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“Equity can only supplement the law, but it cannot supplant or override it. But when there is conflict between law and equity, it is the law which has to prevail”

Arun Mishra, J.

T. Ravi v. B. Chinna Narasimha,
(2017) 7 SCC 342, para 96

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Lex Revolution

UGC Approved Periodical Indexed Journal of Social & Legal Studies

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- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

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MESSAGE

It is with great pleasure we announce the release of Volume III Issue-3 (2017) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Contributors, teachers and Research scholars whose views and opinions have been incorporated in the text.

- **Editorial Board**

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GLOBAL DISTRIBUTIVE JUSTICE AND INTERNATIONAL LAW: ASSURING JUSTICE AMONG SOVEREIGNS

Prof. R. K. Singh* & Bhanu Pratap**

INTRODUCTION

David Archard has succinctly described the theory of Justice as a theory where “*publicly agreed and final principle defines the fundamental terms of social cooperation.*” These theoretical principles regulate institutions which in turn form the basic structure of society.¹ The concept of global distributive justice has sparked debates among political philosophers, economic theorists over a long period of time. The debate is primarily based on the stark difference that we see in the status of development of various states and the consequent diversity in the life of various citizens. The debate is based on the idea as to how Developed Nations actually became developed and how is the plight of the Less Developed Countries to be addressed? If there are huge differences between the social, political and economic infrastructures of different states, then how can they be corrected? How has the present international economic system perpetuated inequalities? Do developed states have an obligation to correct the imbalance? Do Less developed Countries have a Right to be the recipient of the benefits that accrue from the pooling of international Resources? What are the relevant academic theories that support the concept of Global Distributive Justice? These questions have been the point of debate for a considerable period of time.

The concept of Global Distributive Justice received an impetus when the argument started as to whether John Rawls’ ‘Difference Principle’ is applicable at the global level or not. Rawls seminal work ‘A Theory of Justice’ is one of the best recognized academic works of the 20th century and has garnered varied reactions from the academic circle. Rawls is responsible for re kindling the contractarian tradition in the academic circle in the 20th century. His vision of a hypothetical contractarian society, whose basic structure is based on Justice, has spawned an array of theories in the present era of liberalism. The Rawlsian vision, although limited to a domestic order of the states, caught the imagination of the intelligentsia which was

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¹ David Archard, ‘Political and Social Philosophy’ in The Blackwell Companion to Philosophy, Edited by Nicholas Bunin and E. P. Tsui James (1996), Oxford, Blackwell Publications, p. 260

disgruntled with The Breton Woods system. It is to be noted that the Rawlsian vision intersected with the Dependency Theories as propounded by Andre Gunder Frank. This claim is substantiated by Neera Chandhoke.² Thomas Pogge and Charles Beitz spearheaded the debate on the application of Difference principle at the global level.

The application of Distributive Justice on an international level becomes a Sisyphus task because of the nature of International Law itself. The de centralized nature of International law makes it difficult for the idea of global distributive justice to realize its imperative nature. The Realists and the Positivists have developed a skeptical tone towards the nature of International Law itself, which further adds to the difficulty of Global Distributive Justice. However, recent endeavors have paved way for the ‘actual realization’ of the vision of Global Distributive Justice. As far as the theoretical justifications are concerned, it is essential to develop a nexus between Global Distributive Justice and Kantian notion of morality. Kantian notion of Categorical Imperative and Provisional Duty provide strong scaffolding for Global Distributive Justice.

Before mentioning the relationship between International Law and Global Distributive Justice, it is imperative to mention the basic nuances of Rawlsian notion of Distributive Justice and the related political theories that have supported the idea. The next section will discuss in brief the notion of Rawlsian Distributive Justice and the relevant political theories attached to it.

SECTION-I

Rawls' Distributive Justice: John Rawls in his seminal work, ‘A Theory of Justice’ revived the contractarian tradition in political philosophy by elaborating on a hypothetical thought experiment where he envisioned a society whose ‘basic structure’ was based on the Principle of Justice rather than on Rights. Rawls work was a reaction against the Doctrine of Utilitarianism, which according to him ignored the notion of individuality. In his criticism of Utilitarianism, he was in tune with John Stuart Mill, who had criticized the hedonistic approach of the Utilitarianism. In his work, Rawls speaks about a hypothetical contractarian society, whose basic structure is based on the notion of justice. The book envisions the basic principles of justice which in turn formulate the laws and regulations of the society.

² Neera Chandhoke, ‘Who Owes Whom, Why and to What Effect ?’ in Global Justice : Critical Perspectives, Edited by Sebastiano Maffettone, Aakash Singh Rathore, (2012) (New Delhi), Routledge Publications, p. 144

The basic structure of the society includes the most vital institutions of a society, like an educational system, system of taxations and basic liberties.³ An important constituent of ‘A Theory of Justice’ is ‘Original Position’. It is a hypothetical situation in which people choose the basic principles of justice. According to Juha Raikka the people constituting the Original position are rational and egoistic.⁴ In this sense, Rawls contract resembles Hobbes’ Leviathan. As far as Rawls ‘Original Position’ and Hobbes’ Leviathan is concerned, Samuel Freeman comments that the parties to the Original Position make a, “rational choice and are not morally motivated”.⁵ But at the same time, the concept of “veil of ignorance” adds a notion of morality to it. Rawls notion of Justice is referred as ‘justice as fairness’, which simply means that procedures for choosing options should be just as it will make the outcome just and Rawls aims for ‘perfect procedural justice’ where procedures are fair and the outcome is also just.⁶ The original position happens in the sub set of veil of ignorance.⁷ Veil of ignorance denotes a state of mind where people in the original position are not aware of their status (race, economic status, religious status etc.) but have a general understanding about the way society works. This veil of ignorance is a neutral ‘impartial device’ where participants are required to set aside their social, political, historical positions which make differentiate them from others. Rawls’ contention is that factual position about a person which includes his religion, race, wealth, is not good principles which justify the principles of justice.⁸ These conditions are not known to the parties and their views about society are based on the general knowledge of psychology, social cooperation, biological and physical sciences.⁹ This veil of ignorance is lifted when the just institutions are formed on the basis of principles of justice. The idea of veil of ignorance makes Rawls’ theory proximate to the lineage of Natural Rights.¹⁰ After considering these assumptions, Rawls states the two basic principles of justice.

(1) The First Principle of Justice: The Basic Liberties - Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is

³ Juha Raikka, ‘Rawls John’, Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, page 927

⁴ Ibid

⁵ Samuel Freeman, ‘Rawls’ (2007), Sonepat Haryana, Routledge Publications, Page 16

⁶ George P. Fletcher, ‘Basic Concepts of Legal Thought’ (1996), New York, Oxford University Press, page 82

⁷ *Supra* note 2 at p. 927

⁸ *Supra* note 4 at p. 155

⁹ *Supra* note 4 at p. 155

¹⁰ Ibid at p. 18

compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

(2) ***The Second principle of justice:*** Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principles, and

(b) attached to the offices and positions open to all under conditions of fair equality of opportunity¹¹

These two principles of justice have a lexical priority, i.e. Principle 1 has priority over Principle 2. Access to basic civil liberties is the starting point for every just society. The second principle of justice cannot be realized without attaining the First Principle. However, much of the debate of global justice is centered on the “Difference Principle” i.e. part (a) of the Second principle of Justice. The origins of Difference Principle can be traced back to Pareto Condition which states that if a move from state of affairs A to State of Affairs B leaves nobody feeling worse off than before and is able to make the least advantaged person better off than he originally was then it satisfies what is called a Pareto Improvement.¹² Rawlsian Difference Principle is applicable to Institutions First and it is through these institutions that the notion of distributive justice will be transferred to individuals. The institutions include market mechanism, system of property, contract, inheritance, securities, taxation etc.¹³ the difference principle creates norms and principles which further guides human conduct.¹⁴ As far as the question of identifying the criterion of being ‘least advantaged’ is concerned Samuel Freeman comments that according to Rawls the ‘least advantaged’ means the economically least advantaged people in the society who are measured according to the income they have obtained from gainful employment.¹⁵ The difference principle is thus an intriguing concept and its application has been debated over a considerable period of time. Rawls had maintained that the Difference Principle was applicable only in domestic societies and its application at the International level was not

¹¹ Ibid at pp. 44, 86

¹² Oxford Concise Dictionary of Politics Edited by Iain McLean and Alistair McMillan (2003), New Delhi, Oxford publication, p. 393

¹³ *Supra* note 4 at p. 99

¹⁴ Ibid at p. 100

¹⁵ *Supra* note 4 at p. 116

feasible. The municipal application of Difference Principle is understandable because in Amartya Sen's interpretation Rawls' vision is based on a transcendental approach which necessarily creates a nexus between Justice and Sovereign.¹⁶ This transcendental approach fosters the creation of a 'just society' by focusing on the Social Contract theory. As far as the attainment of justice at the global level is concerned, Rawls propounded a different theory in 'Law of The Peoples' which can be read as an argument for the justification of Humanitarian Intervention. The argument for the application of the Difference Principle at the international level was initiated by Rawls' foremost disciple Thomas Pogge. According to Christopher Heath Wellman, Pogge stood out from his contemporaries in two ways:

- (1) He was one of the earliest to suggest that justice shall not merely be applied to the institutions of domestic order.
- (2) Difference principle must be applied through the supranational institutions i.e. Rawls' Difference Principle shall be applicable at an international level.¹⁷

Further, Wellman states that it was Pogge who conceived Human Rights in an 'institutional' manner. It meant that whether Human rights are respected or not depends on the effectiveness of the institutions that have been created to implement the human rights regime. According to Pogge, human rights will not be protected effectively if institutions like State do not do a good job at protecting them.¹⁸ In this sense, Pogge's analysis can be compared to obligations of state under International Human Rights which is three fold in nature:

- (a) Obligation to Respect,
- (b) Obligation to Fulfill,
- (c) Obligation to Protect,

These obligations were proposed by Mr. Asbjorn Eide who was a special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Initially, these obligations were four in numbers, obligation to respect, obligation to protect, obligation

¹⁶ Amartya Sen, ' Global Justice' in Global Justice : Critical Perspectives (Edited by Sebastiano Maffettone, Aakash Singh Rathore), (2012) (New Delhi), Routledge Publications, p. 128

¹⁷ Christopher Heath Wellman, ' Pogge, Thomas' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, p. 847

¹⁸ Ibid at p. 848

ensure and obligation to promote.¹⁹ Later it was revised to become a tripartite division of obligation to respect, protect and to fulfill human rights.²⁰

Pogge's debate is also supported by Peter Singer's groundbreaking article, 'Famine, Affluence and Morality'²¹ Singer's article was written in the background of the hunger crisis that had been brewing in India because of the refugee crisis of Bangladesh.²² Singer maintained a distinction between relative and absolute poverty and opined that affluent nations must make an effort to help the poor nations. He maintained that the realities of globalization must be solved through the ethical approach and moral ought to proposition.²³ Pogge's analysis shows that world's poverty is being perpetuated by global political and economic arrangements which are deliberately designed so by the wealthy nations.²⁴ Pogge's criticism is based on is critical analysis of the 'resource and borrowing privilege' where corrupt political leaders exploit the natural resources of their countries and in turn form a nexus with international institutions and wealthy states. The resource spectrum provides a lucrative raw material area for wealthy states. The privilege spectrum allows the financial institutions to give loans which eventually foster the wealth of the wealthy government and the global poor never get a fair share of the facility.²⁵ Pogge's points of view are against the present Bretton Woods system and the much popular Structural Adjustment Programme (SAP). In order to remove these inequalities, he advocates the global application of the Rawls Difference Principle. The basis of argument for a global distributive justice is primarily based on the following theories:

A) **Moral Cosmopolitanism:** Exponents of moral cosmopolitanism suggests that all human beings are important variables. In recent times the work of Immanuel Kant and other contractarians have been added to this. Diverse interpretations of Moral Cosmopolitanism has been given by various authors. Charles Beitz proposes that the

¹⁹ Olivier De Schutter, '*International Human Rights Law*', (2010), New Delhi, Cambridge University Press, p 242

²⁰ Ibid

²¹ Peter Singer, '*Famine, Affluence and Morality*', in Global Justice: Critical Perspectives, Edited by Sebastiano Maffettone, Aakash Singh Rathore, (2012) (New Delhi), Routledge Publications, Page 15

²² Lawrence Torcello, 'Singer, Peter 'Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, page 1008

²³ Ibid

²⁴ *Supra* note 16 at p. 848

²⁵ *Supra* note 16 at p. 848

global stature of every human being is a universal concern. According to him, all political institutions must be interpreted through the prism of human rights.

Charles Jones describes cosmopolitanism as a system that necessarily includes impartiality, universality, individualism and egalitarianism. Thomas Pogge mentions the twin concepts of interpersonal and international form of ethical cosmopolitanism. One aspect i.e. interpersonal cosmopolitanism refers to human beings and its conduct while the latter refers to states and its conduct. Darrel Moellendorff insists that duties of global justice exist irrespective of nationality or citizenship.²⁶

B) ***Political Cosmopolitanism:*** Political Cosmopolitanism: According to Held and Brown's analysis since the time of Immanuel Kant Political Cosmopolitanism are both a moral and a political project and ponders over the question as to how the vision of moral cosmopolitanism is to be institutionalized. The practical application of Moral Cosmopolitanism includes the following:

- (i) Global justice cosmopolitanism,
- (ii) Cultural Cosmopolitanism,
- (iii) Legal Cosmopolitanism,
- (iv) Political Cosmopolitanism and
- (v) Civic Cosmopolitanism.

According to Held and Brown, all the above mentioned categories are influenced by the political philosophy of Immanuel Kant.²⁷ Political Cosmopolitanism is an attempt to construct the legal, economic consequences of moral cosmopolitanism. It needs to be interpreted in the inequalities that have been created as a result of globalization. The following points reflect the reaction of global distributive justice against the present globalized economic system.

- (a) Lop sided development in the world economy which was perpetuated by the Bretton Woods System.

²⁶ Alyssa R. Bernstein, 'Moral Cosmopolitanism' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, pp. 711-716

²⁷ Alyssa R. Bernstein, 'Political Cosmopolitanism' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, pp. 857

- (b) Developing countries not getting a fair share in the international trade system.
- (c) Over production of food material as a result of subsidies offered by European Union.
- (d) Radical policies of New International Economic Order (NIEO).
- (e) Unsatisfactory patent regime envisioned in the TRIPS system.
- (f) Ill effects of Structural Adjustment Programme in the Developing Countries.
- (g) Integration of Financial markets.
- (h) The socio economic effects of Sub Prime Mortgage Crisis.
- (i) Inability of the Developed Countries to make Free Trade a Fair Trade.
- (j) Deepening of Hunger Crisis around the world.

In conjuring the institutions of Political Cosmopolitanism, various authors have given their different points of view. Kok Chor Tan idea is based on Luck egalitarianism, while Thomas Nagel idea of a global distributive justice is based on a global minimum which can be realized only in a state centric global society.²⁸

C) ***Luck Egalitarianism:*** International Law and Global Distributive Justice: The onus of ‘institutionalizing’ Global Distributive Justice lies on International Law. As far as the ethical aspect of the problem at hand is concerned it has been nurtured by theorists over a period of five decades but the real problem lies in the realization of the theories. This task of realization is possible in the domain of International Law itself. The intersection of International Law and Global Justice demands contemplation on various issues. The de centralized nature of International Law itself begs the question as to what methods should be adopted by the international legal structure to ensure justice among sovereigns. If political and moral cosmopolitanism justifies the existence of Global Distributive Justice at a theoretical level then it is left to the subject of international law to actualize the concept in the existing international legal

²⁸ *Supra* note 27, p. 859

structures. The analysis of Global Distributive Justice through International Law imports the relevancy of morality in the international arena. In order to understand the notion of global distributive justice, international law and international morality Steven R. Ratner considers the following approaches to Public International Law :

- (i) Positivistic Approach
- (ii) Policy Oriented Approach
- (iii) Critical Approach²⁹

According to Steven R. Ratner all these three approaches do not provide an adequate linkage between International Law and Global Distributive justice. Policy Oriented Approach (or New Haven Approach) despite being couched in the prism of the rational expectation of the international society, does not readily mixes its ideas with ethics.³⁰ Critical legal School has failed to provide a theoretical ground to move forward.³¹ In addition to these three approaches, a direct engagement of International Law with Global Distributive Justice is reflected in the incorporation of ethics, morality in the subject of international law.

Section-II

Kantian Philosophy and Global Distributive Justice: An import of international ethics into the subject of Global Distributive Justice has gained momentum in recent times. Kantian philosophy has made a return to legal research and the results are rewarding. It is noteworthy to mention the work of Heather M. Roff whose brilliant analysis of Kantian notion of Provisional Duty of Justice has provided a much needed philosophical base to the concept of Responsibility to Protect.³² Kantian Critical Method and his notion of morality have provided strong scaffolding for myriad subjects including international ethics, international politics and international law. Kant's 'Perpetual Peace' paved way for some of the peremptory norms of international law. The notion of international ethics has gained much popularity in the area of global distributive justice.

²⁹ Steven R. Ratner, *Ethics and International Law : Integrating the Global Justice Project(s)*, Michigan law University of Michigan Law School Public law and Legal Theory Research Paper Series, Paper No. 315, February 2013, pp. 1-46

³⁰ Ibid at p 8

³¹ Supra note 29 at p. 11

³² Heather M. Roff, ' Global Politics and The Responsibility To Protect' : A provisional duty (2013), New York, Routledge Publications

The notion of global distributive justice needs to gain legitimacy in the world order. Legitimacy, as a social tool, allows any concept to be entrenched in the sub consciousness of a society. Kant ‘deontological’ approach to morality has opened a gateway for some of the perplexing questions of our time. Global Distributive Justice can gain ascension in the international order if recourse is made to Kantian notion of morality. According to Thomas Donaldson Kantian methodology shows two pertinent traits:

- 1) His methodology is agent centered and,
- 2) Principles trump consequences.³³

For Kant ideas are a surer guide than empirical certainty and cosmopolitanism is mandatory.³⁴ Kant’s Critical Philosophy is based on the idea of Deontology which avoids the Consequentialist and the Utilitarian. The key to Kantian notion of morality lies in his interpretation of ‘a priori’ and the notion of ‘categorical imperative’. Deontology has been equated with Agent centered approach where principles out trump consequences.³⁵ The emphasis is on moral motives and not on its consequences. Heather M. Roff’s work ‘Global Justice, Kant and the Responsibility to Protect.’ is the latest example to inject Kantian morality into the realm of International law.³⁶ Roff’s analysis of Kant’s taxonomy of duties shows that a defense for the institutional preparedness of state actors in international law in the field of global distributive justice can be made if a resort is made to the notion of Kant’s Provisional duties. Roff’s analysis starts by distinguishing between right and virtue where is shown as one’s inner freedom and if a person’s conduct is guided by morality and not by some external interventions like law then an action is virtuous. It has a higher moral appeal.³⁷ This is followed by the familiar category of perfect and imperfect duties. Perfect duties are coercible, subject to external legislation, have a specified content for fulfillment, fully dischargeable and demanded by right. Imperfect duties on the other hand are incoercible, subject to internal legislation, ethical, they do not specify a particular content, and they are not fully dischargeable. It is wider in nature because its scope is decided by the agent itself.³⁸ However, the novelty of Roff’s analysis lies in the concept of Provisional Duties. This is the

³³ Thomas Donaldson, ‘Kant’s Global Rationalism’, *Traditions of International Ethics* (edited by Terry Nardin and David R. Mapel) (1992), Cambridge Publications, page 136

³⁴ *Supra* note 32 at p. 136

³⁵ *Ibid* at p. 137

³⁶ *Supra* note 32

³⁷ *Ibid* at pp. 10-14

³⁸ *Ibid* at p. 15

novel addition by Heather Roff. The provisional or conditional duties are enabling duties which are conditioned by structural features. If people are ‘enabled’ then they are under a strict necessitation to act.³⁹ The term ‘provisional’ here means limited by special nullifying hindrance of a temporary nature. A movement can be made from Provisional to Peremptory if the institutionalization of mechanisms is made possible to make duties peremptory. This means that in a de centralized system, the institutionalization of structures that would entrench global distributive justice is the way forward for theories that support the cause of global distributive justice.

Roff’s novelty lies in the way the Provisional duties are treated. They are different from imperfect duties. According to Roff, Kant uses the term ‘vorlaufig’ which implies temporariness. The hindrances caused to Provisional duties are temporary in nature. Provisional duties require the institutionalization of institutions, agency and other entities. Provisional duties can be converted into peremptory duties. Such is not the case with imperfect duties.⁴⁰

Once we relate global distributive justice with the notion of Provisional Duties, it becomes clear that theoretically, global distributive justice stands a good chance of surviving the academic debate if we use Kantian ethics and apply the same at an international level. Roff’s argument is based on the idea that a movement towards the Provisional duties removes the stigma that global distributive justice is an imperfect duty.

CONCLUSION

The paper has argued that Rawlsian theory needs to be applied at an international level and in order to achieve this task frequent resort is made to the ethical arguments of leading contractualists. Kantian ethics is one of the best methods to inculcate the culture of global distributive justice and its assurance by the sovereigns would go a long way in removing the defects of the present neo liberal world order. In order to realize the true spirit of global distributive justice international law has to combine its institutions with a sense of non negotiating morality, a morality that is backed by reason and not by consequences. Kantian and Rawlsian model share the same contractarian view about the international ethics. This contractarian view is essential in the post-modern world as it allows the states to step out of

³⁹ *Supra* note 32 at pp. 25-28

⁴⁰ Ibid at p. 27

the state of nature in the international arena and enter into a co-operative mode where states would function in a seamless web. The neo liberal economic system is subject to constant fluctuations. The Asian crisis of 1997, Sub-prime mortgage crisis are its direct consequences that have fractured economies and thrown the social structure towards a downward spiral. Consequently, the world has witnessed strange phenomenon in the form of Occupy Wall Street movement. This ‘headless’ movement was one of the initial knee jerk reactions against a reckless, speculative economy that has pushed the world towards a suicidal direction. It was a unique and ‘missed’ opportunity where intellectuals and academicians could have infused a sense of ethics in the present Machiavellian economic system. Fortunately, Global Distributive justice is not to be considered an abortive attempt. Occupy Wall Street was unique because it was truly a ‘people’s movement’ and was aimed at the reckless nature of the ‘neo-yuppies’. Occupy Wall Street movement should be considered a part of the Global Distributive Justice universe. Unlike, Occupy Wall Street movement, Global Distributive Justice system is trying to institutionalize itself. The work of Thomas Pogge, Kant, Amartya Sen, Kok Char Tan are its examples. For the strengthening of the system it is imperative that a nexus is forged between International Trade law, human rights and the jus cogens principle. International Legal Theory must find a way to integrate jus cogens principles in the Trade treaties.

