2014)4 SCC 427.
[39] *Parivartan Kendra & Anr v. Union of India & Ors* AIR. 2015.

should be taken as fighters against violence than by-product of it. The importance of this paper is summed up with the words of N.R. Madhava Menon:

> "[The] criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognised by law and restitution for loss of life, limb, and property are provided for in the system. The cost for providing it is not exorbitant as sometimes made out to be. In any case, dispensing justice to victims of crime cannot any longer be ignored on grounds of scarcity of resources [by the State]."[40]

[40] N.R. Madhava Menon. "Victim's rights and criminal justice reforms", *The Hindu,* (27 March 2006, Updated March 23, 2012). Available at https://www.thehindu.com/todays-paper/tp-opinion/victims-rights-and-criminal-justice-reforms/article3169888.ece

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 100-115

Legalisation of Passive Euthanasia in India: Right to Die with Dignity with Special Reference to 'Advance Medical Directive'

Purnima Khanna[*]
Pawandeep Kaur[**]

Abstract
"Not long ago, the realms of life and death were delineated by a bright line. Now this line is blurred by wondrous advances in medical technology– advances that until recent years were only ideas conceivable by such science fiction visionaries as Jules Verne and H. G. Wells. Medical technology has entered a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity."[1] This, however, is not free from legal tangles that hover around life and man induced death prompted by a vegetative state of a person whose continuance becomes burden not only for the stakeholders but also to his self. There are instances also where some have wished to advance their death in a fear of imminent but painful death because of the dreaded diseases from which they are suffering. This paper analysis the legal issues surrounding the legal mandate for euthanasia in light of the excitements dealing with subject in transnational jurisdictional the Indian judicial pronouncements.
Keywords: Euthanasia, Advance Medical Directive, Permanent Vegetative State (PVS), Physician Assisted Suicide, Living Will

1. Introduction

Euthanasia, also known as mercy killing, physician assisted death and compassionate murder, in general, means ending the life of a

[*] PhD, Assistant Professor, Khalsa College of Law, Amritsar, Punjab, India
[**]PhD, Assistant Professor, Department of Laws, Guru Nanak Dev University, Amritsar, Punjab, India. email: thepawansandhu@yahoo.co.in

[1]Rasmussen v. Fleming (1987) 154 Ariz 207 quoted in Law Commission of India, One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally ill Patients (Protection of Patients and Medical Practitioners (2006)', p. 67.

person to relieve him from pain and suffering caused due to an irrecoverable disease. In recent times the debate with reference to the legality of *euthanasia* has gained momentum as it touches social morals, medical ethics as well as right to life of a person. Article 21 of Indian Constitution provides fundamental right to life and liberty to all the persons. Time and again Indian judiciary has to deal with the question that whether fundamental right to life includes right to die or not? The constitutionality of section 306 and section 309 of Indian Penal Code has been challenged in various landmark cases. Hon'ble Supreme Court has taken up various facets of *euthanasia* and *advance medical directive* in detail in *Aruna Ramchandra Shanbaug* v. *Union of India and others*[2] and *Common Cause (A Registered Society)* v. *Union of India.*[3] The main questions of law that arose before the court and the court's observations on the matter and directions and guidelines issued by it have been discussed in the present paper.

2. Euthanasia and Advance Medical Directive

The word *euthanasia* is derived from the Greek word *thanatos* which means death and the prefix *eu* means easy or good.[4] Thus, *euthanasia* means an easy and good death. As stated by the British House of Lords Select Committee on Medical Ethics, "Euthanasia means deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering."[5] The term *euthanasia*, in medical context, was used for the first time by Francis Bacon in seventeenth century. In his opinion, "Euthanasia refers to an easy, painless, happy death, during which it was a

[2](2011) 4 SCC 454.

[3] 6 (2018) 5 SCC 1.

[4]Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 3

[5]N.M. Harris, "The Euthanasia Debate", J R Army Med Corps., October 2001, p. 367-70,

physician's responsibility to alleviate the physical sufferings of the body." [6]

The Supreme Court of India in *Aruna Ramchandra Shanbaug* v. *Union of India and others*[7] discussed that

> "Euthanasia is of two types: Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e. g withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma."[8]

The court observed that

> "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."[9]

The Hon'ble Supreme Court in its milestone judgment *Common Cause (A Registered Society)* v *Union of India,*[10] delivered on March 9, 2018, drew a distinction between passive and active euthanasia. Analysing various decisions of the Supreme Court of Canada and the Supreme Court of United States of America, the court observed,

> "In case (of passive euthanasia) when death of a patient occurs due to removal of life supporting measures, the patient dies due to an underlying fatal disease without any intervening act on the

[6]Francis Bacon, *The Major Works by Francis Bacon*, Ed. Brian Vickers, p. 630

[7]Supra note 2.

[8]*ibid.*

[9]*ibid.*

[10] Supra note 3.

> part of the doctor or medical practitioner, whereas in the cases coming within the purview of active euthanasia, for example, when the patient ingests lethal medication, he is killed by that medication."[11]

As stated by Lord Goff in *Airedale case*,[12]

> "The former can be considered lawful either because the doctor intends to give effect to his patient's wishes by withholding the treatment or care....However, active euthanasia, even voluntary, is impermissible despite being prompted by the humanitarian desire to end the suffering of the patient."[13]

In the words of George D. Pozgar,

> "the distinction between the two is imperative for the purpose of considering the duty and liability of a physician who must decide whether to continue or initiate treatment of a comatose or terminally ill patient. Physicians have to use reasonable care to preserve health and to save lives of people, therefore, unless fully protected by the law, they will be reluctant to abide by a patient's or family's wishes to terminate life- support devices."[14]

Euthanasia can be further divided into voluntary euthanasia, done with the consent of the patient and non- voluntary euthanasia, done without the consent of the patient e.g. patient is not in a condition to give such approval.

A further distinction is sometimes drawn between *euthanasia* and *physician assisted suicide*. The difference between the two lies in the person administering the lethal medication. In euthanasia, the

[11] Supra note 10.

[12] 138 L Ed 2d 772, 521 US 793 (1997).

[13] Supra note 3.

[14] See George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 370.

lethal medication is administered by the doctor while in physician assisted suicide the patient takes it himself, as advised by the doctor.

According to the Law Commission of India,

> "A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical procedures and allow nature to take its own course, as was done in good old times."[15]

According to George D. Pozgar,

> "An *advance directive* is a written instruction, such as a living will or durable power of attorney for health care, recognised under state law (whether statutory or as recognised by the courts of the state) and relating to the provision of such care when the individual is incapacitated."[16]

Further "the Advance Directives allow the patient to state in advance the kinds of medical care that he or she considers acceptable or not acceptable. The patient can appoint an agent to make those decisions on his or her behalf."[17]

As per Ministry of Health, Singapore,

> "An Advance Medical Directive (AMD) is a legal document a person signs in advance to inform the doctor that he does not want the use of any life-sustaining treatment to be used to prolong his life

[15]Law Commission of India, One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)', p. 3

[16]George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 374.

[17]*ibid.*

> in the event he becomes terminally ill and unconscious and where death is imminent."[18]

The Supreme Court of India emphasizes that

> "protagonists of advance directives argue that the concept of patient's autonomy for incompetent patients can be given effect to, by evolving new ways so that such patients can beforehand communicate their wishes which are made while they are competent."[19]

The court highlighted that "Advance directives are permissible in various countries so as to specify an individual's health care decisions and also to appoint persons who are authorised to take those decisions in case the person is unable to communicate his wishes to the doctor."[20]

The Law Commission of India in its 196th Report, also dealt with the issue of *euthanasia* and recommended as follows:[21]

> "There is need to have a law to protect patients who are terminally ill, when they take decisions to refuse medical treatment, including artificial nutrition and hydration, so that they may not be considered guilty of the offence of 'attempt to commit suicide' under sec. 309 of the Indian Penal Code, 1860.... It is also necessary to protect doctors (and those who act under their directions) who obey the competent patient's informed decision or who, in the case of (i) incompetent patients or (ii) competent patients whose decisions are not informed decisions, and decide that in the best interests of such patients, the

[18] Retrieved from https://www.moh.gov.sg/policies-and-legislation/advance-medical-directive (May 1, 2021).

[19] Supra note 3.

[20] *ibid.*

[21] Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 401, 402.

> medical treatment needs to be withheld or withdrawn as it is not likely to serve any purpose. Such actions of doctors must be declared by statute to be 'lawful' in order to protect doctors and those who act under their directions if they are hauled up for the offence of 'abetment of suicide' under sections 305 and 306 of the Indian Penal Code, 1860, or for the offence of culpable homicide not amounting to murder under sec. 299 read with sec. 304 of the Penal Code, 1860 or in actions under civil law.[22]

3. Legal position in other countries

A brief overview of the law relating to euthanasia existing in other countries is as follows:

(a) United Kingdom

In November, 2005 "Assisted Dying for Terminally Ill Bill" was introduced in House of Lords in which it was provided that a competent terminally ill person of major age suffering unbearably may either request for assisted suicide or euthanasia.[23] However, the doctors of Royal College of Physicians and the Royal College of General Practitioners on May 9, 2006 issued a united plea against legalising mercy killing that would allow patients to choose when to die. In the opinion poll, out of 5000 respondents only 26 per cent were in favour of a change and the remaining were against it.[24]

(b) United States of America

Active euthanasia is illegal in all the states of USA, but physician assisted suicide is permissible in the states of Oregon, Washington and Montana. In both Oregon and Washington, only self- assisted dying is permitted. Physician- assisted dying and any form of aid to

[22] *ibid.*

[23] See *Times of India*, Hospitals to Allow Suicide, December 14, 2005, p. 9.

[24] See *The Times*, May 10, 2006, UK edition, quoted in K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 591.

help a person commit suicide outside the provisions of law is considered to be criminal offence.[25] The opponents of physician assisted suicide in USA plead that the right to active assistance in hastening one's death does not legally or morally flow from a right to refuse or forego medical treatment.[26] It is said that when a person chooses to refuse life sustaining devise (treatment) the death occurs naturally from the underlying disease, whereas, in case of physician assisted suicide an overt act and not the disease causes death.[27]

(c) Netherlands

It is the first country to begin efforts to legalise physician assisted suicide. Beginning in 1973, a series of guidelines were worked out whereby physicians who complied with them were not be prosecuted for murder despite the provision in Article 293 of the Dutch Penal Code provides that anyone who takes life of another person even at his explicit request will be punished with imprisonment of twelve years.[28]

In 2002 the *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* was passed. It provides that "Euthanasia and physician- assisted suicide are not punishable if the attending physician acts in accordance with criteria of due care."[29]

> "Euthanasia is allowed if each of the following conditions is fulfilled:[30]
>
> a. The patient's suffering is unbearable with no prospect of improvement.
>
> b. The patient's request for euthanasia must be voluntary.
>
> c. He must be fully conscious of his condition, prospects and options.

---

[25] See *Supra note 3.*

[26] K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 587.

[27] *ibid.*

[28] *id*., p. 590.

[29] Buiting H, Van Delden et al., "Reporting of Euthanasia and Physician Assisted Suicide in the Netherlands: Descriptive Study," 2009.

[30] Supra note 2.

> d. There must be consultation with at least one other independent doctor who needs to confirm the above mentioned conditions.
> e. The death must be carried out in a medically appropriate manner in the presence of the doctor.
> f. The doctor must report the cause of death to the municipal coroner in accordance with the provisions of the Burial and Cremation Act."[31]

(d) Belgium

It is the second European country to legalise the practice of euthanasia after Netherlands. In Belgium

> "Assisted suicide can be practiced by doctors under set conditions. Patients who wish to end their own lives must be conscious when they demand for euthanasia and shall repeat their request for euthanasia. They must be suffering from constant and unbearable pain arising from an accident or incurable illness. It is further provided that the authorities shall ensure that poor or isolated patients do not ask for euthanasia for the reason of money."[32]

(e) Switzerland

Assisted suicide is legally permitted in Switzerland and can be performed by non- physicians. However, active euthanasia is illegal there. Article 115 of the Swiss Penal Code, which came into force in 1942, considers assisted suicide a crime if the motive is selfish.[33] The Swiss law is quite distinctive as the recipient of euthanasia may be citizen of any country and presence of a physician is not compulsory to carry the process of assisted suicide.

---

[31] *ibid*.

[32] See *ibid.*

[33] See Nidhi Saxena, "Legalisation of Passive Euhanasia in India (Aruna Ramchandra Shanbaug's Case) - Begining of a New Last civil Right Movement for Demand of Death with Dignity," 2011, *Cri LJ,* Journal section, p. 325.

(f) Australia

In Australia all states, except Tasmania, have laws for Advance Directives. The advance directives as provided by different laws in these states differ in their nature and their binding effect but the purpose of all the laws is same, that is, preservation of the patient's autonomy. The laws provide for circumstances under which the advance directives become inoperative.[34] For instance, in Queensland, "the directive becomes inoperative if the physician is of the opinion that giving effect to the directive is inconsistent with good medical practice or where circumstances have changed, including new advances in medicine, medical practice and technology so that it will be inappropriate to give effect to the directive."[35]

The State of Northern Territory of Australia in 1995 enacted "the *Right of Terminally Ill Act,* 1995 to permit the terminally ill patients to opt for mercy killing, i.e., euthanasia under the strict supervision of medical practitioners in accordance with the guidelines provided in the *Right of Terminally Ill Regulations,* 1996. However, the Act was declared unconstitutional by the courts and it was repealed in 1997."[36]

4. Right to die with dignity- Judicial Response

Euthanasia is one of the most complicated and debatable issue faced by the courts and legislatures all over the world. According to the Apex court, "If a man is allowed to or, for that matter, forced to undergo pain, suffering and state of indignity because of unwarranted medical support, the meaning of dignity is lost and the search for meaning of life is in vain."[37]

In *Gian Kaur* v. *State of Punjab,*[38] the constitution bench of Supreme Court held that the fundamental right to life under

[34] Supra note 3.

[35] See *ibid.*

[36] K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 589.

[37] *Supra note 3.*

[38] 1996 (2) SCC 648.

Article 21 of the Constitution does not include right to die. It overruled the earlier two judge bench decision of the Supreme Court in *P. Rathinam* v. *Union of India.*[39]

In 2009 in its historic judgment of *Aruna Ramchandra Shanbaug* v. *Union of India and others*[40] the Supreme Court dealt with the issue of euthanasia in an elaborate way. A writ petition was filed by Ms. Pinky on behalf of the Aruna Shanbaug under Article 32 of the Constitution. The petitioner's case was that thirty six years ago, Aruna was brutally sodomised and strangulated due to which her brain got damaged. Since then, she is living in a persistent vegetative state. It was prayed before the court that she should be stopped being fed and let to die peacefully.

> "The main legal issues that came up before the court in this case were:
>
> a. If a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies be permissible and unlawful'?
>
> b. If the patient has earlier expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his / her wishes be respected when such situation arises?
>
> c. If the person has not earlier expressed such a wish, can his family or next of kin make a request to withhold or withdraw futile life-sustaining treatments?"[41]

The Supreme Court while deciding *Aruna Shaunbag's case* relied upon various foreign cases. It will be important to discuss the *Airedale case*. In *Airedale's case*, Lord Keith of Kinkel, noted that

> "it was unlawful to administer treatment to an adult who is conscious and of sound mind, without his consent. Such a person is completely at liberty to refuse to undergo treatment, even if the result

[39] 1994 (3) SCC 394.
[40] Supra note 2.
[41] Supra note 2.

> of his doing so will be his death. This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive."[42]

It was held that "if a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion is in the best interests of the unconscious patient."[43]

Answering the first and second legal issue the court agreed with the decision of *Airedale' case* and held that

"if a person is in a permanent vegetative state withdrawal of life sustaining treatment will be permissible. In regard to the third legal issue the court observed that if the person has not expressed such wish previously a question arises as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)?"[44]

The Supreme Court held, "It is ultimately for the Court to decide, as parenspatriae, 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 in coming to its decision."[45] The court laid down that the following directions will continue to be the law until Parliament makes a law on the subject:[46]

> "a. A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a

[42] See *ibid.*
[43] *ibid.*
[44] Supra note 3.
[45] *ibid.*
[46] See *ibid.*

> person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.
>
> b. Such a decision requires approval from the High Court concerned as laid down in Airedale's case."[47]

Recently, a constitutional bench of apex court, in its judgment delivered in *Common Cause (A Registered Society)* v. *Union of India,*[48]on March 9, 2018, has issued directions to legalise passive euthanasia in India. A writ petition was filed by the petitioner, a registered society under Article 32 of the Constitution of India. The petitioner prayed before the court to issue suitable guidelines and directions so as to declare right to die with dignity as a fundamental right as a part of right to life under Article 21 of the Constitution. It further sought the court to issue direction to the Union of India to adopt suitable measures in this regard in consultation with the State Governments. It was further prayed by the petitioner that terminally ill patients shall be allowed to execute *Living Will* and *Attorney Authorisation* to be used in case he is admitted in the hospital with serious illness.[49] The main assertions put forth by the petitioner were in brief as follows:[50]

> "a. Each individual has a right to decide about continuing or discontinuing his life in case of irreversible permanent progressive state.
>
> b. Every person has an inherent right to die with dignity as a part of Article 21 of the Constitution.
>
> c. Right to die without pain and suffering is essential to a person's bodily autonomy which is inherent in the right of privacy.

