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S.No.	Particulars	Author Name	Page No.
ARTICLES			
1.	India - A Global Leader in 2047	Shri. C.G. Karhadkar	7-14
2.	Perspective Can Artificial Intelligence be an Inventor?	Dr. Anjani Kumar Verma	15-20
3.	A Critical Analysis of the Personal Data Protection Bill, 2019	Dr. Varsha Deshmukh	21-29
4.	Indefeasible Right of accused to default bail : Practice, Procedure and Limitations	Shri. Pritesh Chandrashekhar Deshpande	30-40
5.	Climate Change : Events, Effects & Essentials	Prof. Smita Pande	41-51
6.	Revisiting Epic Chronicles...	Dr. Anagha Baldota	52-62
7.	From Marriage to live-in-relationship-Critical Analysis of evolution of marital institution in Hindu society	Dr. Revati Naik	63-71
8.	Plea Bargaining: An Overview	Ms. Chhaya Pote	72-79
9.	Jusice P. N Bhagwati: A memoir of the patron saint of Legal Aid	Adv. Yashpal. D. Purohit	80-84
10.	International Waste Management Laws and Principles: an Analysis	Mr. Anurag Sharma and Adv. Harneet Kaur Khanuja	85-102
11.	Changes proposed about by the Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019	Adv. Vaibhav Karpur	103-105
CASE COMMENT			
12.	Bharti Airtel Limited v. Reliance Industries Limited & Anr.	Mr. Kirti Kapoor and Ms. Shivangi Agarwal	106-112
13.	Nipun Saxena v. Union of India & Ors	Ms. Vidhi Chouradia and Mr. Nikhil Kumar Godchar	113-118
14.	TRF Ltd. v. Energo Engineering Project Ltd.	Ms. Ananyaa Chandak	119-124

One must also appreciate incomparable greatness of Ramayana & Mahabharata that those themselves lend to an infinite number of interpretations, unlike any saga ever written a civilizational singularity that will never cease to simultaneously fascinate and trouble us. Understanding law becomes an insightful exercise while reading chronicles in the epics as the effect of catharsis, accordingly discovers the remedies & this mechanism prevails over entertainment.

Reference:

1. Vipul Maheshwari, Anil Maheshwari, (2020) "Ramayana Revisited: An Epic Through a legal-Framework", Bloomsbury India
2. S.L. Bhairappa, (2009), "Parva: A Tale of War, Peace, Love, Death, God & Man", Sahitya Akademi, New Delhi, India.
3. Iravati Karve, (2007), "Yugant: The End of an Epoch", Orient Black Swan
4. The New Indian Express

From Marriage to live-in-relationship- Critical Analysis of evolution of marital institution in Hindu society

Dr. Revati Naik¹

The family is the basic unit of administration of the society and the foundation of the family is the union of the people of opposite sexes. To govern this relationship, in the process of civilization, marital institution was evolved. It has become the basis of social organisation and foundation of legal rights and obligations. Through the decades the marital institution has gone through the transformation in response to the contemporary needs of the society. This article studies the evolution of the man-woman relationship from the marriage to the new pattern i.e., live in relationship from legal perspective. With this objective this article analyses the evolution of the institutional governance of man-woman relation with respect to different phases of evolution. Taking in consideration the transformation brought by the Hindu Marriage Act, 1955 in the concept of Hindu marriage (hereinafter referred as HMA), these phases are studied as:-

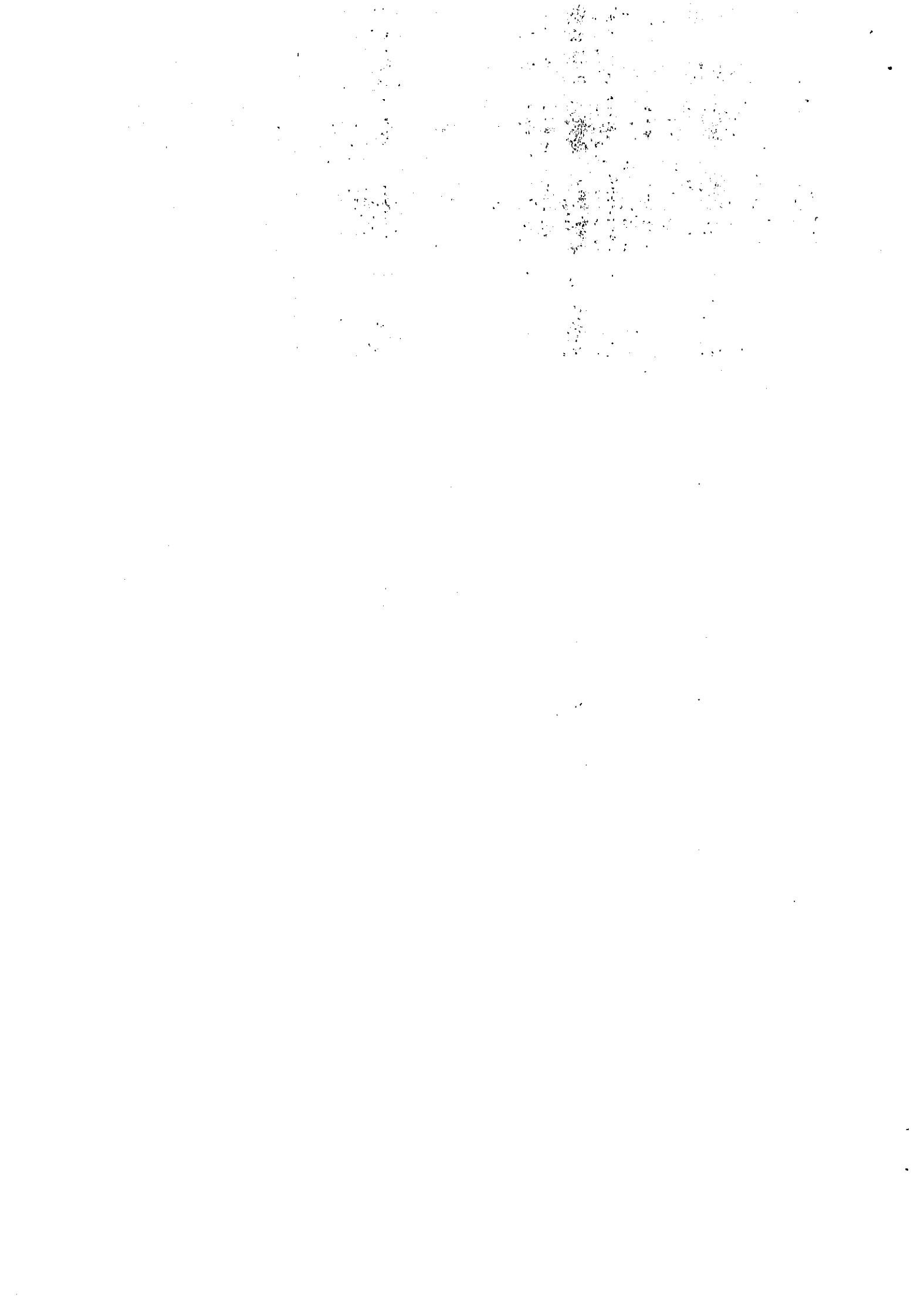
1. Institution of marriage in pre-HMA era
2. Marriage under HMA
3. Relationship in the nature of marriage
4. Towards to new era of same sex relationship