TRIBUNALISATION AND INDEPENDENCE IN ADMINISTRATION OF JUSTICE IN INDIA: A CRITICAL APPRAISAL

Dr. Ashutosh Hajela*

Abstract

The Article explores, analytically, the entire scheme of administration of justice by the tribunals in India in various aspects to ascertain the element of neutrality, fairness and independence in the decisions rendered by them. The paper appreciates the undeniable need for the proliferation of tribunals as specialized adjudicatory bodies in the current phase of time but as the same time is concerned about the manner of administration of them by the government of the day. The researcher identifies a clear conflict of interest in the governmental 'handling' of the tribunals since the government is one of the major litigants before them and as such the factum of the independence of the tribunals in pronouncing the decisions is debatable. Under the existing scheme of tribunal governance, the government has a decisive say in appointing the members of the tribunals, in transferring them as well as renewing their service tenures which casts substantive doubts in the neutrality in the administration of justice by them. The researcher feels that in any system of governance manned by the rule of law, it is imperative that the judicial wing of governance remains independent, neutral and above any suspicion so as to instill public confidence in the justice delivery mechanism. It is, thereby, highlighted in this paper that there lies an urgent need to revamp the existing scheme of management of the tribunals lest the tribunals are perceived as 'governmental departments' by commoners, thus shaking their faith in the administration of justice. The overhauling in the scheme of tribunal management becomes all the more necessary since many of the tribunal orders are vested with a 'finality clause', whereby the constitutional courts do have a 'Limited Access' over their orders. It is important to appreciate that if the tribunals are to be treated as substitutes for the High Courts and even the Supreme Court, they must be properly insulated against all threats and pressures operating upon them in the administration of justice.

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ADMINISTRATION OF JUSTICE AND THE RULE OF LAW

Every system of governance marked by the rule of law necessarily has to have a strong and independent judicial organ in order to ensure effective control over the vast powers exercisable by the various authorities engaged in the running of the affairs of the government. The judicial organ needs to be insulated from every interference in its functioning arriving from any quarter so as to administer justice with even hands and without any fear, favour and prejudice. A word of caution had been consistently sounded by several political philosophers, Aristotle¹, Locke² and Montesquieu³ to the tune that some form⁴ of separation of powers is required in any organizational set up in order to prevent absolutism in the scheme of governance.⁵ It is with this ideology that the Constitution of India has mandated⁶ the State to ensure that the Judiciary is kept separate from the Executive.

EXECUTIVE AUTHORITIES AND ADMINISTRATION OF JUSTICE

It is, however, in the wake of the splurge in the role of the state as a welfare state that a multifold expansion in the functions of the modern day administrative authorities has come to the front. This expansion in the functions of the administrative authorities has increased the interactions of the governmental authorities with the citizens and this, in turn, has multiplied the probability of conflicts between the two. Since the traditional judiciary in India had already been pre-occupied with varied matters pertaining to civil, criminal and miscellaneous jurisdictions, the proposal⁷ of creating a different set of adjudicatory bodies to deal with purely administrative matters was mooted.

¹ See Aristotle, *Politics*, Vol. IV at 14

² See *The Second Treatise of Civil Government*, Chapters 12 and 13

³ *l'Esprit des Lois* (1748), Chapter 12

⁴ *Ibid.*, VIII, 2. According to him, the government tends to become corrupt when people try “to debate for the senate, to execute for the magistrate, and to decide for the judges.”

⁵ “When the legislative and the executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or the senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judicial power be not separated from the legislature and the executive. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.” Nugent (Tr.), *The Spirit of the laws*, 151-52 quoted in C.K.Thakker, *Administrative Law* (Eastern Book Company, 1992) at 31.

⁶ Article 50 of the Constitution of India

⁷ The Central Government set up a Committee under the Chairmanship of Mr. Justice J.C. Shah in 1969. The Committee in its report recommended that an independent Tribunal be established for the purpose of handling service matters pending before the High Courts and the Supreme Court. Further, vide the 124th Report of the

BIRTH OF TRIBUNALS

It was by virtue of the forty second Constitutional amendment⁸that provisions for creation of tribunals were inserted in the Constitution of India.⁹ The apparent legislative intent behind such incorporation had been reduction in the workload of the High Courts and the apex court as well as creation of specialized forums to deal with ‘technical’ issues under conflict. The said amendment empowered the Parliament to create administrative tribunals for twin purposes, the first one being adjudication of the service matters pertaining to the ‘government servants’,¹⁰ and the second one being adjudication of other species of disputes viz., tax, foreign exchange, labour, industrial disputes¹¹, etc., Consequently, there was witnessed setting up of various tribunals pertaining to different subject matters in India under either the

Law Commission of India, it was pressed that in several countries like Australia, Tribunals for the purpose of dealing with Arbitration Tribunals, Workers’ Compensation, Pension had been set up, outside the domain of the traditional courts. It is thus that the Law Commission had recommended the establishment of appellate tribunals both at the Centre and at the States in matters of disciplinary and other actions against the government servants. Similarly, the First Administrative Reforms Commission had also pressed for the creation of Civil Services Tribunals to deal with matters of disciplinary actions against the government servants.

⁸ Section 46 of the Constitution (42nd Amendment) Act, 1976: The date of bringing about this amendment is, however, to be noted since it falls during the phase of emergency imposed by the Indira Gandhi government, which was bent upon to downsize the power of the judicial organ by adopting different tactics.

⁹ Part XIV A, Article 323 A/323B

¹⁰ Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

¹¹ The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature power to make laws has.

(2) The matters referred to in clause (1) are the following, namely:-

- (a) levy, assessment, collection and enforcement of any tax;
- (b) foreign exchange, import and export across customs frontiers;
- (c) industrial and labor disputes;
- (d) land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
- (e) ceiling on urban property;
- (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A;
- (g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
- (h) offences against laws with respect to any of the matters specified in sub-clause (a) to (g) and fees in respect of any of those matters;
- (i) any matter incidental to any of the matters specified in sub-clause (a) to (h).

parliamentary legislations or under the state legislations like the Debt Recovery Tribunal¹², Cyber Appellate Tribunal¹³, National Green Tribunal¹⁴ to name a few.

WORKING SCHEME OF TRIBUNALS

It is further pertinent to note that the fort second amendment in the Constitution paved the way for such law to be made by the Parliament that would divest all the courts of their jurisdiction over the cases¹⁵ which had been allotted to the tribunals. A necessary implication of the same gets manifest in the fact that the decisions of the tribunals would get almost to a state of finality because of the non-availability of the writ jurisdiction of the High Courts and the Supreme Court of India against their orders. The only constitutional remedy left against the orders of the tribunal, in such a situation, happens to be by way of ‘special leave petition’,¹⁶ to the Supreme Court of India which is necessarily a discretionary remedy at the hands of the apex court. It is thus that a substitute for the High Courts had been provided by virtue of the forty second constitutional amendment, disarming the Constitutional courts absolutely in matters under the jurisdiction of the tribunals, thus, to be created.

INDEPENDENCE IN THE FUNCTIONING OF TRIBUNALS

The moot question to be examined at this juncture is whether the tribunals, thus created under statutory legislations, happen to be actually instrumental in administering justice with even and fair hands. The fact needs to be digested that all the tribunals, thus created, stand governed and administered by various administrative departments of the respective governments, central or state, whatever may the case be. This results in variable modes of functioning of these tribunals, thereby presenting a picture of non-uniform scheme of administration of justice. Such non uniformity in the administration of justice happens to be non-conducive to the larger interest of the litigating parties. It is pertinent to appraise the fact that the tribunals are ‘quasi-judicial’ bodies manned by the administrative members

¹² Created under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Section 3
The Tribunal was set up in order to receive claim applications from Banks/Other Financial Institutions against their defaulting borrowers.

¹³ Established under the Information Technology Act, 2000

¹⁴ Established under the National Green Tribunal Act, 2010

¹⁵ Article 323A (2) (d) and 323-B (3) (d) of the Constitution of India: Power to “exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals.”

¹⁶ Article 136 (1), *ibid*: “The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”

belonging to the government departments and by the judicial members, as well. Such members are appointed by the government for a limited tenure.¹⁷ It is under this circumstance that the factum of the independence of the judges of such tribunals in the process of administering justice is to be ascertained analytically.

It is amply clear that the Judges manning the High Courts and the Supreme Court of India are insulated sufficiently by the Constitution of India against any threats directed towards them in the process of administration of justice. They enjoy a complete security of tenure¹⁸ and are liable to be removed from their office only on the ground(s) of proved misbehaviour or incapacity.¹⁹ It is further to be appreciated that the functioning of the judges of the Constitutional Courts has been left totally outside the purview of discussions in the Parliament,²⁰ thus maintaining a substantial distance between the functioning of the Constitutional courts and the Parliament. It is, thus, that a safe and secure working environment is provided to the Judges of the superior judiciary in order to ensure a fair and impartial delivery of justice by them without ant fear, favour or prejudice. However, the presiding officers of the Tribunals lack in such independence in the performance of their functions. Additionally, they also lack the immunities provided to the Judges of the High Courts and the Supreme Court of India in the discharge of their judicial duties.

The ‘safe’ position accorded to the Judges of the Constitutional Courts has been emphatically reflected by the apex court in *L. Chandra Kumar v. Union of India*²¹,

¹⁷ See, for illustration, Section 6, National Green Tribunal Act, 2010: Appointment of Chairperson, Judicial Member and Expert Member. Subject to the provisions of section 5, the Chairperson, Judicial Members and Expert Members of the Tribunal shall be appointed by the Central Government. The Chairperson shall be appointed by the Central Government in consultation with the Chief Justice of India. The Judicial Members and Expert Members of the Tribunal shall be appointed on the recommendations of such Selection Committee and in such manner as may be prescribed.

¹⁸ Article 124(2) of the Constitution of India: “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.”

¹⁹ Article 124 (4) of the Constitution of India: “A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two- thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.”

²⁰ Article 121 of the Constitution of India: “No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.”

²¹ Supra note 17

“The Constitution....contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior Courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior Courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.”²²

It has further emphatically pointed out, *“The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations.”²³*

It is thus that in the matters of an independent administration of justice, the structuring and functioning of the tribunal's lags in comparison to that of the High Courts. The Tribunals remain dependent on the Government for various aspects of their functioning, thereby, substantially compromising their functional autonomy and ‘independence’. It happens to be a matter of fact that various tribunals stand controlled by the executive in matters of appointment, promotion and transfer of their members. The members of the tribunals often happen to be former civil servants; in some cases, the members may even be persons on leave from their previous jobs who are given the ‘privilege’ of the appointments by the government. It is this government which happens to be a party to litigation before them and in the given system of appointments of the members, a fair administration of justice cannot be reasonably expected out of them. It is pertinently important to visualize that if the tribunals are set to replace or substitute the traditional courts, they need to be provided with the same constitutional immunities as are enjoyed by the courts which they seek to replace. In the absence of this up-gradation, vesting of exclusive jurisdictions in the tribunals definitely hampers a fair and neutral administration of justice.

It is a matter of grave concern that in spite of the shortcomings in the tribunal system in India, both in the jurisprudential and in the administrative aspect, there is witnessed a flourishing growth in the tribunals for various issues and matters. It has been lamented by the noted and seasoned lawyer, Gopal Subramaniam that “[The] Tribunals under the ‘pretext of specialisation’ are denuding the Courts of their jurisdiction.”²⁴ He has gone on to say,

²² *Ibid*, para 78 at p. 1149

²³ *Ibid*, para 78 at p. 1149

²⁴ Gopal Subramaniam, “A New Beginning by the Supreme Court”, The Hindu, October, 16, 2015; Available at: <http://www.thehindu.com/opinion/op-ed/gopal-subramanium-writes-on-supreme-court-bench-order-on-njac/article7770998.ece> Accessed on 07.10.2016

*“Tribunals must be abolished and the powers must be restored to courts of competent jurisdiction.”²⁵*The Supreme Court of India has also questioned²⁶ whether the tribunals as they are functioning in India can be said to be substitutes for the courts in discharging their function of judicial review. The court has, itself, answered the question in negative observing,

“They cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function, in this respect is only supplementary.”²⁷

However, despite the adverse findings against the manner and style of the functioning of the tribunals, it is unfortunate that the current times are witnessing a splurge in the number of tribunals without at all providing them with the required immunities to ensure their independence. The act of the government in creating tribunals without the requisite forethought has been resented by the noted lawyer, Arvind P. Datar also identically. He has remarked to the occasion by stating that “the new millennium has seen a proliferation of tribunals”²⁸ without understanding the implications of the same in terms of the fairness in administration of justice. The factum of independence of the tribunals in India had been emphatically reflected by the Supreme Court of India in *Union of India v. Madras Bar Association*.²⁹ The Court has stated, therein,

“In India, unfortunately tribunals have not achieved full independence. The Secretary of the ‘sponsoring department’ concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre.”³⁰

JUDICIAL RESPONSE TOWARDS INCREASED TRIBUNALISATION

²⁵ *Ibid*

²⁶ *L.Chandra Kumar v. Union of India* (1997) 3 SCC 261: “Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review?”

²⁷ *Ibid*, para 93 at p. 1154

²⁸ See Arvind P. Datar, The Tribunalisation of Justice in India, *Acta juridica* 288-302 (2006)

²⁹ (2010) 11 SCC 1

³⁰ (2010) 11 SCC 1, para 70

The crisis, thus created by the increased reliance on the tribunal system in India has been handled suitably by the Supreme Court of India through various decisions pronounced by it from time to time and the apex court needs to be sincerely acknowledged and appreciated for the same. It was another occasion recently³¹ when a Constitution Bench struck down the National Tax Tribunals Act, 2005 in its judgment in *Madras Bar Association v. Union of India*³², hereinafter referred as “NTT case”. It is pertinent to mention at this juncture that the National Tax Tribunal had proposed to replace the High Courts as far as their appellate jurisdiction against the Income Tax Appellate Tribunal and the Customs, Excise and Service Tax Appellate Tribunal was concerned. The stand of the apex court in the matter³³ deserves abundant applause in the name of independence of judiciary since it has emphatically ruled that the National Tax Tribunal had been vested with jurisdiction similar to that of the High Courts, but it failed to afford to its members any of the Constitutional protections that were bestowed upon the Judges of the High Courts in terms of functional independence from the executive. The court had further held that the tribunal, thus created, could not offer as much substantive a remedy in a particular matter as could have been granted by the High Courts which had been sought to be replaced by it. The court had, thereby, declared the entire legislation that had created the tribunal to be unconstitutional.

ANOMALIES IN THE WORKING SCHEME OF THE TRIBUNALS

It stands to be an undisputed fact that the existing tribunal system in India suffers with various deficiencies and lacuna. Many of such issues concerned with the functioning of the tribunals had been under judicial scrutiny in various cases from time to time. The contentions having been raised time and again happen to be quite crucial in terms of the independence of the various tribunals in the administration of justice. Some of the key issues pertaining to the implications of unchannelized tribunalisation are being specifically analysed as under.

DIVESTING THE HIGH COURTS OF APPELLATE/REVIEW POWERS

There is no doubt that the tribunals have divested the High Courts of their appellate and review powers. The moot point at this stage is as to whether the legislature can propose, by

³¹ 25th of September, 2014

³² AIR 2015 SC 1571, Available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41962> Accessed on November, 16, 2016

³³ The controversy in the matter hovered around the point that the National tax Tribunal, by way of its constitution undermined a process of independence and fairness, which happen to be a necessary ingredient of any adjudicatory authority.

any law, to divest the High Courts of their core judicial appellate function by way of creation of specialized bodies³⁴ and if that is done, the same destroys the basic structure of the Constitution, judicial review being one of the prominent features of it. Further, the transfer of such functions to a quasi-judicial authority, essentially lacking in the necessary ingredients of the constitutional courts seems offensive to the spirit of separation and balance of powers imbibed in the Constitution of India.

GOVERNMENTAL CONTROL OVER TRIBUNALS

Another off shoot of the tribunalisation is the effect of the same on the independence and functional autonomy of judiciary. It happens to be a fact that the routine manner of legislature conferring powers upon the Central government to ‘manage’ the affairs of the tribunal are actual dampeners to the spirit of independent and fair administration of justice by the tribunals. It is important to note at this juncture that in the NTT case, the petitioners had found Section 5 (5)³⁵ of the NTT Act, 2005 to be offensive to the functional autonomy and independence of the Tribunal in question since it empowered the Central Government to cause transfers of members from one bench to the other, with the concurrence of the Chairperson of the Tribunal. It had rightly been projected before the apex court in that matter that the Central Government could very well resort to the abuse of such power to harass a sitting Member of the Tribunal which appeared to it to be ‘inconvenient’ and get such a member replaced by a member with ‘readiness’ to tow the desired line. The apex court had clearly opined at an earlier point of time in *Union of India v. R. Gandhi*³⁶ that the functioning of the tribunals as well as the matters of their infrastructure and other administrative requirements need to be specifically assigned to the Ministry of Law and Justice. The court had stated that in order to maintain the independence of the tribunals, none of them and none of their members should be dependent upon the parent ministries or the concerned departments for any matter and this happens to be an urgent need of the hour.

APPOINTMENT OF MEMBERS OF TRIBUNALS

³⁴ Contention raised in *Madras Bar Association v. Union of India* AIR 2015 SC 1571

³⁵ Section 5(5), NTT Act, 2005: “The Central Government may transfer a Member from headquarters of one Bench in one State to the headquarters of another Bench in another State or to the headquarters of any other Bench within a State: Provided that no member shall be transferred without the concurrence of the Chairperson.”

³⁶ (2010) 11 SCC 1

It happens to be an undisputed fact that the manner and mode of the appointment of the members in any body is directly proportional to the independence and credibility in their functioning. As such the members, the presiding officers and the Chairman of the various tribunals should be selected and appointed in an impartial manner and based upon identifiable parameters so as to instill public confidence in the entire scheme of administration of justice by the tribunals. The Supreme Court of India has categorically maintained in *Union of India v. R. Gandhi*³⁷ that the appointments to the tribunals have to be based only on the required expertise, be it legal or technical. It has held, "*The Members of the tribunals, discharging judicial functions, could only be drawn from sources possessed of expertise in law, and competent to discharge judicial functions. Technical Members can be appointed to tribunals where technical expertise is essential for disposal of matters, and not otherwise. Where the adjudicatory process transferred to tribunals, did not involve any specialized skill, knowledge or expertise, a provision for appointment of Technical Members (in addition to, or in substitution of Judicial Members) would constitute a clear case of delusion and encroachment upon the independence of the judiciary, and the rule of law.*"³⁸

The Court has also categorically held that the service conditions of the members should be conducive to their role as an adjudicator who needs to discharge his duties in an independent and impartial manner. It has maintained that the adequate insulation from any legislative and executive interference must be provided in the process of appointments of the tribunal members as well as in the process to be adopted for their removal and transfers. The court had gone on to state that the qualifications and eligibility of persons to be appointed as members of the tribunal, as prescribed by the legislature must be amenable to review by the Constitutional courts.

In order to appreciate the gravity of the situation, it is significant at this juncture, to delve into the legislative scheme of conferment of powers to the Central government in determining the sitting of benches of the National Tax Tribunal Act, as an illustration. The Central Government had been authorized to notify the territorial jurisdiction for each bench, as well as to determine the constitution of the benches; the government could also cause transfers of Members³⁹ of one bench to another bench. The situation, as is reflected here, causes a potent conflict of interest since the central government happens to be a litigant or a stakeholder in

³⁷ (2010) 11 SCC 1

³⁸ (2010) 11 SCC 1

³⁹ Section 5(2), (3), (4) and (5) of the NTT Act

every matter that is triable by the NTT. If the government has any sort of administrative control over the judges, this shall definitely impinge upon a free and fair administration of justice at the hands of such Tribunal members. A similar situation of conflict is avoided in the case of the High Courts by granting this power and authority to the Chief Justice.

The Supreme Court of India has, in this context, held categorically in *Union of India v. R. Gandhi*⁴⁰

*"Vesting of the power of determining the jurisdiction, and the postings of different Members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the Members of the NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting. An unsuitable/disadvantageous Chairperson or Member could be easily moved to an insignificant jurisdiction, or to an inconvenient posting. This could be done to chastise him, to accept a position he would not voluntarily accede to."*⁴¹

CONCLUSION

It is thus that a clear picture emerges about the demerits of the ongoing tribunalisation in India in terms of fair and neutral administration of justice. It is potentially clear that when the tribunals are being seen and are being projected as replacements for the high courts, they must be manned under a scheme which resembles that of the constitutional courts. It is with this comprehension that the statute of the members of the tribunals must match with the judges of the Constitutional courts in terms of manner and mode of appointment⁴², security of tenure, transfers and removal in order to facilitate them for a fair administration of justice. Unless such an insulating cover is created around the tribunal members, the very idea of

⁴⁰ (2010) 11 SCC 1

⁴¹ (2010) 11 SCC 1, para 81: The Court has categorically stated that "*Allowing the Central Government to participate in the afore-stated administrative functioning of the NTT, in our view, would impinge upon the independence and fairness of the Members of the NTT. For the NTT Act to be valid, the Chairperson and Members of the NTT should be possessed of the same independence and security, as the judges of the jurisdictional High Courts (which the NTT is mandated to substitute)*". The Court declared the provisions to be unconstitutional on the ground that they do not "ensure that the alternative adjudicatory authority is totally insulated from all forms of interference, pressure or influence from co-ordinate branches of Government".

⁴² It is pertinent to note that Section 8 of the National tax Tribunal Act empowered the government to re-appoint the Chairperson/Members of the Tribunal for a further period of five years. The power, thus granted, would, by necessary implication, compel the Chairperson/members to decide matters in such a manner that would ensure the probability of their re-appointments.

projecting the tribunals as substitutes of the constitutional courts appears to be a wrongly placed one, the necessary casualty of which shall be reflected in terms of disgruntled litigants suffering owing to non-fair administration of justice. Further, the non-uniformity in the procedure(s) followed by the various tribunals also adds to the agony of the litigants, thereby shaking the faith of the masses in the scheme of administration of justice. The Supreme Court of India had also recommended the unification of all the tribunals in *L. Chandra Kumar v. Union of India* holding,

“[U]ntil a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these tribunals.....The creation of a single umbrella organization will, in our opinion, remove many of the ills of the present system. Such a supervisory authority must ensure that the independence of the members of all such Tribunals is maintained.”⁴³

It is high time that proper legislative mechanism be devised to exercise an active and stringent supervision over all the tribunals functioning in various spheres so as to ensure uniformity and consistency in their functioning and administration of justice. The apprehension of Sir A.V. Dicey about the demerits of tribunalisation, in terms of the maintenance and sustenance of the rule of law, had not been misplaced. It is pertinent to recall that Sir Dicey had insisted on having a unified judiciary and had vehemently criticized the French system of ‘*Droit Administratif*’. In the current tribunal system prevalent in India, the very protection of ‘unified judiciary’ is getting diluted which happens to be offensive to the spirit of the rule of law. It is, therefore, highly imperative that the entire tribunal system be overhauled and the existing lacuna be plugged in to make the system of administration of justice conducive to the interests of the masses.