[47]*ibid.*
[48] Supra note 3.
[49]*ibid.*
[50]*ibid.*

> d. Progress of modern medical technology relating to medical science has resulted in prolonging the dying process of the patient causing distress and agony to the patient and his near and dear ones.
> e. Right to die with dignity is an inseparable and inextricable aspect of right to live with dignity.
> f. The execution of a *living will* is needful as penal laws create a dilemma for doctors to take help of modern techniques or not."[51]

The Union of India filed an affidavit whereby it was contended that "the Law Commission of India has submitted its report on the *Medical Treatment of Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill*, 2006. However, the Ministry of Health and Family Welfare was not in favour of the enactment of the same."[52] The reasons cited by the respondent were in brief as follows:[53]

> "a. The Hippocratic-oath is against intentional killing of a patient.
> b. It will serve as a setback to the development of medical science to relieve pain and suffering.
> c. Suffering is a state of mind which varies from person to person and also depends upon surrounding environmental and social factors.
> d. Can doctors claim to have knowledge and experience to say that the disease is incurable and patient is permanently invalid?
> e. Conducting euthanasia may cause psychological pressure and trauma to the concerned doctor."[54]

The Supreme Court has dealt with the issues raised in the present petition in an articulate and detailed manner. Legal position in various countries and their landmark decisions on the subject of

[51] *ibid*.
[52] *ibid.*
[53] *ibid.*
[54] *ibid*.

euthanasia have been discussed and analysed. The court held that "when a patient is terminally ill or in a permanent vegetative state with no hope of recovery, hastening the process of death so as to reduce the period of suffering constitutes right to live with dignity. Active euthanasia involves a specific overt act to end patient's life while in case of passive euthanasia something necessary to preserve patient's life and for artificially prolonging his life is not done."[55]

The court observed,

> "an inquiry into common law jurisdictions reveals that all adults with capacity to consent have the right of self- determination and autonomy. The said right paves the way for the right to refuse taking of medical treatment....A competent person who has come of age has the right to refuse specific treatment....even if such decision entails a risk of death....where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/ she does not wish to be treated, then such directive has to be given effect to."[56]

The court held that

> "a failure to recognise advance medical directive may amount to non- facilitation of the right to smoothen the dying process and the right to live with dignity. In regard to Advance Medical Directive, the main directions of the court is that it can be executed in writing only by an adult who is of sound mind. It must be voluntarily executed, without any coercion, inducement or compulsion. It shall clearly mention as to when medical treatment may be withdrawn. The name of the guardian or close relative authorised to give

[55] For details see supra note 3.

[56] Supra note 3.

> consent to withdrawal of medical treatment shall be specified. The document shall be signed by the executor in the presence of two attesting witnesses and countersigned by the Judicial Magistrate First Class. The document can be acted upon only when approved by a Medical Board consisting of the Head of the treating Department and at least three experts from the field of general medicine, cardiology, neurology, nephrology, psychiatry or oncology. The Chairman of the Medical Board shall convey the decision of approval to the Judicial Magistrate First Class, who shall visit the patient at the earliest and, after examining all the aspects, authorise the decision of the Board. If the Medical Board refuses the permission the executor or his family may approach the High Court under Article 226 of the Constitution. High Court may appoint an independent committee for the purpose. The court directed that the Advance Directive can be withdrawn or altered by the executor at any time."[57]

5. Conclusion

On the basis of foregoing discussion, it is concluded that the present legal position in India, on the subject of *euthanasia,* is that passive euthanasia is now permissible and legal in India. However, it can be exercised only according to the directions and guidelines laid down by the court. Further, active euthanasia is not permissible under any circumstance. Our judiciary has played a significant role to fill in the void left by the legislature on the issue of *euthanasia.* Till a law is passed on the subject, the directions and guidelines issued by the court will operate as a law.

[57] For details see *ibid.*

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 116-131

Recent Trends in Banking Sector with Special Reference to E-Banking Frauds in India: An Analysis

S. Ali Nawaz Zaidi*
Samiya Khan**

Abstract
The globalization of Indian economy and technological advancements have brought sea-changes in the banking sector. Electronic banking (also known as "e-banking" or "internet banking") services were tailored in consonance with the speedy expansion of information and communication technologies. As technologies advance, the fraudsters have also become more sophisticated and the menace of frauds thwarted the Indian banks. Banking business has been witnessing a shift from traditional modes to digital channels and nowadays it is conducted more online than ever. E-banking is targeted by cyber criminals, hence e-banking frauds are a type of cyber-crimes. According to the Reserve Bank of India's annual report, **"**bank frauds of ₹100,000 and above have more than doubled in value to ₹1.85 lakh crores in the financial year 2020 as compared to ₹71,500 crores in the financial year 2019". Also, the number of such cases has increased by 28% in the same period. The report further states that, around one-third of the total fraud incidents reported, were cyber frauds. Awareness and sensitization is undoubtedly the key to citizen friendly safe and secure internet banking, but it is just the tip of an iceberg as prevention and control of such frauds needs a wider review of traditional anti-fraud solutions. Against this background, this paper attempts to analyze e-banking frauds in the Indian banking sector and the legal provisions prohibiting and preventing such frauds along with the possible suggestions for ensuring safe and cyber secure nation.

Keywords*:* Bank frauds, e-banking, e-banking frauds, Reserve Bank of India, RBI

1. Introduction

The rapid advancement of global information infrastructure during

* Ph.D. Associate Professor, Department of Law, Aligarh Muslim University, Aligarh, Uttar Pradesh, India. email: alinawaz20@rediffmail.com

** Research Scholar, Department of Law, Aligarh Muslim University, Aligarh, Uttar Pradesh, India

the last decades, including information technology and computer networks (Internet and telecommunications systems) has enabled the development of electronic commerce (e-commerce) at a global level.[1] The advent of internet has initiated an electronic revolution in the global banking industry.[2] In plain language, it can be said that electronic banking is the species of which e-commerce is the genus. The banking industry in India is facing a cut-throat competition with the non-traditional banking institutions as foreign banks and private banks provide their services via. Internet.[3] The concept of e-banking transcends the barriers of time, distance and geography.

The number of frauds and forgeries in banks throughout the world is substantial and increasing with the passage of time.[4] In India, the banking sector is also facing the menace of frauds, alike various other countries of the world. According to one of the recent reports of Reserve Bank of India, "the volume of cyber frauds at banks has doubled in a year. In 2017-18, cyber frauds at banks saw a big spike over the previous year. Further, a total of 2,059 cases of cyber frauds were reported in 2017-18 amounting to Rs. 109.6 crore. The number of cyber fraud cases in 2016-17 was 1,372." The Economic Times (dated January 2, 2019) reported that, "a total of 5,917 frauds were reported in 2017-18 and nearly one-third of these were cyber frauds". An increase in the number of cyber frauds is more than any other types of bank frauds. Cyber fraud in the banking industry has emerged as a big problem and a cause of worry for this sector.[5] Thus, in nutshell, inadequate measures to

[1] E.A. Shanab and S. Matalqa, "Security and Fraud Issues of E-banking" 2 *IJCNA* 179 (2015).

[2] V. Deva, *E-Banking* 1 (Commonwealth Publishers, New Delhi, 2005).

[3] M.C. Pande and S. Kumar (eds.), *Banking: Trends & Practices* 146 (Anamika Publishers & Distributors (P) Ltd., New Delhi, 2005).

[4] M. Mitra (ed.), *Tannan's Banking Law* 809 (Lexis Nexis, student edition, 2015).

[5] R.R. Soni and N. Soni, "An Investigative Study of Banking Cyber Frauds with Special Reference to Private and Public Sector Banks" 2 *Research Journal of Management Sciences* 22-27 (July 2013).

prevent banking fraud is the primary reason for widespread frauds. Technology is like a double-edged sword, which can be used to perpetuate, detect and prevent frauds.[6]

Dismayed by the increasing rate of electronic frauds in banking sector in India, this study has been undertaken to look into the matter from legal perspective. The structure of this paper consists of conceptual and legal framework of e-banking frauds and their classification along with the judicial approach from Indian perspective.

2. Conceptual Framework of E-banking Frauds

Banking sector is embracing technology and business advancements in order to strive for growth but is prone to increasing levels of cyber and digital risks. Such innovations have probably introduced complexities into the system. For example,

> "the continued adoption of web, mobile, cloud, and social media technologies have increased opportunities for attackers. "Similarly, the waves of outsourcing, offshoring, and third-party contracting driven by a cost reduction objective may have further diluted institutional control over IT systems and access points. These trends have resulted in the development of an increasingly boundary-less ecosystem within which banking companies operate, and thus a much broader attack surface for the fraudsters to exploit."[7]

The term "E-banking" is a commonly used abbreviation for "electronic banking system" and is also known as "virtual banking" or "online banking". This concept is quite nascent in its origin and

[6]M.L. Bhasin, "Corporate Governance and Forensic Accountant: An Exploratory Study" 20 *Journal of Accounting, Business and Management* 55-75 (October 2013).

[7]Today's Cyber Security is a Game of Cat-and-Mouse Wall Street & Technology (03 July 2014). Available at https://www.wallstreetandtech.com/security/todays-cyber-security-is-a-game-of-cat-and-mouse/d/d-id/1268787

dates back to later part of 20th century. It involves use of internet for delivery of banking products and services.[8] E-banking includes internet banking, mobile banking, telephone banking, electronic data interchange (EDI), automated teller machine (ATM), e-cash, e-cheques, e-wallets, credit cards, etc. "Internet banking has benefited both banks and customers. The banks are benefited because the internet has allowed banks to diminish their operational costs in terms of decreasing physical facilities involving human resources, paperwork, and supporting staff. The customers are benefited because e-banking has given them fast access to various financial activities, such as money transfer, payment for utility bills, checking account management."[9]

When a fraud is committed via Internet or digital channel, it is an "internet fraud or cyber fraud". Likewise, if a banking fraud is committed via. Internet or any other electronic channel, it is known as "electronic banking fraud (or e-banking fraud)".E-banking frauds are also known as "Online Banking Frauds", "Internet Banking Frauds", "Computer-related Bank Frauds", "Mobile Banking Frauds", etc. E-banking, in India, is comparatively new. So, are e-banking frauds. Their investigation, detection, prevention and meeting their challenges are also being tackled with great earnestness.[10] E-banking frauds involve "manipulations, alterations, obliterations, hiding, eliminations and corruption of electronic documents, messages, e-mails, SMSs, digital data, digital signatures, command menu and software used in e-banking."[11]

3. Classification of E-banking Frauds

The classification of anything helps in better understanding of that thing. Thus, bank frauds are classified on the basis of different

[8] *Supra* note 3 at 144.

[9] A.O. Alsayed and A.L. Bilgrami, "E-Banking Security: Internet Hacking, Phishing Attacks, Analysis and Prevention of Fraudulent Activities". *IJETAE,* Vol. 7, No. 1 (2017), pp. 109.

[10] B.R. Sharma, *Bank Frauds: Prevention and Detection* 65 (LexisNexis, Haryana, 4thed., 2016).

[11] *Ibid.*

considerations which involve:

a) Law-based classification
b) Technology-based classification
c) RBI's Reporting-based classification
d) Fraud Amount-based classification
e) Fraudster-based (or fraud-based) classification.

Since, the thrust area of this paper is e-banking frauds, therefore, we would be pointing out the classification under which such frauds fall. So, the technology-based frauds are further divided into two major classes, viz:

(i) Classical (or traditional) Frauds

Classical or traditional frauds mainly involve manipulation of documents and material property. Cheque frauds, fake signature frauds, spurious fingerprints frauds, fake seals and stamps frauds, material alterations fraud, spurious and fake documents frauds, deposit account frauds, hypothecation frauds, letter of credit frauds, impersonation frauds, etc. are some examples of classical or traditional frauds.

(ii) E-banking Frauds

An introduction of electronic banking system over the years has facilitated various services for bank customers. At the same time, the fraudsters have also become sophisticated and use digital or electronic channels for illegally obtaining customer's personal bank details and information in order to gain wrongful access to their accounts.

A brief account of some of the e-banking frauds is enumerated as under:

a. Identity theft frauds: Identity theft and identity fraud are two different acts, but they are used interchangeably. When someone steals personal information of some other person without permission is called "identity theft" and when the former uses the stolen information of the latter to commit crime or fraud, it is called "identity fraud". The theft of identity (to gain access to bank details) can be done through various ways such as phishing, vishing, smishing, etc.

According to *Cambridge Dictionary*, "Phishing means an attempt to trick someone into giving information over the internet or by email that would allow someone else to take money from them, for example by taking money out of their bank."[12] Vishing or voice phishing is the telephone equivalent of phishing. It is described as "the act of using the telephone in an attempt to scam the user into surrendering private information that will be used for identity theft"[13]. Smishing is defined by *Collins Dictionary* as "the practice of using fraudulent text messages to extract financial data from users for purposes of identity theft"[14].

b. Hacking: Hacking would mean destruction or alteration of any information residing in a computer resource, i.e. tangible or intangible. Tangible resource includes the hardware components of the computer, whereas intangible ones are information in the electronic form, magnetic or optical impulses. In simple words, hacking means seeking un-authorized access through computer network and it is one of the most common forms of cybercrime these days. The case of hacking into bank's debit card payment system and siphoning off a large amount therefrom has been reported in India recently. Fraudsters hack into bank's or customers' computer systems by using malware attacks, viruses, trojans, web-spoofing, e-mail bombing, password hacking, etc.

c. Automated Teller Machine (ATM) frauds: In India, proliferated incidents have been reported of frauds committed through ATM machines and/or ATM cards, in

---

[12] Phishing, *available at*: https://dictionary.cambridge.org/dictionary/english/phishing (last visited on February19, 2022).

[13] Vishing, *available at*: https://www.webopedia.com/TERM/V/vishing.html (last visited on February 19, 2019).

[14] Smishing, *available at*: https://www.collinsdictionary.com/dictionary/english/smishing (last visited on February 19, 2022).

recent years. The frauds which could be committed through debit or credit card, can also be committed using ATM cards as well. There are different techniques in vogue these days for facilitating these types of frauds. Card skimming and card cloning is couple of aforesaid techniques used for committing frauds.

d. **Electronic Funds Transfer (EFT)/National Electronic Funds Transfer (NEFT) frauds:** Electronic funds transfer (EFT) is a method of moving money directly from one bank account to another without the use of physical money and through an electronic device.[15] In India, this system is known as National Electronics Fund Transfer (NEFT) between bank branches via. NEFT network. It is managed by the Reserve Bank of India (RBI). The EFT has not exclusively been utilized for genuine purposes, at the same time it is also being utilized by crooks for unlawful transactions. Some well-known instances of such transactions are by terrorists, drug syndicates, corrupt politicians, bureaucrats and money launderers.

e. **Credit Card frauds:** The origin of fraudulent cards starts with the theft of the card or its generation from the relevant data which is stolen or purchased. Genuine cards are stolen in transit, either from the issuing institution to the potential user or from the owners. Oftentimes, the card is misplaced. The misuse of these stolen or lost cards is easy. The fraudster has only to practice imitation of signature on the card to sign sale voucher.

f. **Social engineering frauds:** It refers to "the scams used by criminals to trick, deceive and manipulate their victims into giving out confidential information and funds"[16]. Most often, the criminals take advantage of people's confidence to get

[15] Electronic Funds Transfer (EFT) Law and Legal Definition, *available at*: https://definitions.uslegal.com/e/electronic-funds-transfer-EFT/ (last visited on February 19, 2022).

[16] Social Engineering Fraud, *available at*: https://www.interpol.int/Crimes/Financial-crime/Social-engineering-scams (last visited on February 19, 2022).

banking information, passwords, and other personal information.

g. **Data diddling:** This technique is usually used in computer-based crimes. It happens when somebody having certain information, uses and manipulate such information prior to its computer entry. Data diddling is used to gain wrongfully, generally financial gains.

h. **Money laundering:** Money laundering is a process or scheme by which the fraudster changes true origin of 'black money' into 'white money' by concealing its true source.[17] This is done by passing that money through the complex sequence of bank transfers after which it can be used for legitimate purposes.

i. **Salami frauds:** Salami slicing, or penny shaving is "the fraudulent practice of stealing money repeatedly in extremely small quantities, usually by taking advantage of rounding to the nearest rupee (or other monetary unit) in financial transactions." This type of fraud usually goes unnoticed by the victims because of miniscule amount it involves.

4. Legal Framework

E-banking is nothing but banking through electronic channels. Banking is regulated by Reserve Bank of India Act, 1934 and law regulating electronic documents is governed by Information Technology (IT) Act, 2000 (as amended by the Act of 2008). The IT Act, 2000 primarily deals with e-commerce and cyber-crimes. This Act is substantially based on United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce adopted in 1996.

Banking has been defined by Section 5(b) of the Banking Regulation Act, 1949 as "accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, or order

[17] *Supra* note 9 at 78.

or otherwise." Furthermore, "a bank fraud is a deliberate act of commission or omission by any person carried out in the course of banking transactions or in the books of accounts, resulting in wrongful gain to any person for a temporary period or otherwise, with or without any monetary loss to the bank."

Post advent of technology the law regulating to banking has undergone a sea-change. Various legal provisions were added, amended and modified in order to march along with the international standards. The brief account of the laws pertaining to e-banking and e-banking frauds, in India is discussed as under:

4.1 Reserve Bank of India Act, 1934

The Act has been amended to incorporate provisions relating to electronic banking. Section 58 (2) (pp) of the Act provides for electronic funds transfer (EFT). Various electronic payment systems have been introduced, such as Electronic Clearing Service (ECS) and EFT system, followed by NEFT system and Cheque Truncation System (CTS).

4.2 Banking Regulation Act, 1949

The Banking Laws Amendment Act, 2012 has been passed to amend the Banking Regulation Act, 1949 and couple other Acts, in order to strengthen and increase the control of RBI over banks in the country.

4.3 Negotiable Instruments Act, 1881

Section 6 of the NI Act deals with "cheques which includes an electronic form of cheques and electronic image of truncated cheques." Sections 6, 64, 81, 89 and 131 were amended through Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, to incorporate provisions dealing with e-cheques.

4.4 Bankers' Books Evidence Act, 1891

Bankers' Books Evidence Act, 1891 has also been amended in the wake of e-banking in India. Section 2 of the Act provides that, "Bankers' books include ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank

whether kept in the written form or as printouts of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device." Similarly, Section 2 (8) provides that, "certified copy means books in written form and has an attestation as true copy and printout, or data stored in a floppy, disc or tape or any other electronic magnetic storage system."