These phases can be discussed as follows:-

1. Institution of marriage in pre HMA era:

Marriage under the uncodified law was essentially a sacrament. It was regarded as a holy permanent union and could come in existence only after performance of sacred rites and ceremonies. The parties to the marriage were imparted with the status of husband and wife and children born out of such wedlock were given the status of legitimacy. It was the last of the tenth sacraments prescribed by the religion for regeneration of men and was considered obligatory in case of every Hindu who did not want to become the sanyasi². The sacramental status of Hindu marriage has been affirmed and reaffirmed in various judicial pronouncements³.

1 Assistant Professor, MMM's Shankarrao Chavan Law College, Pune.
2 Satyajcet Desai(ed.), Mulla Hindu Law 816 (LexisNexis, Gurgaon, 2018).
3 Tikait v. Basant, ILR 28 CAL. 758, Shivonandh v. Bhagavanthumma AIR (1962) Mad., 400.



Under ancient Hindu law there were as many as eight different forms of marriage and each of this form depicted the different stage of social progress⁴. These eight forms covered almost every possible form of conjugal relationship ranging from the unrestricted polyandry to the ideal monogamy. Out of these eight forms, four were approved and four were disapproved. However, before passing of the Hindu Marriage Act, 1956, Brahma and Asura were the two forms which were in practice. The only difference between the two is that in Brahma form of marriage the girl is gifted but in Asura form of marriage the girl is sold i.e. her father receives the bride price. Therefore, the Brahma form was considered approved and Asura a disapproved one. This distinction between the two forms of marriage had a reflection on the law of succession where a woman married in Asura form died intestate, her property devolved upon her father or his heirs instead of her husband and if the marriage was in Brahma form property devolved upon her husband or his heirs and not upon her father or paternal relations.

Sacramental nature made the marriage permanent holy union without any scope of dissolution by way of divorce. Monogamy was not compulsory. Further, sacramental nature of marriage also influenced the capacity to marry and relegated the consent of parties to somewhat subordinate place as it was not considered as criterion for the performance of the marriage. Minor could be given in marriage and marriage of impotent or insane person was considered valid. The valid marriage between the parties conferred the status of wife and husband and children born out of such wedlock were conferred with the stamp of legitimacy. The valid marriage formed the basis of civil rights and obligations between the spouses inter se such as right to be maintained and rights of mutual inheritance.

The significant difference of relevance is that before HMA we find the recognition of certain rights specifically right to be maintained and right of inheritance even in case of illegitimate children and exclusively kept concubine known as 'Avaruddhastri'. An Avaruddhastri who was in the exclusive keeping of the man till his death was entitled to receive maintenance out of his estate and could

4 T.V. Subba Rao and Vijender Kumar (eds.), Prof. G.C.V.Subba Rao Family Law in India, 196 (S. Gogia and Company, Hyderabad 2012).

enforce the claim against those who took the estate⁵. A married woman who left her husband and lived with another as his permanently kept mistress was also considered as 'Avaruddhastree' and was held to be entitled to the maintenance provided she remained faithful to him. Such woman was given maintenance subject to her sexual fidelity to her paramour⁶.

The illegitimate sons of a Hindu were divided into four classes⁷ :-

1. Illegitimate sons of a Hindu belonging to one of the three higher classes by a dasi, i.e. a Hindu concubine in the continuous and exclusive keeping of their putative father;
2. Illegitimate sons of a Sudra by a dasi
3. Illegitimate sons of a Hindu by a Hindu woman, who is not a dasi
4. Illegitimate sons of a Hindu by a non-Hindu woman

Illegitimate sons in the first category are entitled to maintenance from the separate property of the father and in absence of that to the joint family property of father. But such son had given no share of the inheritance.

The illegitimate son of a Sudra by a dasi was entitled to a share in the separate property of his deceased father. In absence of the separate property of father, he was entitled to receive maintenance out of the joint family of the father in the hands of his collaterals.

Illegitimate son of a Hindu by a Hindu woman who was not a dasi was entitled to maintenance even though he be the result of casual or adulterous intercourse. He was entitled to receive the maintenance out of the separate property of his deceased father and in absence of that out of the estate of the joint family of his father.

Thus, the law seems to have taken a care of maintenance of the illegitimate children and the woman who maintained the sexual fidelity with a man even without any sort of marriage. However above position needs to be interpreted in the light of situation that before passing of the Hindu Marriage Act 1955, for a Hindu male monogamy was not compulsory.

5 *Bai Nagubai v Bai Monghibai* AIR 1926 PC 73.

6 *Akku Prhlad v Ganesh Prhlad*, AIR(1945) Bom 217.

7 *Supra* note 1 at 740.

2. Marriage under the HMA:

While codifying the law of marriages of Hindus, the Act, introduced certain provisions to reform the institution, and with this objective made some radical changes in the earlier concept of marriage as a sacrament. It prescribed the conditions for valid marriage and provided for the consequence of their breach. It provided for the void and voidable marriages and carved out the remedy of divorce. Various provisions of the Act highlight its distinctive features which differ significantly from the sacramental notion of marriage under ancient Hindu law. Due to this it is often said that the Act has made the marriage a sacro contract by introducing some of the elements of contract in the sacramental conceptualisation of marriage⁸.

One of the important provisions of the Act dealing with the issue of legitimacy of the children of void and voidable marriage is the statutory legitimacy. The Act has carved out this fiction of legitimacy to give relief to the children of imperfect relationship by imparting limited legitimacy to children of void and voidable marriage annulled by the decree of nullity⁹. Due to this fictional legitimacy such child is entitled to inherit the separate property of his parents but it neither can inherit the ancestral property nor can acquire the status of coparcener in the Mitakshara Coparcenary property. However, Solemnization of some form of marriage between the spouses is the pre-requisite of the application statutory legitimacy and relationships without the marriage does not strictly come within the purview of it.