⁴³ Supra note 28, *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 Ibid, para 96, p. 1155

FORENSIC TOXICOLOGY AND ITS RELEVANCE WITH CRIMINAL JUSTICE DELIVERY SYSTEM

Dr. Mazoor Ahmad Mansoori*

INTRODUCTION

Toxicology is the study of the adverse effects of drugs and chemicals on biological systems. It is understood as that branch of science which deals with poisons, and a poison can be defined as any substance that causes a harmful effect when administered, either by accident or design, to a living organism.¹ Toxicology does embrace the study of deleterious effects of substance exposure not only to the human body but also to the environment and all other organism existing in the environment.²

Whereas, Forensic toxicology, is the use of toxicology and other disciplines such as analytical chemistry, pharmacology and clinical chemistry to cases and issues where those adverse effects have administrative or medico-legal consequences, and where the results are likely to be used in court.³ It is a thoroughly modern science, based on published and widely accepted scientific methods and practices, for both analysis of drugs in biological materials, and interpretation of those results. Many of the methods it employs have been derived from innovations in clinical medicine and academic laboratories throughout the world.⁴

The application of this knowledge of drug presence (through forensic toxicology) in tissues is to meet the varied needs of the law. The interpretation of effects of drugs and their duration of action for the purpose of a medico-legal process is best referred to as forensic pharmacology, although there is overlap between these two scientific disciplines.⁵

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¹ Hodgson, E., *Introduction to Toxicology*, in A TEXTBOOK OF MODERN TOXICOLOGY 3 (Third Edition, 2004), John Wiley & Sons, Inc., Hoboken, NJ, USA

² Frederick W. Fochtman, *Forensic Toxicology*, in LEGAL MEDICINE 617 (7th edition, 2007) (ed. Shafeek S. Sanbar). [hereinafter LEGAL MEDICINE]

³ Deepak Ratan & Mohd. Hasan Zaidi, *Toxicology Division*, in FORENSIC SCIENCE IN INDIA AND THE WORLD, p. 578, (2008).

⁴ The Forensic Toxicology Council, *Briefing: What is Forensic Toxicology?* (July 2010), Available at <http://abft.org/files/WHAT%20IS%20FORENSIC%20TOXICOLOGY.pdf>

⁵ Drummer, O.H., *Forensic pharmacology and toxicology*, in EXPERT EVIDENCE, 1-36 (2008) (Ed. Ian Freckleton and Hugh Selby, Thomson Reuters)

The first comprehensive work on Forensic Toxicology was published in 1813 by Mathieu Orfila. He was a respected Spanish chemist and the physician who is often given the distinction of “***Father of Toxicology.***” His work emphasized the need for adequate proof of identification and the need for quality assurance. It also recognized the application of forensic toxicology in pharmaceutical, clinical, industrial and environmental fields. The primary concern for forensic toxicology is not the legal outcome of the toxicological investigation, but rather the technology and techniques for obtaining and interpreting the results.

Forensic toxicology is governed through various professional certifying and accrediting boards in various places such as— The American Board of Forensic Toxicology (ABFT) – and promotes professional development and education through major professional organizations, the Society of Forensic Toxicologists (SOFT), the American Academy of Forensic Sciences (AAFS), and international organizations such as The International Association of Forensic Toxicologists (TIAFT).

DISCIPLINES OF FORENSIC TOXICOLOGY

1. Death Investigation Toxicology (Postmortem Toxicology):

Postmortem forensic toxicology involves analyzing body fluids and organs from death cases and interpreting that information. Sudden unexpected and/or unexplained deaths become coroner’s cases or fall under the jurisdiction of the medical examiner. Forensic toxicologists work with pathologists, medical examiners in helping to establish the role of alcohol, drugs and poisons in the causation of death.⁶

- a. The toxicologist identifies and quantifies the presence of drugs and chemicals in blood and tissue samples. This is done using state of the art chemical and biomedical instrumentation capable of detecting small amounts of toxic materials, positively identifying them, and accurately measuring how much is present.
- b. Accuracy, validity and reliability are essential, as this information is used in the determination of cause and manner of death.
- c. Accurately establishing the appropriate cause and manner of death has serious implications for public health and public safety, and forensically reliable toxicology

⁶ *Supra* note 2

is an essential component of that process. Death investigation toxicology is performed by both public and private laboratories and many private forensic laboratories provide specialized expertise and services not available in government laboratories.⁷

2. Human Performance Toxicology:

Human Performance Toxicology deals with the effects of alcohol and drugs on human performance and behavior, and the medico-legal consequences of drug and alcohol use. This may include investigations of impaired driving, vehicular assault and homicide, drug facilitated crimes including sexual assault, and aircraft, motor vehicle and maritime collision investigations.⁸ It can be referred to as behavioral toxicology.⁹

- a. Forensic toxicologists perform analysis of drugs and alcohol in biological samples, typically blood and urine, but increasingly in other matrices such as oral fluid, and hair, for the purposes of determining the timing, extent, and impairment resulting from different patterns of drug and alcohol use. The toxicologist uses those analytical methods that are found in many research and hospital laboratories to isolate drugs from complex biological samples, prepare them for analysis through extraction and purification, then determine the identity and amount of drug present.
- b. This can include performance enhancement which occurs following the use of stimulants, and impairment from recreational or prescription medication use and misuse.
- c. Many blood alcohol and drug testing cases are performed in accredited private or academic forensic toxicology laboratories . Forensic toxicologists frequently testify in court to both their findings and to their interpretation. This type of testing may occur in public crime laboratories, but also may be a function of a health department in some states.¹⁰

⁷ Toxicology Council, Supra note 4 @ page 1-2

⁸ *Ibid*

⁹ Legal Medicine, Supra Note 2

¹⁰ Drummer OH, Gerostamoulos J., *Postmortem drug analysis: Analytical and Toxicological aspects*, 24(2) Therapeutic Drug Monitoring, 199-209 (2002).

3. Doping Control

Governing bodies of most competitive and intramural sports have derived rules regarding performance enhancing drug use to protect the health and welfare of the amateur and professional athletes, to maintain a fair and even competitive standard, and avoid wagering fraud. This applies to both human and animal sports and athletes. International groups such as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA), and the International Federation of Horseracing Authorities (IFHA) work to update and maintain these lists as patterns of drug use change. Forensic toxicologists in this field use many of the same high performance analytical methods to detect current and historical use of banned substances, including stimulants, anabolic steroids, and diuretics. This type of testing occurs in commercial and public accredited laboratories around the world, though there is also testing of high-school, college and other athletes that occurs in private laboratories.

4. Forensic Workplace Drug Testing

Use of drugs by people in the workplace has significant safety and economic consequences. Consequently, in many states, workers in safety sensitive positions are prohibited from using recreational drugs or taking certain medications without a prescription.

Particularly, in recent years there has been increased emphasis on testing employees to make sure that they are not using drugs while on the job. This testing started with workers in sensitive situations or those who worked in dangerous environments, such as police officers, locomotive engineers, pilots, etc., but has since spread to many other occupations.

However, the testing has to be done through some enforcing standards (that has to be made by legislation through forensic departments) that requires pre-employment, random, and for-cause drug testing, such as following an accident or a transportation collision.

The majority of workplace drug testing is not covered directly by accreditation programs hence there are numerous examples of improper procedures and conclusions that have led to the termination of employees based on faulty drug testing.

SYSTEMATIC TOXICOLOGICAL ANALYSIS

Sampling is of the utmost importance for a successful systematic toxicological analysis (STA). The reliability and accuracy of any toxicological result is usually determined by the nature and integrity of the specimen(s) provided for analysis. Appropriate selection, sampling and proper storage of biological evidence are important, yet sometimes over-looked, steps in forensic toxicology, particularly when the results are to be used in the judicial system.¹¹

To address the issue of sampling for forensic toxicological analysis, selection of proper specimen, availability and recommendations of specimen types, amounts that should be collected and submitted to laboratories expected to perform STA, and criteria for ensuring quality assurance in sample collection is pertinent.¹²

Generally speaking, STA involves the identification of a "general unknown", as opposed to the detection of common drugs or metabolites from a finite list.¹³ In order to establish impairment from toxicological findings, a relevant substance must be identified within a relevant specimen.

In forensic toxicology, the purpose of sampling is to provide a representative part of the whole that is suitable for screens and confirmations, affords reliable interpretation, and, when possible, allows for subsequent re-analysis, if required. Given this, it should be recognized that sampling is case-dependent.

Sampling Includes-

- Selection of sample material suitable for analysis;
- Sampling at the correct point of time;
- Sufficient quantity;
- Suitable sampling technique;
- Adequate container;

¹¹ Sarah Kerrigan. Sampling, Storage and Stability in Clarke's Analysis of Drugs and Poisons, (4th Ed.) Pharmaceutical Press, London, UK. Eds. A.C. Moffat, M.D. Osselton and B. Widdop (in press)

¹² Supra note 12 at p. 335

¹³ Levine B., *Principles of Forensic Toxicology*, AMERICAN ASSOCIATION FOR CLINICAL CHEMISTRY, WASHINGTON, (2006) [hereinafter LEVINE]; THE BULLETIN OF INTERNATIONAL ASSOCIATION OF FORENSIC TOXICOLOGIST, TIAFT-Bulletin vol. XXIX (1), (1999), Available at http://www.tiaft.org/_test12/tiaft_bulletin

- Unique labeling;
- Appropriate storage;
- Packaging, transport or handing over of sample(s) with a request form;
- Confirmation of receipt in the laboratory, intermediate storage until analysis is performed;
- Storage mode and time of remaining material in storage;
- Disposal of sample(s);
- Complete documentation of all individual steps in the procedure (chain of custody).

SAMPLES USED IN TOXICOLOGY STUDIES

1. Urine

A urine sample is quick and easy for a live subject, and is common among drug testing for employee of athletes. Urine sample do not necessarily reflect the toxic substances unless the subject was influenced by it at the time of the sample collection.¹⁴ Urine is a valuable specimen for both ante mortem and post mortem drug testing because it is a relatively uncomplicated matrix.¹⁵ The amount required for sampling is 50 ml or total amount.¹⁶ It is considered as the best specimen for comprehensive drug and poison screening is urine.¹⁷

2. Blood

Blood provides unique advantages over other matrices in terms of the wide variety of analytical methodologies available. A blood sample of approximately 10 ml is usually sufficient to screen and confirm most common toxic substances. A blood sample provides the toxicologist with a profile of the substance that the subject was influenced by at the time of collection; for this reason, it is the sample of choice for measuring blood alcohol content in drunken driving cases. For cases of poisoning where gaseous or volatile substances are

¹⁴ *Supra* note 3 at 578-79

¹⁵ *Supra* note 12 at 342

¹⁶ G. Skopp, Heidelberg; L. von Meyer, München, *Appendix D of the GTFC Guideline for Quality Control in Forensic Toxicological Analyses , Recommendations for sampling postmortem specimens for forensic toxicological analyses and special aspects of a postmortem toxicology investigation*, 2004, 5 June.

¹⁷ *Supra* note 14

involved, samples of brain, lungs and blood must be collected immediately using gas-tight containers, and if possible, tarred, cooled glass containers.¹⁸ Maintaining a frozen fraction of blood may help ensure better analyze stability in later re-analyses.

3. Hair

Hair has been used in variety of toxicology settings to provide a history of drug exposure and has therefore found applications in workplace drug testing, in monitoring of persons on probation or on parole for drug use, in insurance testing to verify the truthfulness of statements made by applicants relating to whether they use drugs or are smokers, in drug-facilitated sexual assault and in other types of criminal case- work.¹⁹

Hair is capable of recording medium to long-term or high dosage substance abuse. Chemicals in the bloodstream may be transferred to the growing hair and stored in the follicle, providing a rough timeline of drug intake events.

However, testing for drugs in hair is not standard throughout the population. *For eg-* If two people consumed the same amount of drugs, the person with the darker and coarser hair will have more drug in their hair than the lighter haired person when tested. This raises issues of possible racial bias in substance tests with hair samples.²⁰ Approximately 100-200 mg of hair should be collected from the vertex posterior on the back of the head by cutting as close to the scalp as possible, ensuring that it is clearly marked which end is closest to the scalp and appropriately securing the hair into a bundle with a rubber band, twist tie, or string. The hair sample may then be placed into aluminum foil, an envelope, or plastic collection tube and stored at room temperature until analysis.²¹

Therefore concluding that, hair is considered as one of the most useful specimens for STA, when there has been a significant delay between suspected exposure to a drug or poison and reporting to law enforcement.

4. Oral Fluid

¹⁸ *Supra* note 17

¹⁹ Nakahara Y (1999) hair analysis for abused and therapeutic drugs, J. Chromatogr B Biomed Sci Appl 733: 161-180; Kintz P et al., Hair analysis for drug detection. Ther Drug Monit 28: 442–446 (2006)

²⁰ *Supra* note 3 at 579

²¹ Levine, *Supra* note 14; Tiess D (2003) Asservierung, Exhumierung, Thanatochemie. In: Madea B, Brinkmann B (Hrsg.) Handbuch gerichtliche Medizin, Bd. 2, Springer, Berlin, Heidelberg, New York.

The use of oral fluid is gaining importance in forensic toxicology for showing recent drug use, e.g. in clinical settings or investigation of driving under influence of substances. It can be collected non-invasively, conveniently and without invasion of privacy and is most commonly collected fluid from the oral cavity for the determination of drugs.²² The use of oral fluid is gaining importance in forensic toxicology for showing recent drug use, e.g. in clinical settings or investigation of driving under influence of substances

It is composed of many things and concentrations of drugs typically parallel to those found in blood. Sometimes referred to as ultra-filtrate of blood, it is thought that drugs pass into oral fluid predominantly through a process known as passive diffusion. Drugs and pharmaceuticals that are highly protein bound in blood will have a lower concentration in oral fluid.

5. Vitreous Humor

It is one of the post-mortem specimens. The availability of autopsy specimens in postmortem toxicology allow for a more flexible analytical approach to the analysis, although some specimens have more value than others when specific drugs or poisons are involved in the death.

The fact that vitreous humor resides in an anatomically isolated and protected area of the body (behind the lens of the eye), coupled with its good stability as a biological fluid, makes this specimen more resistant to putrefactive changes than other postmortem specimens. All available vitreous fluid from each eye should be collected separately.²³

Vitreous humor is particularly useful for postmortem analysis of glucose, urea nitrogen, uric acid, creatinine, sodium and chloride. These are important analyses for the evaluation of diabetes, degree of hydration, electrolyte imbalance, postmortem interval and the state of renal function prior to death.²⁴

6. Gastric Contents

²² Crouch DJ, *Oral fluid collection: The neglected variable in oral fluid testing*, FORENSIC SCI INT, 165–173 (2005).

²³ TIAFT, Supra note 14

²⁴ Coe JI, Postmortem chemistry of blood, cerebrospinal fluid, and vitreous humor. Leg Med Annu 1976: 55–92 (1977); Coe JI, Postmortem chemistry update. Emphasis on forensic application. Am J Forensic Med Pathol 14: 91–117(1993)

Gastric content is a potentially valuable specimen for analysis in postmortem and clinical cases. Oral ingestion remains the most popular means of exposure to drugs and poisons. Therefore, gastric contents are essential for screening tests. All of the available sample should be collected without the addition of a preservative. Undigested pills and tablets should be separated and placed into plastic pillboxes for analysis. After opening the abdominal cavity, the stomach should be tied off and then removed, subsequently emptying the contents into a container and documenting the total amount. Suspicious items such as tablet remnants and herbal matter etc. should be isolated, dried (e.g. on cellulose tissue) and stored separately.²⁵ Gastric contents are non-homogeneous and should be homogenized prior to sampling.

7. Tissues

Tissue samples collected in postmortem investigations generally provide supplemental information to the toxicologist to assist in interpretation of their results. In STA, analysis of the correct tissue specimen may be vital to the identification or confirmation of an unknown causative agent. When tissues are sampled they should be collected quickly and placed immediately into airtight containers. Liver, kidney, brain, lung and spleen are the most frequently collected postmortem tissues.

APPLICATION OF FORENSIC TOXICOLOGY

This area of forensics has evolved to mean the study of illegal drugs and legal ones such as alcohol. It has been already discussed above that forensic toxicology can identify poisons and hazardous chemicals which can be used in interpreting the outcome or the real situation. The chemical makeup of each substance is studied and they are also identified from different sources such as urine or hair. Forensic toxicology deals with the way that substances are absorbed, distributed or eliminated in the body the metabolism of substances. When learning about drugs and how they act in the body, forensic toxicology will study where the drug affects the body and how this occurs.

While there are many uses for forensic toxicology testing, the most familiar one to most people is likely to be drug and alcohol testing. This type of testing is commonly performed in the transportation industry and in workplaces. Another use is for drug overdoses, whether these are intended or accidental. People who drive with a blood alcohol concentration over

²⁵ *Supra* note 17 at p. 5

the accepted legal limit can also be accessed through toxicology testing. Another application of forensic toxicology relates to sexual assault that involves the use of drugs. Various drugs are used today for the purposes of rendering the victim unable to fight the attacker, who then proceeds to sexually assault the victim. Through toxicology testing, a victim can find out what drug was given and can then be treated accordingly.

There are a lot of substances and poisons in our world many of which impact how we function in work and society. Forensic toxicology is also applied in cases of post-mortem investigations where toxicology is required to establish if an excessive intake of the drug occurred and, if so, whether this contributed to death. Forensic toxicology testing allows forensic scientists to identify substances and determine a pattern of use.

Suicidal, homicidal and accidental cases of poisoning are common in India and in other countries. With the availability of various agents like pesticides, insecticides, drugs, chemicals the probability of the misuse of the same is happening. The substances of preference for poisoning are aconite, strychnine, calotropis, oleander, copper, mercury, arsenic etc. The forensic toxicology laboratory, thus, analyzes body fluids and tissues to determine the presence of these substances. Toxicologists conduct the analysis, issue reports on their findings, and provide court testimony to interpret the test results.

LAW GOVERNING FORENSICS IN INDIA

Arising out of a growing concern over the burgeoning incidence of poisoning worldwide, coupled with a lack of public awareness about its seriousness, the government has incorporated provisions regarding the abuse of poison and admissibility of the reports of medical examinations into the Indian legislation. It is dealt below in following parts:

1. Criminal Offences in Indian Panel Code (IPC)

In India mostly poisons are used for robbery and suicidal purposes. *For eg-* Datura is used by that sect of the thugs who poisoned wayfarers. Even today the poisoning and robbing of travelers was of frequent occurrence in India. Therefore, the administration of a poison is a criminal offence whenever-

- i. It is with intent to kill,

- ii. with intent to cause serious injury,
- iii. used recklessly even though there is no intent to kill,
- iv. for stupefying to facilitate a crime, eg., robbery or rape,
- v. to procure an abortion,
- vi. to annoy the victim,
- vii. to throw poison on another person with intention to injure him.²⁶

Different sections of Indian penal code related to poisons are as follows:

- i. *Sec. 272 I.P.C.*- Punishment for adulterating food or drink intended for sale;
- ii. *Sec. 273 I.P.C.*- Punishment for selling noxious food or drink;
- iii. *Sec. 274 I.P.C.*- Punishment for adulteration of drugs in any form with any change in its effect knowing that it Will be sold;
- iv. *Sec. 275 I.P.C.*- Punishment for knowingly selling adulterated drugs with less efficacy or altered action;
- v. *Sec. 276 I.P.C.*- Punishment for selling a drug as a different drug or Preparation;
- vi. *Sec. 277 I.P.C.*- Punishment for fouling water of public spring or reservoir;
- vii. *Sec. 278 I.P.C.*- Punishment for voluntarily making atmosphere noxious to health;
- viii. *Sec. 284 I.P.C.*- Punishment for negligent conduct with respect to poisonous substance;
- ix. *Sec. 328 I.P.C.*- Punishment for causing hurt by means of poison or any stupefying, intoxicating or unwholesome drug.

²⁶ Murari A, Sharma GK, *A comparative study of poisoning cases autopsied in LHMC*, New Delhi and JIP-MER Pondicherry. *J Forensic Med. Toxicol.* 19-21, (2002)

2. Law governing Expert Witness

In so far as the Indian legal system and its position is concerned, when Indian Evidence Act 1872 or the Code of Criminal Procedure, 1973 were enacted, legislature could not anticipate the tremendous development of modern science and technology and its deep impact on the forensic science as well as well as administration of justice. However, it was later on that the reports of the expert in relation to the results of forensic toxicology, became admissible as the Indian Evidence Act permits evidence of the opinion of persons (called ‘experts’ under the Act itself) specially skilled upon a point of foreign law, science, art, or as to identity of handwriting or finger impressions, the opinions upon that point.²⁷ Expert evidence is appreciated based on several factors such as the skill of the expert²⁸ and the exactness of the science.²⁹

Since Expert witnesses may deliver expert evidence about facts from the domain of their expertise therefore, they are usually instructed to produce a joint statement detailing points of agreement and disagreement to assist the court or tribunal.

However, the Supreme Court has opined, in a case concerning specifically with the medical examination of a victim of rape, that medical jurisprudence is not an exact science.³⁰ If the science itself is imprecise, expert opinion is only of corroborative value and insufficient to secure a conviction by itself. Therefore such evidences have to be seen along with the physical and circumstantial evidence in every case.

The main legal provisions, which govern the expert evidences, are in:

- Indian Constitution. (Article 20 (3))
- Indian Evidence Act, 1872. (Sections 45 & 112)
- Code of Criminal Procedure, 1972. (Sections 53, 194 & 293)

²⁷ Section 45, Indian Evidence Act, 1872.