4.5 Prevention of Money Laundering Act, 2002

Section 3 of the Prevention of Money Laundering Act, 2002 states that, "whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering." The Act provides for maintenance of records by banking companies and other financial institutions, punishment for money laundering, attachment and confiscation of property, adjudicating authority, etc. E-banking is more prone to money laundering risk because such transactions are conducted remotely, and the rules of money laundering seem to be difficult to be applied with respect to some of the electronic payments.

4.6 Indian Contract Act, 1872

Since, banker and customer relationship is a contractual one; we would be looking into the legal provisions dealing with the contracts. The Indian Contract Act deals with the contracts inclusive of electronic contracts. The essentials of a valid contract are offer and its acceptance; lawful object and lawful consideration; free consent and the parties to the contract must be competent. Sans these requirements a contract could not be enforceable. Electronic contract is a kind of contract that is formed in the course of electronic commerce by interaction of two or more individuals using electronic means. Consent of the parties to the contracts must be free and should not be induced by coercion, undue influence, fraud, misrepresentation or by mistake. Fraud is both civil as well as criminal wrong.

Fraud has been defined inspection 17 of the Indian Contract Act, 1872 as it

> "means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> a. the suggestion as a fact, of that which is not true, by one who does not believe it to be true;
>
> b. the active concealment of a fact by one having knowledge or belief of the fact;
>
> c. a promise made without any intention of performing it;
>
> d. any other act fitted to deceive;
>
> e. any such act or omission as the law specially declares to be fraudulent."

4.7 Indian Penal Code, 1860

The criminal liability in respect of e-banking frauds could be determined on the basis of legal provisions contained in the Indian Penal Code, 1860. To harmonize the IPC with ever-evolving and ever-enhancing information and communication technologies, several amendments have been made via Information Technology Act, 2000. Section 29A has been inserted which deals with "electronic records." Sections 167, 172, 173, 175, 192, 204, 463, 464, 468, 469, 470, 471, 474, 476, 477A have been amended on the same lines.

> Though there are different types of frauds, but RBI has classified them on the basis of their reporting as under: misappropriation (Section 403 IPC) and criminal breach of trust (Section 405 IPC); fraudulent encashment through forged instruments, manipulation of books of account or through fictitious accounts and conversion of property (Sections 477A, 378 and 120A); unauthorized credit facilities extended for reward

> or for illegal gratification; negligence and cash shortages; cheating (Section 415 IPC) and forgery (Section 463 IPC); forgery of electronic records (Section 465 IPC); bogus websites, cyber frauds, phishing (Section 420 of IPC); irregularities in foreign exchange transactions; and any other type of fraud not coming under the specific heads as above."

4.8 Information Technology Act, 2000

The Information Technology Act, 2000 is a pivotal legislation dealing with cyber-crimes in India. The Act was amended in 2008 for providing amended definitions, introduction of the concept of "electronic signatures" and creating new offences. According to the provisions of this Act, banks are rendered as "intermediaries". Sections 43-45 of the Act provides for the "penalties for damage to computer, computer system; for failure to furnish information return; and residuary penalties, respectively." Sections 65-74 of Chapter 11 deal with offence like, 'tampering with computer source documents', 'hacking with computer system', 'misrepresentation', 'breach of confidentiality and privacy', 'publishing digital signature certificate false in certain particulars', 'publication for fraudulent purpose', etc.

The provisions of IT (Amendment) Act, 2008 which deals with the prevention and control of e-banking frauds are: Sections 43, 66B, 66C, 66D, 66E, 66F, 67C, 69, 69A, 69B, 71, 72A, 74, 79, 84A, 84B, 84C, 85.

4.9 Indian Evidence Act, 1872

The nature of evidence in the real world and virtual world is different. This disparity is conspicuous in all the stages of evidence detection, gathering, storage and exhibition before the court.[18] Slight negligence in the procedure might result in the evidence's value being diminished; the process of preserving cyber-crime evidences requires the expertise of an efficient and skilled

[18] Y. Joshi and A. Singh, "A Study on Cyber Crime and Security Scenario in India", 3 *IJEMR* 16 (2013).

computer forensics specialist. This Act gave recognition to electronic records and documents. The expressions such as, 'Certifying Authority', 'digital signature', Digital Signature Certificate, 'electronic form', 'electronic records', 'Information', 'secure electronic record', 'secure digital signature' and 'subscriber' shall have the meanings as assigned to them in the Information Technology Act, 2000.

5. Judicial Approach

The courts of law in India have dealt with the cases of e-banking frauds via. criminal liability imposed under the provisions of Indian Penal Code, 1860 and Information Technology Act, 2000. Some of such instances are briefly discussed hereunder:

In,*Sanjay Kumar v. State of Haryana*[19]*,* the Court of law in the criminal revision petition upheld the conviction of the petitioner for the offences punishable under Sections 420, 467, 468, 471 of IPC and Sections 65 and 66 of the IT Act. The facts of the instant case are that, "a complaint was moved against the petitioner by Senior Branch Manager, Vijay Bank, NIT, Faridabad. He was employed to maintain the software system of the bank whereby he has access to ledgers and other accounts of the bank which were computerized. Later on, while auditing the accounts certain discrepancies were found and it was revealed that accused-petitioner has manipulated the entries by forging and fabricating certain entries from one account to another, from the computer system by handling the software and withdrew the amounts from the bank on various dates. The Trial court after appreciation of evidence convicted and sentenced the petitioner. The petitioner preferred an appeal against the said order which was dismissed, thus, this revision petition has been filed. The counsel for the petitioner contends that he has been falsely implicated as there is no direct evidence to connect him to the alleged offence." The Punjab and Haryana High Court held that there is no merit in the

[19] CRR No.66 of 2013 (O&M).

contentions raised by the counsel for the petitioner; hence, the petition was dismissed.

In a landmark case, *National Association of Software and Service Companies v. Ajay Sood and Ors.*[20], Delhi High Court declared "phishing on the internet to be an illegal act, entailing an injunction and recovery of damages." Elaborating on the concept of phishing, in order to lay down a precedent in India, the court stated that, "it is a form of internet fraud where a person pretends to be a legitimate association in order to extract personal data from a customer such as access codes, passwords, etc. Personal data so collected by misrepresenting the identity of the legitimate party is commonly used for the collecting party's advantage. Court, by way of an example, stated that, typical phishing scams involve persons who pretend to represent online banks and siphon cash from e-banking accounts after conning consumers into handling over confidential banking details." The Delhi High Court observed that, "even though there is no specific legislation in India to penalize phishing, but it could be defined under Indian law as a misrepresentation made in the course of trade leading to confusion as to the source and origin of e-mail causing harm not only to the consumer but even to the person or organization whose name, identity or password has been misused."

In another case of *State Bank of India* v. *Rizvi Exports Ltd.,*[21] the brief facts were like this- "State Bank of India (SBI) had filled a case to recover money from some persons who had taken various loans from it. As a part of the evidence, SBI submitted printouts of statement of accounts maintained in SBI's computer systems. The relevant certificates as mandated by the Bankers' Books Evidence Act, 1891 (as amended by Information Technology Act, 2000) had not been attached to these printouts." It was held by the Court that these documents were not admissible as evidence.

[20] 119 (2005) DLT 596.

[21] II (2003) BC 96.

6. Role of Reserve Bank of India in the context of E-banking Frauds

In exercise of its supervision over commercial banks and other financial entities, the RBI issues directions via notification and circulars. Consequently, it has issued several directions with respect to the electronic banking transactions as well. Couple of directions needs a special mention as they have a direct bearing on e-banking. One such direction was issued by the RBI in the year 2016, viz. **Master Direction on Frauds- Classification and Reporting by commercial banks and select FIs**. It was issued with a view to providing a framework to banks enabling them timely consequent actions like reporting to various investigative agencies so that the fraudsters are brought to book early, examining staff accountability and an effective fraud risk management. Aforesaid direction classifies the frauds based mainly on the provisions of the Indian Penal Code, 1860. **Customer Protection- Limited Liability of Customers in Unauthorized Electronic Banking Transactions** is another important direction issued by the RBI in July, 2017. It has been issued in the backdrop of an increased thrust on financial inclusion and customer protection and considering the recent surge in customer grievances relating to unauthorized transactions resulting in debits to their accounts/cards. It also focuses on strengthening of systems and procedures in banks in order to repose customer's trust by ensuring financial security, via. guidelines. It, further, lays down the procedure for reporting of unauthorized transactions by customers to banks. The breakthrough was achieved by this very direction in the form of limiting as well as doing away with the customer's liability in certain cases reported of unauthorized banking transactions.

7. Conclusion

In conclusion, this article evokes the major issue concerning cyber space, viz. e-banking frauds. Due to the proliferation of information technology, there has been an exponential growth of e-commerce across the globe. Since, e-banking is one of the species of e-commerce, the industry relating to former has also

gained the market potential. The e-banking revolution significantly altered the banking industry by bringing multiple benefits to customers as well as new revenue prospects for banks. This change poses a threat to the security of consumers and integrity of banks, in a way that cyber-crimes have augmented at a phenomenal rate in the recent past.

In summary, the analysis of conceptual and legal framework of e-banking frauds in the Indian banking sector paints a picture which is not as mesmerizing as it could have been. There is plethora of legal provisions contained in the land of law that deals with the prohibition of e-banking frauds, but they are scattered over and among different legislations. A comprehensive and consolidated piece of legislation might work best to curb the menace of such frauds. Despite various guidelines of RBI, the reporting and detection mechanism of the frauds in the banks is not up to the mark.

Philosophically, prevention of e-banking frauds is a real homework. Every individual or organization must remain aware and ensure its security by itself, i.e. by securing one's online banking accounts by fool proof passwords, by checking 'last logged', by keeping the system up-to-date, by installing personal firewalls, by checking sites (URL), etc. Preventive measures need legislation, user's training, public awareness and technical security measures. They will go a long way in controlling e-banking frauds and ensuring safe and secure cyber space.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 132-164

Rape in Marriage: A Socio-Legal Analysis of Perception and Attitude of Wife

Shailja Shukla [*]
Sufiya Ahmad [**]

Abstract
Marital rape has to be seen from the prism of changing social perspectives and dynamics. Right from early times men were given supremacy in all social domains, will and desire of women became irrelevant and secondary. Rape within marriage is a concept that agonies the wife to the very core. Marriage in the modern times is now regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Then why marital rape is still not recognized as a crime, is a question for both society and government; as both are equally responsible for non-resolution of this menace. The present study is a socio-legal in nature, which is based on questionnaires distributed among 100 married women of Lucknow, India to appraise their opinions on various issues related to rape of wife by husband and to suggest measures with some concrete conclusion.
Keywords: Marital Rape, Violence against women, Criminal law, Sexual assault.

1. Introduction

Marital rape connotes rape during marital relations. Rape is derived from the Latin term 'rapio' which means 'to seize'; and 'marital' refers to the matrimonial bond. It conclusively means rape within the four walls of matrimonial relationship. The definition of marital rape is not provided in any of the statutes in India. Marital rape refers to "unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent." As far back as 1736, Sir Matthew Hale declared: 'the husband cannot be guilty of rape

[*]Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar Central University, Lucknow, Uttar Pradesh, India.
[**]PhD. Assistant Professor, Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar Central University, Lucknow, Uttar Pradesh, India. email: sufi.bbau@gmail.com

committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.[1] It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually[2]. The offence against women, violating her dignity and self-respect and when it occurs within four walls of matrimonial home, it reduces the women to the status of an object used merely for sexual gratification[3].

IPC is not the only legislation which touches upon the topic of marital rape; there are many more statutes which directly or indirectly deal with the issue of marital rape. Procedural complexity is very much known and apparent in the case of marital rape, but it is equally essential to understand the substantive position of marital rape and its attaching components in Indian legislations. The other statutes which in anyway deal with marital rape are Hindu Marriage Act, 1955, Protection of Women from Domestic Violence Act, 2005, Special Marriages Act, 1954, Divorce Act, 1869, Parsi Marriage and Divorce Act, 1936 and Family Courts Act, 1984. The definition of marital rape is not provided in any of the statutes in India. Marital rape refers to "unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent." It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually[4]. The provision of restitution of conjugal rights in Hindu Marriage Act, 1955[5], Divorce Act, 1869[6], Parsi Marriage and Divorce Act, 1936[7] and Special

[1] Government of India, Report of the Committee on Amendments to Criminal Law (2013), Page no. 113

[2] *Nimeshbhai Bharatbhai Desai* v. *State of Gujarat* R/CR.MA/26957/2017, 3

[3] Rajni Nanda, "Marital Rape: Recent Position with The Criminal Law Amendment Act 2013", Vol. 1 Issue 6 IJLJS, 1

[4] Supra note 10

[5] Hindu Marriage Act, 1955 (Act 25 of 1955), s. 9

[6] Divorce Act, 1869 (Act 4 of 1869), s. 32

[7] Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936), s. 36

Marriages Act, 1954[8] are nothing more than another way of telling the married women that law does not understand her plight only because the root of her suffering is her husband. "There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person".[9] Even after such views and opinions being expressed by Indian judiciary, the legislations still accommodate these provisions. Although many a times it was contended by courts that restitution of conjugal right do not necessarily mean establishment of sexual relations[10], but such provision makes it even harder for the wife to report for marital rape, because if a husband and wife are not judicially separated and wife is not below 18 years, there cannot be marital rape[11].

Although Unites States of America has laws for marital rape in all its states from 1993, but majority of states have some sort of loopholes that make prosecution of the accused hard and victim is not rendered with proper justice. In 2019, a woman found 2 year old video clips that showed her husband forcefully penetrating foreign object when she was not conscious and might have been drugged. As law in the state of Minnesota do not penalize sexual act without consent when the wife is unable to give consent, because of this loophole, the court did not charge the accused with felony and it broke an outrage among women protesters and legislatures. Keeping this case in mind the state legislature passed the Bill in 2019 which stands to get rid of this loophole. This prompt response was appreciated nationwide by women. The same kind of loophole is present in the relevant laws in the States

[8] Special Marriages Act, 1954 (Act 43 of 1954), s. 22

[9] *T Sareetha* v. *Venakata Subaiah*, AIR 1983 AP 356

[10] Manan Katyal, 'Constitutionality of Restitution of Conjugal Rights under Hindu Marriage Act, 1955', *available at:* https://blog.ipleaders.in/constitutionality-of-restitution-of-conjugal-rights-under-hindu-marriage-act-1955/ (last visited on March 11, 2019)

[11] *Sree Kumar* v. *Pearly Karun*, 1999 (2) (Alt Cri 77)

of Michigan and Ohio, and the changes made by Minnesota sparked other states to introduce Bill in order to remove this exception. Very recently, Singapore criminalizes marital rape which came into force on 1 January 2020. This change has been made as a part of their Criminal Law Reform Act which got the assent of Parliament in May, 2019. This step of an Asian country is a milestone in itself and would definitely help the women empowerment movements in India as well as in other nations. This change might hopefully spark advent of new, safe and happy era for women.

Marital Rape Myths

1. MYTH: Marriage bond has many objectives, and two of them are reproduction and establishment of sexual relations between partners. Some people discard the notion of forced sexual relations between people who are supposed to establish such relations as they are in a matrimonial bond. The Blackstone's philosophy of man and woman as a single entity after marriage supports such notion and that when they are 'one', how 'one' can rape 'self'.

   REALITY: It is to be understood that in India, Blackstone's unity principle, does not apply and even if it would apply, it is clearly unacceptable to snatch a woman's identity and individuality just because she got married. It should be without any doubt the rule that she is a human being first, then a woman and even much later a wife.
2. MYTH: Before marriage, wife is held to have given irrevocable consent to her husband till the marriage survives. So there cannot be a situation where wife can complain about unconsented sexual intercourse by husband.

   REALITY: The right to give consent cannot be taken back from a woman just because she is married. Women have a sole right over their body and she should not be forced to engage in any activity that she does not consent to. Such exploitation is not an exploitation of a woman only but also of the Constitution, law, justice, morality and humanity.

3. MYTH: It is usually said that if wife does not want to engage in sexual intercourse, then she should and can resist if a husband force her to do so.
   REALITY: Here people do not consider the difference in physical strength between a man and a woman. Also, it is essential to understand the nature of society which in majority is patriarchal and if this myth is true, several other crimes wouldn't be taking place such as domestic violence, rape, cruelty etc.
4. MYTH: It is contented that it is wife's duty to satisfy every need of her husband and if some demands are put forward by the husband; then why would a wife say no or not be willing to have sexual relations with her husband?
   REALITY: It is not one way around that wife is supposed to satisfy husband's need and husband is not even supposed to take care of the needs, wellness and health of his own wife. It should be clear that marriage does not make a women slave, who has to work at the will of the husband only. Marriage revolves around the notion of equal and mutual partnership, respect and love.
5. MYTH: Penalization of marital rape would intervene in the private matters of a couple and would be infringement of privacy of individuals.
   REALITY: Right to privacy would not get affected in any way if marital rape gets criminalized as its trial procedure would not be any different from that of offences such as cruelty, domestic violence and divorce proceedings; which of course are not an intervention on privacy but helping hand to the victim.
6. MYTH: The offence of marital rape will affect women only and men will become the ultimate victim of misuse of this kind of law.
   REALITY: This act of physical and mental distress is not only the concern of women; but equally that of men as well. Many instances have been seen where men get verbally

humiliated and blackmailed for divorce if they are not able or willing to satisfy their wives' sexual needs. Men should not be worried of its misuse that judicial system treat cases of marriage more delicately but they should be worried of no legal protection for them in case of marital rape or assault against them.

2. Determinants of Marital Rape

2.1. Patriarchal society

The male-dominated society overpowers the aspirations and dreams of the woman. In a home, the whole life of woman revolves around the male counterpart i.e. husband, father or son. Every day from waking up in the morning till sleeping at night wife is supposed to work in the interest of the home and the husband as if she does not have any wishes or hopes of her own. And women, who have accepted subordination of men, and made it their fate that they are inferior to the male counterpart, are mostly who are subjected to marital rape and violence from their husband.