This piece of legislation is so much progressive that still today it is the only legislation which provides maintenance to the dependant husband to be paid by the wife. The maintenance¹⁰ can be granted to a wife, divorced wife and even to the wife of void or voidable marriage subsequently annulled¹¹.

Presumption of Marriage - Even prior to the passing of HMA, courts have recognised the validity of long-standing relationships between a man and a

woman without marriage by evoking the presumption of marriage under the Indian Evidence Act, 1872¹². In the case of *A. Dinohamy v. W L Blahamy*,¹³ the Privy Council laid down a broad rule postulating that, "Where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage." In *S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi*,¹⁴ the Supreme Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.

However, it is seen that courts granted the relief in the form of maintenance and declaration of legitimacy only in those cases where the live-in partners were not previously married. In a live in relationship where one of the partner was already married, the courts have denied to grant any relief on the basis of such relationship finding the presumption non applicable¹⁵. In a recent case while dealing with the writ petition of petitioners for protection from interference by others in their living as husband and wife, the court refused to grant the protection as the lady had a previous subsisting marriage. The petitioners had contended that they are adults, live as husband and wife and no one should interfere in their lives. Rejecting the petition, the court observed that if a married woman is living with another person without divorcing the husband, they are not entitled to the protection and ruled it constitutes an offence¹⁶.

3. Relationship in the nature of marriage, so called recognition of Live in relationship:

The first ever not so much clear and qualified recognition of live in relationship is found in the Protection of Women from Domestic Violence Act, 2005. For the

12 The Indian Evidence Act, 1972 (Act 1 of 1872), s. 114.

13 *A Dinohamy v. WL Blahamy* (1928) 1 MLJ 388 (PC).

14 AIR 1992 SC 756

15 *Chanmuniya v. Virendra Kumar Singh Kushwaha*, 2011 (73) ACC 334.

16 *Married Woman in live in relationship not entitled to protection: Allahabad High Court*, Hindustan Times, Jan. 21, 2021.

8 Dr. Neera Bharihoke, *Modern Hindu Law* (Delhi Law House, Delhi, 2008).

9 The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 16.

10 Id. Ss. 24,25.

11 *K Moni v. State*, I (1987) D.M.C. 36, *Bhausahab Sandu v. Leclabai*, AIR. 2004 Bom. 283

purpose of availing the protection enshrined under the Act, the domestic relationship was defined as including the relationship in the nature of marriage where the couple lived in a shared household even without the marriage¹⁷. The recognition is qualified in two respects firstly it has recognized only those relationships which resembled to that of marriage and that too for limited purpose of conferring protection as a remedy under criminal law.

In an attempt to explain the nature of live-in relation the Delhi High Court in *Alok Kumar v State*¹⁸ held that "Live-in relationship' is a walk-in and walk-out relationship. There are no strings attached to this relationship, neither this relationship creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time."

Non offensive nature of the live-in relationship has been upheld by the Apex Court¹⁹ and the court even found its authoritative source in right to life and liberty enshrined in Indian Constitution.

The recognition of relationship in the nature of marriage under the Protection of Women from Domestic Violence Act created the impression as all sorts of live-in relationship are being legalized by the law but the confusion regarding it is tried to be clarified by catena of judicial pronouncements where the constitutional courts laid down various criteria to be present in the relationship to be eligible for the protection prescribed under the Act. In *D. Velusamy v. Patchaiammal*²⁰, the Supreme Court laid down certain requirements which must be fulfilled for imparting the status of 'relationship in the nature of marriage' which are as follows:-

- (a) The couple must hold themselves out to society as being akin to spouses.
- (b) They must be of legal age to marry.

17 The Protection of Women from Domestic Violence Act, 2005, (act 43 of 2005) s. 2(f).

18 *Alok Kumar v State* CrI.M.C.No 299/2009, decided by the Delhi High Court on Aug. 9, 2010.

19 *Khushboo v. Kanniammal* AIR 2010 SC 31, *Lata Singh v. State of U.P.* AIR 2006 SC 2522, *Jyoti v. State of U.P.* AIR 2004 All. 45.

20 *Velusamy V Patchaiammal* AIR 2011 SC 479.

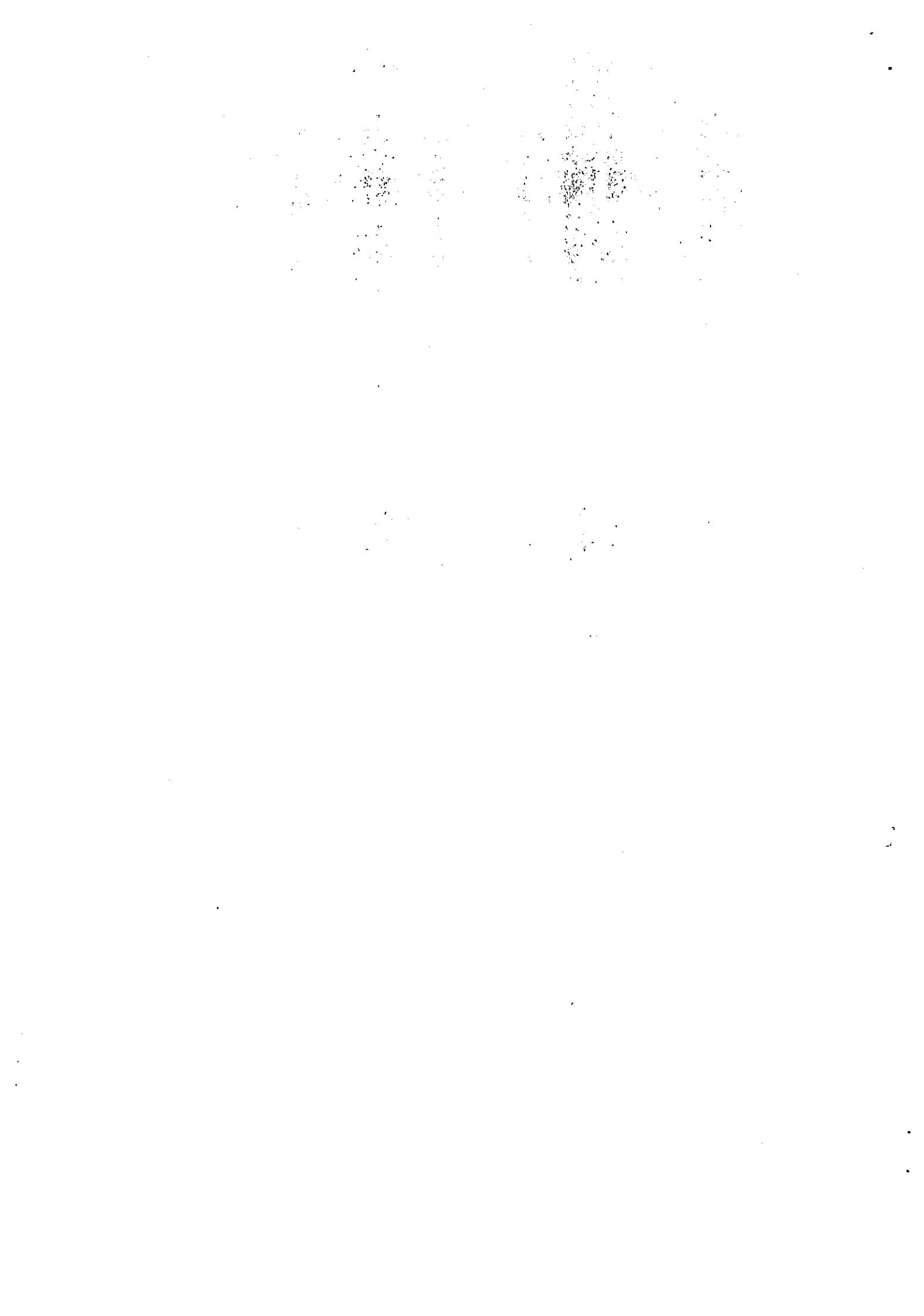
- (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