²⁸ *State v. S.J. Choudhary*, AIR 1990 SC 1050 at para 9, quoting the 69th Report of the Law Commission at para 17.31

²⁹ *Pratap Misra v. State of Orissa*, AIR 1977 SC 1307 at para 5

³⁰ *Ibid.*

3. Several other provisions

For collection of blood samples, S. 53 of the CrPC is required which goes with the marginal heading “*Examination of the accused by Medical Practitioner at the request of the Police.*” This section deals with examination of the accused by a medical practitioner at the request of the police officer, if there are reasonable grounds for believing that an examination of a person will afford evidence as to the commission of offence. So it shall be lawful for a registered medical practitioner at the request of the police officer not below the rank of sub-inspector and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence and to use such force as is reasonably necessary. This section does not specifically say whether it would be applicable for DNA tests also. This section does not state that the police officer shall be entitled to personally collect semen, blood, hair root, urine, vaginal swab, etc for the purpose of investigation himself. By the amendment Act of 2005 the CrPC has been amended and added S. 53A which states that examination of a person accused of rape by medical practitioner. The new Explanation now stands which include within its ambit examination of blood, blood stains, semen, sputum, swabs, sweat, hair samples and finger nails by the use of modern techniques in the case of sexual offences including DNA profiling and such other tests which is necessary in a particular case. Though, S. 53 of CrPC refers only to examination of the accused by medical practitioner at the request of the public officer but the Court has wider power for the purpose of doing justice in criminal cases. By issuing direction to the police officer to collect blood samples from the accused and conduct DNA test for the purpose of further investigation under S. 173(8) of CrPC.

- S. 293 (4) (e) of the CrPC provides for report of certain Government scientific experts. This section is only an ancillary provision which provides for giving of report by scientific experts.
- S. 112 of the Evidence Act raises a conclusive presumption about the paternity of a child born during the subsistence of a valid marriage. The said conclusiveness can be rebutted and it can be shown that the parties had no access to each other at the time when the child could have been begotten. The result of genuine DNA test is said to be scientifically accurate. If a husband and wife were living together during the time of conception, and the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain

unrebuttable. There was an admitted access between husband and wife during which she could have conceived and delivered normal child. The presumption under s. 112 was not rebutted. No adverse inference can be drawn against refusing to submit himself to blood test. Section 112 requires the party disputing the paternity to prove non-access in order to dispel the presumption. “Access” and “non-access” mean the existence or non-existence of opportunities for the sexual intercourse. It does not mean actual co-habitation. It is a rebuttable presumption of law under s. 112 that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

CASES SOLVED WITH THE HELP OF FORENSICS (IN INDIA)

The incidence of poisoning in India is among the highest in the world, and it is estimated that more than 50,000 people die every year from toxic exposure.³¹ The causes of poisoning are many - civilian and industrial, accidental and deliberate. The commonest agents in India appear to be pesticides (organophosphates, carbamates, chlorinated hydrocarbons, and pyrethroids), sedative drugs, chemicals (corrosive acids and copper sulfate), alcohols, plant toxins (datura, oleander, strychnos, and gastro-intestinal irritants such as castor, croton, calotropis, etc.), and household poisons (mostly cleaning agents).³²

Therefore, with the ever increasing cases of poison in India, the role of forensic toxicology has been greatly appreciated in various cases.

1. Tandoor Murder Case (1995) Delhi

This was the first criminal case in India solved by the help of forensics and an attempt was made by the criminals to conceal a homicide by firearm by putting the dead body on fire. However a clever and systematic forensic investigation revealed the true cause of death. The case involved an incident in which the victim was shot by Shusil Sharma (husband of the victim) and then put in tandoor. After murdering his wife Sharma took her body in his car to the Bagiya restaurant, where he and restaurant manager Keshav Kumar attempted to burn her in a tandoor.

³¹ Aggarwal P, Handa R, Wali JP, COMMON POISONINGS IN INDIA, J. Forensic Med. Toxicol. 15: 73-79 (1998); Boesche Roger, “Kautilya’s Arthashastra on War and Diplomacy in Ancient India,” The Journal of Military History, 67: 9–37 (2003).

³² Qureshi JM, Bano S, Mohammad T, Khan MA, *Medicinal potential of poisonous plants of Tehsil Kahuta from district Rawalpindi, Pakistan*, Pakistan Journal of Biological Sciences, 4:331-332 (2001).

Police recovered Sharma's revolver and blood-stained clothes and sent them to Lodhi Road forensic laboratory. They also took blood sample of Sahni's parents, Harbhajan Singh and Jaswant Kaur and sent them for a DNA test. According to the lab report, "Blood sample preserved by the doctor while conducting the post mortem and the blood stains on two leads recovered from the skull and the neck of the body of deceased Naina are of 'B' blood group." Confirming that the body was that of Sahni, the DNA report said, "The tests prove beyond any reasonable doubt that the charred body is that of Naina Sahni who is the biological offspring of Mr. Harbhajan Singh and Jaswant Kaur." And finally Mr. Shusil Sharma was found guilty with the help of forensic evidences.

2. Sister Abhaya murder case (1995) Kerala

The Sister Abhaya Case is a case regarding the death of a Knanaya Roman Catholic nun, who was found dead in a water well in Kottayam, India, on 27 March 1992. She was 19 years old at the time of her death and was a member of St. Joseph's Congregation for women under the Knanaya Catholic diocese of Kottayam, Kerala in India. On the day of her death she got up from sleep early at around 4 am to study for her exam, had gone down to the kitchen of the hostel to get water from the refrigerator. Later her body was found in the well outside the kitchen in the convent/hostel compound. Scientific investigation methods such as polygraph tests, brain mapping/brain fingerprinting and narco-analysis were used to solve the case. As part of its investigation in August 2007, the CBI conducted Narco-analysis tests. Subsequently with the help of these, two fathers of the church were arrested.

3. Aarushi Talwar murder case (2007) Noida

In year 2008, Aarushi Talwar, the 14-year-old daughter of a successful dentist couple, was found dead with her throat slit in her parents' home in Noida, Delhi. Along with the girl, the servant of the house Hemraj was found dead. In this case fingerprinting was applied and DNA was extracted from the clothes containing blood stains. Also several fingerprints were found on the glasses of the house at the time of murder. Several narcoanalysis tests were applied on Aarushi's father on CBI's suspicion, but after no evidence Aarushi's father was acquitted. The final verdict of the Court on this case is still pending. The case also discussed about the admissibility of the narco tests as legal evidence.

4. *Anant Chintaman Lagu v. State of Bombay*³³

The court stated in a case of poisoning, the prosecution must establish:

- That the death was caused due to poison;
- That the accused possessed the poison;
- That the accused had an opportunity to administer the poison to the deceased.

If these facts are proved and there is motive, the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.

5. *Poloniswamy v. State*³⁴

When the murder is alleged to have been caused by poison and the medical evidence is unable to determine poison, even then conviction can be recorded if the other evidence, oral or circumstances on the record establishes the guilt of the accused.

6. *Mahabir v. State of Bihar*³⁵

The court upheld that the fact that the heart of the deceased at the time of post-mortem examination was found to be empty would not rule out asphyxia death as a result of poisoning. It is difficult to isolate and recognize the poison in a number of cases where the deceased dies due to poisoning. The doctor's part in the diagnosis of poisoning is secondary. Several poisons particularly of the synthetic hypnotics and vegetable alkaloidal group do not leave any characteristic signs which can be noticed on postmortem examination.

SIGNIFICANCE OF FORENSIC TOXICOLOGY

Forensic science is the application of a broad spectrum of sciences to answer questions of interest to a legal system. This may be in relation to a crime or a civil action. Besides its relevance to a legal system, more generally *forensics* encompasses the accepted scholarly or scientific methodology and norms under which the facts regarding an event, or an artifact, or some other physical item are ascertained as being the case. In that regard, the concept is

³³ AIR 1960 SC 500

³⁴ AIR 1968 Bom. 127

³⁵ AIR 1972 SC 1331

related to the notion of authentication, where by an interest outside of a legal form exists in determining whether an object is what it purports to be, or is alleged as being.

As it has been noted above that the use of drug has become a significant and social problem in the society therefore the chemical testing of biological specimens from individuals is generally accepted to be the most objective method for determining the drug use.³⁶ Drug testing with the help of forensic is increasingly used within the criminal justice system to monitor drug use.

As such, toxicological analysis represents a tool for assessing the degree of impairment exerted by a drug or combination of drugs. With the ultimate degree of impairment being death, toxicological findings are also used to determine cause and manner of death. Every year many people are found dead in unexplained circumstances: they may be found in bed at home or in hotels, or in squats or on open ground. Evidence found at the scene, such as empty tablet bottles, bottles of alcohol or drug-taking paraphernalia can help to indicate a drug or alcohol-related death. Toxicological analysis can be crucial in determining the cause of death and many such cases are submitted to LGC Forensics from coroners and the police. Suspicious deaths in nursing homes and hospitals are particularly challenging, as the interpretation of high levels of a prescribed drug in an individual with some tolerance to its effects can be complex.

The most common application of toxicological findings to assess or explain performance impairment is to determine whether an individual has been driving under-the-influence (DUI) of ethanol (alcohol) and/or drugs (DUID). Another application is to determine whether the actions, behavior or demeanor of a homicide subject or suspect were affected by drugs or alcohol at the time of the incident and, thereby, offer potentially mitigating circumstances when the case is brought before a jury.³⁷

The study of toxicology serves society in many ways, not only to protect humans and the environment from the deleterious effects of toxicants but also to facilitate the development of more selective toxicants such as anticancer and other clinical drugs and pesticides.³⁸

³⁶ Barry Levine, Ch-3 *Forensic Drug Testing*, in PRINCIPLES OF FORENSIC TOXICOLOGY, p. 31 (2006).

³⁷ Available at <http://www.adfs.alabama.gov/Toxicology/ToxicologyMain.aspx>

³⁸ Ernest Hodgson, *Introduction to Toxicology*, A TEXTBOOK OF MODERN TOXICOLOGY, p. 3 (3rd Ed.)

Clearly, toxicology is preeminently an applied science, dedicated to the enhancement of the quality of life and the protection of the environment.

Data on forensic evidence collected at crime scenes included DNA material, weapons evidence, latent prints, ballistics, trace evidence, and other types of forensic evidence. Through crime lab reports, it was possible to determine the number of cases with requests for analysis by investigators and the results of the analysis by forensic scientists. Comparisons were then made between open and closed cases from the two participating sites.³⁹

CONCLUSION

As a matter of fact we know that with the advent of 21st century, the scope of a forensic toxicology service has technically and intellectually become very demanding.

Even though the short-comings of forensic toxicology persists in some spheres, still its role in delivering the justice and solving criminal cases has been highly appreciated and relied upon. Yet after the limitations, the court and society at large depends on the findings of the forensic examination and reports. The growth of forensic studies in field of toxicology is witnessed because as the society advances and becomes more complex, the crime presents itself in different forms. This correspondingly necessitates the employment of modern scientific techniques in investigation. This need of the society is taken care by the field of forensic toxicology.

³⁹ Tom McEwen, *The Role and Impact of Forensic Evidence in the Criminal Justice System*, p. 1, (2010), Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236475.pdf>

HONOUR KILLINGS AS SOCIO LEGAL OFFENCE IN INDIA: CAUSES, CONCERNS AND CHALLENGES

Dr. Meena Ketan Sahu*

Abstract

Honour is the prime asset of every human being. It can neither be sacrificed for the individual interest nor for the collective interest. Killing for the sake of honour is not only illegal but also gross violation of human right. It is illegal to take the life of someone and especially for no reasons. It is also unconstitutional. Every person has the right to life and dignity. Honour is intact with life. This right is guaranteed in the constitution of India as fundamental right. It is the right of every person to be protected from any type of danger to his/her life. Every person has the right to choice. Right to opinion is also guaranteed. Right to marry is also comes within the purview of right to life. Right to reside with dignity in society is also compatible with this right. But for the sake of honour of the family, one cannot kill the other and at the same time by killing the newly wedded couple against consent of the family does not restore honour rather this acts amounts to murder. Honour, the very word resounds courage, velour and regrettably in our Indian context also its antonym "shame". Murders meted out to couples who have married against the wishes and commands of their parents and community has unfortunately become a repetitive social practice where the acts of the married couple calls upon the honour of the entire family who can only justify and avenge it by killing the couple in question. The aim of the paper is to discuss the concept of honour killing and its legal imperatives in India. The author has made an attempt to discuss the various causes of honour killings. In the present paper, the author has suggested that there is need of a comprehensive legislation on honour killing. The author has also highlighted the role of Khap Panchayat in honour killing and its constitutional validity.

Keywords: Honour, Illegal, Right, Murder, Dignity etc.

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INTRODUCTION

Honour killings are inhuman cruel act which violates the natural right which is inalienable rights of the victims. It is observed that, Honour killing includes any kind of abusive behaviour, torture, mutilation, rape, forced married, by confine within the house and even committing murder with intending to preserve and protect the family honour.¹ Honour killing crime deprives the life of the person. It is extreme form of violation of the fundamental right of the victim person. When the girl is killed for choosing a life partner of her own certainly it takes away this right. Right to life very well includes the right to privacy; the right to bodily integrity and it is also the right to marry and to have a family of her own. Honour killing violates the women's rights, which is provided by birth as natural rights which are inalienable.² Honour killing is the bane to human society and inhuman in nature. It is a barbarous act for which punishment is not sufficient. It is irreparable loss to the parent of the victim. Killing of couple for the sake of honour is not the solution. It can't compensate the death of a person.

MEANING AND CONCEPT

According to Human Rights Watch, honour killing are acts of vengeance, usually death, committed by male family members against female family members, who are held to have brought dishonor upon the family. A woman can be targeted by (individuals within) her family for a variety of reasons, including refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce-even from an abusive husband-or (allegedly) committing adultery. The mere perception that a woman has behaved in a way that dishonors her family is sufficient to trigger an attack on her life.

As far as the conceptual analysis of honour killing is concerned, it is connected with gender, especially with women sexual behavioural activities that exhibit the family honour. Honour binds closely connected with women's behaviours in their social norms of society.³ Honour is regulated by male and female persons particularly women, and their sexual activities, exhibits the honour of the family, males are considered the safeguard of family honour. A woman's

¹ Available at www.shodhganga.inflibnet.ac.in/bitstream/10603/89946/13/13_chapter%20-v.pdf Accessed on 12/4/2017 at 4.45 p.m.

² Available at www.shodhganga.inflibnet.ac.in/bitstream/10603/89946/15/15_chapter%20vii.pdf Accessed on 15/4/2017 at 12.55 p.m.

³ See www.shodhganga.inflibnet.ac.in/bitstream/10603/89946/11/11_chapter%20-iii.pdf Accessed on 14/5/2017 at 4.55 p.m.

behavioural, activities reflect to entire family members. She will be considered as symbol of the family. Entire family honour depends upon the women's chastity. Honour killings are murders that are carried out to purify tarnished honour, the honour in question being *namus* which means chastity. Both men and women possess *namus*. For women and girls, *namus* means chastity, while for men it means having chaste female family members. A man is therefore dependent for his *namus* on the conduct of the womenfolk in his family. This means in effect that women and girls must not have illicit contact with a member of the opposite sex and must avoid becoming the subject of gossip, since gossip alone can impugn *namus*. Girls must adhere to the *namus* code of behaviour, which differs from region to region and country to country.⁴

Honour killing is a form of gender based violence perpetrated by a male family member, usually a brother or a father, against a female family member believed to have dishonoured the family by engaging in immoral and unacceptable forms of sexual behalft.⁵

It is pertinent to mention here that the crimes of honour are not restricted by gender. Men can also be the victims of honour killing by the family members of the woman with whom they are perceived to have an inappropriate relationship. Honour crimes although are targeting more often towards women, they are in no way restricted to women alone.

Encyclopaedia Britannica defines honour killing as the killing of a relative, especially a girl or woman, who is perceived to have brought dishonour on the family. Honour killing is also called as shame killing or customary killing. It denotes the homicide of a member of a family by other members, due to the perpetrators' belief that the victim has brought shame or dishonour upon the family, or has violated the principles of a community or a religion, usually for reasons such as refusing to enter an arranged marriage, being in a relationship that is disapproved by their family, having sex outside marriage, becoming the victim of rape, dressing in ways which are deemed inappropriate, engaging in non-heterosexual relations or renouncing a faith.⁶

⁴ Clementine van Eck, "Purified by Blood, Honour Killings amongst Turks in the Netherland" Amsterdam University Press, 1st Edition, 2003, p. 15

⁵ Dr. Amani M. Awwad State University of New York, "Gossip, Scandal, Shame and Honor Killing: A Case for Social Constructionism and hegemonic Discourse, Available at HEINONLINE, Accessed on 7/6/2017 at 2:45 pm.

⁶ Available at http://en.wikipedia.org/wiki/honour_killing Accessed on 22/5/2017 at 4.35 pm.

Honour killing is also defined as a death that is awarded to a woman of the family for marrying against the parent's wishes, having extramarital and premarital relationships, marrying within the same gotra or outside one's caste or marrying a cousin from a different caste.

Honour killing is nothing but the murder of a woman or girl by male family members. The killers justify their actions by claiming that the victim has brought dishonour upon the family name or prestige. It also connotes killing of a woman by the male members of the family who has not only brings dishonour but also tarnished the image of the family.

Etymologically speaking, honour killing is the “unlawful killing of a woman for her actual or perceived morally or mentally unclean and impure behaviour”. Honour killings are murders by families on family members who are said to have brought shame on the honour and name of family. These are acts in which “*a male member of the family kills a female relative for tarnishing the family image*”. The term is also defined as the purposeful pre-planned murder, generally of a woman, by or at the command of members of her family stimulated by a perception that she has brought shame on the family.

According to Oxford Dictionary of Law Enforcement 2007, “*Honour killings can also be described as extra-judicial punishment of a female relative for assumed sexual and marriage offences. These offences, which are considered as a misdeed or insult, include sexual faithlessness, marrying without the will of parents or having a relationship that the family considers to be inappropriate and rebelling against the tribal and social matrimonial customs. These acts of killing women are justified on the basis that the offence has brought dishonour and shame to family or tribe*”

As mentioned earlier, Honour Killing is a concept which is based on patriarchal norms. There is a constant tussle in between honour killing and modernity. Tradition and tradition oriented society is not detrimental to anyone but when tradition is based of bias, discrimination and exploitation in the name of honour and leads to loss of lives of helpless and innocent minority segments of populations, it leads to violence. It is a matter of great concern that the couples who are eloped against their caste and causes huge loss to the family which is casted based results to barbaric Honour Killings.

In fact, there is neither any statutory definition of Honour killing nor any precise definition which can be said to be universally recognized. It is a stupendous task to define the honour

killing exactly. However, most prevalent meaning is, “*the murder and forced suicide in the name of imposing certain moral values, the transgression of which are professed as intolerable are honour killings*”.

WHO IS VICTIM IN HONOUR KILLING?

It is noteworthy to mention here that men can also be the victims of honor killings by member of the family of a woman with whom they are perceived to have an inappropriate relationship. The loose term *honor killing* applies to killing of both male and female irrespective of their cultures that they practice. It is not only women who are victims of honour killings, but men too. The one responsible for the loss of namus or chastity is killed. If a girl is raped, the rapist is killed, not the girl. If a woman turns to prostitution, then she is the guilty party and hence the victim, not the men who visit her. If both parties are guilty, as in the case of adultery, both deserve to die: first the man, and then the woman. The man is killed by the family of the woman or girl whose honour he has violated, the woman by members of her own family.⁷

In situations where an honour killing is deemed necessary, however, the woman or girl is often shielded by her family, who turn a blind eye to the question of guilt. The family frequently goes to great lengths to point to the man as the guilty party. Claiming that the woman was raped, they kill the man, although he is in fact her lover. The family is not deluding itself here. Honour entails upholding one's reputation to the outside world. Provided others accept the ‘rape’ story, the family is content to kill the male transgressor.⁸

CAUSES OF HONOUR KILLING

The first and foremost cause for committing an ‘honour killing’ is nothing but a belief that any member of family has brought dishonor to the family, defamed and the reputation of the family is tarnished. The dishonor can be of different types for different families.⁹ Also the most obvious reason for this practice to continue in India is because of the fact that the caste system continues to be at its rigid best and also because people from rural areas refuse to change their attitude to marriage. Also in our country the society is mainly patriarchal. Men

⁷ Clementine van Eck, “*Purified by Blood, Honour Killings amongst Turks in the Netherland*”, Amsterdam University Press, 1st Edition, 2003, p. 43

⁸ Ibid.

⁹ Available at: www.manupatra.com/roundup/337/Articles/Honour%20Killing.pdf Accessed on 5/6/2017 at 7:55 am.

are expected to enforce such norms and traditions and protect family and male honour from shame. Women are expected to conduct themselves honourably. This understanding of the notion gives legitimacy to all forms of social regulation of women's behaviour and to violence committed against them.¹⁰

Thousands of women are murdered by their families each year in the name of family honor. It's difficult to get precise numbers on the phenomenon of honor killing; the murders frequently go unreported, the perpetrators unpunished, and the concept of family honor justifies the act in the eyes of some societies.¹¹ Most honour killings occur in countries where the concept of women as a vessel of the family reputation predominates.¹²

There are so many causes of honour killing. Here question arises as to why people or family members decide to kill the daughter in the name of preserving their family honour. The most obvious reason for this practice in India is because of the fact that the caste system continues to be at its rigid best and also because people from the rural areas refuse to change their attitude to marriage. According to them, if any daughter dares to disobey her parents on the issue of marriage and decides to marry a man of her wishes but from another gotra or outside her caste, it would bring disrepute to the family honour and hence they decide to give the ultimate sentence i.e. death to the daughter. It has become the norm even the son-in-law is killed as well. Sociologists believe that the reason why honour killings continue to take place is because of the continued rigidity of the caste system. Hence the fear of losing their caste status through which they gain many benefits makes them commit this heinous crime. The other reason why honour killings are taking place is because the mentality of people has not changed and they just cannot accept that marriages can take place in the same gotra or outside one's caste. The root of the cause for the increase in the number of honour killings is because the formal governance has not been able to reach the rural areas and as a result. Thus, this practice continues.

In addition to this, there are various misconceptions regarding the practice of honour killing. Some people says that it is only prevalent in rural areas, some people give opinion that it is

¹⁰ Arun Pal, "Honour Killing: Culture, Dilemma and Ritual" 1st Edn, 2012, Arise Publisher & Distributor, New Delhi, p. 225

¹¹ Thousands of Women Killed for Family 'Honor' Hillary Mayell for National Geographic News February 12, 2002

¹² Marsha Freeman, "Director of International Women's Rights Action Watch", Hubert Humphrey Institute of Public Affairs, University of Minnesota

also rampant in urban areas but it is reported that it is prevalent in both rural as well as urban areas. It has spread to vast geographical area. The first misconception about honour killing is that this is a practice that is limited to the rural areas. The truth is that it is spread over such a large geographical area that we cannot isolate honour killings to rural areas only, though one has to admit that majority of the killings take place in the rural areas. But it has also been seen recently that even the metropolitan cities like Delhi, Punjab and Tamil Nadu are not safe from this crime because honor killings are constantly reported in these area. Hence, it is noticed clearly that honor killing is not confined to rural areas; it has also spread to urban areas also. The second misconception regarding honor killing is that it has religious roots. It is not correct to say that the honour killing is having religious backing or religious roots.