2.2. Physical dominance of spouse

The power struggle between man and woman is not new phenomenon. It revolves around many aspects such as physical strength, mental strength, psychological strength, economic strength etc. The main reason for males to consider themselves as superior is based on their physical strength. They are physically strong and females are weak and thus dominate woman.

2.3. Sexual repression

Sexual repression by men and objectification of women nearly at every public platform is yet another reason for marital rape. Not giving the respect and consideration of more than a sexual being to women has led to the loss of dignity and morality among men with regard to women. Use of objectionable words to describe women in daily life, movies, T V serials, books and magazines have demeaned the position and role of women in the world and confined women to a mere sex symbol.

2.4. Cultural tolerance

There is a wrong notion that the women have accepted this demoralizing behaviour of men because these things have been happening to women since time immemorial and it wound not stop any time soon. There is no reason to make it such a big issue. It is only going to make things worse for women. "*Patiparmeshwarhai*". This statement suffices the position that males occupy in a marriage. These cultural notions have led to this power struggle.

2.5. Financial dominance

As women are not given the opportunity to be independent and earn living for themselves, this causes the situation where women remain with no option but to tolerate the violence as they are dependent on their male counterpart for bread, roof and a piece of cloth. Many men have the view that they are giving the livelihood to their wife, then she should obey everything of her husband. This is one of the major causes of marital rape.

2.6. Religious norms and preaching

Religion plays a very important role in the mindset of the people. There is a saying that a woman after being married only leave her matrimonial home after she dies, not before. This notion burdens the women that if they are revolting against the violence in marriage, they are defying their religion, family values and not fulfilling society's expectations from a woman.

2.7. Societal pressure

Huge pressure is put on married couple, especially on woman to present her marriage as perfect as she can be. Instead of helping the couple to come up with the resolution of their issues, they are told to make compromises. Such societal pressure makes life of victim of marital rape a living hell. Marriage is a very sacred institution and should be respected and preserved.

3. Empirical Study on Marital Rape

The purpose of the study is-

- To explore the level of awareness regarding marital rape.

- To examine the behavioural pattern regarding marital rape awareness.
- To understand the views of married women regarding marriage and marital rape.
- To comprehend the opinion on the need of understanding marital rape laws among respondents.
- To examine the seriousness of the issue in the mind of married women.
- To understand the level of awareness to be spread to make respondents aware of the social menace of marital rape.

4. Methodology

The present study is an empirical (non-doctorial) research and is to be carried out in a very limited time with an intention to collect most authentic data. Conducting empirical research in the area of law is of recent origin. For the awareness and perspective regarding marital rape, the data was collected through a questionnaire. Well-designed questionnaire was filled-up by personal visits to the respondents. The core objective of this study is to investigate about the level of marital rape awareness among married women and the reality of sexual abuse in marriage in their life itself. The response given by respondents has been analysed and produced in a structured format. Analysis of responses has been made along with the question. Finally, in the end, conclusion has been drawn and suggestions have been made.

4.1 Universe

The present study is conducted in Lucknow because this is one of the biggest and diverse residential areas in the state where quality data will be available that would help to eliminate biasness in the study.

4.2 Sample Size

The residential area of South City, Lucknow was selected for this research. Since this aims at examining the level of awareness and the plights a married woman faces in her matrimonial home, 100 respondents were selected randomly for this response.

5. Limitations of Research

The limitations of research are as follows:

- The number of respondents for research are 100 and it consist only of married women who are living with their husband and are not separated, divorced or widowed.
- The research has been completed in a limited time.
- The area which was selected for research is totally in the city of Lucknow, so the responses gathered could vary if taken from the other parts of the city.

6. Data Analysis and Interpretation

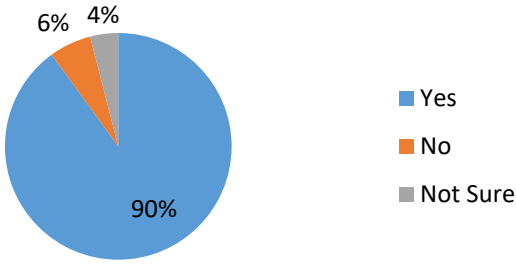

Fig.1: Is Rape by Husband Possible?

Fig. 1 reflects on the awareness and beliefs of the respondents regarding marital rape by their husband, and in this regard, 90% of the women are aware and think that marital rape by husband is possible, whereas 6% resent the notion. 4% are not sure about the phenomenon or the menace of marital rape by husband in the society.

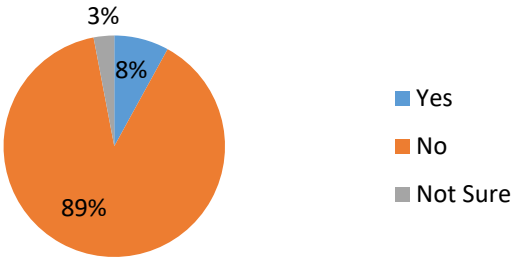

Fig. 2: Whether Husband has a Right to have Sexual Intercourse without the consent of wife?

The response on this question is of a lot importance, as this gives an impression of the mindset of the respondents. 89% of the married women gave negative response to the question, while 8% say that husband has the right to have sexual relations with wife without her will. While 3% are not sure and cannot give a definite response.

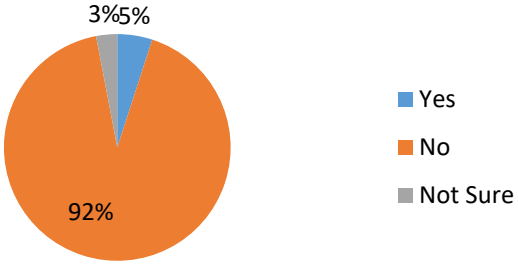

Fig. 3: Is Marriage a license to Rape?

The above figure shows that 92% of the women are of the view that marriage is not a license to rape the spouse, whereas 5% gave affirmative response. While 3% are not sure. The response to this question raises many concerns, legal as well as social.

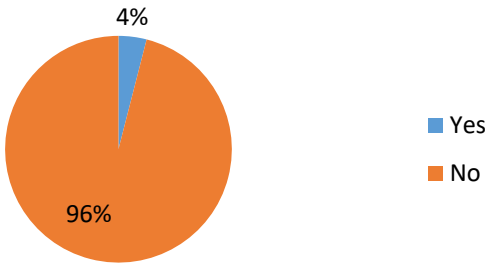

Fig. 4: Is Wife a Property of Husband?

The above figure implies that 96% of the respondents are of the view that wife is not the property of husband, whereas 4% gave an affirmative response to this question.

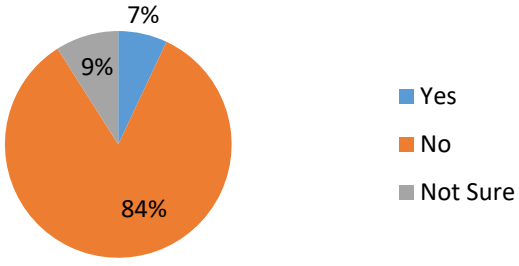

Fig. 5: Whether Marital Rape is a Recent Phenomenon?

The above figure elaborates the percentage of the people who are of the view that marital rape is a recent phenomenon. 84% of the people say that it is not, while 7% say it is. On the other hand, 9% are unaware and not sure.

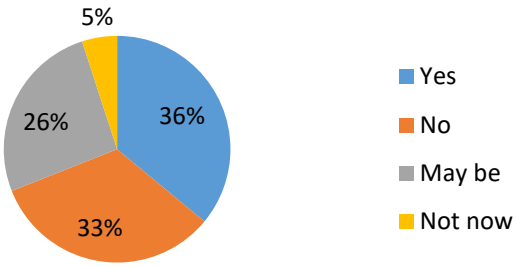

Fig. 6: Is it a Gender-Neutral Issue?

The above pie chart shows that 26% of the respondents are not aware and unsure about the fact whether marital rape is a gender-neutral issue. While 33% state that it is not a gender-neutral issue. 36% are of the affirmative view. And 5% say that is not a gender-neutral issue now.

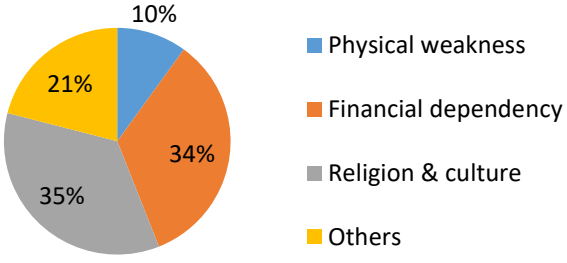

Fig. 7: Why Women Tolerate Marital Rape?

From the above figure is it clear that 35% of the respondents think that religion and culture is the prominent reason for women tolerating marital rape. 34% of the people seem financial dependency as the reason and only 10% stated physical weakness as the cause. While 21% gave other reasons such as children, society, family etc.

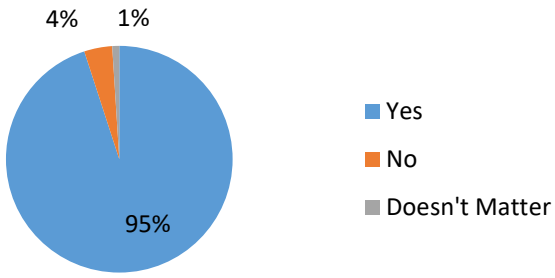

Fig. 8: Is Sexual Intercourse without Consent of Wife is Equivalent to Violence?

The above figure elaborates on the response of the question that whether sexual intercourse without consent of wife is equivalent to violence. 95% gave an affirmative response and 4% say that sexual intercourse without consent of wife is not equivalent to violence. While 1% are of the view that it doesn't matter at all.

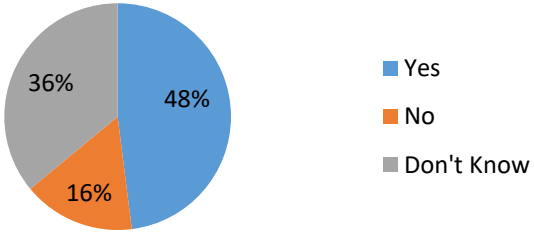

Fig. 9: Is Marital Rape Criminalisied in India?

As per the above figure, only 48% of the people are of the knowledge that marital rape is criminalized in India, while according to 16% people it is not criminalized. And 27% of the respondents don't know the legal character of marital rape.

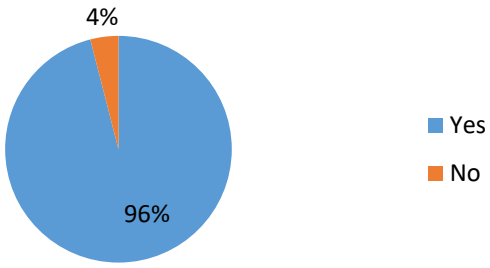

Fig. 10: Whether Consent of Wife is Important or should be Taken?

As per the above pie-chart, 96% of the people consider taking wife's consent before sexual intercourse or any sexual activity as crucial and important, while 4% don't.

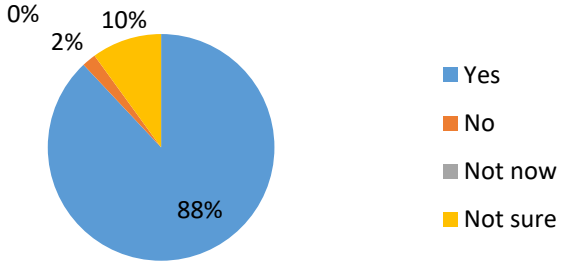

Fig. 11: Should Marital Rape Be A Crime Punishable By Law?

The response to this question unfolds the mindset of the married women and their potential marital responsibilities and duties. 88% of the respondents are of the view that marital rape should be punishable by law, whereas only 2% say that it shouldn't. 10% are not very sure how and when law should intervene in marital rape and no one thinks that this is not optimum time for criminalizing marital rape.

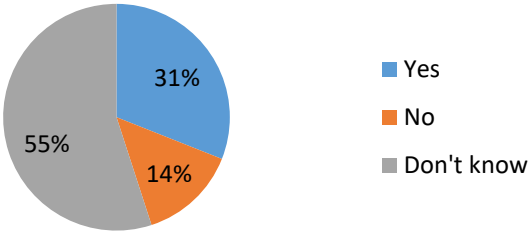

Fig. 12: Is There Any Law Which Punishes Marital Rape?

The above figure reflects that only 55% are aware that marital rape is punishable by law, whereas 31% of the respondents think that there is no law with regard to marital rape and 14% of the people don't know about the legality of marital rape.

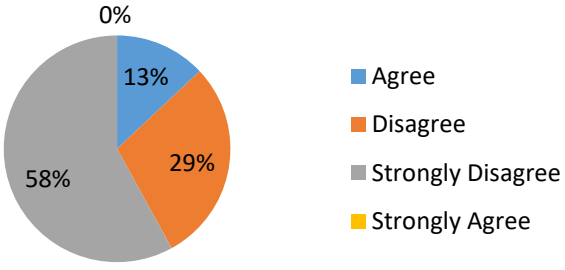

Fig. 13: Is It Culturally Justifiable to Make a Forced Sexual Relationship With Wife?

The above figure elaborates on the view that no one strongly agree that it is culturally justifiable to have sexual relations with wife, only 13% agree with the justifiability and 29% disagree and 58% strongly disagree with the notion.

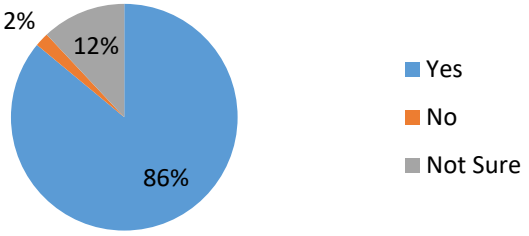

Fig. 14: Can Marital Rape Be A Ground For Divorce?

As per the above figure 86% of the respondents are of the view that marital rape can be a ground for divorce. According to 2% of the people marital rape cannot be a ground for divorce, and 12% are not sure.

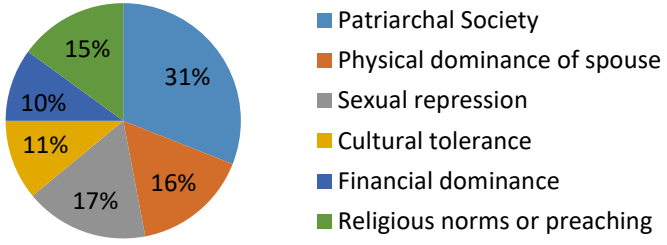

Fig. 15: What Is the Most Contributing Factor For Marital Rape?

As per the above figure 31% find patriarchal society as the most contributing factor, 16% think that the physical dominance of the spouse, 17% think sexual repression, 11% find cultural tolerance, 15% religious norms and preaching and 10% think financial dominance as the prominent factor for marital rape.

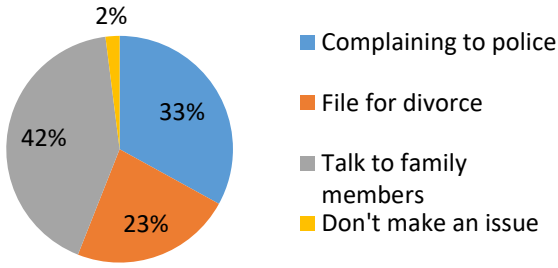

Fig. 16: What should be the Recourse to Be Chosen By Wife in Case of Marital Rape?

As per the above figure 33% think complaining to police is the appropriate step, 23% think that filing for divorce is optimum recourse, 42% think that talking to family members would be appropriate and 2% are of the view that one should not make issue about marital rape.

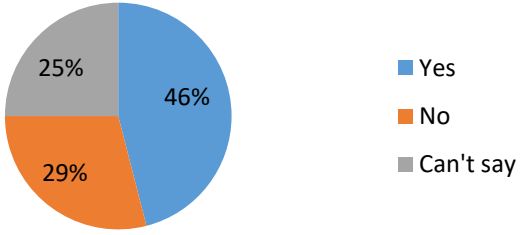

Fig. 17: Should There Be Any Law To Criminalise Marital Rape By Parliament?

As per the above figure, 46% are of the view that there should be law framed on marital rape, 25% cannot form an appropriate response on it and 29% don't find necessary to laws made on marital rape by parliament.

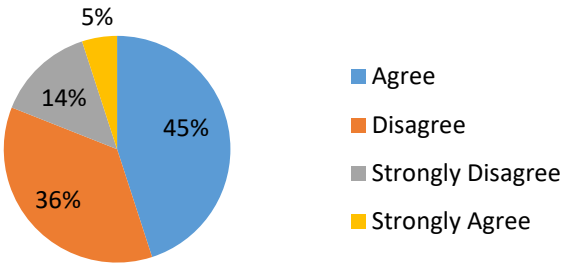

Fig. 18: Do You Think If Marital Rape Is Criminalised Divorce Rate Would Increase?

As per the pie-chart, 45% agrees, 36% disagree, 5% strongly agree and 14% strongly disagree on whether divorce rate would increase if marital rape gets criminalized in India.

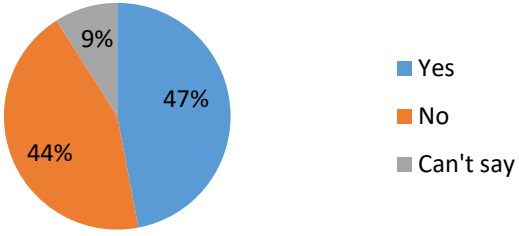

Fig. 19: Is Criminalising Marital Rape A Right To Privacy Issue?

As per the above figure, 47% agree on the question that it would raise issue of right to privacy, 44% dissent from the notion and 9% chose to not provide definite answer and went with “can’t say”.