The Court further mentioned that the 'relationship in the nature of marriage' must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined under the Act. Merely spending weekends together or a one-night stand would not make it a 'domestic relationship'. The Court observed that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'

In *Indra Sarma v. V.K.V.*²¹ Sarma the Supreme Court held that when the woman is aware of the fact that the man with whom she is having living-in-relationship and who already has a legally-wedded wife and two children, is not entitled to various reliefs available to a legally wedded wife and also to the protection provided under Protection of Women from Domestic Violence Act, 2005.

As discussed earlier even though the courts have used the presumption of marriage to uphold the legitimacy of long standing relationships there are also cases where the court denied to grant the relief on the basis of relationship where one or both of them were previously married. The consistent stand taken by the courts has categorized the live in relationships in two types, first those long standing relationships which deserves to be protected by the law and can form the basis of recognition of rights of woman and children of such relationship and on the other hand those relationships which because of knowledge about the previous marriage of the live in partner are disqualified from any sort of recognition and protection. This denial resulted in making the women involved in such relationship and children of such relationships more vulnerable. Further decriminalization of the offence of adultery and requirement of strict prove of solemnization of both marriages leave the legally wedded wife without much significant remedy but to go

21 *Indra Sarma v V.K.V Sarma*, AIR 2014 SC 309



for divorce. In short, such relationships and the way in which they are treated by the law results in vulnerability of both women i.e. wife and live in partner. Further it allow the married man to escape his liability to maintain his live in partner and thus allow him to reap the benefits of his own wrong. This outcome must not have been definitely anticipated by any woman welfare legislation.

Taking a note of the fact such live in relationships may prevail for a long time and can result in dependency and vulnerability, the apex court has called for the legislative action by the state to deal with various issues relating to such relationships²². In *Indra Sharma*²³ the court observed that when such relationships are broken, the woman invariably is the sufferer. The court further observed that the absence of express statutory provision to deal with the termination or disruption of such relationship is likely to lead to disputes pertaining to rearing of children, joint property or with respect to the succession when one of the parties dies intestate.

The analysis of ancient law prevailing makes it clear the ancient law had taken more benevolent approach towards such illegitimate relationships by providing relief in the form of maintenance or share in the property. On the contrary present law excludes all such women and children from the relief as maintenance and legitimacy.

4. Towards to new era of same sex relationship

The gradual shift from using the presumption of marriage to advance protection to the women involved in these relationships to the express recognition of the right to be in live in relationship can be seen in the recent judicial pronouncement. The flag bearer of this trend is *Navtej Singh Johar V Union of India*²⁴ which decriminalized the consensual sexual conduct between two adults of same sex. Relying upon *Navtej*, very recently Orissa High Court has upheld the right to sexual preferences including the right to have a live in relationship with a person of choice including the person of same gender. In this case the court granted the writ of Habeas Corpus directing the maternal relation of sexual partner of the petitioner.

22 S. Kushboo v Kanniammal, AIR 2010 SC 3196

23 Supra note 23.

24 (2008) 10 SCC 1

Taking a progressive approach the court has further conferred all rights which are available to a woman under the Protection of Women from Domestic Violence Act, 2005 on the sexual partner of the petitioner²⁵.

The judgment given by the Orissa High Court marks the beginning of new era. In near future the same sex couple in live in relationship will definitely raise their voice for recognition of more rights such as right to establish the family, right to adopt, right to maintenance and many more. Further to deal with the issues which may arise in such same sex couple such as domestic violence, distribution of joint property purchased during the subsistence of the relationship, there is an urgent need of the law. Therefore, the recognition of various rights and duties of same sex partners is utmost necessary as mere decriminalization without the clear statement of law as to various matters pertaining to this relationship will lead to nothing but vulnerability of the live in partners. There is urgent need of the comprehensive law balancing the conflicting claims of parties to such relationship so as to make it possible to carve remedy for victims. The law on the subject may provide for registration of such relationship or imparting validity to the written contract dealing with all the incidents of such relationship.

25 Chinmayee Jena@ Sonu Krishna Jena v. State of Odisha, W.P.(cri) no. 57 of 2020 decided by the Orissa High Court on 24/8/2020.

Ms. Chhaya Pote¹

Abstract

India has the highest crime rate, as compared to the Indian population it does not have enough courts, due to this pendency of cases in court is increased day by day. Pendency of criminal cases is one of the serious problems which is facing by the Indian judiciary. Plea bargaining is one of the best ways to dispose of criminal cases. The object of the study is to understand the meaning and concept of plea bargaining, examine the legal provision of plea bargaining.

Plea Bargaining is a negotiation between the accused and prosecutor or complainant of the case. This concept was inserted in Criminal Procedure Code Amendment -2005 A separate Chapter XXIA Section 265A to 265L, but in the USA it has been used since 19 century, Ninety-five percent of cases are decided, negotiated by using plea bargaining. Provision of plea bargaining is benefited to accused, prosecutors, court also. As per the view of Apex court plea bargaining is against public policy and is unreasonable, unjust and would be violative of Article 21 of the Constitution, but Apex Court said that it helps to speedy disposal of criminal cases.