In this digital era, people are more conscious. Globalization and immense spread of education have changed the thinking of the people but still the barbarous act like honour killing prevails in India. Even the people are unable to find out their fault of honour killing. As in the present days of globalization and immense spread of education in India still the peoples of India could not find the faultiness of the Honor killing. They still justify honour killing saying that it is customary law in the society. A lot of reasons are responsible for which innocent lives are being brutally killed in the name of honour. Let us discuss some of the reasons for honour killing which are as follows:

1. Marrying in the same gotra

The most significant reason of honour killing is nothing but marrying in the same gotra or having illicit elation with the person who belongs to the same gotra. It is not permissible in most of the family to marry in the same gotra. It is not only against one's gatra but also against the sentiment of the family members. Marrying in the same gatra brings dishonour to the family and shake the conscience of the family members and becomes difficult for their peaceful existence in the society. So, they choose no alternative but killing the couple for bringing dishonour to the family.

2. Attachment to society

It is pertinent to mention here that every person is having some attachment to a particular society where he resides. He is having some belongingness. He is to obey the norms fixed by that society or community. The belongingness is nothing but a desire to obey moral societal codes. The feeling of loyalty to the society is intrinsic to which every person is liable to obey.

One has social identity where he lives. The disobedience to such code is nothing against the sentiment of the people which causes discontentment and may lead to honour related violence. In addition to this, disobeying social convention brings the risk of losing one's identity.

3. Male dominated society

In a male dominated society, masculinity is recognized by the concept of honour. The competency of man to protect his honour is judges by his family and neighbours. If it is defiled, the only way men can restore it is to remove the stain that brought shame on him. The changing cultural and economic status of women has also been used to explain the occurrences of honour killings. Women who have gained economic independence go against the patriarchal culture, and undermine the authority of male members in the family. This shift towards greater responsibility for women and less for their fathers may cause the male members in the family to act in oppressive and sometimes violent manners in order to regain this authority.

4. Intolerance

As a family member women are seen as the repositories of the man's or family's honour, and they must guard their virginity and chastity. In the case of married women, fidelity and monogamy are the determining forces of both her and her husband's honour. An unchaste woman affects not just one victim, but her entire family and her tribe. Women stands as the symbol of respect and honour of family. So if she does any act which is against the family or family's reputation, then the entire family is disturbed and they feel that they are dishonoured. Hence, the male counterparts are unable to tolerate and take the drastic step.

5. Status anxiety

Status of the family in the society is based on reputation and honour. As the family is high status, so as the honour. If this honour is violated, then it is justified to kill and die for honour. To a large extent, honour killings are linked to an extreme form of status anxiety which is the fear of losing status, and involves the desire to protect it. The act of the women which brings dishonour will cause irreparable loss to the family and their social status will be deteriorated which is based on money, property, education or political effluent.

6. Customs

In some cultures, the women of the family are seen as embodiment of its honor, so there is an immense pressure on them to behave properly¹³. These social conventions include, never attracting attention to them, dressing modestly, never talking to men outside the family, and most importantly, avoiding sex before marriage (or outside marriage, once they are wed) and consenting to marry a partner chosen by their family.

7. Love affairs

Most honour killings are a punishment for the completely natural and healthy human instinct of falling in love. Family members in these cases strongly disapprove of any affiliation with a member of a different caste, or with a stranger not hand-picked by their parents.

8. Fear of public shame

Public shame is another reason for honour killing. If any act is committed by women which is shameful to the family such as extra-marital relationships, rape, incest or other sexual abuse. This results to the excessive fear of public shame that many people face¹³ in the day to day life. The honour which can't return back to the family due to the illicit relation of the women with other man and this leads to discontentment of the family member which also compels the to take any step like honour killing.

9. Importance of Culture

In male dominated society, the male member of the family acts as the head of the family and they are assigned the major responsibility to protect their property i.e movable, immovable and reputation also. The male members of the family are vested with abundant power. They always stand for culture and try to maintain it by any means. Using this strength and power they try to impose their will power upon the female and try to keep them in their rightful place.

All crimes of honour, including honour killing, are gross violations of human rights. Crimes of honour may involve the violation or abuse of a number of human rights, which include the right to life, liberty and security of the person; the prohibition on torture or other cruel,

¹³ International Journal of Enhanced Research in Educational Development, Vol. 4 Issue 4, July-August, 2016, p. 36

inhuman, or humiliating treatment or punishment; the ban on slavery; the right to freedom from gender-based discrimination; the right to privacy; the right to marry; the right to be free from sexual abuse and exploitation; the obligation to amend customs that discriminate against women; and the right to an effective remedy.

Moreover, it is declared by the Apex Court of India that there is nothing honourable in honour killing.¹⁴ At the same time, it is the direct violation of human rights of a person who by virtue of being a human have the basic birth right to live. And in cases of honor killings violation of the right by the very family member and in most cases by the father or by the real brother only because of they don't allow their daughter or female member to marry according to her will. This is the offence of murder by the members of family and gross violation of fundamental human rights.¹⁵

ROLE OF KHAP PANCHAYAT

Khap (caste) Panchayats in some parts of India define their own laws by running their own parallel judicial institution to the courts. Not only do these Khap (caste) Panchayats declare marriages null and void, but go beyond by awarding death as a punishment in many cases. These killings are used to restore faith in the orthodox approaches of the rural people. They believe that these socially unapproved marriages must be punished by extreme measures, including death.

Legally speaking, under the Hindu Marriage Act, 1955, except for the observation of certain prohibited degrees of relationship, legal restrictions on the choice of marriage partner are almost non-existent. This implies that under the law, both agnatic (kin in the patrilineal line of descent whose members claim descent from the same gotra ancestor) and inter-caste marriages are permitted. Khap Panchayats are illegal and unconstitutional. Yet, they still seem to flourish in north India due to the political support that they hold. Culturally translated, the principle of village exogamy means that all men and women of the same clan, the same localized clan and the same village are bound by the morality of brother-sister and, therefore, that both sex and marriage are prohibited between members of any of these units.¹⁶ Difference and hierarchy are the two most widely acknowledged and characteristic features

¹⁴ *Lata Singh v. State of Uttar Pradesh & Another* (2006) 5 SCC

¹⁵ Katie L. Zaunbreche, “*When culture hurts: dispelling the myth of cultural justification for gender-based human rights violations*” P. 689. Available at: HEINONLINE, Accessed on 4/5/2017 at 9.55 p.m.

¹⁶ HERSHMAN P. *Punjabi kinship and marriage*, Delhi: Hindustan Publishing Corporation, 199, p.178

of the caste system. To maintain these characteristics, the principle of strict caste endogamy has to be maintained. Inter-caste marriages lead to a blurring of the differences between different caste groups and disturb the recognized caste hierarchies.¹⁷ Therefore, anyone venturing to transgress this law is out-casted, expelled or worse killed as a result. For the execution of punishment, the khap Panchayats do not afford the luxury of having a standby executing police force, instead they count on irrational mob thinking. This mob then makes believe to each member that their actions are a justified reaction. They consider such cleansing as mere settling of the disturbed balance. Khap Panchayat is an unconstitutional body. The decision or any instruction of Khap Panchayat has been declared as unconstitutional. The function of Khap Panchayat is against the law. It has no legal sanctity.

CONCLUDING OBSERVATIONS

Here the pertinent question arises as to what steps are to be adopted to combat honour killings? What remedial measures can be taken to prevent such a thing from occurring repeatedly? It is noteworthy to mention here that enactments of so many laws are not sufficient. In addition to this, the mentality of the people has to change. It is inherent thing and can be prevented through thinking of people. Here, when we say that the mentality has to change, we mean to say that parents should accept their children's wishes regarding marriage as it is they who have to lead a life with their life partners and if they are not satisfied with their life partner then they will lead a horrible married life which might even end in suicide.

Last but not the least, comprehensive law to combat honour killing is the crying need of the hour. There is need of a separate law to prevent this crime. There is also need of provisions of law pertaining to quantum of punishment for this type of crime which must be deterrent. It is a socio-legal issue and it is alarming now. Special cells are to be set up in each district which will receive complaints from the couples pertaining to this type of offence and for their safety. Granting of bail should be strict and no leniency should be shown while granting bail to the accused persons as well as the abettors of the crime. Mass awareness is to be created to eradicate this social evil. Role of mass media communication plays prominent role in controlling honour killings in India. Regularly organizing seminars, workshops, legal literacy camps, discussions, deliberations in universities, colleges and schools can be another remedial measures to combat this crime if not immediately but gradually.

¹⁷ Prem Chowdhry, "Caste panchayats and the policing of marriage in Haryana: Enforcing kinship and territorial exogamy Contribution to Indian Sociology" (January 2004), 38 (1-2), pp. 1-42

DISABILITY AND INDIAN JUDICIARY: A LEGAL PART

Dr. Shefali Yadav* & Pooja Kaushik**

INTRODUCTION

The twenty-first century witnessed its first human rights treaty that was chiefly concerned with disability in the form of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)¹ in the General Assembly in 2007. India was among the primary members which signed and ratified it which makes it mandatory for the Indian state to bring its domestic laws in consonance with the Disability Convention.

According to Census 2011 (India)², total households having disabled persons have shown an increase of 20.5 lakhs, from 187.3 lakhs in 2001 to 207.8 lakhs in 2011. Of these, 6.2 lakhs are in rural and 14.3 lakhs in urban areas. The differently-abled in normal households increased by 48,19,382 institutional households by 65,895 and house-less households by 22,948 between 2001-11, the data said. It is heartening that the predicament of the disabled has been taken note of by the Indian Legislature. Several Acts have been made to protect the legal interests of the disabled who would otherwise be left to the vagaries of fate. These Acts mainly consist of the Mental Health Act, 1987³ (Now The Mental Health (Amendment) Bill, 2016⁴), the Rehabilitation Council of India Act, 1992⁵, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995⁶ and more recently the

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¹ The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol and ratification of the Convention. This is the highest number of signatories in history to a UN Convention on its opening day. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations. The Convention entered into force on May 3, 2008

² Available at: www.mospi.gov.in/sites/default/files/...reports/Disabled_persons_in_India_2016.pdf (Accessed on 15/04/2017)

³ In India, the Mental Health Act was passed on 22 May 1987.

⁴ The Bill repeals the existing Mental Health Act, 1987, which is vastly different in letter and spirit.

⁵ The Rehabilitation Council of India (RCI) was set up as a registered society in 1986. On September, 1992 the RCI Act was enacted by Parliament and it became a Statutory Body on 22 June 1993.

⁶ Act is replaced by the Rights of People with Disabilities Act 2016.

National Trust for welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

There are also several constitutional guarantees and protections made available to the disabled in various other laws of the country. With the aid of these legislative tools Indian Judiciary has, from time to time, played an important role in interpreting these laws in a manner so as to make available the rights to the disabled persons in India and likewise given several guidelines to eliminate discrimination against them in the society.

CONSTITUTIONAL POSITION

The Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including persons with disabilities. The right of persons with disabilities to respect, dignity and freedom is part of this generic right to life. However, the recognition of disability as part of a larger terrain of human diversity is something that has not yet entered official discourse on disability rights. Article 21⁷ of the Constitution of India protects the Right to Life and Personal Liberty, which are inclusive of the principles of inherent dignity and individual autonomy for all persons resident in India. This, together with Article 14⁸, the Right to Equality before law provide the conditioning environment for specific laws and policies that uphold fundamental rights for different classes of individuals.⁹

While the Indian Constitution prohibits discrimination *per se*, it does not explicitly prohibit discrimination on grounds of disability. However, a seven judge constitutional bench of the Supreme Court of India in *Indra Sawhney v. Union of India*¹⁰ held that the “spirit of Articles 14 [right to equality] 15(1) [right against discrimination]¹¹ and 16 [right against discrimination in public employment]¹²” allowed for discrimination and affirmative actions

⁷ “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

⁸ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁹ Disability Rights Monitor (DRPI): Written Report Kalpana Kannabiran Asmita Resource Centre for Women, Monitoring the Human Rights of Persons with Disabilities: Laws, Policies and Programs in India

¹⁰ 1992 Supp (3) SCC 217

¹¹ The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

¹² No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

for persons with disabilities. As a result of this decision, the Constitution may be read as explicitly prohibiting discrimination against persons with disabilities.

LEGAL DEFINITIONS OF DISABILITY

A disability may be generally defined as a condition which may restrict a person's mental, sensory, or mobility functions to undertake or perform a task in the same way as a person who does not have a disability. There is an array of legal definitions related to disability and it becomes difficult to choose. Various meaning and definitions of disability are categorized as follows:

According to Black's Law Dictionary¹³ - Developmental disability is an impairment of general intellectual functioning or adaptive behaviour. Physical disability is an incapacity caused by a physical defect or infirmity, or by bodily imperfection or mental weakness.

According to Oxford Law dictionary¹⁴, a 'disabled person' who has a physical or mental impairment that has a substantial and long-term effect on his abilities to carry out day-to-day activities.

The want of legal ability or capacity to exercise legal rights, either special or ordinary, or to do certain acts with proper legal effect or to enjoy certain privileges or powers of free action¹⁵. As far as statutory definitions of disability are concerned, various legislations in India defined it as follows:

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 incorporates a medical definition. According to section 2(t) 'person with disability' means a person suffering from not less than forty per cent of any disability as certified by a medical authority. Further, the meaning of disability is described in section 2(i) stating that disability means:

- i. blindness;
- ii. low vision;
- iii. leprosy-cured;

¹³ Bryan a. Garner, *Black's Law Dictionary*, Thomson Reuters, 9th Ed. 2009, p. 528

¹⁴ Elizabeth a. Martin, *Oxford Law Dictionary*, Oxford University Press, 5th Ed. 2003, p. 151

¹⁵ *Berkin v. Marsh*, 18 mont 152

- iv. hearing impairment;
- v. locomotor disability;
- vi. mental retardation;
- vii. mental illness

Section 2(i) which defined the word disability used the phrase means which connotes that it is an exhaustive definition and not intended to be illustrative.¹⁶ Section 2 of the Act has given distinct and different definitions of ‘disability’ and ‘person with disability’. It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. Definition of disability as enumerated in Section 2(i) has no application to employees who suffer disability while in service.¹⁷

‘Locomotors disability’ means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy;¹⁸ Section 2 of the Act has given distinct and different definitions of disability and person with disability. It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition.¹⁹

The Rights of Persons with Disabilities Act, 2016 – Section 2(s) - “person with disability” means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.

Under the same Act, Section 2 (r) - “person with benchmark disability” means a person with not less than forty per cent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.

¹⁶ *Telangana State Road Transport v. P. Ramesh*, W.A. Nos.1120 of 2015, decided on 08-09-2016.

¹⁷ *M. Venkateswarlu v. APSRTC*, W.P. Nos. 36337 of 2012, decided on 29-01-2016.

¹⁸ ‘Cerebral palsy’ means a group of non-progressive conditions of a person characterized by abnormal motor control posture resulting from brain insult or injuries occurring in the prenatal, perinatal or infant period of development. [*The Management of Tamil Nadu v. B. Gnanasekaran*, (2007) IILLJ 959 Mad.].

¹⁹ *The Management of Tamil Nadu v. B. Gnanasekaran*, (2007) IILLJ 959 Mad.

Census 2011²⁰, and other official surveys, used the following definition of disability: A person with one or more of the following long-lasting conditions or difficulties:

- Blindness or severe vision impairment
- Deafness or a severe hearing impairment
- An intellectual disability
- A difficulty with learning, remembering or concentrating
- A difficulty with basic physical activities
- A psychological or emotional condition
- A difficulty with pain, breathing, or any other chronic illness or condition

STATUTORY PROTECTION TO RIGHTS OF DISABLED PERSONS

Indian Parliament has made several efforts to recognize the rights of disabled in the form of following statutes:

- The Person with Disabilities Act, 1995 (Replaced with The Rights of Persons with Disabilities Bill – 2016)
- The Mental Health Act, 1987 (Replaced with Mental Healthcare Bill, 2016)
- The Rehabilitation Council of India, 1992
- The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999
- Declaration On The Rights Of Mentally Retarded Persons

THE PERSONS WITH DISABILITIES (PWD) (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995²¹

²⁰ Available at www.mospi.gov.in/sites/default/files/...reports/disabled_persons_in_india_2016.pdf (Accessed on 12/04/2017)

“The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995” had come into enforcement on February 7, 1996. It is a significant step which ensures equal opportunities for the people with disabilities and their full participation in the nation building. The Act provides for both the preventive and promotional aspects of rehabilitation like education, employment and vocational training, reservation, research and manpower development, creation of barrier-free environment, rehabilitation of persons with disability, unemployment allowance for the disabled, special insurance scheme for the disabled employees and establishment of homes for persons with severe disability etc.

THE RIGHTS OF PERSONS WITH DISABILITIES BILL - 2016²²

The Lok Sabha passed *The Rights of Persons with Disabilities Bill - 2016*. The Bill will replace the existing PWD Act, 1995, which was enacted 21 years back. The Rajya Sabha has already passed the Bill on 14.12.2016²³.

The New Act will bring our law in line with the United National Convention on the Rights of Persons with Disabilities (UNCRPD), to which India is a signatory. This will fulfill the obligations on the part of India in terms of UNCRD. Further, the new law will not only enhance the Rights and Entitlements of Divyangjan but also provide effective mechanism for ensuring their empowerment and true inclusion into the Society in a satisfactory manner.

Salient Features of the Bill

1. The Act has categorized Persons with Disabilities into three categories:

- person with disability
- person with benchmark disability
- person with disability having high support needs

²¹ The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995(1 of 1996) PUBLISHED IN PART II, SECTION 1 OF THE EXTRAORDINARY GAZETTE OF INDIA, MINISTRY OF LAW

²² The Rights of Persons with Disabilities Act, 2016 (NO. 49 OF 2016) IN PART II, SECTION 1 OF THE EXTRAORDINARY GAZETTE OF INDIA, MINISTRY OF LAW

²³ Available at <http://www.narendramodi.in/rights-of-persons-with-disabilities-bill-2016-passed-by-parliament-533533> (Accessed on 12/04/2017)

2. The Bill makes a larger number of people eligible for rights on the grounds of their disability. The rights include reservations in government jobs and welfare schemes among others.
3. The revision to the Disability Bill recognises acid attacks and Parkinson's disease as disabilities.
4. The amendments to the Disability Bill also make a particular mention of the requirements of women and children with disabilities. It also makes sure that the people with disabilities are provided with barrier-free access in buildings, transport systems and all kinds of public infrastructure.
5. The Rights of Persons with Disabilities Bill 2016 promises 5 per cent reservation for persons with benchmark disabilities.
6. The 2014 Bill made infringement of any provision of the Bill punishable with a jail term of up to 6 months, and/or a fine of Rs 10,000. The anticipated Bill has proposed to do away with the jail term.

Also, the Bill is expected to eliminate any kind of discrimination against people with disabilities. It defines discrimination as "any distinction, exclusion, restriction on the basis of disability damaging the exercise on an equal basis of rights in the political, social, cultural, civil or any other field."²⁴

THE MENTAL HEALTH ACT, 1987²⁵

Under the Mental Health Act, 1987 mentally ill persons are entitled to the following rights:

A right to be admitted, treated and cared in a psychiatric hospital or psychiatric nursing home or convalescent home established or maintained by the Government or any other person for the treatment and care of mentally ill persons (other than the general hospitals or nursing homes of the Government).

Even mentally ill prisoners and minors have a right of treatment in psychiatric hospitals or psychiatric nursing homes of the Government.

²⁴ Chanchal Chauhan, India, December 16, 2016.

²⁵ The Mental Health Act, 1987 (14 of 1987), PUBLISHED IN PART II, SECTION 1 OF THE EXTRAORDINARY GAZETTE OF INDIA, MINISTRY OF LAW

Minors under the age of 16 years, persons addicted to alcohol or other drugs which lead to behavioural changes, and those convicted of any offence are entitled to admission, treatment and care in separate psychiatric hospitals or nursing homes established or maintained by the Government.

Mentally ill persons have the right to get regulated, directed and co-ordinated mental health services from the Government. The Central Authority and the State Authorities set up under the Act have the responsibility of such regulation and issue of licenses for establishing and maintaining psychiatric hospitals and nursing homes. Treatment at Government hospitals and nursing homes mentioned above can be obtained either as in patient or on an out-patients basis. Mentally ill persons can seek voluntary admission in such hospitals or nursing homes and minors can seek admission through their guardians. Admission can be sought for by the relatives of the mentally ill person on behalf of the latter. Applications can also be made to the local magistrate for grants of such (reception) orders. The police have an obligation to take into protective custody a wandering or neglected mentally ill person, and inform his relative, and also have to produce such a person before the local magistrate for issue of reception orders. Mentally ill persons have the right to be discharged when cured and entitled to 'leave' the mental health facility in accordance with the provisions in the Act. Where mentally ill persons own properties including land which they cannot themselves manage, the district court upon application has to protect and secure the management of such properties by entrusting the same to a 'Court of Wards', by appointing guardians of such mentally ill persons or appointment of managers of such property.

The costs of maintenance of mentally ill persons detained as in-patient in any government psychiatric hospital or nursing home shall be borne by the state government concerned unless such costs have been agreed to be borne by the relative or other person on behalf of the mentally ill person and no provision for such maintenance has been made by order of the District Court. Such costs can also be borne out of the estate of the mentally ill person. Mentally ill persons undergoing treatment shall not be subjected to any indignity (whether physical or mental) or cruelty. Mentally ill persons cannot be used without their own valid consent for purposes of research, though they could receive their diagnosis and treatment. Mentally ill persons who are entitled to any pay, pension, gratuity or any other form of allowance from the government (such as government servants who become mentally ill during their tenure) cannot be denied of such payments. The person who is in-charge of such

mentally person or his dependents will receive such payments after the magistrate has certified the same. A mentally ill person shall be entitled to the services of a legal practitioner by order of the magistrate or district court if he has no means to engage a legal practitioner or his circumstances so warrant in respect of proceedings under the Act.

MENTAL HEALTHCARE BILL, 2016²⁶

This new bill passed by parliament on March 27, 2017 replaced earlier Mental Health Act, 1987. With the Lok Sabha's assent to the legislation, the Mental Healthcare Bill 2016²⁷ secured parliamentary approval as it was earlier passed by the Rajya Sabha in August 2016.

An important factor in the Bill is that it separates attempt to suicide from the Indian Penal Code. In effect, IPC provisions cannot be invoked in case of an attempt to suicide.