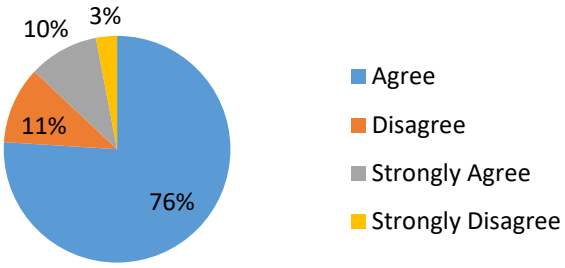

Fig. 20: Is It Against Principle Of Equality?

As per the above figure, 76% are of the view that marital rape is against principle of equality, 31% say that it is not against the equality principle, 10% strongly agree with the question and 3% strongly disagree.

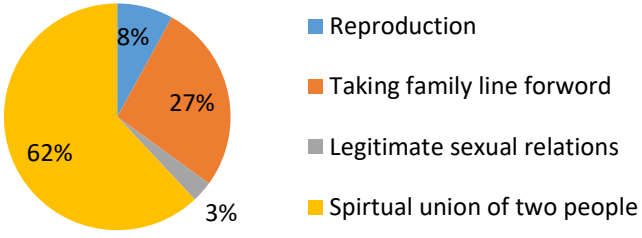

Fig. 21: Object of Marriage

The above figure shows that 62% of the respondents possess the view that object of marriage is spiritual union of two people, 27% reflect on taking family line forward, while 8% render views of reproduction as the object of marriage whereas only 8% provide legitimate sexual relations as response.

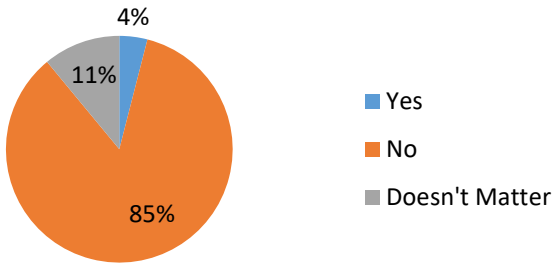

Fig. 22: Will You Allow Your Spouse to Have Sexual Intercourse Without Your Will?

The above figure shows that 85% of the respondents won't allow their spouse to have sexual relations without their will, while for 11% it doesn't create a concern and whereas 4% will allow their better half to have sexual intercourse without their own will.

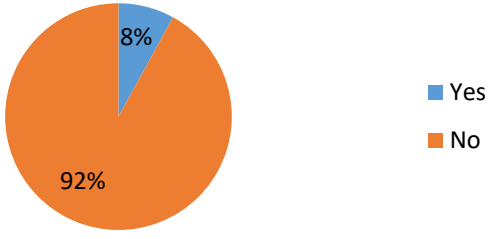

Fig. 23: Experiencing Sexual Violence

The above figure shows that only 8% of the respondents have experienced any form of sexual violence from their husband and 92% of the married women have denied any such experience or violence; which clearly would indicate any two of the following inferences firstly, it indicate the hesitation on the part of women accepting any such private family affair or secondly, it could be the situation that sexual violence is really very less against wife. Although the second implication doesn't seem accurate for women in this patriarchal Indian society.

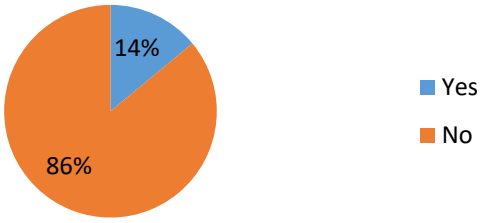

Fig. 24: Have You Faced Any Threat To Have Sexual Intercourse From Your Husband?

The above figure shows that 86% of the respondents haven't faced any threat from their husband for sexual intercourse and 14% of married women admitted the use of threat on the part of husband for sexual intercourse.

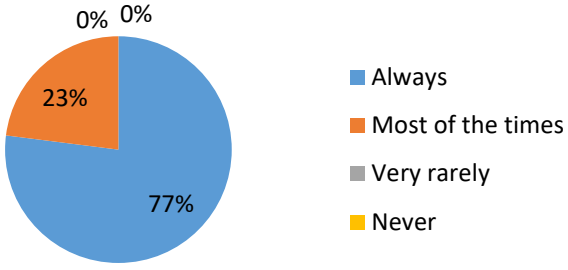

Fig. 25: How Often Does Your Husband Seek Your Husband?

The above pie chart elaborates on the fact that 77% of the women said that their husbands always seek their consent and 23% of women responded that most of the times take their consent for sexual intercourse.

7. Findings and Discussion

Selecting South City as universe for this socio-legal study was very fruitful; as it is the residential area. It was established 20 years ago and is very diverse in relation to social status, religion, education, occupation etc. The results that have been obtained from this

socio-legal study have diversity embodied in it. A wide range of respondents were selected in this study in order to get a sample, with diverse socio-legal attributes that reflect the thought, opinion and view of married women at large in Lucknow.

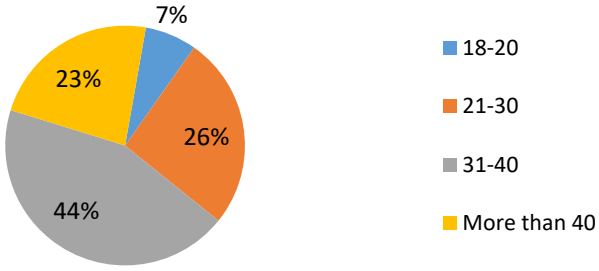

Fig. 26: Age Groups of Respondents

The respondents of this study belong to a variety of age groups (Fig. 26). 7% belong to 18-20 years, 26% belong to 21-30 years, 44% belong to 31-40 years and 23% are more than 40 years old. This would help to gain perspective of the married women who are newly married may be of 22 years old approximately and married women who have been in this bond for decades. Age variance really enhances the quality of result as it would contain the opinions of married women towards marital rape through different spectacles. As it would depict what a 21 year old thinks and what 55 year old married women think of spousal rape.

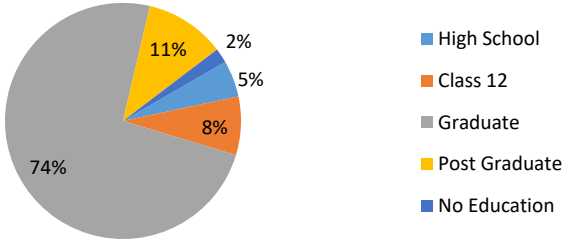

Fig. 27: Educational Qualification of Respondents

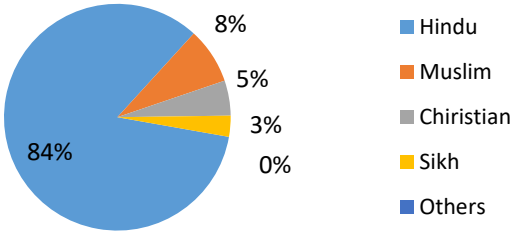

Fig. 287: Religion of Respondents

Respondents having educational qualification ranging from not educated at all to post graduates are part of this study (Fig. 27).It is again another factor which formulates the views towards marital rape of a married woman. Respondents belonging to different faiths are given appropriate consideration as religious preaching from the very beginning frame the mind-set (Fig. 28).

It is remarkable that approximately 90% married women are of the following views:

1. Rape by husband is possible.
2. Husband do not have right to have sexual intercourse without consent and will of wife.
3. Marriage is not a license to rape.
4. Wife is not a property of husband.
5. Sexual intercourse without consent of wife is equivalent to violence.
6. Consent of wife is important and should be taken.
7. Marital rape should be punishable by law.

It is very intriguing that 55% of the women admitted that they don't know if there is any law that punishes marital rape. And only 14% know that there is no law on marital rape. This clearly indicates on the need of sex education and general awareness to be spread among women for their well-being and happiness. The present study though conducted on a small sample reveals that women want marital rape to be an offence and they observe it as a violation of fundamental right of equality and women described

religion and culture as the most important factor for tolerating of marital rape. Women should not be considered as some chattel and should be given respect that they deserve and marriage should not be some excuse to accommodate sexual abuse against a woman.

During this study, one of the respondents while describing her thoughts on marital rape said:

> "I am a human first, before becoming someone's daughter or wife or mother, I am human first, so why should I be deprived of my own body and dignity. I am a woman, but only after being a human."

Another respondent of about 45 years age said:

> "It is hard to live with this love-hate relationship I don't hate my husband, but I don't like that he does not take my wish and desire in consideration in the bedroom. The hardest thing is to wake up early in the morning and smile and laugh at his jokes and pretend like nothing has happened."

This study suggests that married women are aware of the menace of marital rape. They are not only aware but they acknowledge its presence. Moreover, they want it to be criminalized. Perspective of married women is very important as most of them want to have a happy and safe married life. They cannot afford to lose the shelter over their head; If marital rape gets penalized, then after complaining against it, would land their spouses in jail. More than 85% responded that they won't allow their partner to have sexual intercourse without their will. This indicates that there are married women who don't accept marital rape and even though they don't have any choice. Nearly 15% women have said that establishing sexual relations with wife without her consent is culturally justiciable. This demands counselling of women in order to make them realize that their life, health, wellness and more importantly their consent matters; and if husband try to abuse his wife in any manner, it should not be tolerated.

8. Conclusion and Suggestions

Irrespective of the fact that women have to be treated unequal, they face a lot of problems in a marriage such as giving up their career, dowry demands, loss of self-respect and individuality and to top it all, the absence of liberty to deny sexual intercourse with husband, which could lead to sexually transmitted disease, unwanted pregnancy or any physical harm. The domination of society on the woman is apparent as there is absence of reciprocal respect, dignity and integrity which they deserve. Here legal authorities have to play significant role after the society accepts the issues women face due to marital rape. The real struggle is the issue of changing the mindsets of the society and making people realize that women are not mere sexual beings but are respectable individuals with wishes, hope, liberty, responsibility and rights. And it does not only hold true for women, this statement should be construed in universal manner irrespective of sex, gender and sexuality, no one should be deprived of his dignity and self-respect.

We must, at this stage, rely upon the opinion of Prof. Sandra Fredman of the University of Oxford, who has submitted to the Committee that the "training and awareness programs should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife".[12]

The Law Commission of Britain report observed that, "A woman, like a man, is entitled on any particular occasion to decide whether to have or not to have sexual intercourse, outside or inside marriage."[13]

The following suggestion was made by the Law Commission of India, which could help in combating the issue of malicious prosecution and victimization of husband and in-laws:

[12] Government of India, Report of the Committee on Amendments to Criminal Law (2013) Page no. 118

[13] 'Britain: Law Commission urges ban on rape in marriage', 21(5) Off Our Backs, The Work Issue (May, 1991), 3

> "Make 498-A IPC gender neutral. 498-A should be removed from criminal case as it is a family matter and because of this many adverse consequences will follow. The filing of Police report after FIR must be completed in three months and court proceedings should be completed within one year thereafter."[14]

Another contention which remains the highlight of the arguments is how such a crime could be proved which take place between two people within four walls, and there is one simple solution for that i.e. even though marital rape is not an offence in its own but it has few of its facets in Section 498-A of IPC; and sexual exploitation till now come under the purview of this Section only. It is very apparent that there are well established procedures for trial of the offence of cruelty. So with some changes and additions the procedure for trial of offence of marital rape could be framed which give protection to husbands against malicious accusations and ultimate redressal of grievances to married women. It was suggested by the Law Commission of India[15] that following provision should be added in Indian Evidence Act, 1872:

> "114A. Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

[14] Law Commission India 243th Report, 498-A (August, 2012), Page no. 77

[15] Government of India, Report of the Committee on Amendments to Criminal Law (2013) Page no. 117

The draft bill that is proposed by Dr. Shashi Tharoor in 2019 in Lok Sabha, has some very appreciable texts and recommendations; but the suggestion of just omitting the Exception 2 from Section 375 does not appear to be an optimum solution. There should be some scope of revival of the marriage if it turns out that both the spouses are of the view that they would like to be married and just want to not repeat the mistake of taking wife's consent for granted. It would not be very easy to establish this in nation like India, but at this stage when women are not even safe in their homes; there is a need for legislation in regard of marital rape.

Although in the same report it was put forward by the Law Commission that deleting the Exception of Section 375 of IPC would amount to excessive interference with the marital relationship.[16] But later on Justice Verma Committee on Amendments to Criminal Law recommended that such Exception should be deleted and relationship between the accused and victim of offence of rape and forced sexual relation should not be a determining factor for culpability, marital rape should be punishable.[17]

Many reasons and arguments are given for the criminalization of marital rape. The below figures actually demonstrate the status and situation of Indian women and marriages[18]:

a) 52% of women and 42% of men believe that a husband is justified in beating his wife.[19]
b) A husband is justified in hitting or beating his wife if she refuses to have sex with him, for this 13% woman and 9% men shared the same contention.[20]
c) The percentage of women who agree that women can refuse sex to their husband has remained virtually unchanged since

[16] Ibid. at 15
[17] Ibid. at 117
[18] National Family Health Survey (NFHS-4), 2015-16: India. Mumbai: IIPS
[19] Ibid. at 514
[20] Ibid.

NFHS-3, but this percentage has declined by 7 percentage points for men, from its level in NFHS-3 (i.e., 70%).[21]

d) 17% of women and 15% of men do not agree that a wife can refuse sex.[22]
e) 18% of men do agree that a husband has the right to get angry and reprimand a woman if she refuses to have sex with her husband.[23]
f) Thirty percent of ever-married women have experienced spousal physical violence, with 23% experiencing this type of violence in the past 12 months. Seven percent have experienced spousal sexual violence, with 5% experiencing this type of violence in the past 12 months. Spousal emotional violence was reported by 14% of ever-married women, and 11% reported such violence in the past 12 months.[24]

Fear of husband and spousal violence are highly correlated. Women who say that they are afraid of their husband most of the time are most likely to have ever experienced spousal violence (58%), followed by women who are sometimes afraid of their husbands (32%). Among women who say that they are never afraid of their husband, 20 percent have experienced spousal violence.[25]

Reasons given by society, legislature and judiciary for non-criminalization of marital rape-

a) During marriage irrevocable consent was given, then why should consent become a factor afterwards.
b) Husband is supposed to establish sexual relations with wife, and if he cannot do so with his own wife, then with whom he is supposed to do so.
c) Wife and husband is one unit and wife cannot rape oneself.

[21] Ibid. at 515
[22] Ibid.
[23] Ibid.
[24] Ibid. at 568
[25] Ibid. at 571

d) Wife will use this kind of law to harass the husband and in-laws.
e) Proving marital rape is very hard to prove in court of law.
f) Marriage would not be able to survive if law will enter the bed room.
g) It would jeopardize the relationship of husband and wife.
h) Wife is supposed to fulfil needs and desires of husband, and she cannot and should not step down from her wifely duties.
i) India is land of culture and such a law that questions the validity of sexual relations would pollute the culture and heritage.
j) What would be the fate of marriage when husband lands up in jail?
k) India should not follow the footsteps of western nations, as would bring havoc in the lives of people and culture.
l) Criminalizing marital rape would increase divorce rate among married couples.

Recently a case was brought before Allahabad High Court[26] in which a complaint was filed by a woman for rape. During the hearing the accused (man) took the plea of being married to the victim. Court had asked the accused to show the marriage certificate to prove his claim. This all appears to be a big mockery of marriage, dignity of woman and law itself. It is very hard to comprehend the status of women in India as this is the country which treats women as goddesses but have to fight every day for their dignity, life and existence.

In many reports of Law Commission of India, it was suggested that law against sexual assault should be made gender neutral as time has changed and many cases of sexual assault against men had come forward and denied even being reported as other than POSCO. There is no law that would help men to get justice against

[26]Rape Accused Claims He Has Been Married To The Victim; SC Asks Him To Show Marriage Certificate, *available at:* https://www.livelaw.in/news-updates/sc-asks-rape-accused-to-file-marriage-certificate-144267 (last visited on April 18, 2019)

sexual assault in any form. Law should not be discriminatory in nature and should render justice and aid to everyone who seeks its help.

9. Suggestions

a) There should be discussion and debate in parliament and universities; and research should be carried out by researchers on marital rape.
b) Approach should be adopted that women have right to give consent rather men having right to not seek consent for sexual intercourse with their spouse.
c) The concept of marital rape is an antithesis of the philosophy of the sacrament of marriage where man and woman are understood at par supporting each other in the journey of life. So, there should be mutual respect between husband and wife.
d) The myth that wife is property of husband should be broken.
e) Marital rape is an example of age old power struggle between man and woman that should be restrained as soon as possible for healthy and sustainable marriage.
f) Marital rape is gender neutral issue and is against the ideals of modern, democratic and welfare society.
g) State should take into account financial independency of women, as would help them to take stand for their rights against an abusive marriage and do not feel burdened to be part of it. Women should be preached and taught that religion and culture do not supersede democratic rights of women and that why her dignity and rights should not be compromised at any cost. The concept that women are physically weak should be torn and should be empowered to such an extent that they could take stand for themselves against their husband and society if subjected to sexual abuse.
h) Holier than thou position that has been given to husband in Indian society should be challenged by women and any kind

violence against them should not be tolerated and come under purview of law.

i) This is an offence against humanity much before it is a women rights' issue, this thought should be spread in the society.
j) The place that marriage has as an institution cannot be undermined and it should be given importance but not at the cost of life and misery of an individual.
k) Women should be encouraged to study and be educationally empowered in order to become financially and mentally independent; and do not fear to make her voice heard.
l) There could be system of hotline help to women that would support counselling facilities to them at their homes. This way they don't have to seek help outside for any problem and would become aware of the redressal methods, and would not take any wrong steps when faced any problem.
m) Fast track procedure should be framed for handling sensitive issues like this as it would wind up the case in less than 3 months which would help in non-victimization of women during decades of trail period.
n) Police administration should be made to undergo sensitization programs, as to become more sensitive towards the plights of married women.

The issue of marital rape should be open to discussion on different platforms so that women do not hesitate to come out and share their views and perspectives.