Introduction:

India is the second greatest population country, under develop also. India has the highest Crime rate as compared to other countries. As compared to the population of India, it has not had a sufficient number of courts to dispose of the cases; the result is that there are lots of cases pending in the court. Pendency of cases is one of the serious problems which is facing by the Indian judiciary. Several Law Commission reports have tried to draw the attention of the Government of India towards this problem. The Law Commission of India in its 77th report in the year 1978, 124th report in the year 1988, 221st report in the year 2009, and 229th report in the year 2009 has suggested the measures to combat the arrears of cases in the "subordinate courts, High Courts and the Supreme Court".² It becomes a necessity of the Indian legal system to adopt the different ways to solve the problem of

pendency of cases, which will help to dispose of the case easily and speedily. So the burden of the court will be decreased. Plea bargaining is one of the best ways to dispose of criminal cases without trial. Plea bargaining is a new concept for India. The main object of the study is to understand the meaning and concept of plea bargaining and to examine the legal provision of plea bargaining.

Famous jurist Nani Palkhivala once said that, "The greatest drawback of the administration of justice in India today is because of delay of cases. The law may or may not be an ass, but in India, it is certainly a snail and our cases proceed at a pace that would be regarded as unduly slow in the community of snails. Justice has to be blind but I see no reason why it should be lame."³

Meaning of Plea Bargaining

The general meaning of a plea is a request for something and bargaining means negotiating the term and conditions of a transaction. The term plea bargaining means an accused makes a request to the magistrate to give concessions in the punishment. Prior to applying this term a person who has been accused of a crime has to confess says in court that he or she is guilty or not guilty of the crime. It is a negotiation between the accused and prosecutor or complainant of the case. It's a pre-trial procedure. plea bargaining is useful for simple nature offences, but it will not be possible to apply for serious type offence for example murder, rape, offences committed by habitual offenders because such type of offences affect on whole society.

History of Plea Bargaining: Plea Bargaining concept existed in the USA from 19 century, this is an important step taken by the American Criminal Justice System, to resolve the problem of pendency of cases. Plea bargaining using by accused of that Prosecutors takes initiatives with approval of the court and it helps to settle the criminal cases. Ninety to ninety-five percent of criminal cases are decided or negotiated by using plea bargaining. it helps in the speedy disposal of accumulated cases and will expedite the delivery of criminal justice

¹ Asst. Professor, Amolakchand Law College, Yavatmal

² <https://blog.ipladers.in/far-law-commission-india-effective/> dated 5/4/2021

³ Nani A Palkhivala, "We the nation - lost decade (1994)", UBS Publications, p 215. Cf, <https://lexinsight.wordpress.com/2018/12/24/displeasure-of-indian-judiciary-towards-plea-bargaining/> dated 28/3/2021

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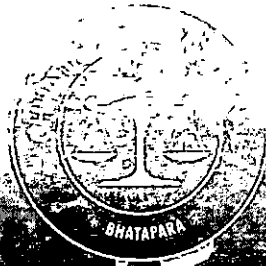
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1.	Epistemology of Restorative Justice System in India in relation to offence against Women. <i>Amit Ghosh & Mrs. Shimul Datta</i>	(1-5)	restorative justice system in India
2	Application of The Doctrine of Ultra Vires : Its Implications And Impact Under Indian Company Law <i>Dr. Mohammadi Tarannum</i>	(6-9)	Company Law Ultra Vires Doctrine
3	Women Empowerment And Laws <i>Mr Vivek kumar</i>	(10-12)	Women Empowerment Laws
4	Legal Framework of Banking system in India <i>Ramnak Tiwari & Dr. Aryendu Dwivedi</i>	(13-16)	Banking System Legal Framework
5	The Issue of Insurgency in India: Causes, Instances And the Role of Judiciary <i>Himanshi Babbar</i>	(17-21)	Insurgency Judiciary Role
6	Judicial Approach To Medical Negligence In India - Problems And Solutions <i>Dr. Priyamvada Tiwari</i>	(22-27)	Medical Negligence Judicial Approach
7	Traditional Knowledge And Biopiracy <i>Jitendra Yadav</i>	(28-33)	Traditional Knowledge Biopiracy
8	Legal Control of Human Trafficking in Women and Children for Commercial Sexual Exploitation: An Indian and Nepalese Perspective <i>Dr. Suresh Kumar Dhungana</i>	(34-43)	Human Trafficking Legal Control
9	Application of the concepts of Authority and Consent in the Transplantation of Human Organs and Tissues 1994: An analytical Study <i>Dr. Pradipkumar Tambe</i>	(44-50)	Transplantation Human Organs Authority Consent
10	Dispute-Redressal Problems in International Investment: New Challenges <i>Sunil Pandey</i>	(51-56)	Dispute- Redressal Problems International Investment
11	Effect of Bhujangasan on Human Body <i>Khushbu Dhakad & Ritu Harjpalani</i>	(57-60)	Bhujangasan Human Body
12	Jurisprudential Dimensions of Access to Justice in India <i>Dr. Bindu Sangra</i>	(61-67)	Jurisprudential Dimensions Access to Justice
13	Domestic Violence Against Working Women <i>Sudheer Kumar Baghel & r. Dharendra Singh</i>	(68-73)	Domestic Violence Working Women
14.	Reform and Privatization of State-Owned Enterprises in India <i>Ankit Sharma & Mrs. Akanksha Sharma</i>	(74-80)	Reform and Privatization State-Owned Enterprises
15	Committee of Creditors Under Insolvency bankruptcy code 2016 <i>Dr. Arvind Kumar</i>	(81-87)	Committee of Creditors Insolvency bankruptcy code 2016
16	Right to health: A consumer protection perspective <i>Dr. Ajay Bhupendra Jaiswal & Ashut Panigrahi</i>	(88-93)	Right to health Consumer protection perspective
17	An analytical overview of NEP 2020 <i>Dr. Neelam Sharma & Aditi Vashistha</i>	(94-99)	NEP 2020 Analytical overview
18	Tradition or Modernism in Grammar Teaching: Deductive v. Inductive Approaches <i>Prashant Kumar Dixit</i>	(100-105)	Grammar Teaching Deductive Inductive Approaches
19	संगठित अपराधों एक विश्व-राष्ट्रीय विवेचन <i>डॉ. अरुण कुमार तिवारी</i>	(106-111)	संगठित अपराधों एक विश्व- राष्ट्रीय विवेचन
20	राष्ट्रीय शिक्षा नीति 2020 एक विवेचन <i>डॉ. पुष्पा जोशी एवं प्रमोद कुमार</i>	(112-117)	राष्ट्रीय शिक्षा नीति 2020 एक विवेचन
21	आधुनिक भारत में अनाथ, बालिकाओं से संबंधित संवैधानिक अधिकार एक विश्व-विवेचन <i>डॉ. राजश्री चौधरी एवं देवनारायण भोगा</i>	(118-123)	आधुनिक भारत में अनाथ, बालिकाओं से संबंधित संवैधानिक अधिकार एक विश्व-विवेचन
22	भारतीय संविधान द्वारा प्रत्याभूत धार्मिक स्वतंत्रता का अधिकार <i>प्राची त्यागी</i>	(124-129)	भारतीय संविधान द्वारा प्रत्याभूत धार्मिक स्वतंत्रता का अधिकार
23	स्वतंत्रता और प्राणिक स्वास्थ्य का विवेचनात्मक अध्ययन <i>Dhara Garg & Pushpadēep Prajapati</i>	(130-135)	स्वतंत्रता और प्राणिक स्वास्थ्य का विवेचनात्मक अध्ययन
24	कठोर वास्तव के आधुनिक रूप का समीक्षात्मक अध्ययन <i>श्री राजेन्द्र प्रसाद</i>	(136-141)	कठोर वास्तव के आधुनिक रूप का समीक्षात्मक अध्ययन