Salient Features of the Mental Healthcare Bill, 2016

- Decriminalising attempt to commit suicide
- Bans use of electric shock therapy for treating children with mental illness
- Permits conditional use of shock therapy on adults, after being given anaesthesia, muscle relaxants
- Emphasises on ensuring no intrusion of rights and dignity of people with mental illness

Also, the Bill gives an opportunity to a person to provide advance directions on the kind of treatment they would want in case diagnosed with a mental illness in future. "*The earlier Act of 1987 focused on regulations but this new Bill is patient-centric and after wide consultations, we have ensured that the patient's interest is safeguarded*".²⁸

THE REHABILITATION COUNCIL OF INDIA ACT, 1992²⁹

²⁶ Available at <https://scroll.in/latest/832987/lok-sabha-passes-mental-healthcare-bill-2016-which-decriminalises-suicide> (Accessed on: 12/04/2017)

²⁷ The Mental Healthcare Act, 2017 No. 10 Of 2017, Published In Part II, Section 1 of The Extraordinary Gazette Of India, Ministry of Law

²⁸ Jagat Prakash Nadda, Union Minister of Health and Family Welfare, Government of India.

²⁹ The Rehabilitation Council of India Act, 1992 (Act No. 34 Of 1992), Published In Part II, Section 1 of The Extraordinary Gazette of India, Ministry of Law

This Act provides guarantees so as to ensure the good quality of services rendered by various rehabilitation personnel. Following is the list of such guarantees:

- To have the right to be served by trained and qualified rehabilitation professionals whose names are borne on the Register maintained by the Council
- To have the guarantee of maintenance of minimum standards of education required for recognition of rehabilitation qualification by universities or institutions in India.
- To have the guarantee of maintenance of standards of professional conduct and ethics by rehabilitation professionals in order to protect against the penalty of disciplinary action and removal from the Register of the Council
- To have the guarantee of regulation of the profession of rehabilitation professionals by a statutory council under the control of the central government and within the bounds prescribed by the statute

**THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM,
CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITIES
ACT, 1999³⁰**

The Central Government has the obligation to set up, in accordance with this Act and for the purpose of the benefit of the disabled, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability at New Delhi. The National Trust created by the Central Government has to ensure that the objects for which it has been set up as enshrined in Section 10 of this Act have to be fulfilled. It is an obligation on part of the Board of Trustees of the National Trust so as to make arrangements for an adequate standard of living of any beneficiary named in any request received by it, and to provide financial assistance to the registered organizations for carrying out any approved programme for the benefit of disabled.

³⁰ The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Act No. 44 of 1999) dated 30th December, 1999 was being Act of Parliament, enacted with the object to deal with welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities by constituting a National Level Body. The assent by President was given on 30th December, 1999. It contains seven chapters with 36 sections providing for several matters including constitution of aforesaid National Level Body.

Disabled persons have the right to be placed under guardianship appointed by the ‘Local Level Committees’ in accordance with the provisions of the Act. The guardians so appointed will have the obligation to be responsible for the disabled person and their property and required to be accountable for the same. A disabled person has the right to have his guardian removed under certain conditions. These include an abuse or neglect of the disabled, or neglect or misappropriation of the property under care.

Whenever the Board of Trustees are unable to perform or have persistently made default in their performance of duties, a registered organization for the disabled can complain to the central government to have the Board of Trustees superseded and/or reconstituted. The National Trust shall be bound by the provisions of this Act regarding its accountability, monitoring finance, accounts and audit.

JUDICIAL PROTECTION

Supreme Court and High Courts of the country, from time to time, through various judgments has resolved the issues relating to violation of rights of disabled person. The issues of following nature were brought by the victims through writs: -

Issues of Concern

- Disability as a reason for discrimination
- Lack of education opportunities both at the primary and higher levels
- Lack of employment and livelihood opportunities
- Lack of physical Access in the built infrastructure
- Lack of access to information in accessible formats
- Denial of rights to promotion and emoluments to those who do find employment
- Denial of reasonable accommodation in employment, education and so on
- Denial of access to most Civil and Political rights
- Marginalisation and discrimination faced by women with disabilities

In recent times, various directions to bring changes in the present statutory protection have been highlighted in the following manner:

A. *Jeeja Ghosh v. Union of India & Others*³¹

Ms. Jeeja Ghosh, a disabled woman was asked to de-board the flight just because of the reason of her disability by the Pilot. The Supreme Court held that the Pilot as well as the Crew members of the airlines is supposed to ensure the safety of all the passengers and a decision can be taken to de-board a particular passenger in the larger interest and safety of other co-passengers.

Further, the court said that the rights that are guaranteed to differently abled persons under the Act, 1995 are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has its roots in Article 21 of the Constitution.

B. *Rajeev Kumar Gupta v. Union of India*³²

The petitioners are employed with Prasar Bharati Corporation of India (hereinafter, “Prasar Bharati”), a statutory corporation brought into existence by the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (hereinafter “the 1990 Act”). The petitioners are ‘persons with disability’ (hereinafter, “PWD”) as defined under Section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter “the 1995 Act”). They filed this writ petition aggrieved by office memoranda issued by the Department of Personnel and Training, Government of India. The petitioners’ grievance is that the impugned memoranda deprive them of the statutory benefit of reservation under the 1995 Act w.r.t. Group A and Group B posts in Prasar Bharati. It was held that PWD are not and cannot be equated with backward classes contemplated under Article 16(4). Supreme Court directed the Government to extend three percent reservation to PWD in all identified posts in Group A and Group B, irrespective of the mode of filling up of such posts.

³¹ Writ Petition (C) No. 98 Of 2012

³² Writ Petition (Civil) No.521 of 2008. Civil Appeal No. 5389 OF 2016 (Arising out of SLP (Civil) No.244 of 2016)

C. *Pranay Kumar Podder v. State of Tripura & Others*³³

Two students were declared to be ineligible to take admission to MBBS course at the stage of counselling held on 23rd June, 2015 on the score that they suffered partial colour blindness. Total exclusion for admission to medical courses without any stipulation in which they really can practice and render assistance would tantamount to regressive thinking. When we conceive of global phenomenon and universal brotherhood, efforts are to be made to be within the said parameters.

D. *Union of India & Others v. Dileep Kumar Singh*³⁴

It was held that if at the appointment stage, persons with disabilities need to have vacancies in posts reserved for them, and equally after suffering a disability during service, a person may for the self-same reason not to be able to perform what is required of him in the defence of the nation, thereby justifying his discharge from service.

E. *Ashok Kumar Giri v. Government of India and others*³⁵

3% reservation for differently abled persons will have to be computed on the basis of total vacancies of the cadre and not on the basis of the vacancies available in the identified posts, namely, at the time of notification calling for applications to fill up the available vacant vacancies. Likewise, there are several issues on which numerous judgments are pronounced for the protection of the rights of disabled.

CONCLUSION & SUGGESTIONS

India has come out with various legislations and schemes for the upliftment of differently abled persons, but gap between the laws and reality still remains. Even though human rights activists have made their best efforts to create awareness that people with disabilities have also right to enjoy their life and spend the same not only with the sense of fulfilment but also to make them contribute in the growth of the society, yet mind set of large section of the people who claim themselves to be ‘able’ persons still needs to be changed towards differently abled persons. It is this mind set of the other class which is still preventing, in a

³³ Civil Appeal No.4393 of 2017 (Arising out of S.L.P.(C) No.27388 of 2015).

³⁴ 2015 AIR SCW 1565

³⁵ AIR 2016 SC (Civil) 1963

great measure, differently abled persons from enjoying their human rights which are otherwise recognised in their favour.

It is well known that we are still far behind in terms of physical infrastructure as compared to the advanced economies. In this context, the physical accessibility to India's judiciary is not adequate for disabled citizens. To address this serious accessibility concern for the disabled and providing them their basic right of access to justice, instead of scrapping the existing office of Chief Commissioner, as proposed in the draft bill, it will be in the interest of both the Indian state and its disabled citizens to continue with this institution. It could be dedicated solely for the purpose of grievance redressal by sorting out the issues of inadequate infrastructure and limited staff which have hitherto plagued the normal functioning of this watchdog body.

If India really wants to ensure justice and empower its citizens with disabilities, then it must have a strong and effective institutional framework which can truly provide unhindered democratic and civil rights to its millions of disabled persons.

ACID ATTACK (A PHYSICAL VIOLENCE): WHAT MORE IS NEEDED IN INDIA

Priti Bhasker*

INTRODUCTION

Violence and other forms of abuse are most commonly understood as a pattern of behavior intended to establish and maintain control over family, household members, intimate partners, colleagues, individuals or groups. Violence and abuse are used to establish and maintain power and control over another person, and often reflect an imbalance of power between the victim and the abuser. Violence is a choice, and it is preventable. There are nine distinct forms of violence and abuse. Physical violence is one of them and occurs when someone uses a part of their body or an object to control a person's actions.

Physical violence includes, but is not limited to: Using physical force which results in pain, discomfort or injury; Hitting, pinching, hair-pulling, arm-twisting, strangling, burning, stabbing, punching, pushing, slapping, beating, etc. Physical violence includes acid attack because 'Acid Attack' or vitriolage is defined as the act of throwing acid onto the body of a person "*with the intention of injuries or disfiguring them out of jealousy or revenge*".

Acid violence is prevalent in those countries because of three related factors: gender inequality and discrimination, the easy availability of acid, and impunity for acid attack perpetrators. These acid attacks results from domestic or land disputes, dowry demands or revenge. In many cases they are a form of gender based violence, perhaps because a young girl or woman spurned sexual advances or rejected a marriage proposal. So far as acid attack is concerned it not only violates the physical integrity but also causes scar on the soul. It completely shatters her confidence to move forward in life deeply affecting her psyche and emotional quotient. Such horrific kinds of violence are also instrumental in the phenomenon of marginalization of women in the development processes.

Even so many initiatives have been done by the government at national level but the lack of concern for women victims can also be noticed in various legislations. The Indian Constitution provided safeguards to the women in general but there are no specific provisions

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for protecting the women victims. The Indian Penal code, 1860 and the Criminal procedure Code, 1973, collectively contain a negligible number of special protective provisions to women as victim of violence. Those statutes which are exclusively applicable to acid attack victims have also failed in taking into account the vulnerability of women and their special needs. Present paper analyses different laws related to physical violence against women and what more is needed in this regard.

LAWS RELATING TO ACID ATTACK IN INDIA

1. Constitutional Provisions

The rights of women have the originating source in the constitution of Indian, for all Indian laws are emerged from Constitution. The Indian Constitution guarantees equality of status and opportunity to men and women. The fundamental rights are enshrined in Part III of the Constitution of India. It must be borne in mind that when the fundamental rights are infringed, the natural basic human rights inherent in human beings are violated.¹

Acid attack results in violation of the fundamental rights of “Gender Equality” and ‘Right to life and liberty’ It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution.² The relevant articles of the constitution of India, which bestow legal rights upon women, are:

- (1) Article 14, which confers the equality before the law or the equal protection of the laws to every person. It not only prohibits discrimination but also makes various provisions for the protection of women.
- (2) Art. 15(1), which prohibits any discrimination on grounds of religion, race caste, sex or place of birth. However Article 15 (3) empowers the state to make any special provision for women and children.
- (3) Articles 21 ensures; ‘No person shall be deprived of his life or personal liberty except according to the procedure established by law’. Women have a right to lead dignified, honourable and peaceful life with liberty.

¹ *Ibid.*

² *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011

(4) Article 51 (e), Constitution of India enumerates the fundamental duty to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women, its true realization in spirit is much awaited.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 14 is not mere formal equality, it also encompasses substantive equality. This means that equality cannot simply exist on paper. The State has to take positive action including special measures to ensure equality. As women in India are disproportionately the victims of acid attacks, and acid attacks largely constitute gendered violence, women require special protection from acid violence under law.

In *Bandhua Mukti Morcha v. Union of India*,³ the Apex Court held that the right to life under Article 21 means the right to live with dignity, free from exploitation.⁴

As seen above right to Life in terms of the language used in Article 21 is available not only to every citizen of this country, but also to a ‘person’ who may not be a citizen of the country. On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity would be entitled to the protection of their lives in accordance with the constitutional provisions’. They also have a right to life” in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of persons who are not citizens?⁵ The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass in the facets of gender equality including prevention of acid attack. The courts are under a constitutional obligation to protect and preserve those fundamental rights. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so when, there is no inconsistency between them and there is a void in domestic law.

³ (1984) 3 SCC 161

⁴ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

⁵ *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465

No person shall be deprived of his life or personal liberty except according to procedure established by law. The Supreme Court in a catena of judgments has recognised that the right to life includes the right to be free from inhuman and degrading treatment. As pronounced in *Francis Coralie Mullin v. Union Territory of Delhi & Ors*,⁶ the Supreme Court held as under: “It is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights (ICCPR).” The Supreme Court has held that Article 21 includes the right to health and the right to health services.

2. National Legal Responses

Acid attack results in violation of the fundamental rights of ‘Gender Equality’ and ‘Right to life and liberty’. It is a clear violation of the rights under Arts. 14, 15 and 21 of the Constitution.⁷ Needless to say, this constitutes a serious violation of women’s human rights especially right to health.

The Indian Penal Code was amended by the Criminal Law (Amendment) Act, 2013, to include the offence of acid attack within its ambit. The Criminal Law (Amendment) Act, 2013, made the following changes:

Section 100 - Acid, attack has been included under the list of grievous crimes under which the right to private defence extends to causing death. This means that an acid attack is so grave that a survivor may be justified in killing the perpetrator to defend herself from the attack.⁸

Section 326A - Whoever causes permanent or partial damage, deformity, burns, maims, disfigures or disables any part or parts of the body of a person with the intention or knowing that it is likely to cause such injury or hurt, shall be punished with either simple or rigorous imprisonment for a term of at least 10 years, which may extend to imprisonment for life, and a fine. The fine shall be paid to the victim, and shall be just and reasonable to meet the

⁶ 1981 SCR (2) 516

⁷ *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011

⁸ Sec.100 of Indian Penal Code 1860, Diglot Edition, 2016, Central Law Agency, p.22

medical expenses of the victim.⁹

Section 326B – Attempting to throw or administer acid with the intention of causing permanent or partial damage, deformity, burns, maim, disfigure, disable, grievous hurt shall be imprisoned with either simple or rigorous imprisonment for at least five years, up to seven years, and a fine.¹⁰

Section 166A – A public servant who refuses to record any information in relation to an offence under Section 326 A and 326 B (as well as some other sections), shall be imprisoned with rigorous imprisonment for a term of at least six months which may extend up to two years, and be liable to pay a fine.¹¹

Section 166B – Whoever is in charge of any hospital, whether public or private, run by the Central or State Government, a local body, or any person, and who contravenes Section 357C of the Code of Criminal Procedure, shall be imprisoned for a term which may extend to one year, or with fine, or both. Section 357C governs treatment of victims of crimes.¹²

The Code of Criminal Procedure was similarly amended by the same Criminal Law (Amendment) Act, 2013:

Section 154 – When the information is given by the woman victim of a crime under Section 326A, 326B which are the sections dealing with acid attacks (and other sections of the IPC), the information will be recorded by a woman police officer or any woman officer.¹³

Section 154(a) provides for special provisions for survivors of offences under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E, or Section 509 of the IPC (sexual harassment, criminal force to a woman with intent to disrobe, watching a woman in a private act, stalking, rape, and aggravated rape). When an offence under the Sections has been committed and the victim has been permanently or temporarily mentally or physically disabled, then the police officer shall, in the presence of a special educator or interpreter record information from the victim at the victim's residence of any place of the victim's choosing. The recording of such information may be video graphed if needed. Section 154(a)

⁹ Sec.326-A of Indian Penal Code 1860, Diglot Edition, 2016, Central Law Agency, p.84

¹⁰ Ibid, Sec.326-B

¹¹ Sec.166-A of Indian Penal Code 1860, Diglot Edition, 2016, Central Law Agency, p.40

¹² Ibid, Sec.166-B

¹³ Sec.154 of Cr.P.C. 1973, Diglot Edition, 2016, Central Law Agency, p.69

seems to have overlooked acid attack victims as Section 326A and 326B has not been included. This might be particularly problematic as in most cases acid attack victims suffer from significant physical disability following the attack. Section 164 (5A)(a) makes similar provisions as Section 154(a), for a Judicial Magistrate to record the statement taking the assistance of a special educator or interpreter in cases wherein the victim is temporarily or permanently mentally or physically disabled, and for the statement to be video graphed. This statement shall be considered in lieu of examination in chief under the Indian Evidence Act. Again, acid attacks under Section 326A and 326B have not been included within this section.

3. Incorporating International Law on Violence Against Women in India

International conventions and norms have been used in India in cases where there is a lacuna in domestic legislation in case of *Vellore Citizens Welfare Forum v. Union of India*,¹⁴ it was held that any rule of customary international law which isn't contrary to municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by courts of law.

However, the incorporation of international law into domestic law is possible only when the law does not come into conflict with an Act of Parliament. As held in the *Gramophone Co. of India Ltd. v. B.B. Pandey*,¹⁵ the will of the legislative bodies is still supreme and international law only fills the gaps in municipal law. Heavy reliance has been placed on various conventions and declarations that have been signed by the executive body of India with regard to the duty of the government to safeguard women's rights to protection from violence and prevent discrimination. These include the convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Beijing Platform for Action of the Fourth World Conference on Women in Beijing. Article 11¹⁶ and Article 24¹⁷ of CEDAW were referred to in the judgment. The guidelines, especially with reference to the definition of sexual harassment, have borrowed heavily from CEDAW. At the Fourth World Conference

¹⁴ AIR 1996 SC 2715

¹⁵ AIR 1984 SC 667

¹⁶ Article 11 of CEDAW states: '*1. State parties shall take appropriate measures to eliminate discrimination against women In the field of employment in order to ensure, on the basis of equality of men and women, the same rights, in particular: (a) the right to work as an inalienable right of all human beings; (if) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*'

¹⁷ Article 24 of CEDAW states: 'states Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the right recognized in the present convention'

on Women in Beijing the Government of India made an official commitment to protect women's rights by undertaking various steps, and stated that it would formulate and implement national policy on women. The integration of international law can therefore be an important catalyst for strengthening the administration of justice in the area of violence against women.

India, as a state party to CEDAW has the legally binding obligation to "eliminate discrimination against women by any person, organization or enterprise," as enumerated in Article 2(e). State parties have to take appropriate measures to eliminate prejudices and customary practices, such as "acid violence", "which are based on the idea of the inferiority or the superiority of either of the sexes," as enumerated in Article 2(e). Creating statutes that criminalize the different types of acts that fall within the ambit of "acid crimes", while essential, and is certainly not adequate if there is no systematic enforcement of the statutes. Active prosecutions are one of the means to achieve the practical realization of eliminating discriminatory principles such as "acid crimes", in order to ensure that state parties meet their obligations to "take all appropriate measures to eliminate discrimination against women [Article 2]. Taking preventative measures, such as promoting gender sensitization and initiatives on combating dated patriarchal notions, are also necessary to eliminate discrimination against women.

SUPREME COURT AND HIGH COURT JUDGMENTS

Victim of acid attack remain the most vulnerable group in our society. Acid attack is crime against the most basic human right and violates the victims most cherished fundamental right.¹⁸ It gives a serious blow to her womanhood and also offends her self-esteem. Therefore, providing punishment to the offender will not rehabilitate her to the normal life. After analyzing the issues pertaining to acid attack victims the apex court expanded its compensatory jurisprudence to the victims of acid attack also.

As India did not have a separate law governing the crime of acid attack, cases have been registered under different sections of the Indian Penal Code (IPC) particularly the sections relating to hurt, grievous hurt, grievous hurt by corrosive substances and attempt to murder and murder. However, as discussed earlier, the after effects of an acid attack even if the

¹⁸ See Article 21 of the constitution of India

victim survives are distinct and scar the victim; who is usually a woman throughout her life both physically and mentally.

In some of the positive cases the accused have been charged with murder, as the intention of the attacker has been construed as an intention to kill the victim. Even in these positive cases however the amount of fine which has been levied has often been an insignificant amount. The victim has also often not been given this fine by the court.

In a 1998 Maharashtra case¹⁹ acid was thrown on a woman, while she was holding her two and a half year old baby, by her brother-in-law. The woman finally died due to burn injuries. In this case, the brother-in-law was sentenced by the Court under Section 302 of IPC, to undergo imprisonment for life and pay a fine of Rs. 1000 and also sentenced to rigorous imprisonment for a month. Under Section 326 of the IPC he was awarded 5 years of imprisonment apart from a fine of Rs. 2000/-and 3 months of rigorous imprisonment. Though the accused was found guilty the learned Judge failed to appreciate that he should levy an adequate amount as fine and give this fine to the victim's child, who suffered from the attack in multiple ways.

In a case before the Madras High Court²⁰, a person suspected his wife had developed an illicit relationship with one of his acquaintances. In that fit of anger he threw acid on her resulting in severe burns and death of the victim. The husband was convicted under Sec 302 IPC and 313 IPC (causing miscarriage of a woman without her consent) with life imprisonment and a fine of Rs. 2000. The fine was thus again a meager amount.

In some cases which are targeted against women dowry and property can be the reasons for acid attacks. Property and land disputes and sometimes revenge²¹ can prove to be a motive for acid attacks against men. It appears that the idea that acid is an easy effective method of harming and killing enemies can spread to general attacks against both women and men.

In case before the Supreme Court of India²² the accused was the husband of the deceased, Sushila and wanted to kill her and their daughters, Bindu and Nandini to grab property as he was the immediate beneficiary to her estate. He poured acid over her to kill her. She received

¹⁹ *Gulab Sahiblal Shaikh v. The State of Maharashtra*, [1998 Bom CR(Cri)]

²⁰ *Balu v. State Represented Inspector of police* (Decided on 26/10/2006)

²¹ *State of Madhya Pradesh v. Jhaddu and Ors.* (1991 Supp(1)545)

²² *Ram Charittar and Anr. etc. v. State of Uttar Pradesh etc.* (04.04.2007 - SC)

extensive burn injuries on large parts of their bodies including the face, chest, neck, etc. According to the Doctor the death was due to the corrosive acid burns and shock. The High Court convicted the appellants Ram Charittar and Kishori Lal under Section 302/34 IPC, and sentenced them to life imprisonment. The appeal for their acquittal was dismissed by the Hon'ble Supreme Court. No compensation was awarded to the victims.