Chief Editor: [Decision on 11th May, 2022) The division bench of Delhi HC was called to decide constitutionality of section 375 (2) of the Indian Penal Code, i.e., marital rape exception to the legal status of marital rape. The two judges discussed at length several important issues that resulted in conflicting opinions. Justice Rajive Shakdher opined that the object of law is to penalize certain sexual acts when committed without the consent. The act is punishable for its harmful effects and lack of consent. This makes marriage

bond irrelevant. Woman who faces non -consensual sexual acts has been raped, regardless of her relationship with the accused. Since there is no rational relationship between differentia (married and unmarried women) and the object of law (punishing non-consensual sexual acts) marital rape exception fails the test of reasonable classification and must be struck down as un-constitutional. The help of Article 14 has to be taken which forbids inequality and discrimination. He said that "the right of women to withdraw consent at any given point in time forms the core of the women's' rights to life and liberty which encompasses her right to protect her physical and mental being". He called for change in 162 year old law.

Justice C. Hari Shankar came with the opposite finding by holding that though main object of the provision is to punish acts of rape, the object of marital rape exception is to keep the taint of the allegation of rape outside the marital relations with an object to protect the institution of marriage and concludes that the differential treatment as pleaded in the case hand is constitutional. The key issues of disagreement between the two judges were: availability of evidence; the importance of consent; whether courts could adjudicate over the issue of marital rape or legislature could decide; whether the state's concerns about safeguarding the institution of marriage were valid or not and whether remedies were available to women survivors of spousal violence in other laws such as the law on domestic violence. Hindu 11 May 2022 (Online)

Before bringing marital rape within the pale of criminality, (as the case will be now heard by the larger bench or will be referred to the apex court), its pros and cons have to be weighed in golden scales. No one will justify violence of any nature to wife including unwanted or nonconsensual sex but to punish husband for it will be too much to ask for. Will it be easy for a husband to share the bed with the same wife and to enjoy sexual intercourse with her who has been hell bent to disgrace her husband for having unwanted sex with her? Will marriage bond continue even after

husband has been punished for having unwanted sex with her wife? Will punishment be gender neutral as there are cases filed by husbands for divorce for over demand of sex by their wives? Is there any empirical evidence available to show that women have sought divorce because of marital rape so as to end marriage bond only on the demands of unwanted sex by their husband? The concept of marital rape is western in origin where marriage institution has lost its spirit and only its shell has remained. Will it serve any worthwhile purpose to follow blindly this concept of west ignoring mindset of the east and nature and value that is attached to marriage institution? Having urge for sex more than the normal is a biological issue, instead of penalizing it, the other alternatives can be explored. For instance: if wife is not ready to meet the excessive demands of sex or not ready to accept unwanted sex, she (If she is a Hindu) can take recourse of section 13 (1) of Hindu Marriage Act, 1955 that provides "cruelty" as a ground for dissolution of marriage and defines it as willful and unjustifiable conduct of such character as to cause such danger to life, limb, or health, bodily or mental or as to give rise to a reasonable apprehension of such danger. The marital rape will fall in the definition of cruelty. The concerned wife can plead that her bodily or mental health will be so affected as to constitute cruelty on the part of her husband. Once it is established; she can gracefully walk away from the marriage bond. But to inflict punishment to the husband for unwanted sex with his wife and then to expect from couple to live together happily as husband and wife is akin to 'eat the cake and have it too'. Mindset of both the parties (husband and wife) has to be properly understood before making any decision on marital rape, lest we may do more harm to the marriage institution than any good to it. We may be relegating this marriage institution to the commercial relation like partnership and may not be able to retain it as a bond of love and affection where one partner has ailment and another partner feels its pain.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 165-179

A Curious Case of Radio-Taxi Market under Indian Competition Law: An Analysis

Amit Ghosh[*]
Mohammadi Tarannum[**]

Abstract
The radio taxi market is a market where customers through the Internet can book a taxi to the desired destination at a reasonable price charged by an aggregator or middleman who is not the actual owner of the vehicle. By using the internet platform, the aggregators hire a number of taxi owners and drivers and then they provide these taxi services to the consumers. Before new arrangement, the yellow taxi in the market had been transporting passengers across India for many years. Unfortunately, after getting tired of the behavior of yellow taxi drivers and abusing the recharge process through mechanical or electronic meters, a large number of customers have turned to the electricity consumption market, led by Ola and Uber. However, the Competition Commission, which hears competition law cases, dealt with reports alleging an anti-competitive agreement and abuse of dominance when Meru Cabs, one of the radio taxi service, filed a lawsuit against Uber. The Commission held that Uber did not engage in unfair conduct, but the Court of Appeals for Competition, the appellate body, overruled the opinion of the Commission. The Supreme Court of India upheld the order of the 'Court of Competition Appeal'. An attempt is made in this paper to examine the legal issues raised and judicial principles pronounced in these conflicting opinions of different courts so as to appraise their loopholes.
Keywords: Cartel, Abuse of Dominance, Competition, Relevant Market

1. Introduction

The "Meru Cab" case is significant to understand the 'radio taxi service' market in India. Three cases came before the Competition Commission of India (CCI). One of them was filed by "Meru Cab"

[*]State Aided College Teacher-I, Surendranath Law College, University of Calcutta, West Bengal, India
[**]Ph.D, Vice-Principal, Surendranath Law College, University of Calcutta, West Bengal, India. email: dr.mtsnlcollege@gmail.com

against "Uber"[1] and another case was filed against "Ola"[2]. "Fast Track Cab"[3] also filed the same allegation against OLA. The Competition Commission of India (CCI) clubbed these cases for the same allegation. Filing these cases, the Informants wanted to contest OLA under Case. No. 74/2015[4], 06/2015[5], and Uber under Case No. 96/2015[6] against 'predatory pricing'[7]. These complaints were rejected by the Commission stating that OLA or Uber was not holding dominant position. In the Uber case, the "Supreme Court of India" (SCI) upheld the opinion of the Competition Appellate Tribunal order, which is oppositeto Competition Commission's order.[8] In the OLA case, the same allegation was raised but CCI rejected it by holding that OLA is not the only enterprise that is facilitating 'radio taxi services in the taxi industry but Uber is also proving the similar service. There is a close competition between them. Informants alleged in Case No. 74/2015 and 06/2015 that Ola and Uber jointly abuse the dominant power but CCI rejected it by saying that the Competition Act only determines the dominance done by a single enterprise or group. It doesnot permit 'collective

[1]Meru Travel Solutions Private Ltd. v. Uber India Syatem Private Ltd., Case No- 96/2015, https://www.cci.gov.in/sites/default/files/26(2)_96%20of%202015.pdf

[2]Meru Travel Solutions Private Ltd. v. ANI Technologies Private Ltd., Case No- 74/2015, https://www.cci.gov.in/sites/default/files/6%20%26%2074%20of%202015.pdf

[3]Fast Track Call Cab Pvt. Ltd v. ANI Technologies Private Ltd., Case No-06/2015, https://www.cci.gov.in/sites/default/files/6%20%26%2074%20of%202015.pdf

[4]Supra note 2.

[5]Supra note 3.

[6]Supra note. 1.

[7]"Predatory price" refers to the selling of goods or provision of services at a price that is lower than the cost of production of the goods or provision of services, as set by rules, in order to decrease competition or remove competitors.

[8]Uber India Systems Pvt. Ltd v Competition Commission of India, Civil Appeal No. 641 of 2017

dominance'. This paper will review these findings in light of the applicable law and make suggestions to put the applicable legal position in a proper perspective. Its hypothesis is that the requirement of 'collective dominance' in Indian competition law comes in the way of aim of the Act which is to protect fair competition in the market.

2. Periphery of 'Collective Dominance'

'Collective Dominance' simply means dominance done collectively or jointly. Any abusive practices done by any enterprise having a dominant position will be void according to the Competition Act 2002 in India. Whereas, according to Article 82 of the 'European Community Treaty (EC Treaty)', later amended as Article 102 of 'Treaty on the Functioning of the European Union (TEFU)', acknowledges 'Collective or Joint Dominance'. It specifies that any abuse of a dominating position by one or more undertakings inside the common market, or a considerable portion of it, is forbidden as incompatible with the common market if it influences trade between the Member States.[9]Collective domination is a situation in which two or more independent businesses, linked by economic ties, work together to maintain a competitive edge over other market participants while staying autonomous.[10]When two or more businesses join together and share a significant portion of the market, stiff competition ensues.[11] The Competition Amendment Bill of 2012 had suggested integrating the notion of joint dominance but it was rejected by the Competition Law Review Committee.

3. Abuse of dominance- Legal Position

Section 4(a) of the Competition Act lays down the definition of dominance. Dominant power is a position enjoyed by an

[9]EC Treaty, art. 82 repealed as TFEU, art.102.

[10]Shrivastava. V. and Maheshwari. K; Exigency of Indian Competition Law: The Concept of Collective Dominance, NLUJ Law Review, Journal and Blog, Jodhpur Publication, Published on May,29, 2020.

[11]Richard Whish and David Balley, Competition Law 566 (2011).

enterprise due to its strength. Where a particular enterprise operates independently over the competitive forces prevailing in the market or affects its competitors or consumers or the relevant market in its favor, then that particular enterprise would be determined as a dominant enterprise. Section 4 read with Section 19(4) of the Act stipulates the provision to determine abuse of dominance. Section 4 of the Act codifies some practices as abusive, they are mentioned below:

a) Unfair or discriminatory impositions on goods and services, such as predatory pricing;
b) Limiting or restricting the output of a product or service;
c) Entry barriers;
d) Indulges in denying market access;
e) The conclusion of contracts irrationally; and or
f) Use dominance to shift the market towards its favor.

The competition law of India allows dominance but its abuses are considered void. Supporting this view, the observation of 'Raghavan Committee' in its report is very pertinent to mention here.

> "Having 20% market share with an enterprise may be dominant in respect of other enterprises having other 80% market share. Whereas having 60% market share with an enterprise may not be dominant upon remaining enterprises which have other 40% market share because of its fair practice allowed by the market regulations".

Section 19(4) of the Competition Act, 2002 lays down some determining factors to consider an enterprise to be dominant. The factors are:

a) Market share
b) Resources of the enterprise
c) Size and importance of the competitors
d) Economic power
e) Vertical integration of the enterprises or sale or service network of such enterprises

f) Dependence of the consumers
g) Dominance acquired from government policy
h) Entry barriers
i) Countervailing buying power
j) Market structure and size of the market
k) Social obligations and social costs
l) Relative advantage, by way of the contribution to the economic development
m) Any other factors which the Commission deem fit

However, to prove abuse of dominance the relevant market is required to be identified first. The relevant market means relevant product market, relevant geography market, or both markets.[12]A relevant geographic market is one in which the conditions of competition related to demand and supply of goods and services are distinctly homogeneous and distinguishable from those in neighboring areas.[13] The meaning of homogeneous is nowhere defined in the Competition Act. However, Law Lexicon describes it as "identical descriptions." It implies that the market conditions related to the supply of goods and services in a certain geographic area must be consistent.[14] According to Section 2(t) of the Competition Act, 2002, a relevant product market includes any items or services that the consumer considers interchangeable or substitutable due to product or service qualities, prices, or intended purpose.[15]

4. Radio Taxi market- The Curious Case

Radio Taxi Market is a market where internet platform is used to hire a taxi. It is a platform that provides a meeting point between the owner/driver of the Taxi from one side, and consumer/ commuter interested in hiring taxi service on the other side. This new arrangement facilitated by the digital technology has very

[12]Competition Act 2002, sec.2(r)
[13]Competition Act 2002, sec.2(s)
[14]Competition Act 2002, sec.2(t)
[15]Supra note 10.

successfully replaced decades old the yellow taxises that were used by the consumers generally for short duration. Passengers were to pay the charges that had been worked out by the mechanical meter that used to be installed as per the rules in vogue. In the course of time, the electronic meter was introduced to reduce the malpractices. However, these electronic meters also did not prevent consumer exploitation as they proved vulnerable to tampering and misuse.

The internet-based taxi transport system was introduced where internet platform is like an aggregator or intermediary. We have moved from yellow taxi to radio taxi which is now internet facilitated. It has manifold advantages. It provides assured service to the consumer from any destination that too at a reasonable price unheared before. Even cancellation of service is intimated in advance. The rates are fixed and can be availed against a proper receipt. This is a one type of service from which a large number of commuters residing in India avail taxi to reach their destination. The radio taxi market is a two-sided service market. One aspect of radio taxi is passenger communication, while another is transportation services by drivers and automobile owners. Markets that provide e-services have ushered in a revolutionary shift in the classic market notion that dates back to antiquity.[16] Where buyers had to come physically or through an agent to avail his service or product and seller also had to meet the buyer physically or through his agent. Commonly this system was being followed from the ancient age. However, due to revolutionary change in computing and e-service, the twenty-first century world has seriously started shifting to the new concept evolved after significant changes because of this internet and computer-based market system. Tom Godwin, an economist, once remarked that the economy of the twenty-first century demonstrates that Uber, one of the world's largest taxi companies, does not own vehicles;

[16]Shrivastava, v. and Maheshwari. K. Exigency of Indian Competition Law: The concept of collective dominance, NLUJ Law Review, Journal and Blog, Jodhpur Publication, Published on May 29, 2020.

most popular media owner Facebook does not make content; one of the world's most valuable retailers Alibaba has no inventory; Airbnb most popular accommodation provider has no real estate. Something interesting is happening gradually.

5. The Case in Hand

"Meru Travel Solution Private Ltd." challenged the order of the "Competition Commission of India" (CCI) where Uber, the alleged party, got a clean chit from CCI. The CCI did not find Uber guilty of "Predatory Pricing". The complaint was filed by "Meru" which is one of the big players in the radio taxi market, using the internet platform to provide transport service to the consumers. It had alleged that Uber, the other rival enterprise, had resorted to predatory pricing that resulted huge loss to it. Not only this, Uber has more market power, being an international entrant, started providing incentives to the drivers and high profitable discounts to the taxi owners associated with them. Under section 19(1) of the CCI Act the Meru filed information before CCI. The Director-General (DG) was directed to start an inquiry.[17]DG report revealed that it could not be said that in the radio taxi market only Uber had been providing this particular service rather much rivalry exists in this market. The present complaint is also the result of this rivalry. DG report also stated that Ola, which has a sizable share in the taxi market, had a close competition with Uber. Uber could not be considered dominant over the relevant market. Here, the relevant product market was considered as radio taxi market and the relevant geographic market was considered as Delhi. The informant produced one research report namely the *Tech Sci* report[18] where it was found that Uber had suddenly gained its market share within a short period that might be suspicious. The Commission stated that the TechSci study was unreliable since the Uber group was not interviewed during the data gathering process

[17]Competition Act 2002, sec.26(1).

[18]New Age TechSci Research Pvt. Ltd., "Research on Delhi-NCR Radio Taxi Service Market Analysis" in September 2015.

and that the Commission had received another research report, 6Wresearch, with a different outcome in another case, which was filed by the "Fast Track Call Cab" against "ANI Technologies" led by the "Ola". Subsequently, the "Meru Cab" filed the information against the "Ola". Perusing both reports, CCI found a close competition had been continuing between Ola and Uber, the other rival enterprises were very far from them in terms of market share which happened within a minimum time.

In appeal, "Meru" challenged the relevant geographical market that was considered by CCI. It was stated that NCR should be included with Delhi to determine relevant geographical market. The Competition Appellate Tribunal (hereinafter COMPAT) had also given a serious thought to the information that "Meru" had submitted that the loss which Uber faced at the time of starting a business for providing incentives to the consumers needs to be re-investigated. The COMPAT also noted that cabs like Uber and Ola operate under tourist taxi permits, which are not restricted to operate within city boundaries. As a result, the COMPAT concluded that the case's relevant market must be the market for "radio taxi service in Delhi NCR."[19] COMPAT also observed that the report furnished by Tech Sci revealed Uber had a dominant market share but 6Wresearch the other report exposed Ola as having a dominant share in the market so the two reports should be given serious thought for this investigation. High discounts to the passengers and incentives given to the taxi owners and drivers should also be given due consideration as according to the observation of COMPAT. It gave a significant success to the "Meru Transport Solution Ltd.", the appealing party. The Supreme Court upheld the order of the COMPAT.[20]

A similar type of allegation was found when the "Fast Track Call Cab" filed a complaint against ANI Ola vide case no- 06/2015 and the "Meru Travels Private Ltd." filed a complaint against the same

[19]Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016.

[20]Supra note 10.

respondent. CCI clubbed the two cases as they were based on similar complaint and having satisfied *prima facie* the DG started investigation. Here the relevant market was considered the market for radio taxi services in Bengaluru. Based on annual data from 2012-13 to 2015-16, DG found that the "Meru", "Mega Cabs", "Easy Cabs", and "Karnataka State Tourism Development Corporation" (KSTDC) had declining market shares in terms of the number of point-to-point trips from 2012-13 to 2015-16, whereas OP, which entered the market in early 2011, had a market share of only 5-6 percent in 2012-13, which climbed to 61-62 percent in 2015-16. Uber, which began operations in August 2013, had a minor market share of less than 1-2 percent in 2013-14, but increased to 9-10 percent in 2014-15, according to the report. However, the DG observed that, while OP's market share climbed marginally from 2% to 3% in the first six months of 2015-16, Uber's share expanded at a quicker rate which is roughly 20% -22 percent. So in this market segment neither Ola nor Uber could be said dominant according to DG.[21] Agreed with DG, the CCI uphold the same opinion. It was found from the DG report that a close contest had been continuing between Ola and Uber so no one is dominant in this market.

The other charge which informant wanted to share that "ANI Technologies Private Ltd." jointly dominate the market and abuses its dominance. The CCI straightly rejected it stating that Indian Legislatures had no intent to include joint or more than one enterprise dominance. The Informant also attempted to prove joint dominance based on sub-clause (b) of Section 27 of the Act. It states that the Commission may impose a penalty of up to ten percent of the average annual revenue for the three preceding financial years on each of the persons or businesses who are parties to such agreements or abuses.[22] Commission stated that informant had to satisfy provisions determining abuse of dominance rather than provision for penalty. But the confusion

[21]Supra note 3.