Afterwards, particularly, after the establishment of legal system across globe and progression in medical science transplantation movement extended rapidly. Continued growth in organ transplantation led to the numerous ethical issues. Human Body was considered as property. The assumption that there was 'no property in a dead body' was merely 'a gift of flesh for the worms', dated back to the 17th century. This view was upheld in *Williams v Williams* in which it was held that, as there is no property in a dead body, any direction made by the deceased during his lifetime binding upon his executors. Consent to autopsy was regarded as a professional courtesy, not a necessary interpretation had been reinforced in the 20th century by the decision in *Dondevard v Spence* (1969). Because of its of itself worthless, the court held that any human material became the property of the person who gave it and preserving it.⁹ After the recognition, several scandals appeared on record such as Alder Hey Children's Hospital in Liverpool and at Bristol Royal Infirmary¹⁰ which ultimately forced law makers to address these issues and laid down procedure for it. Accordingly, in India, The Transplantation of Human Organs and Tissues Act, 1994 was passed by Parliament of India. The legal procedure is based on the two fundamental concepts 'Authority and Consent'. This paper intends to study the application of the concept of 'authority and consent' in the legal procedure mentioned in Act, lacunas exists in the Act and the concrete solution to redress the identified issues.

III. Need of Transplant Donation:

There is a relentlessly increasing need for organs for patients with life threatening organ failures that require the use of donors and timely intervention to obtain the donated organs in the best possible transplantable condition. Many diseases and conditions can lead to end-stage organ failure.¹² Right to life is at stake due to the failure of an organ which can be easily treated. It is estimated around 1.8 lakh persons suffer from renal failure every year, however the number of renal transplants performed in India is around 6000 only. An estimated 2 lac patients die of liver failure or liver cancer annually in India, about 10000 liver transplants can be saved with a timely liver transplant. Hence about 25-30 thousand liver transplants are needed annually but only about one thousand five hundred are being performed. Similarly, about 50000 persons suffer from heart failure annually but only about 10 to 15 heart transplants are performed every year in India. In case of Cornea transplants are done every year against a requirement of 1 lakh.¹³ Shortage of Organs, critical and complex procedure, awareness among the people, religious misunderstanding etc. are the foremost reasons for this issue.

IV. **Concept of Organ Transplantation:** Organ Donation is the process of retrieving or procuring an organ from a deceased person and transplanted into the recipient who requires that organ.¹⁴ It becomes necessary due to the failure of the functioning of such organs to live life healthy.

V. **Kinds of Human Organ Transplantation:** Human Organ Transplantation are classified into the following many

- a) **Living Donor Organ Donation:** "Living organ donors" are the persons who can donate certain organs while they are still living.¹⁵ An organ is taken from a live person and given to another. A popular example is kidney. Living Organ Donation Means a person during his life can donate one kidney (one kidney is capable for maintaining body functions), a portion of pancreas (half of the pancreas is adequate for sustaining pancreatic functions) or a part of the liver (the segments of liver will regenerate after a period of time).¹⁷
- b) **Cadaver Organ Donation:** Cadaver Organs are the organs which are retrieved from brain dead declared as individual and transplanted into the body of a living recipient who requires it.¹⁸
- c) **Xeno Transplantation:** An organ is taken from another animal and used in a human.¹⁹
- d) **Genetically Created Organ:** Scientists are presently working on this technology. The hope is that a certain time an organ can be created in a laboratory, from a person's own generic material, that can be used and transplanted into a person.

9 Dealing with Death: a handbook of practices, procedures and law, Jennifer Green and Michael Green, Jessica Kingsley Publishers, London, First Publication, 2006. ISBN: 10:1-84310-381-8P.122

10 Alder Hey Children's Hospital in Liverpool and at Bristol came into limelight after the allegations made for the preserving of human body parts in the hospital. After inquiries it was found that thousands of human body parts and samples of tissues were preserved in the hospital without the parents or relatives consent. And this was continuously operated against the name of research by the college administration.

11 Institute of Medicine, et al. *Heart-Beating Organ Transplantation: Medical and Ethical Issues in Procurement*. National Academic Press, 1998. ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/inflibnet-ebooks/detail.action?docID=3376365>

12 Created from inflibnet-ebooks on 2021-08-31 09:14:14. Pg. 8
13 *Understanding Organ Donation Applied Behavioral Science Perspectives*, Edited by Jason T. Siegel and Eusebio M. Alvarez, by Blackwell Publishing Ltd., Chichester, UK, 2010. First Publication, Pg. No. 14.