In a case before the Jharkhand High Court²³ the victim was standing with her friend at a Bus Stop in Dhanbad. The Appellant came and poured acid over her head and face the victim suffered burn injuries over the left side of her eye, neck and chest and had to be hospitalized. A case was registered under Sections 324, 326, 307 IPC. The police investigated the case and finally submitted a chargesheet against the appellant under the aforesaid sections. The learned 2nd Additional Sessions Judge, Dhanbad held the appellant guilty under Section 324 IPC and convicted and sentenced him to undergo RI for three years. The appellant's conviction was upheld by the Hon'ble High Court. No compensation whatsoever was awarded to the victim. In this case the court seems to have been guided by the nature of injuries which in its opinion did not amount to grievous hurt.²⁴

In one of the most famous cases involving acid attack²⁵ the accused threw acid on a girl, Hasina, for refusing his job offer. This deeply scarred her physical appearance, changed the colour and appearance of her face and left her blind. The accused was convicted under Section 307 of IPC and sentenced to imprisonment for life. A compensation of Rs. 2,00,000/- in addition to the Trial Court fine of Rs. 3,00,000 was to be paid by the accused to Hasina's parents. This was a landmark case as it was the first time that a compensation which was quite a large sum was given to the victim to meet the medical expenses including that of plastic surgeries. However, no compensation was awarded for the after effects of the attack such as loss of income etc.

In a case from Delhi²⁶ the accused threw acid on the victim's face. The liquid splashed on her face produced some redness (erythema) on the skin over a part of her face involving her upper eye-lids. There was no corrosion, of the skin or other deformity. The accused was convicted for causing hurt under Section 323 of the IPC and a meager fine of Rs. 300 along

²³ *Awadhesh Roy v. State of Jharkhand* (Decided on 12/6/2006)

²⁴ See also *Students of A.P.A.U. & Another v. The Registrar, A.P.A.U.* (1997(1) ALT 547

²⁵ *State of Karnataka v. Joseph Rodrigues* (Decided in the Hon'ble High Court of Kerala on 22/8/2006)

²⁶ *State (Delhi Administration) v. Mewa Singh* 5 (1969) DLT 506

with 15 days imprisonment was awarded. This sort of punishment and fine for acid attack is in itself a mockery of sorts and does not take into consideration the gravity of the crime and its after effects like trauma which affects the victim throughout her life.

Thus, over the years various kinds of acid attacks have been registered under the sections related to hurt, grievous hurt, murder etc. However, the nature and effect of the crime of acid attack is very distinct and complex and the Sections relating to hurt and grievous hurt do not provide an adequate relief and punishment. Apart from this the police often use their discretion to decide what sections should be registered in the case of acid attacks and this discretion is at times influenced by gender bias and corruption or is a wrong assessment.

In most of the cases no compensation has been awarded. In those in which compensation has been awarded the sum is minimal and is totally inadequate to meet even the medical expenses. Normally courts just levy fines without even giving these to the victims. The section on Compensation in the Cr.P.C. should therefore clearly spell out that the fines levied should be given to the victim or their dependents.

The victims suffer a great deal due to a slow judicial process, inadequate compensation and obviously from the after effect of the acid attack itself. Thus, there is an urgent need to legislate distinct sections in the I.P.C to deal with acid attacks and to setup a Criminal Injuries Compensation Board in India to deal with such cases in an effective and efficient manner, to help the victims of acid attack to get compensation for medical expenses and rehabilitation apart from making Section 357 Cr.P.C. mandatory in certain respects.

After the leading case of *Laxmi v. UOI*,²⁷ the Supreme Court passed an order to put ban on selling of acid in shops. Laxmi of 22 years old, who was an acid attack survivor was waiting for a bus in Delhi's tony Khan Market in 2005, when two men poured acid on her after she refused to marry one of them, leaving her disfigured. Though the victim and her parents were poor they were fortunately helped by a benefactor who bore the medical expenses approximating to Rs. 2.5 Lakhs. However, even after 4 plastic surgeries the victim's physical appearance remains horrific and many more surgeries would be required to make her physical appearance a semblance of what it was. The victim can of course never look as she did before the attack.

²⁷ Criminal Appeal No. 129 of 2006

The Supreme Court directed all states to pay acid attack victim Rs. 3 lakh towards medical treatment and aftercare rehabilitation and Rs. 1 lakh within 15 days of an incident and the balance within two months thereafter. Alok Dixit, Founder of Stop Acid Attack says that the good thing that has come out of it is the compensation but that is for the girls who will be attacked in the future.

In another case *Parivartan Kendra v. Union of India & Ors.*,²⁸ in this case after working closely with acid attack survivors an NGO working for marginalized persons in Bihar filed this petition in the Supreme Court of India to ensure complete rehabilitative services and compensation for acid attack survivors. The outcome of the case is that Supreme Court issued notices to the state and union territories for information on victim compensation and CSAAW became co petitioner. S.C. stated that, the victim (Chanchal) should be compensated to a tune of at least Rs. 10 Lakhs. Suffice it to say that the compensation must not only be awarded in terms of the physical injury, we have also to take note of victim's inability to lead a full life and to enjoy those amenities which is being robbed of her as a result of the acid attack. Therefore, this Court deems it proper to award a compensation of Rs. 10 lakhs and accordingly, we direct the concerned Government to compensate the victim Chanchal to a tune of Rs. 10 Lakhs, and in light of the Judgment given in Laxmi's case we direct the concerned State Government of Bihar to compensate the main victim's sister, Sonam to a tune of Rs. 3 Lakhs.

In another case *Ayushi Dubey & Ors. v. State of U.P. & Ors.*,²⁹ this petition filed on behalf of Madhuri Prajapati an acid attack survivor. The team visited and filed the petition. It sought to constitute a team of doctors and experts to examine Madhuri, to reimburse the survivors of medical expenses, to fast track the criminal trial, to award compensation to her and her mother. In this regard the High court passed some sweeping orders and asked to state to ensure all the prayers made in the petition.

In *Shaheen v. State of Haryana through its Chief Minister and SP, Panipat and Bala and Yashwinder*,³⁰ HRLN filed petition on behalf of Shaheen to modify the victim compensation scheme to provide retroactive free medical and surgical treatment for acid attack survivors, rehabilitation, and compensation to survivors, to compensate Shaheen's medical expenses, to

²⁸ WP (C) 867/2013, Order dated 7/12/2015

²⁹ WP (C) 68901/2013

³⁰ WP (C) 4046/2014

provide immediate free treatment for Shaheen. The case is pending with the Court and yet to be decided.

ROLE OF POLICE IN THE INVESTIGATION OF ACID ATTACKS

Police department in a country should ideally be a safe harbor for the citizens of the country and should play a proactive and pivotal role to nab and curb criminals and crime. But in India this view exists only on paper and not in practical world. The police response to violence against women is grossly inadequate and inappropriate, even in the contemporary India, where women are emerging as leaders. The cult of masculinity prevalent in the department makes the police officers hold some stereotypes about violence against women. The stereotypes lead to certain standard patterns of police response. For example one of the most common responses of police with respect to violence against women is that it is victim-precipitated. Women ask for rape/sexual violence by provocative mode of dress and behavior or by going out after dark or going to shady and lonely places.³¹ The police often aggravate the trauma of the victims. Generally, they are insensitive in their behavior with the victim, despite various Supreme Court guidelines on the issue. Instead of addressing her pain and trauma, they aggravate the same and set examples and precedents in the society for not reporting such crimes. That is why most of the crimes against women are not reported. Acid victims also feel reluctant to report acid attacks to the police because they fear the harassment and the ridicule from the police officers. Officers may frame acid violence investigations in terms of a woman's sexual history and questions of morality.³²

Corruption flows through the veins of the Police Department of India and is manifested at each and every level. Several acid attack victims reported that their attackers bribed the police officers with money in order to influence investigation. For example Jacqueline Asha claims her attacker gave the police a bribe; thereafter she faced threats from the officers to withdraw the case.³³ In order to deal with the insensitivity of police officers in cases of violence against women, Criminal (Amendment) Act, 2013 introduced proviso has been

³¹ NCW Report, Retrieved from <http://ncw.nic.in/pdfreports/gender%20sensitization%20of%20police%20officers.pdf>

³² Campaign and Struggle against Acid attacks on women (CSAAW), Burnt not defeated 21-22(2007).

³³ Avon Global Centre for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, The Cornell Law School International Human Rights Clinic, The Virtue foundation.(2011).Combating Acid Violence in Bangladesh, India and Cambodia available at www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/AvonGlobalCentreforWomenandJustice.pdf

added to Section 154 which deals with recording of First Information Report. As per this provision, in cases of violence against women, statement of the victim shall be recorded by the women police officers. But problem here lies on the fact that there are very few women police officers in the Indian Police Department. In the year 2011, there were no women police officers at all in the state of Mizoram.³⁴ Furthermore merely employing female police officers will not solve the problem to its core. Women in the police department must get the training, support and confidence needed to put them on a par in every sense with their male counterparts.³⁵ Being the protectors of the citizens, moral training should also be emphasized during their training period. They should be given a true insight of their job and duty, to not only fight against crime, but to help the fellow citizens.

(1) Ensuring Implementation of Laws Designed to Combat Acid Violence

As noted, there is currently no law in effect specifically addressing acid violence. For the reasons noted above, the design and structure of existing laws are not adequate to combat acid violence. As in the Bangladeshi criminal justice system, there are endemic problems, including corruption and a lack of resources, in the Indian system inhibiting appropriate investigation of crimes, protection of victims, and punishment of perpetrators.

One problem that affects acid attack prosecutions is the lack of adequate numbers of judges in India. An estimate puts the judge-to-person ratio in India at 12.5 judges per one million people.³⁶ The ratio in India is lower than that of other countries; in the United States there are 107 judges per one million people; in Canada there are 75 judges per one million; and in Britain there are 51 judges per one million.³⁷ In India, it may take many years for courts to hear and decide cases. Such delays tend to hurt prosecutions' cases, as victims and witnesses lose interest and as physical evidence deteriorates or disappears.³⁸ Indeed, 41.8% of IPC

³⁴ Editorial, (2013, March) Women in the Police, The Hindu, Retrieved from <http://www.thehindu.com/opinion/editorial/women-in-the-police/article4485344.ece>

³⁵ *Ibid.*

³⁶ PRS Legislative Research, Vital Stats: Pendency of Cases In Indian Courts (Center for Policy Research 2009), Retrieved from <http://www.prsindia.org/administrator/uploads/general/1251796330~~Vital%20Stats%20%20Pendency%20of%20Cases%20in%20Indian%20Courts%2026Aug2009%20v10.pdf>

³⁷ Committee on reforms of Criminal Justice System, Govt. of India, Ministry Of Home Affairs, Report Vol. I (Mailmath Committee Report) 18–19 (2003), Retrieved from

http://indialawyers.files.wordpress.com/2009/12/criminal_justice_system.pdf

³⁸ See Interview with Judge Subhash B. Adi, High Court of Karnataka, in Bangalore, India (Jan. 20, 2010) (on file with Avon Global Center)

cases reported resulted in convictions,³⁹ a figure much lower than the 90% or more conviction rate in criminal cases of countries such as the United Kingdom, the United States, France, Japan, and Singapore. Below we discuss specific concerns faced by acid attack victims in their interactions with the criminal justice system.

(2) Investigation

Acid victims note that they are reluctant to report acid attacks to the police because they fear harassment and ridicule from police officers.⁴⁰ Some police officers espouse blatantly sexist views. For instance, an advocate recounted that one police officer, when asked why he felt that certain women are attacked with acid, answered: “These women dress up like boys. What do they expect?”⁴¹

Additionally, officers may frame acid violence investigations in terms of a woman’s sexual history and questions of morality.⁴² For example, an investigating officer blamed one victim for the acid attack against her, saying that she instigated the crime by engaging in a series of “affairs” with co-workers, which led to one of the co-workers throwing acid at her.⁴³ The Delhi Deputy Commissioner of Police, who believes that acid violence is a form of gender based violence, agrees on the need to more broadly “sensitize the police force” to the specific issues faced by acid attack victims.⁴⁴

Additionally, some police officers are susceptible to corruption. Indeed, several acid attack victims reported that their attackers bribed the police with money in order to influence investigations. For example, Jacqueline Asha claims her attacker gave the police a bribe; thereafter she faced threats from the officers to withdraw the case.⁴⁵

(3) Protection

³⁹ See Mailmath Committee Report, *Supra note* 290, at 12–13

⁴⁰ See Burnt Not Defeated, *Supra note* 5, at 46

⁴¹ Interview with Usha, *Supra note* 151

⁴² See Burnt Not Defeated, *Supra note* 5, at 47

⁴³ *Ibid* at 48

⁴⁴ E-mail message from Sagar Preet Hooda, Deputy Commissioner of Police, Delhi Police, May 2010, in response to a query posted by the KRITI Team on the Resource Team and Members, Solution Exchange for Gender Community - an initiative of UN agencies in India

⁴⁵ Burnt Not Defeated, *Supra note* 5, at 50

There are several documented cases in which acid attack victims have received inadequate police protection even when they have complained of harassment by their perpetrators prior to the attack. For instance, acid violence victim Shri Mahaveer Singh filed a police complaint stating that a man was harassing her and threatening to kill her, abduct her, and throw acid on her if she did not marry him.⁴⁶ Her father requested that police protect his daughter from harm and included the name and description of the man harassing Shri in his complaint.⁴⁷ The police failed to take any action to protect her, and two years later the harasser threw acid at Shri.⁴⁸ A subsequent National Human Rights Commission investigation found the police to be negligent in failing to protect Shri and deemed their negligence the proximate cause of the acid burn injuries Shri suffered.⁴⁹ In Dr. Mahalakshmi's case, the police ridiculed her unmarried status when she filed complaints of harassment against the man who later attacked her with acid.⁵⁰

(4) Prosecution and Punishment

Perpetrators of acid attacks are not effectively prosecuted. Given their extensive caseloads and lack of training, public prosecutors do not have the time or resources to properly investigate and prosecute cases.⁵¹ For instance, Gita was unconscious for several days after the attack against her and could not give a statement to the police.⁵² Since then she has attempted several times to meet with the public prosecutor, but he has refused to meet with her.⁵³ One High Court Chief Justice urged more cooperation between victims and prosecutors and allowing victims an opportunity to play a more active role in prosecutions.⁵⁴

The role of judges is crucial to ensuring that acid attack perpetrators are adequately punished. Gender insensitivity and other structural problems within the Indian judiciary present challenges for the punishment of acid attack perpetrators. In one case, for example, the judge

⁴⁶ National Human Rights Commission (NHRC), *Action Details, File Number 719/30/98-99*, 14 September 1998(on file with Avon Global Center) [hereinafter NHRC Action Details File Number 719/30/98-99].

⁴⁷ *Ibid*

⁴⁸ *Ibid*

⁴⁹ *Ibid*

⁵⁰ Burnt not Defeated, *Supra note 5*, at 46.

⁵¹ See Interview with Sheela Ramanathan, Campaign and Struggle Against Acid Attacks on Women (CSAAW) & Human Rights Law Network (HRLN) of Bangalore, in Mysore, India (Jan. 18, 2010) (on file with Avon Global Center)

⁵² Interview with Usha, *Supra note 151*.

⁵³ *Ibid*

⁵⁴ Telephone interview with Justice Bannurathum, Chief Justice of Kerala High Court (Jan. 19, 2010) (on file with Avon Global Center)

hearing an acid attack case asked the survivor to cover her face when she appeared in court.⁵⁵ In cases in which judges have imposed stiff punishments on acid attackers, it appears that, in assessing the harm to the victim, judges have given great weight to the fact that the victim has lost her chance to be married and to be a mother.⁵⁶ Thus, if a judge believes that the perpetrator has prevented a woman from satisfying her traditional role as mother or wife, then the perpetrator is likely to receive a higher sentence.

(5) Providing Redress to Victims

The Karnataka High Court in a public interest litigation case, ordered the Karnataka state government to give each acid attack victim Rs. 2 lakhs (\$4,522 USD). Further, health officials in Karnataka suggested that they would be willing to compensate victims for additional medical expenses.⁵⁷ However, there is no central government scheme to provide compensation. The Minister for Health and Family Welfare, Dinesh Trivedi, recently proposed that acid attack victims receive free healthcare and insurance, but no concrete steps have been taken to adopt this proposal.⁵⁸

Victims in India report unacceptable treatment in government hospitals. In one case, after acid survivor Shanti was admitted to a government hospital with massive burns, she received only an energy drink at the first hospital she visited.⁵⁹ Upon her transfer to a second government hospital, she received an improper treatment regimen of ointments for 18 days.⁶⁰ Only after she was transferred to a private hospital was the dead skin appropriately removed.⁶¹

The unacceptable quality of treatment can be attributed in part to the lack of facilities for proper care. Most government hospitals in India, like those in the other countries studied, do not have plastic surgeons or medical facilities necessary to conduct necessary procedures for acid survivors.⁶² For instance, in Bangalore, India, the Burn Center at the primary public

⁵⁵ Burnt not Defeated, *Supra note 5*, at 22–23.

⁵⁶ *Ibid* At 58

⁵⁷ See Interview with Dr. Ramesh, Deputy Director, Department of Health, State of Karnataka, in Bangalore, India (Jan. 20, 2010) (on file with Avon Global Center).

⁵⁸ Aarti Dhar, *Free Treatment Proposed for Acid Attack Victims*, HINDU, Nov. 24, 2010, 2010 WLNR 23353857.

⁵⁹ Burnt not Defeated, *Supra note 5*, at 22–23

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Ibid*

hospital has 60 beds for a region with a population of over 12 million people.⁶³ In addition, there is a shortage of plastic surgeons in the country. According to one medical expert, there are only around 2,500 plastic surgeons in a country of one billion people.⁶⁴ Even if there were more trained professionals, hospitals do not have the facilities and equipment to support them.⁶⁵

In addition to the lack of adequate facilities, government hospitals in India have routinely denied admission and treatment to acid attacks victims. According to CSAAW, in the State of Karnataka, India, hospitals denied admission to 80% of the acid attack victims they studied.⁶⁶ In other cases, despite admitting victims to government facilities, health professionals may refuse to treat them.⁶⁷

WHAT MORE IS NEEDED IN INDIA

Though violence against women continues to increase in India the law the criminal justice system has in many ways failed to respond to or deal effectively with it. Indeed in crimes against women the rate of conviction is reported to be less than 4 percent. Very little effort, both in terms of making the law of more sensitive to women and in terms of enforcing it has been made in the past few years by the State to actually curb or deal with the violence. Women at therefore continue to suffer without adequate legal or other redress. Though some amendments took place in the early eighties, the substantive laws relating to violence against women are inadequate and do not reflect the various kinds of violence women experience. The Law Commission had suggested various reforms in both the substantive and procedural laws as far back as 1980, but a significant number of these suggestions were ignored by the State. Not only the law but social ethics must also be reformed to deal with the problem. Despite the constitutional mandate of equal legal status for men and women, the same is yet to be realized. The *de jure* laws have not been translated into *de facto* situation for various reasons such as illiteracy, social practices, prejudices, cultural norms based on patriarchal values, poor representation of women in policy-making, poverty, regional disparity in development, lack of access and opportunity to information and resources, etc. The ground situation more or less remains the same. The awareness on laws and access to

⁶³ See Interview with Dr. Satish, *Supra* note 12

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ Burnt not Defeated, *Supra* note 5, at 39

⁶⁷ *Ibid* at 21-22

justice remains dismal. At the district and the state level sensitivity on women rights among judicial officers, administration and the police is very low. This leads to a situation where the implementation of the law becomes difficult. Recently India has increased its budgetary support for the implementation of various laws on violence against women.

Since the problem of violence against women is a complex one, interfacing with many different social and economic factors that entrench gender inequality, law reform in India must be holistic. Our country has complex legal systems, derived from many sources because of its historical experience spans many centuries. Religious custom and colonial legal norms have combined to entrench discriminatory legal values, and these need to be removed to provide a normative structure, and harmonise with women's rights recognized in international law and national Constitution. These studies demonstrate clearly that reform of laws on violence against women are incomplete, and can at best have limited impact, when discrimination is entrenched in other connected areas.

POSITIVE AND NEGATIVE ASPECTS OF CONSUMERISM IN INDIA: A SOCIO LEGAL STUDY

Mukesh Shukla*

INTRODUCTION

A consumer is a person who has to perform a tough task of separating chaff from the grains. He is part and parcel of the economy. He faces a great deal of challenges in present ranging from bad quality goods to high prices.

The advancement in different variety of consumer goods has now made the market more complex. It is often difficult for the consumer to judge their quality adequately. The advertisements regarding the taste, favour, style, quality standards of the commodities and services of their products by the manufacturers and dealers always allure the consumer to purchase their goods.

However, process of development along with increasing liberalization and globalisation across the country has enabled consumers to realise their increasingly important role in society as a consumer. Consumer has started purchasing more but they have started raising voice against anti-consumer practices. The concentration of the market power in the hands of a select few has affected consumers' behaviour over time. In a developing country like India where the incidence of poverty and unemployment is very high and the level of literacy is very low, the people face a volume of problems, particularly in the context of consumer related issues. Unlike in the developed world, consumers in these countries have not been able to play a greater role in the development process.

WHO IS A CONSUMER?

A consumer is one who is the decision maker whether or not to buy an item at the store, or someone who is influenced by advertisement and marketing.¹ According to Oxford Dictionary, consumer is a purchaser of goods or services. He is the end user and not necessarily a purchaser in the distribution chain of a good or service.²

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¹ Available at: <http://www.consumerrights.org.in/meaning-of-consumer.html>

² Available at: <http://www.businessdictionary.com/definition/consumer.html>

Under the Consumer Protection Act, 1986 a consumer is defined under Section 2(d) as follows:

“Consumer” means any person who,

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.

In *Morgan Stanley Mutual Fund v. Kartika Das*,³ it was said that the consumer as the term implies is one who consumes. As per the definition in CPA, consumer is the one who purchases goods for private use or consumption. The meaning of word is broadly stated in the above definition, so as to include anyone who consumes goods and services at the end chain of production.

In *Indian Medical Association v. V. P. Shanta*,⁴ giving abroad to the term consumer, it was held that medical services are “services” under the consumer protection act.

M. K. Gandhi said about a customer, “*The customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an interruption on our work. He is the purpose of it. He is not an outsider on our business; he is*

³ (1994) 4 SCC 225

⁴ AIR (1996) SC 550

the part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us an opportunity to do so".⁵

WHAT IS CONSUMERISM?

It does not have an exact definition. There are several meanings and definitions for this term. Some of them are similar, most of them are conflicting. The term 'consumerism' had been first used in the year 1915 and referred to advocacy of the rights and interests of consumers" defined in Oxford English Dictionary but here in this article the term 'consumerism' means the sense which was first used in 1960, emphasis on or preoccupation with the acquisition of consumer goods.⁶

CONSUMERISM IN TERMS OF EXCESSIVE GOOD PURCHASING

Consumerism means continual expansion of one's wants and needs for goods and services.⁷ It can be said as a materialistic attachment to possessions. The consumer satisfy his wants and keep them increasing and thereby purchase more of goods and then consume them.