[22]Competition Act 2002, sec.27(b).

that exists in statute related to provisions of definition and penalty has not been resolved till today.

There are five kinds of the market system which are as follows "Perfect competition", "Monopoly", "Oligopoly", "Monopolistic competition" and "Monopsony". When there are a huge number of buyers and sellers, as well as a large number of market participants, it is difficult for one member to change the market's prevailing price. This is the perfect desirability of a market system. It is called Perfect competition. In a Monopoly market, there is only one entrant who can set their rates, but their ultimate revenue is restricted by customers' capacity or willingness to pay their price. An oligopoly is a market system where a handful of players exist. It is so much similar to monopoly, yet unlike it. In oligopoly more than one player can exist. But because of a handful of players, it is possible, due to poor government regulation, oligopolists can set prices and behave like a monopolist. Monopsonylitic competition is a market system that contains the characteristics of both monopolistic and perfect competition. Monopsony occurs when there is only one buyer for a specific good or service, giving that buyer enormous negotiating power over the price of the goods supplied. The radio taxi market is a market where a handful number of players exist. Those were according to DG report in *Fast Track Call Cab & others*[23]. "Ola" and "Uber" were also "Fast Track", "Mega Cabs", "Easy Cabs" and "Meru" exist. So it is looking like an oligopoly market. The market system of oligopoly itself speaks that a handful number of firms can behave like a monopoly and set prices at their own choice like monopolists. So this radio taxi market may have to be handled carefully.

6. The Legislative Intent

Legislature and Judiciary have similar views relating to the incorporation of the 'collective dominance' concept to identify abuse of dominance. They have not considered dominance that

[23]Supra note 5.

occur between more than one enterprise. The Competition Act, 2002 became operative after "Competition Amendment Act, 2009". "Competition Amendment Bill, 2012" was tabled proposing for incorporation of "jointly or singly" concept into section 4(1) of "Competition Act, 2002". Although, it was not passed, it suggested a part that stated that no firm or group, individually or collectively, shall exploit its dominating position. The Competition Law Review Committee argued that sections 3(3) ('Cartel') and 5 (b) ('Group') of the Act are sufficient to deal with the idea of "Collective or Joint" dominance. A cartel is a group of businesses that have agreed to use collective bargaining to limit, control, or seek to control the production, distribution, sale, or price of goods or services.[24]

"Agreement" refers to any formal or writing arrangement, understanding, or action taken in concert, which is intended to be enforced through legal actions.[25] Different firms belonging to the same group in terms of management control or equity are referred to as a 'group.'[26] In the "*Manappuram Jeweller Private Ltd*." Case[27], the allegation was "Kerala Gold & Silver Dealers Association" (KGSDA) made predatory pricing which affected the complainant very badly. From the DG report, it was found that out of 650 jewelers existing in the Trissur market, the association had 242 members, constituting 37% jewelers but they were not individually dominant in their respective markets. So, according to the Commission, the contention of collective dominance did not arise.

7. International Best Practices

Article 82 of the European Communities Treaty determine more than one enterprise dominance. This treaty has changed its name over time, originally signed in Rome in 1957 as the Treaty

[24]Competition Act 2002, sec.2(c).

[25]Competition Act, sec.2 (b).

[26]Consumer online Foundation v. Tata Sky Ltd. & Others. Case No. 02/09 (CCI).

[27]Manappuram Jeweller Private Ltd V. Kerala Gold & Silver Dealers Association, 2012, CompLR. 548 (CCI).

establishing the European Economic Community (The Treaty of Rome), then becoming Treaty establishing the European Community. Its title is now the "Treaty on the Functioning of the European Union" (TFEU). TFEU also considers dominance done by more than one enterprise to be void. But like the Competition Act, 2002 of India, European Union (EU) has not defined dominance in its entire treaty. This function has been left to judiciary for their interpretation. The common law system is based on precedents. The definition has emerged from the *United Brand's Case*[28] and later it is affirmed in the *Hoffman La Roche case*[29]. In both these cases, the European Commission opined a similar view. It was noted that the dominant position is a monopoly enjoyed by an undertaking that allows it to prevent fair competition in the relevant market and allows it to act independently to its rivals and ultimately to its consumers.

The US Department of Justice has also filed a complaint against two payment card networks Visa and MasterCard which broke the Sherman Antitrust Act.[30] The decisions of these cases have a substantial impact on competition in the credit card market.Both using the exclusionary method prevented their member banks.[31] In December 2010, the Canadian Competition Bureau (the "CCB") filed an application with the Canadian Competition Tribunal to strike down certain MasterCard rules related to point-of-sale acceptance, including the "honor all cards" and "no surcharge" rules. In the Canadian Competition Tribunal the Commissioner also filed a case suo moto on Visa and MasterCard alleging their liability on joint dominance in the market.[32] On July 23, 2013, the

[28]United Brands Company v. EC Commission, (1978) ECR 207.

[29]Hoffman La Roche v. Commission 85/76 [1979] ECR 461.

[30]U.S.A. v. VISA Et al., 344 F.3d 229 (United States Court of Appeals, Second Circuit).

[31] David A. Balto (1994). Access Claims Faced by Credit Card Joint Ventures. *The Business Lawyer,* 49(3), 1367–1376. doi:10.2307/40687502.

[32]The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al, CT-2010-010.

Competition Tribunal issued a decision in MasterCard's favor and dismissed the CCB's application.[33]

The Federal Trade Commission Act prohibits unfair methods of competition and conscious parallelism.[34] Anyone who monopolizes or seeks to monopolize, or who combines or conspires with any other person or persons to monopolize any part of trade or commerce among the states, or with foreign nations, is guilty of a crime, according to Section 2 of the Sherman Act, which was passed over a century ago.[35] Most of the provisions of the Sherman Act are of civil nature but they provide punishment also.

India's competition regime is largely based on EU law, with a corresponding relationship to US law. However, the EC Treaty deals with abuse of dominance done by one or more undertakings but the Competition Act of 2002 begins with "no firm or group that does not allow it". The phrase "one or more undertakings" was first used in the *Italian Flat Glass* case[36] and the first known account where the Court of First Instance recognized the concept of joint dominance by one or more undertakings.[37]Where more than one independent entity is united in a specific market through economic links they hold a dominant position over other market entities. This declaration marked the start of Europe's collective dominance paradigm.

The European Union's General Court confirmed that a link of dependence between parties to a tight oligopoly that allowed for coordination was sufficient to establish collective control.[38]

---

[33] James B Musgrove, et.al, The Canadian Competition Tribunal as the Champion of Certainty, available at: https://www.lexpert.ca/archive/the-canadian-competition-tribunal-as-the-champion-of-certainty/349085 (Visited on 17th May, 2022).

[34]Federal Trade Commission Act, sec.5.

[35]Sherman Act, sec.2.

[36] Cases T-68, 77 and 78/89, Socieata Italiano Vetro SpA v. Commission (Flat Glass) 1992 ECR-II-I403.

[37]R.Nazzini, (2011). The Foundations of European Union Competition Law: The Objective and Principles of Article 102. Oxford University Press (p.360).

[38]Gencor v. Commission, 1999, E.C.R. II- 753.

Furthermore, the Court established some guidelines in the Airtours[39] decision to examine whether the idea of joint dominance was being abused. It had set out the following three significant questions to undermine the joint dominance:

a) How other members were behaving, did each firm know?
b) Was tacit coordination sustained between enterprises?; and
c) Would the tacit coordination jeopardize the common policy between competitors and consumers?

8. Conclusion

When the Competition Amendment Bill 2012 was drafted, it was not passed because of the opposition by the Competition Law Review Committee on account of showing that the present provisions on cartel are sufficient to deal with these matters. The Committee gave the example of US Antitrust laws which also does not consider the collective dominance concept. The model followed by US Antitrust Laws based on the Sherman Act is a combination of civil and criminal nature. In India, if the enterprise against which the order is issued, does not follow it, section 42(3) of the Competition Act, 2002 punishes the enterprise with three years imprisonment or a fine up to Rs. 25 crores, or both. But the punishment which the US gives is ten times more than India. Indian Competition regime is mostly modeled on Europe legal regime in this context. It is very much civil remedy like Europe. In India, Section 27 of Competition Act provides discontinuing of abusing agreement or compensation order and Section 28 of the same Act provides "cease and desist" order. In the case of *Fast Track Call Cab & Meru Transport Private Ltd. v. ANI Technologies Private Ltd*.[40] the Competition Commission of India issued an immediate refusal, stating that section 27 (b) of the Indian Competition Act provides that the Commission may impose a penalty of not more than ten percent of the average turnover for the previous three financial years on each of such persons or

[39]*Airtours v. Commission,* 2002, E.C.R. II-2585.
[40] CCI Case No. 6 & 74 of 2015.

enterprises who are parties to such agreements. So the penalty section identifies more than one mode of dominance. But the Commission argued definition and determination process of abuse of dominance provided in the Act does not recognize dominance done collectively. Section 27(b) read with section 4 of the Competition Act may be revisited by the legislature. In the series of cases mentioned in this paper, it has been found that the 'collective dominance' is involved but, being not included in the definition, the courts have straightway rejected it. The jurisprudence relating to collective dominance in Europe may be required to be revisted by the legislature and judiciary in India so that it could be introduced after fine tunning to suit Indian conditions.

Acknowledgement

The authors are grateful to Prof. Farooq Ahmad Mir, Dean, School of Legal studies, Central University of Kashmir for his valuable suggestions on the first draft of this paper.

Central University of Kashmir Law Review
Vol. 1 (2021)
eISSN: 2583-6935
pp. 180-195

Jurisprudential Analysis of Constitutional Interpretation in India: Some Hindsights

Syed Shahid Rashid*

Abstract

A Constitutional document sets forth the principles upon which the government of the state is founded. It shapes as fundamental law for the political order of State. In the realm of interpreting constitutional percepts the questions of reflection on the ultimate ends of legal ordering cannot be solved without having an eye on jurisprudential orientation of constitution. This paper is a humble attempt to analyze the working of Jurisprudence in the Constitutional Interpretation in India.

Keywords: Jurisprudence, Literal, Declaratory, Sociological, Realism, Liberty

1. Introduction

'Law' and 'jurisprudence' are varied phenomena, however, interrelated. Both the terms are defined by jurists in different forms. However, the central theme of jurisprudence is to study nature, content and purpose of law. The western legal thought or modern jurisprudence emanates from four major schools of jurisprudence i.e. Natural Law, Analytical Positivism, Historical School or Evolutionary theories and Sociological School. The legal thought of the West revolves largely around these four schools even though new schools of legal thought[1] have also emerged. However, the larger influence of these schools remains in force in one form or the other even today. Natural Law takes its roots from reason, divine, morals, abstract, and universality of law. Naturalists see law as a higher ideal, the phenomenon of universality closely linked with reason. They consider law inextricable with morality, reasonableness and universality. However, this morality is not necessarily to be emanated from theological parameters. The law

*Teaching Law at Kashmir Law College, Srinagar, J&K, India. Also, Research Scholar, School of Law, University of Kashmir, J&K India. email: syed_shahid1066@yahoo.co.in

[1] American Realism, Pure theory of law, Neo positivism etc.

is conceived by the exponents of this school as inherent in nature of man or society, and independent of convention, legislation or other institutional devices. Natural Law emerged and expanded its ambit in the Greek, Roman, Christian, Medieval and Modern period. This school, however, remained more in idealism and failed to transform the thought into practice for a very long period of time on account of inconsistencies and lack of sound theological basis. Natural law emerged on theological principles but could not sustain such foundations and got secularized in the beginning of eighteenth century and gradually it was understood to be law not necessarily connected with religion or divine but purely on human reason. The exploitation in the name of religion during the Christian period in Europe played a larger part in the degeneration and failure of natural law to emerge as a concrete legal thought. Analytical Positivism in England discarded Natural law as vague, theological and metaphysical and considered that law should be studied through the process of observation, comparison, experiment, analysis and classification just as physical bodies are studied in physical sciences. The main exponents of this school were Jeremy Bentham and John Austin who considered law as the command of the sovereign i.e., a state power. For them Law is to be understood and accepted 'as it is' form and not in 'ought to be' form. The legal thought propounded by analytical positivism gave rise to the authoritarian and imperialistic attitude of law which implies coercion, command and sanctions; divorced from morality and ethics; emanate purely from the will of the state power. This school promoted literalist approach of law which ultimately leads to the stagnation of law as it is immune to surrounding influences and does not show concern to the actual requirements of the society (ought). Historical School in Germany propounded by Carl Von Savigny also rejected Natural Law being static, stagnant and universal and considered law as a varied phenomenon. This school strongly advocated the evolutionary process of law and considers law as 'volksgiest' i.e. it should always conform to the popular consciousness which emanates from customs, history, language

and national character of the people and these factors act as the core features in the structure of 'law'. This school rejects the positive notion of law and legal reforms in the form of codifications and considers law as a matter of unconscious and organic growth. Therefore, law is found not made. Sociological School of law was a reaction and revolt against the self-justified sovereign based on rigid analytical positivism and cultural processes based historical school. Sociological school considers law as a social fact or reality. Law, according to this school, is strongly connected with society and cannot flourish in isolation free from social and economic factors. It is an instrument of social change. The relationship between law and society is strong base for understanding law. Law is to be seen in terms of purpose i.e working of law and not in terms of nature only. Law should be flexible, accommodative, socially accepted and for social purpose. The prominent sociologists of this school are Ihering, Duguit, and Pound.

2. Interpretation of Law

Interpretation of law means to know the purpose of law or intention of the law maker. In other words, interpretation of law aims at knowing the real purpose and intention of legislature. The domain of interpretation of laws be it, Constitution or any other legislation, lies within the ambit of judiciary as it is regarded as the guardian of the Constitution and Law. The courts have faced innumerable challenges in the process of interpretation of enactments, more particularly, the interpretation of constitutional letters. How the court reads and interprets facts and relates it to the law requires a lot of skill, insight and vision. The methodology that judges use to interpret the Constitution has garnered significant public attention in recent decades. It has been observed over the period of time that the debate over methodology has been framed as a contest between two views. On the one side are those who argue that the text of the Constitution should be construed according to its original understanding that is the way

the Judicial Interpretation of the text was understood by the people who drafted, proposed, and ratified it. This is called literal interpretation or grammatical interpretation i.e. technocratic approach. The task before the court is to confine itself only to the letters of the law (*litera legis*).

On the other hand, some have argued in favor of treating the Constitution as a living document. They believe that the Constitution cannot afford to remain static but it has to grow and evolve over the period of time as it has to provided solution to the societal issues. The society is in a constant motion so must be constitutional interpretation. Proponents of this view believe that such evolution is inherent in the constitutional design because the framers intended the document to serve as a general charter for a growing nation and a changing world. Thus, constitutional and statutory interpretation must be informed by historical facts, contemporary norms, social circumstances, purposes and needs and it cannot remain stick to its original meaning. This is called liberal and wide interpretation i.e. activist approach.

3. Declaratory and Legislative Theories of Interpretation

However, the question is where to strike a balance between liberal and literal interpretation of the laws? In other words, to what extent the court can expand its wings in the interpretation of Constitutional and Statutory provisions. The role, which a judge plays in the processes of adjudication is the subject of discussion and debate. There are two contrary views on this point. One is Declaratory theory i.e. Judges only discover and declare law while the another one is a Legislative theory i.e. Judges make law. The supporters of the declaratory theory include the eminent jurists like Blackstone, Bacon, Coke, Mathew Hale, Prof. Hammond, Dr. Carter, Lord Esher, Lord, Scrutton. They believe that judges are no more than discoverers of law. The role of Judge is to discover, declare and interpret the law, but not to make it. A decision of the Court helps to locate, expound, declare and publish the law which is laid down in the form of order of the King, law of the parliament,

or the general customs. Black Stone is considered to be the great exponent of this view. According to him the judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the Common Law.[2] Dr. Carter, a great American Jurist says, 'the judges were the discoverers, and not the makers of the law'. He further says that if the judges would declare law before it was existing, in other words, it was yet to be framed by legislature, then it would be an indefeasible outrage. If there already exist a law on the point, it cannot be said that the judge made the law. Thus according to Carter, court decisions merely declare the existing law. This proposition was also laid down by Scrutton L.J in *Hernett v. Fisher*[3] that this court sits to administer the law; not to make new law if there are cases not provided for. In *Rajeshwar Prasad v. The State of West Bengal*[4] Hidayatullah J. stated:

> No doubt the law declared by this court (SC) binds courts in India but it should always be remembered that this Court does not enact.

The other view is that judges make law. This theory was initiated by Bentham and carried to a radical conclusion by John Chimpan Gray, who asserted that judges produce law as much legislators do.[5] Other eminent jurists like Salmond, Dicey, Bacon, Holmes etc. also concurred with this view. Gray, an American Realist said:

> Law (of the State or of any organized body of men) is composed of the rules which the courts i.e. judicial organs of that body lay down for the determination of legal rights and duties.' The courts put life into the dead words of the statute and whoever hath an absolute authority not only

[2] Black Stone, *Commentaries*, 68.

[3] (1927) K.B. 402

[4] AIR 1965 SC 1887

[5] Edgar Bodenheimer, *Jurisprudence*: *The Philosophy and Method of Law* 439 (Universal Law Publishing Co. Pvt. Ltd New Delhi, 7th Indian edn., 2011).

> to interpret the law but to say, what the law is, is truly the law giver.'[6]

Salmond criticized declaratory theory by stating that this theory must be totally rejected both in law and in equity if we are to attain any sound analysis and explanation of the true operation of judicial decisions. In the words of Holmes, 'Law is what the Courts do, Law is what the Judges say, and Law is action of Courts. The creative role of the judge has been so dominant in England that English law is, sometimes spoken of as judge made law. Law of Torts in England is a significant example of development of law through judicial decisions.