14 <https://ajis.gov.in/content/135333> National Organ Transplant Programme.aspx (Last accessed on 09th May, 2022 at 10:15am)

15 Srivastava A, Mani A. Deceased organ transplantation in India: Promises and Challenges. *Neurol India*

16 *Organ donation in India and Nurses as a change to lead in organ donation: scoping review of organ donation*, Mahendra Kumar et al., *Asian J Nursing Education and Research* 2021; 11(3): 321-323, 2021 Pg. 322

17 *Medical Law and Ethics*, Jonathan Herring, Oxford University Press, 2012, Fourth Edition ISBN 978-0-19-964640-1. Pg. 431

18 <https://ajis.gov.in/content/135333>
19 Srivastava A, Mani A. Deceased organ donation and transplantation in India: Promises and challenges. *Neurol India* [serial online]. Cited 2020 Aug 25; 66(3):16-22. Available from: <https://www.neurologyindia.com/text.asp?2018/66/3/16/227259>

20 *Medical Law and Ethics*, Jonathan Herring, Oxford University Press, 2012, Fourth Edition ISBN 978-0-19-964640-1. Pg. 432

e) Artificial Organs: Some work is being done to create robotic/mechanical organs for replacement with some success.²⁰

Legal Framework for the Organ Transplantation:

The Transplantation of Human Organs and Tissues Act, 1994 (herein after Act) is enacted with an object to regulate removal, storage and transplantation of human organs and tissues for therapeutic purposes and for the prevention of commercial dealing in human organs and tissues.²¹ The object of the Act is to regulate removal and transplantation of human organs with a view to prohibit commercial dealings in such transactions. A legislation of this nature was necessitated because of the exploitation of humans for financial benefits in the dealings of organs.²² Selling and purchasing of human organs is absolutely prohibited and only method adopted for human organ transplantation is donation. To achieve this objective, the Act constituted several authorities for the regulation of the organ transplantation in India which is the second largest transplanting country in the world.²³ Several attempts have been made by the Government to promote people to donate their organs still demand and supply ratio could not be achieved after the enforcement of legislation. 'Authorization and consent' are essential factors for living organ donation as well as for deceased organ donation.

The central idea behind the regulation of the human organ is authority or transfer of power from the donor to the recipient. The key concept applied in The Transplantation of Organs and Tissues Act, 1994. The bedrock of the Act is the 'Authority and Consent'. Authority means the moral or legal right or ability to control.²⁴ Authority is a specific justification or justification of a prescription precisely when the prescription does not follow with inferential clarity from other prescription and nobody accept.²⁵ Subsumptive, Institutional Authority and Personal Authority are the well-known categories of authority. Personal authority means individual transferred power upon the others. In simple words, authority means to confer power. Under this Act, donor is vested a power and right to donate human organ or tissues to the recipient. The entire procedure involves several fundamental issues which are discussed below:

Living Organ Donation:
Section 3 of the Act, legalizes the living organ donation and provides procedure for the removal before his death of any human organ or tissue or both of his body for therapeutic purpose.²⁷ The donor and recipient shall make jointly an application for approval for removal and transplantation of a human organ to the competent authority or authorization committee specified in Form No. 11 with requisites documents in case of 'near relatives donation'.

Deceased Organ Donation:
In the absence of such authority granted by the donor, the person lawfully having possession of the dead body may authorize for the human organs, tissues or both donation for therapeutic purposes.²⁸ Sub-section (4) of section 3 states that authority given under sub-section (1) or sub-section (2) would be sufficient warrant for the removal of any human organ or tissues for therapeutic purposes. The detailed procedure is laid down under Rule 3 of the Transplantation of Human Organs and Tissues Rules, 2014 and Form No. 1, 2 and 3. Form No. 1 contains the authority and consent for donation of organ or tissue to near relatives and added further declaration that the living donor is understood about the nature of criminal offences, non-transaction of payment, free will for removal of donor, explanation of medical procedure and risks involved in it. It is also mentioned that Form No. 1, should be notarized. Registered Medical Practitioner is duty bound merely to verify the unequivocal and unrevoked authorization by the donor.²⁹ Further, Rule 7 deals with the powers and functions of authorization committee. Express obligation is imposed upon the Authorization Committee to evaluate and verify that any commercial transaction or transfer of payment made between the donor and recipient also to examine the reasons why the donor wishes to donate the organs or tissues.³⁰ But, there is no mention about the duty to verify the validity of authority given by the donor which is rather very crucial unaddressed issue.

Non-application of the Core concept of Consent in the procedure and conditions laid down in the Form No. 1, 2 and 3. Consent is an essential element in the entire procedure of human organ donation. Donor authorizes with his/her consent for organ donation for therapeutic purposes. Section 2, 9 and 19 of the Act as well as Form No. 1, 2 and 3 of the Transplantation of Human Organs and Tissues Rules, 2014 provides legal procedure to delegate the powers from donor to recipient.

Medical Law and Ethics, Jonathan Herring, Oxford University Press, 2012, Fourth Edition ISBN 978-0-19-964640-1 Pg 432
The Transplantation of Human Organs and Tissues Act, 1994-Object of the Act
Shreef K. M. v. State of Kerala, 2018 AIR CC 1936 (KRR) (2017) 3 Ker LJ 876
<http://www.transplant-observatory.org>, GODT
<https://dictionary.cambridge.org/dictionary/english/authority>
Harris, J. W. "Kelsen's Concept of Authority." The Cambridge Law Journal, vol. 36, no. 2, 1977, pp. 353-63. Pg 353
<http://www.jstor.org/stable/4506020>. Accessed 16 May 2022.
Harris, J. W. "Kelsen's Concept of Authority." The Cambridge Law Journal, vol. 36, no. 2, 1977, pp. 353-63, Pg 360
<http://www.jstor.org/stable/4506020>. Accessed 16 May 2022.
Sec. 3 of the Act
Sec. 3(3) of the Act
The Transplantation of Human Organs and Tissues Rules, 2014 Rule 5
The Transplantation of Human Organs and Tissues Rules, 2014 Rule 7(3)
45

'Authority and consent' are the essence of the whole legal procedure. The legal procedure laid down under Transplantation of Human Organs and Tissues Act, 1994 emphasizes on written form of authority. Surprisingly, except in case of 'near relatives' it is presumed that 'written authority on paper' would be sufficient evidence for the transplant of human organ.

The major concern for the consideration is the validity of the authority and consent which is the most crucially categorized ignored aspect in the Act. Form No. 1, 2 and 3 states the delegation of written authority from the donor, recipient and medical practitioner.

Unfortunately, careful study of the Transplantation of Human Organs and Tissues Act, 1994 and 2014 Rules thereunder, indicates the inappropriate attention is accorded towards this issue. Hence, whole of the process of giving authority by donor is in question and major loophole is still exists.

The essentials of consent are understanding of the subject matter, adequate information to be provided to the donor, voluntariness and competency of the donor. The phrase consent is used especially in the Form No. 1, 2 and 3 to understand the application of concept of consent, major alarming question remain unanswered is the verification and attestation of the consent. In order to accord consent, Form No. 1 is to be attested by Notary Public.³¹ Form No. 1 contains affirmation and declaration to be given by the prospective donor in respect of non-receipt of payment, giving consent authority for the removal of human organ, understanding the nature of medical procedure and risks and consent etc. Form No. 2 and Form No. 3 covers the authority and consent given by the prospective donor with address proof.