3.1 Position in England

The United Kingdom follows the doctrine of parliamentary sovereignty which means that the Supreme Court of England is much more limited in its powers of judicial review. It cannot overturn any primary legislation made by Parliament. However, it can overturn secondary legislation if, for example, that legislation is found to be *ultra vires* to the powers in primary legislation allowing it to be made.[7] Therefore, in England, judicial review is in the form of interpretation and not in the form of struck down of law. Judicial review is applicable on administrative actions and not on the primary legislation made by the Parliament. Dicey's theory of Parliamentary supremacy was an English constitutional incarnation of Austin's theory of sovereignty. It is evident that analytical positivism or what may be called as British Positivism runs very high on the minds of Judges in United Kingdom and therefore, the courts follow declaratory theory of law. It also means that English method tends more towards literal interpretation.

[6] Gray, *The Nature and Sources of Law.*

[7] https://en.m.wikipedia.org/wiki/Supreme_Court_of_the_United_Kingdom last retrieved on 18th oct, 2017.

3.2 Position in America

The doctrine of judicial review is an integral part of the American Judicial and constitutional process although the US Constitution does not explicitly mention the same in any provision. Since *Marbury v. Madison*,[8] the institution of judicial review has been a subject of perennial and passionate debate among the scholars and jurists and characterizes it as anti-majoritarian. However the doctrine of judicial review has made the US Supreme Court a vital institution in the governmental process of the country.[9] American sociological jurisprudence has arisen not merely as a protest against traditional concepts of natural rights, but also as a reaction to the formalistic attitude of analytical jurisprudence. The Jurists in America mostly belong to Legal Realism and believe in legislative theory of interpretation of law, therefore, tends more towards liberal interpretation. Justice Holmes, noted American Jurist once pointed out that judges do and must legislate, but they can do so only interstitially, they are confined from molar to molecular motions.[10] One of the greatest of American judges, Benjamin N. Cardozo stressed the necessity of judicial alertness to social realities. He came to the conclusion that considerations of social policy loom large in the art of adjudication. Thus there is an element of creation as well as an element of discovery contained in the judicial process.[11] The Supreme Court of Washington once pointed out that "constitutional provisions should be interpreted to meet and cover changing conditions of social and economic

[8] 5 US 137 (1803). In 1803, in this case, the US Supreme Court very clearly and specifically claimed that it had the power of judicial review and it would review the constitutionality of the Acts passed by the Congress.

[9] M.P. Jain, *Indian Constitutional Law* 1695 (lexis Nexis, Butterworths Wadhwa Nagpur, 6th ed., 2010).

[10] Edgar Bodenheimer, *Jurisprudence The Philosophy and Method of Law* 442(Universal Law Publishing Co. Pvt. Ltd New Delhi, 7th Indian ed., 2011).

[11] Ibid at p: 121

life."[12] In the celebrated case of *McCulloch v. Maryland*[13] Chief Justice Marshall declared that American Constitution was intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs.

4. Constitutional Reading in India: Austinian Influence and Phase I Approach

In the context of Indian Constitution, there has been interpretation on the parallels of two different aspects in jurisprudential terms; American legal Realism and Austinian analytical positivism. American legal realism stands for Supreme Court as a sole guiding institution of law. The law (or the Constitution) is what the court say it is' is the working principle of realistic jurisprudence.[14] On the other hand, in the United Kingdom the concept of sovereignty had led to legal positivism which regards Parliament as sovereign in modern times, as the ultimate source of positivity in law. The Constitution of India partakes of both, the US and the British Constitution; it is natural that the two theories of law and jurisprudences may make an impact on each other continuously in the working of the Indian Constitution. In the infancy years of the Constitution of India, Mcwhinney[15] had remarked:

> The high-watermark of legal positivism on the part of the Indian Supreme Court was attained in one of the Court's first opinions, Gopalan v. State of Madras [16]….

All the considerations which are likely to influence the judge who may be called upon to decide a matter such as his personal and professional background, his social, cultural or economical likes

[12] *State v. Superior Court,* 146 P at 547(1994). *Gompers v U.S.,* 233 US 604 at 610(1914).

[13] 17 U.S. (4 Wheat.)316, at 415 (1819).

[14] "We are under the Constitution , but the Constitution is what the Judges say it" a dictum of C.J. Hughes quoted in Abraham, *The Judicial Process* 326(2nd of 1968): Hart, *The Concepts of Law* 138(1961)

[15] McWhinney, *Judicial Review* 130 (4th edn.,1965)

[16] AIR 1950 SC 27

and dislikes are worthy of study for making accurate prediction because these will be reflected in his decisions making. This emphasis of legal realism is very much recognized by the former Chief Justice Hidayatullah. He stated:

> *Every judge …has a distinct stream of tendency in him. Since he sees things with his own eyes, there works on his mind all those imponderable influences built round himself in life's experience. He may not be aware of the influence but they are there. The tendencies of Judges are as varied as the colours of an artist. There are also various approaches and methods for viewing legal problems. One judge may be influenced by one approach more than another.*[17]

The judge may not give a liberal interpretation to the law but may apply it to the matters with which it directly deals and within such limits may give a broad or limiting interpretation to the words to suit the ends of justice.[18]

To begin with, generally the predominant judicial approach of the Indian Courts was positivist, i.e. to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to the interpretation of ordinary statutes. Judges of India were brought up in English Positivist tradition. This approach offshoot a concept of judge not making or creating the law but merely declaring the law. This principle was judicially laid down in these words by Justice Mukherjea: "*In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution makers".*[19]

The Plain meaning rule, also known as the literal rule, is one of three rules of statutory construction traditionally applied by English courts. It means that statute is to be interpreted using the ordinary meaning of the language of the statute, unless a statute

[17] M. Hidayatullah , *A Judge's Miscellany*,67(1972)
[18] Paton, *Jurisprudence* 187 (2nd edn.,1951)
[19] *Chiranjit Lal Chowdhuri v. Union of India* AIR 1951SC 58

explicitly defines some of its terms otherwise. In other words, the law is to be read word by word and should not divert from its ordinary meaning. The plain meaning rule is the mechanism that underlines textualism and, to a certain extent, originalism. The literal rule is what the law says instead of what the law intended to say. In the Words of Austin what he called law as it is distinguished from Law ought to be. Prof. Larry Solum expands on this premise:

> Some laws are meant for all citizens (e.g., criminal statutes) and some are meant only for specialists (e.g., some sections of the tax code). A text that means one thing in a legal context might mean something else if it were in a technical manual or a novel. So the plain meaning of a legal text is something like the meaning that would be understood by competent speakers of the natural language in which the text was written who are within the intended readership of the text and who understand that the text is a legal text of a certain type.[20]

The advocates of literal interpretation argue that Constitution itself incorporates the principle of statutory interpretation. Article 367[21] provides that the General Clauses Act, 1897,[22] shall apply for the interpretation of the Constitution as it applies for the interpretation of legislative enactments.[23]

In the very first instance of literal interpretation to the constitutional provisions the first case on fundamental rights, *A.K. Gopalan v. State of Madras*[24] in which the limits of the rights under

[20] Legal Theory Lexicon

[21]. Article 367(1) states that unless, the context otherwise, requires the General Clauses Act 1897, shall subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of this Constitution as it applies for the Interpretation of the an Act of the Legislature of the Dominion of India.

[22] This Act contains as it were, a legislative dictionary for India.

[23] *Jawala Ram v. Pepsu* AIR 1962 SC 1246

[24] AIR 1950 SC 27

Articles 21[25] and 19 were distinguished from one another on the principle of direct consequence of law and focused on the letters of the law *per* Justice Kania.[26] The Supreme Court rejected the idea of interpretation of the provisions of Constitution "in the spirit of the Constitution".[27] The Supreme Court emphasized that it will confine itself to the written text of the Constitution for the purpose of interpretation and will not take recourse to any abstract or external concept like spirit of the constitution. It rejected this contention that preamble should be guiding star in its interpretation and Article 21 should be construed with natural justice. The Court with Majority held that Law in Article 21 refers to positive or state made law and not to natural justice and this language of Article 21 could not be modified with reference to preamble.[28] Gopalan was followed subsequently in many cases. In *Ram Singh v. Delhi*[29]*,* the Court again invoked literal rule of interpretation and exclude relationship between Article 19 and Article 21. This preposition was reiterated by Supreme Court in *State of Bihar v. Kameshwar*[30], Mahajan J. observed: "It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicitly in respect of a certain right or matter. The spirit of the Constitution cannot prevail as against its letters."

The biggest drawback of positivistic interpretation of Constitution in India was the decision in *ADM Jabalpur v. Shivkant Shukla* [31] in which the Court held suspension of Article 21 as valid. The court applies literal interpretation to the "the concept of personal liberty" in Article 21 by laying down practice of Court not to pronounce on such points which have not been raised. The Court

[25] No person shall be deprived of his life or personal liberty except according to procedure established by law.

[26] *Supra* note 22 at 34.

[27] *A.K.Gopalan v State of Madras* 1950 SCJ 174

[28] *AK Gopalan v State of Madras* 1950 SCR 88 (parah 120,198)

[29] AIR 1951 SC 270

[30] AIR 1952 SC 252 at 309

[31] AIR 1976 SC 1207 (Parah 546)

in this case by 4:1 held that when Article 21 is suspended during emergency by presidential order under Article 359(1), any order of detention or imprisonment could not be challenged on the ground that it was without law. Therefore, the court does not allow peeping through the letters of the law and by literal means held that when procedure established by law is suspended during emergency the same can't be asked from the court. If such pleas are allowed then it would mean to enforce Article 21 itself, the enforcement of which has been suspended under Article 359(1).[32] This case is regarded as an example of narrow, restrictive and literal interpretation of the Constitution by the Supreme Court as the decision has been characterized as a hard blow on the very basis of constitutionalism and rule of law in the Country. The Court failed to provide any protection to the people when its protection was needed the most.[33]

4.2 Constitutional Liberalism in India and Phase II approach

(i) Introduction of Basic Structure Theory

The doctrine of 'basic structure' itself cannot be found or located in the Indian Constitution. However, the Supreme Court recognized this concept for the first time in the historic Kesavananda Bharati case.[34] This was the time when Courts look into the spirit of the law rather than focusing on the mere letters of the law. In this case, the Supreme Court ruled that amendments of the Constitution must respect the "basic structure" of the Constitution. This doctrine states that certain fundamental features of the constitution cannot be altered by amendment. The Court observed that it would not allow the Parliament to destroy,[35] repeal,[36] or abrogate[37] the constitution or to destroy its identity[38]

---

[32] *Ibid* at (parah 127,290.433,477,524

[33] M.P. Jain, *Indian Constitutional Law* (lexis Nexis, Butterworths Wadhwa Nagpur, 6th edn., 2010).

[34] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461;

[35] *Id*. at 481 per Hegde J.

[36] *Id.* at 320 per Sikri C.J, Id at p. 680 per Palejkar J

or to frame a new one.[39] There were certain limitations implied on the power through basic structure theory. In this case, the Supreme Court regarded Supremacy of the Constitution, Republican and democratic form of Government, Secular character of the Constitution, Separation of powers between Legislature, Executive and the Judiciary, Federal Character of the Constitution as the "basic foundation and structure" of the Constitution. The Supreme Court thereafter in subsequent cases added many features to the basic structure theory like Rule of Law, Judicial Review,[40] Democracy,[41] which implies free and fair election, limited power of Parliament to amend the Constitution,[42] harmony and balance between fundamental rights and directive principles,[43] independence of Judiciary.[44]

(ii) Natural Law and Individual Liberty

Natural Law approach is at the core of freedom, rights and liberty of individual. The extended and wide interpretation of Part III of the Constitution of India speaks about the revival of natural law in India as the principles like 'reasonableness' 'natural justice' 'equality' 'non-arbitrariness' 'reasonable opportunity of being heard' were incorporated by the Courts in India in adjudicating the matters. The most important challenge which the courts in India faced while interpreting Constitution was to achieve a proper balance between the rights of the individual and those of the state or between individual liberty and social control. The constitutional journey in India passed through many ups and downs with notable

---

[37] *Id.* at 767 per Khanna J. , Id at p. 632 per Ray J. and id at 897 per Mathew J.

[38] *Id. at 767 per Khanna J.*

[39] *Id.* at 432 per Shetal J.

[40] *L.Chandra Kumar v. Union of India* AIR 1997SC 1125

[41] *Indira Gandhi v. Raj Narian*, AIR 1975 SC2299

[42] *Minerva Mills v. Union of India* AIR1980 SC1789.

[43] Ibid.

[44] *Shri Kumar Padma Prasad v Union of India,* (1992) 2SCC 428.

developments like right to property[45] in Pre-1977 era, where judicial line shifted in favour of social control and Right to life and personal liberty in post 1977 era, where line shifted in favour of an individual's freedom and liberty. The constitutional jurisprudence of India witnessed the dynamic shift from traditional literal methods to wide interpretations when the Apex Court of India start peeping through the letters of the constitutional provisions in order to provide wheels to drive justice to the doors of needful, courtesy to legal principles laid down in Maneka Gandhi's Case. The Court laid stress on relationship of Articles 14 and 19 with Article 21 by invoking the doctrine of inclusiveness of Fundamental Rights in Maneka Gandhi's case.[46] The Court observed:

> *The law must therefore now be settled that Art. 21 do not exclude Art. 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty, and there is consequently no infringement of the fundamental rights conferred by Art. 21 such as a law in so far as it abridge or take away any fundamental rights under Art. 19 would have to meet the challenges of that Article. Thus a law depriving a person of "his personal liberty" has not only to stand the test of Art. 21 but it must stand the test of Art. 19 and Art.14 of the Constitution.*

Right to life guaranteed under Article 21 embraces within its sweep not only physical existence but the quality of life. If any statutory provisions runs counter to such a right, it must be held unconstitutional.[47] It is not mere animal existence but something

[45] Right to Property as a fundamental right was abolished in 1978 by 44th Amendment. *Sankari Prasad Singh Deo v. Union of India,* AIR 1951 SC 458; *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845; I.C. *Golakh Nath v. State of Punjab* AIR 1967 SC 1643 are important cases in this regard.

[46] *Maneka Ghandhi v. Union of India* AIR 1978 SC 597

[47] *Confederation of Ex-Service man Association v. Union of* India AIR 2006 SC 2945

more is meant. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.[48] The reincarnation of Article 21 in Maneka Ghandhi case[49] added new dimensions to the constitutional jurisprudence of India. Bagwati J. observed: "The expression personal liberty in Article 21 is of the widest amplitude and it *covers a variety of rights which go to constitute the personal liberty of man* and some of them have risen to the status of distinct fundamental rights and given additional protection of Article 19. The Fundamental Rights under Part III of the Constitution were recognized and read as a part of an integrated scheme, so that a person who has been deprived of his liberty, whether by an order of punitive or preventive detention, is entitled to complain that his rights under Arts. 14, 19, 20, 21, or 22 or any of them have been violated by the impugned order[50].

4.3 Sociological Influences in Constitutional Interpretation and Phase III approach

The influence of sociological jurisprudence on the minds of Judges in India in the decades of seventies and eighties not only allows courts to accommodate the social and economic changes in determining the scope of law but also enhance the functional aspect of law. Sociological jurists urge that a judge who wishes to fulfill his functions in a satisfactory way must have an intimate knowledge of the social and economic factors which shape and influence the law. In this direction, a significant role was played by Indian Judges especially Krishna Iyer J. and P.N. Bhagwati J. This is evident from the wide interpretation given to the directive principles enshrined in Part IV of the Constitution. The Directive Principles and Fundamental Rights are now considered as supplementary and complimentary to each other. Environmental jurisprudence, labour jurisprudence, laws relating to woman and

[48] *Munn v Illinois* 94 US (1877)
[49] AIR 1978 SC 597
[50] *A.K. Roy v. Union of India* AIR 1982 SC 710

child and other social welfare measures have been developed as a result of such interpretation.[51]

5. Conclusion

Interpretation of laws is one of the main tasks of courts. The judges are definitely influenced by different schools of jurisprudence. Of late, revival of natural law and sociological thought are now dominate approaches that influence constitutional courts in India in their interpretation. However, it is imperative that courts, while taking recourse to the different approaches of legal thought, should not transform judicial activism into judicial adventurism, rather a dynamic interpretation is one where a fine balance is maintained between judicial overreach and judicial restraint. The sound interpretation is one which not only addressed the letter of law but also catches its spirit without being overboard.

Acknowledgement

Author acknowledges constructive suggestions made on the first draft of this paper by Prof. Farooq Ahmad Mir, Dean, School of Legal Studies, Central University of Kashmir.

[51] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461; *Pathuma v. State of Kerela* AIR 1978 SC 771*; Minerva Mills v. Union of India* AIR 1980 SC 1789; *State of Kerela v. N. M. Thomas* 1976 SCR(1)906; *Charu Khurana v. Union of India* AIR 2015 SC 839.

Author Guidelines

Before submitting a manuscript to the journal, the author(s) must ensure

(a) The manuscript is not submitted to any other journal for consideration.
(b) The submission file is in Microsoft Word file format.
(c) Where available, URLs for the references have been provided.
(d) The text is single-spaced with 12-point font, and all illustrations, figures, and tables are placed within the text rather than at the end.
(e) The manuscript includes an Abstract of around 200 words followed by four to five keywords.
(f) Footnotes and Citations are provided as per the Indian Law Institute Rules of footnoting and Citation Style.

Journal Policy

(a) Manuscripts submitted for consideration in the journal shall be subject to the plagiarism check through Turnitin - one of the leading web-based similarity detection tools.
(b) No fee is charged from the authors for publishing their manuscripts in the Journal.
(c) The journal accepts manuscripts for possible publication around the year.
(d) The Editor of the Journal is disqualified from publishing his/her research work in CUKLR to ensure transparency and maintain the standard of the research papers by eliminating any kind of favour to him/her.
(e) Submissions are reviewed by one of the approved referees, not less than the rank of a professor with expertise in the concerned area and not in any way connected with the Central University of Kashmir.