The Act has laid down a procedure for the validity of authority and consent. A Notary is obligatory to verify and attest the authority and consent given by the prospective donor at his office. Unfortunately, adequate procedure is not laid down regarding how the verification of authority and consent to be done. Merely signature of the prospective donor on the form is sufficient to indicate that the prospective donor has given an authority and consent for the removal of human organ. In *Karamjit Kaur v. State of Punjab*³² Punjab and Haryana High Court has raised a doubt about the validity of authority and consent in case of 'near relatives' procedure for organ transplantation and passed direction to validate the authority and consent in life.

Further, notary is not a god who has a detailed knowledge about all illness as well as pros and cons of organ donation in a situation, if medical practitioner has given wrong or inadequate information to the donor about the risk or loss involved in the donation and eventually, based on the information provided by the medical practitioner, if donor has given an authority and consent for the donation. Still, is it a valid authority or consent or just a legal formality?

Application of essentials of the concept of consent provides additional effective support to the above discussed. Surprisingly, definition of consent is not laid down under the Act. The roots of the consent are found in the concept of individual autonomy.³⁴ For the valid consent, adequate information regarding the medical risk involved in the procedure, probable impact upon the health and demerits of the removal organs etc must be provided by the competent medical practitioner to the prospective donor.

Also, understanding of the information, voluntariness as well as competency of the prospective donor are the most prominent aspects of consent. The Act has not defined the procedure to get the consent after the observation of the core concepts of consent in the entire procedure. Signature on the Forms is just a formality and evidence for the authority and consent. However, Notary is bound to take signature on the Forms and entry into the register. Though express duty is imposed by the Notaries Act, 1952 but unanswered questions appears in the mind such as how notary verifies the consent when he exists only to take signature and make entry in the register. It seems most inappropriate and irrational when notary is supposed to verify the competency of the prospective donor at the time of taking signature on Forms. Regarding voluntariness of the consent, how notary would verify and ascertain that the prospective donor is well informed about probable consequences of the human organ donation and now such person with free consent is ready to accord consent?

Additionally, majority of the Indian societal members are not fully literate to understand the meaning of the word 'consent' laid in the Act. Moreover, the practice usually observed in the real life is just to put the signature on the form without reading the terms and conditions or contents of the form. Several instances happened in the medical history which are a dire fact as well. Giving an authority to transfer living organ or deceased organ to another is very crucial and emotional.

31 Sec. 8 deals with the functions of the Notaries. Sec. (1)(a) provides that a notary may verify, authenticate, certify or at least the execution of any instrument.

32 Sec. 8 deals with the functions of the Notaries. Sec. (1)(a) provides that a notary may verify, authenticate, certify or at least the execution of any instrument.

33 2010 (4) RCU (Civil) 760; Punjab and Haryana High Court directed that where the proposed transplant is between a married couple, competent authority or Authorization Committee (in case donor or recipient is a foreigner) must evaluate the factum and duration of marriage and ensure that documents such as marriage certificate, marriage photograph etc. are kept for records along with the information of the number and age of children and a family photograph depicting the entire family, birth certificate of children containing the parents of parents and issues a certificate in Form 6 (for approval/denial).

34 Autonomy is the concept understood in the reference with 'to think, decide and act'. It means individual persons particular kind of decision or action based on rationality.

ch is related with the donors' right to health. Hence, considering this view, there should be a clear provision for donors' authority or consent could be affected due to the present of coercion, undue influence, or compulsion. A common person or uneducated person could be trapped easily in the process.

the most structured and determined process to get the authority for organ donation. In the process of providing leading information, donor may be convinced or authority could be based on any information provided by the recipient or medical practitioner. In these cases, whether it is legally appropriate to say that the authority or consent is legally valid? Without any express power granted under the Act, such a kind of authority or consent is not legally valid. Any authority granted is it legally correct and valid.

Therefore, taking into consideration the practical aspects of the societal structure, behavioral pattern and the nature of the donor, it is always indispensable and advantageous to protect the interest of the prospective donor by the legislature. The wise expectation from the legislature is to respect the prospective donor's right to take an appropriate decision to donate organs and it is the legitimate sphere of decision making process of the donor.

Therefore, the entire procedure laid down under the Act of giving authority and consent is not a mere formality. If transferring an authority and consent is frustrated,

the defined procedure is just a legal formality and documentary order to meet the requirements of the Transplantation of Human Organs and Tissues Act, 1994. Authority and consent under the Act is a big question.

Conclusion:

In conclusion, the Act has laid down the detailed procedure for human organ donation. The main objective of the Act is to regulate, storage and transplantation of human organs and tissues for therapeutic purposes. To achieve this objectives and prevent commercial transactions, human donation is the only way. The Act has considered 'authority and consent' as a foundation of the entire legal procedure for organ donation. The Individual autonomy is to take appropriate decision for human organ donation. Authority and consent is legally valid.

the purpose of legally valid and binding 'authority and consent' under the Act, following suggestions should be appropriate to resolve ambiguities and the real object of the Act could be achieved.

Authority upon Authorization Committee: Researcher suggests that express duty must be imposed upon the Authorization Committee to verify the validity of authority and consent as well. Such committee should ensure the prospective donor is

1. informed about his authority to donate human organ. During the entire procedure, from should be an informed donor. The entire medical procedure to be used for organ transplantation, validating the competency of the donor, should be adequate procedure to be observed in the organ donation, without any undue influences or any coercion, free will, consent as well as pros and cons of the granting authority upon the donor's interest etc. The entire procedure should be recorded in audio and video system.

Authority upon the Medical Practitioner: To establish the legally valid system in the organ donation, under the Act, it is suggested that the medical practitioner under whose supervision and control or authority, human organ donation should be duty bound to inform the prospective donor about the detailed medical procedure to be used for organ donation from his body as well as after the removal what will be the impact upon his body in the future as well. This entire procedure should be happened before the authorization committee. After the intimation of detailed information, sufficient information should be given to the prospective donor to take appropriate decision regarding human organ donation. Further, the entire procedure should be recorded in audio-video format. Afterwards, authorization committee will verify the authority and consent.

In any case, it is found that, authorization committee or medical practitioner fail to perform their duties, stringent penal action should be initiated against them and Act should prescribe imprisonment upto seven years in such cases.

In nutshell, merely prescribing granting of authority and consent is not sufficient also to avoid the issues discussed above. It is essential to fix the responsibility upon the medical practitioner as well as authorization committee to accord the real legal meaning of authority and consent in human organ donation.

As per WHO Constitution (1946) health means the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being. Also the preamble of the Constitution defines health as: "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."