Consumerism is a social as well as economic order which encourages the buying of goods and services in ever-greater amounts. This term is sometimes associated with critics of consumption beginning with Thorstein Veblen or more recently by a movement called Enoughism. Veblen's topic of examination, the newly emerging middle class coming up at the threshold of the twentieth century, is coming to full fruition by twentieth century end through the process of globalization.

CONSUMERISM AS CONSUMER MOVEMENT

At some places, the term 'consumerism' refers to the consumerist's movement, consumer activism or consumer protection which seeks to defend and inform consumers by having required these practices as honest advertising and packaging, product guarantees, and

⁵ Available at <http://www.iiste.org/Journals/index.php/IAGS/article/download/865/780>

⁶ Available at <http://www.consumerrights.org.in/consumerism.html>

⁷ Available at <http://www.businessdictionary.com/definition/consumerism.html>

enhanced standards of safety. As commonly understood consumerism refer to a wide range of activities of government, business, and individual designed to protect rights of consumers.⁸

It is treated as a policy of protecting and informing consumers through honesty in price and quality. In this regard it is a movement having a mission of regulating the products, methods, services, and standards of sellers, manufacturers and advertisers in the buyers' interests. In fact consumerism today is an all pervasive term meaning nothing more than people's search for getting better value for their money.⁹

CONSUMERISM FROM ECONOMIC POINT OF VIEW

As per economics, consumerism means economic policies laying emphasis on consumption. In a sense, it is believed that the consumers are free to make choice and should dictate the society's economic structure.

Consumerism is economically resembled in constant purchasing of new goods and services, with little attention to their true need, durability, product origin or the environmental consequences of manufacture and disposal. It is driven by huge sums spent on advertising designed to create both a desire to follow trends, and the resultant satisfaction of needs and wants. Materialism is one of the end results of consumerism. Here, it can be said that the meaning of consumerism from economic point of view ultimately leads to meaning of consumerism from view of excessive purchasing and leading to mean as a movement. All these meanings though not common or similar, are in one or the other way attached to each other.

HISTORICAL BACKGROUND OF CONSUMERISM

Consumerism has links with western world but it is in fact an international phenomenon. People purchasing goods and utilizing them in excess of their needs is old as civilizations, for example ancient Egypt, ancient Rome etc.

A great turn in consumerism arrived just before the industrial revolution. In the nineteenth century, capitalist development and industrial revolution were primarily focused on capital

⁸ S. S. Singh and Sapna Chadah, Consumer Protection In India, Published Under Aages Of Consultancy Assignment By Department Of Consumer Affairs, Ministry Of Consumer Affairs, Government Of India (1st Ed. 2005) p. 6

⁹ Ibid at p. 6

goods sector and industrial infrastructure. At that time essential consumer commodities and commercial activities had developed to a great extent but not to the same extent as that of other sectors. During that time some leaders came to understand that mass production presupposed mass consumption. During that time Winslow Taylor came up with his theory of scientific management. His theory led to changes in price range of goods and their availability and thus leading to change in consumption patterns of consumer. The consumer started purchasing more and consuming more.

Industrial revolution changed the time as it never has been. Prices of goods were reduced which led to mass consumption. This is the reason why the era of industrial revolution is treated to mark with the concept of consumerism.

CONSUMERISM IN INDIA

Consumer co-operative movement has originated from Britain. Twenty eight weavers joined together and started a consumer society known as “*Rochdale Society of Equitable Pioneers*” at Rochdale in 1844 to protect themselves against the exploitation of unscrupulous traders. The success of the Rochdale Stores led to the growth of the movement throughout the world. The movement gained importance in India in 1912 when Cooperative Societies Act was passed. However the cooperative could not become successful before the First World War. Consumers cooperative were described as ‘War babies’ as it gained importance during that period. But this movement has not succeeded in its attempt to protect consumers.¹⁰ Thereafter; several movements took place, which marked the beginning of consumerism in India.

EFFECTS OF CONSUMERISM

Consumerism does not have positive effects on society, economy and environment. The positive has always clubbed with certain negative effects. These effects are as follows:

Positive Consumerism Effects

- 1) More industrial production.
- 2) A higher growth rate economy.

¹⁰ Available at <http://www.iiste.org/Journals/index.php/IAGS/article/download/865/780>

- 3) More goods and services available.
- 4) More advertising since goods manufactured have to be sold.
- 5) Increased production will result in more employment opportunities.
- 6) A variety of goods and services to choose from.
- 7) More comforts for a better living style.

Negative Consumerism Effects

- 1) *High Craving For Goods And Services*- The wants and desires of the people increase. The better their income, the better their purchasing power. But in case, they are not able to do so, and then they feel dissatisfied.
- 2) *High competition leading to tension*- One is in a competition to earn more and is forced to cope up with stress and other work related tensions.
- 3) *Importance to material wealth*- Material wealth is the deciding factor about whether a society is highly developed or not. Spiritual values and cultures are underplayed.
- 4) *Over-dependence on labour saving devices*- Every consumer wants to do no work. He wants to make use of gadgets to save his labour and energy.
- 5) *Increasing crime*- Crime rate also increases as wants to possess expensive gadgets increase. Thefts become common and robberies take place. More than that people may kill other to satisfy their want for material possessions.
- 6) *Distorted personal relationship*- Personal relationships also get affected as people are busy trying to earn more to maintain their standard of living. They do not have time for their family members and their loved ones.
- 7) *Value of home industries reduced*- Cheaper goods are imported from other goods affecting the growth of locally based manufacturing industries.
- 8) *Effect on environment*- Consumerism has also resulted in ecological imbalances. The natural habitat is being destroyed to create more goods and build more buildings affecting the weather. Global warming will eventually result in health problems.

Industrial pollution is affecting people in many ways. Consumerism is also depleting the natural resources of the respective country.

- 9) *Change in cultural values-* People lifestyles have also changed in the sense they are more lavish, full of material comforts rather than focusing on simplicity. The Eastern spiritualism and philosophy has always laid emphasis on simplicity. Gandhian principles and values favor a non-materialistic approach to life.
- 10) *Effect on physical and mental health-* Psychological health also can get affected if one's desires are not meant such as depression. Jealousy and envy can lead to crime.

CONSUMERISM AND CONSUMER PROTECTION IN INDIA

Consumer Rights

Based upon UN guidelines (adopted in 1985, revised in 1999) for consumer protection, a consumer has following rights:

- 1) Right to safety
- 2) Right to be informed
- 3) Right to choose
- 4) Right to fair hearing
- 5) Right to satisfaction of basic needs
- 6) Right to healthy environment
- 7) Right to redressal of grievances
- 8) Right to consumer education

NEED FOR CONSUMER PROTECTION

Consumer protection movement is a part of global recognition. Consumer protection means safeguarding the rights and interests of consumers. It includes all the measures aimed at

protecting the rights and interests of consumers.¹¹ Hence, it is necessary that consumers must be protected against unfair activities of producers and sellers.

Thus a consumer needs protection against activities like-

- Unsafe and harmful products
- Unfair trade practices
- False advertising
- Abuse of monopoly power
- Environmental pollution

REASON FOR CONSUMER PROTECTION

Consumers need protection due to the following reasons:

1. Illiteracy and ignorance:

Consumers in India are mostly illiterate and ignorant. They do not understand their rights. A system is required to protect them from unscrupulous businessmen.

2. Unorganised consumers:

In India consumers are widely dispersed and are not united. They are at the mercy of businessmen. On the other hand, producers and traders are organised and powerful.

3. Spurious goods:

There is increasing supply of duplicate products. It is very difficult for an ordinary consumer to distinguish between a genuine product and its imitation. He pays the price for the original but gets a substandard product. It is necessary to protect consumers from such exploitation.

4. Deceptive advertising:

¹¹ Available at http://www.zenithresearch.org.in/images/stories/pdf/2011/May/vol-1_issue-1_art-7.pdf

Some businessmen give misleading information about quality, safety and utility of products. Consumers are misled by false advertisement and do not know the real quality of advertised goods. A mechanism is needed to prevent misleading advertisements.

5. Malpractices of businessmen:

Fraudulent, unethical and monopolistic trade practices on the part of businessmen lead to exploitation of consumers. Consumers often get defective, inferior and substandard goods and poor service.

Certain measures are required to protect the consumers against such malpractices. Greedy businessmen indulge in adulteration, boarding, black-marketing and other illegal practices.

6. Freedom of enterprise:

Businessmen must ensure satisfaction of consumers. In the long run survival and growth of business is not possible without the support and goodwill of consumers. If business does not protect consumer's interests. Government intervention and regulatory measures will grow to curb unfair trade practices.

CONSUMER PROTECTION IN INDIA

In the early years when welfare legislatures like the consumer protection Act did not exist, the maxim *Caveat emptor* (let the buyer beware) governed the market deals. We find the seeds of consumer protection during the Mughal times and especially during the time of Khiljis.¹² During the British regime (1765-1947), also known as the '*Colonial Era*', Government's economic policies in India was concerned more with protecting and promoting the British interests than with advancing the welfare of the native population.¹³

However there were certain legislations which provided for protection of consumer rights. These included the Indian Penal code, 1860, the sale of Goods act, 1930, the dangerous drugs act, 1930 and the drugs and cosmetics act, 1940.

¹² Avaiable at http://www.zenithresearch.org.in/images/stories/pdf/2011/May/vol-1_issue-1_art-7.pdf

¹³ *Ibid*

During post-independence scenario, there was greater focus on industrialization. After that time there came some important enactments such as, Banking Regulation Act, Industries (Development and Regulation) Act, 1951 which dealt with consumer protection.

With the opening up of the Global Market and economics and progressive removal of international trade barriers, two phenomenons have been witnessed with. First, there is influx of foreign brands and franchises. Second, within India, there is increasing competition among manufacturers which has benefited consumers in the form of improvement in quality of goods and resources. Thus in turn has witnessed more and more legislations aimed at regulating the manufacturing and trading activities and providing protection to consumers at large. Now the maxim *caveat emptor* has been replaced by, “let the seller beware”. As a result of this change in scenario business has now come to be substantially regulated by Government and Authorities in favour of consumers.¹⁴

Other than above mentioned reasons for consumer protection, an Indian consumer needs protection because of certain factors such as-

- Low literacy level
- Disorganised consumerism
- Less competitive products in the Indian market
- No proper implementation of laws and legal protection.

FATE OF CONSUMERISM IN INDIA

Consumerism is still in not well developed in our country. Other than certain educated people living in major cities, most of the consumers reside in villages, who are not well educated and informed. The rising tide of consumerism is a matter of interest, and sometimes concern, to politicians, civil servants, businessmen, consumerists themselves, and students of consumer behaviour.¹⁵

In modern times it is necessary that consumer is supposed to be the king and business is expected to provide maximum possible satisfaction to consumers. But in reality, consumers

¹⁴ *Ibid*

¹⁵ Available at <http://www.econ.umn.edu/library/mnpapers/1972-17.pdf>

are often exploited. In a country like India there is shortage of many products. A few firms enjoy monopoly powers in the market place. What consumerism lacks here are education and information resources, testing facilities, competent leadership, price control mechanism, and adequate quasi-judicial machinery.¹⁶ In a developing country like India consumerism has to a great job. It has to move into minds of every human being to enable them to understand their rights and privileges.

RELATION OF CONSUMERISM WITH SOCIETY AND ECONOMY

Relation with Individual

The relation of consumerism with individual is both positive and negative. On one hand Consumerism results in the loss of things which are important to the human rather than those gained by materialistic acquisitions, like family and community relations. Consumerism puts the individual onto a never-ending, ever-accelerating urge of acquiring possessions leaving little time and energy for more meaningful things in life. Attachment to possessions rather than is now leading to selfishness and miserliness.

Consumerism leads to judging and treating people according to their possessions, which give rise to hatred and causes a breakdown in family and community relations. Furthermore, if consumerism leads a person towards debt, crime or depression; this results in much anxiety, and inevitably strains one's social relations with others.

Consumerism sets each person against themselves in an endless quest for the attainment of material things or the imaginary world conjured up and made possible by things yet to be purchased. Weight training, diet centers, cosmetic surgery, permanent eye make-up, liposuction, collagen injections, these are some examples of people turning themselves into human consumer goods more suited for the "marketplace" than living in a healthy balanced society.

On the positive side, consumerism requires individual to be well educated and informed so as to protect their rights. Consumerism makes a consumer aware of his rights, help him in raising voice against exploitation and seek redressal of his grievances. Consumer's

¹⁶

Available

at

<http://www.lakeproject.net/download/India/Consumer%20Law/Concept%20of%20Consumerism%20in%20India.%20Judicial%20Attitude.pdf>

consciousness determines the effectiveness of consumerism.¹⁷ Hence, it is all about information and knowledge. A knowledgeable consumer can help in reducing ill effects of consumerism, giving rise to positive aspects.

RELATION WITH SOCIETY

The modern consumer is not an isolated individual making purchases in a vacuum. Rather, we are all participants in a contemporary phenomenon that has been variously called a consumerist culture and a consumer society. To say that some people have consumerist values or attitudes means that they always want to consume more, and that they find meaning and satisfaction in life, to a large extent, through the purchase of new consumer goods. Consumerism has emerged as part of a historical process that has created mass markets, industrialization, and cultural attitudes that ensure that rising incomes are used to purchase an ever-growing output¹⁸

Consumerism interferes with the workings of society by replacing the normal common-sense desire for an adequate supply of life's necessities, community life, a stable family and healthy relationships with an artificial ongoing and insatiable quest for things and the money to buy them with little regard for the true utility of what is bought.¹⁹ This is the negative side of consumerism.

On the positive side, consumerism can help society to become well-organised and united. The society with the help of consumerism can reduce gap between poor and rich, educated and uneducated.

RELATION WITH ECONOMY

The whole economy revolves for and around consumer. Consumerism is becoming the hallmark of most world economies. In the west, it is a common phenomenon, but now even developing countries in the world are resorting to it. Even in India the fate of consumerism is rising. Consumerism rests on the assumption that the economy will grow and grow forever. The dictum of consumerism and capitalism dictates that the social goods come through subtle

¹⁷ Available at <http://www.lakeproject.net/download/India/Consumer%20Law/Concept%20of%20Consumerism%20in%20India.%20Judicial%20Attitude.pdf>

¹⁸ Available at http://www.ase.tufts.edu/gdae/education_materials/modules/consumption_and_the_consumer_society.pdf

greed and meeting the demands of people.²⁰ But infinite growth is incompatible with a finite planet and finite resources.

It is necessary that consumerism must not lead to depletion of economy. For this consumerism must be associated with the idea of sustainable development. It requires using present resources in such a way that future generation can also enjoy benefits of them. There must be need and not greed. This concept exists in India but the need is to associate consumerism with it.

RELATION WITH ENVIRONMENT

Environmentalism has an important relation with consumerism. It is a cause which extends far beyond consumerism.²¹ Increasing production and consumption beyond a point does not improve the fulfilment of basic needs nor does it result in greater happiness.²² Consumption can affect the environment in many ways: higher levels of consumption (and therefore higher levels of production) require larger inputs of energy and material and generate larger quantities of waste by products. Increased extraction and exploitation of natural resources, accumulation of waste and concentration of pollutants can damage the environment and, on the long run, limit economic activity. Consumerism or excessive consumption can even do worse as long as it determines an increase in the amount of purchased goods.²³

Consumerism must not be promoted at the instance of environment. It is necessary to understand that once environment depleted, consumerism will soon be destroyed. It is essential that consumption is given the central place in all programmes of sustainability.²⁴ This will ensure that consumption is sustainable which means “the use of goods and services that respond to basic needs and bring a better quality of life, while minimising the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so

²⁰ Sheetal Kapoor, *Consumer And The Market*, Indian Institute Of Public Administration, New Delhi (2008 Edition), p. 20

²¹ Available at <http://www.econ.umn.edu/library/mnpapers/1972-17.pdf>

²² Pranab Banerji, Environment And Consumer: A Global Quest For Sustainable Consumption, Indian Institute Of Public Administration, New Delhi (2008 Edition), p. 17

²³ Available at http://www.researchgate.net/profile/Carlo_Orecchia/publication/24125654_Consumerism_and_environment_does_consumption_behaviour_affect_environmental_quality/links/0c96051fbbe7e6881f000000.pdf?inViewer=true&e&pdfJsDownload=true&&origin=publication_detail&inViewer=true

²⁴ Pranab Banerji, *Environment And Consumer: A Global Quest For Sustainable Consumption*, Indian Institute Of Public Administration, New Delhi (2008 Edition), p.16

as not to jeopardise the needs of future generations”²⁵. Various attempts have been made UNCSD, Johannesburg Plan, World Bank etc to ensure sustainable consumption in and around the world.

JUDICIAL ACTIVISM ON CONSUMERISM

This part discusses various case laws which show how much active judiciary has been to protect the rights of consumers and promoting consumerism.

In *Bhupesh Khurana & Others v. Vishwa Budha Parishad*, while expanding the scope of Consumer Law, National Commission opened new doors in and others that imparting education falls within the ambit of service as defined under Consumer Protection Act, 1986. The National Commission is entrusted with the responsibility of protecting consumer interest and for that it can create awareness.

In *Vasantha P. Nair v. Smt. V.P. Nair*,²⁶ the National Commission upheld the decision of the Kerala State Commission which said that a patient is a “consumer” and the medical assistance was a “service” and, therefore, in the event of any deficiency in the performance of medical service, the consumer courts can have the jurisdiction. It was further observed that the medical officer’s service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act. The controversy has been set at rest and the Supreme Court in its landmark decision in *Indian Medical Association v. V.P. Shantha & Others*. The court has held that patients aggrieved by any deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act.

In *Sankar v. B. M. Vijaya Bank*,²⁷ it was held that dishonor of a cheque without justification amounts to deficiency in service. The O.P. who dishonored the cheque issued by the complainant was held liable to pay compensation for the same.

In *Punjab National Bank v. K.B. Shetty*,²⁸ the complainant hired a bank locker. Due to the negligence of the bank, the locker was found open and ornaments kept therein were found

²⁵ Definition proposed by Oslo Symposium in 1994.

²⁶ III (1995) C.P.J. 1 (S.C.)

²⁷ I (1996) C.P.J. 137 (Karnataka, S.C.D.R.C.)

²⁸ III (1995) C.P.J. 256

missing. It was held that the consumer forum has jurisdiction in such a case and the bank would be liable for negligence.

In *Union of India v. Ashok Kumar Singh*, the train timings were changed, according to the established railway practice. The complainant, an advocate, who had purchased 1st class tickets from Saharsa to Hazipur by Hariharnath Express missed the train. The National Commission held that the complainant, being an educated person, was negligent in watching his interest and enquiring from the enquiry, as new timings were to come into force. The order of the State Commission holding the Railways liable was set aside.

In *Anil Gupta v. General Manager, Northern Railways*,²⁹ the complainant had booked two 2nd Class A.C. berths, but no reservation was available to the complainants for that day for which the berths were booked. That was held to be deficiency in service by the Railways and a compensation amounting to Rs. 2,000/- was allowed for the discomfort and mental agony caused thereby.

In *Bhupinder Singh v. AIR India*, the complainant got a confirmed ticket from the O.P. for 3-4- 1993 from Delhi to Toronto in Canada. Due to the strike by the employees of the O.P., i.e., Air India, the flight did not take off on that day. The complainant thereafter was booked for another flight scheduled for 15-4-93, but by that time the fares had increased and the complainant was required to pay excess fare. It was held that charging excess fare in this case amounted to deficiency in service and the complainant was held entitled to the refund of excess fare charged from him.

In *HDFC Bank Limited v. Balwinder Singh*,³⁰ the complaint was of the bank, or its loan recovery agent, employing musclemen to take forcible repossession of the hypothecated vehicle and thus causing physical harassment and mental trauma to the complainant. The District Forum allowed the complaint and directed the bank to pay compensation of Rs. 4 Lakh for repossessing the vehicle in this manner and reselling it to a third party. The State Commission confirmed the order in appeal. Dealing with the bank's revision petition, the National Commission expressed shock that the bank had hired musclemen directly or through its recovery agents to recover the loan/reposess the vehicle. The Commission also referred to the State Commission's order, which had observed that the alleged letter produced by the

²⁹ Decided on November 6, 1990

³⁰ III (2009) CPJ 40 (NC)

bank purporting to the complainant voluntarily handing over possession of the vehicle was unreliable and that no notice was given to the complainant at the stages of repossession and sale of vehicle. The Commission relied upon its judgment in *Citicorp Maruti Finance Limited v. S. Vijayalaxmi*³¹ where it had strongly deprecated such practices. The Commission dismissed the petition and awarded Rs. 25,000/- as exemplary costs in this case.

CONCLUSION AND SUGGESTIONS

Where consumerism is seen as policy of protecting consumer rights it is required to be developed. In spite of the enactment of various laws for protecting the consumer, there has been no effective deterrent against the production and sale of spurious goods which continue to flood the markets. In the face of enormity of consumer problems, numerous consumer oriented legislation were enacted. But the enforcement and implementation of these machineries are inadequate.

Consumers are a vulnerable group, more so in a developing country with the prevalence of mass poverty and illiteracy. India too is no exception to it. Instances like overcharging, black marketing, adulteration, profiteering, lack of proper services in trains, telecommunication, water supply, airlines, etc are not uncommon here. Rise of e-commerce has also given rise to unfair practices. Unless the consumer is educated enough, he cannot protect himself. For this it is necessary that consumerism must be promoted, so that a movement which led to consumer education can be ensured but when consumerism is seen in terms of excessive attachment to material possessions, it is necessary to set a limit. This is so because, such kind of consumerism will lead to distortion of individual, society, culture and environment, especially in a country like India which is full of values. For this it is also important to create awareness and knowledge. At last it can be said that, Consumerism has to go miles ahead. In this time, it will be necessary that positive meaning of consumerism is brought about.

“Amidst of an active propaganda machinery, controlled by the world's largest corporations constantly reassuring that consumerism is the path to happiness, governmental restraint of market excess is the cause our distress, and economic globalization is both a historical inevitability and a boon to the human species, a consumer is a shopper who is sore about...”

- David Edward.

³¹ III (2007) CPJ 161 (NC)

CHRONICLES OF JAMMU AND KASHMIR: CONSTITUTIONAL DEVELOPMENT AND HUMAN RIGHTS VIOLATION

Drishti Saxena*

Abstract

There is a fine line between killing a suspect who is a threat to the society and killing a person who, the officials reckon, may pose a threat to the society. That line is unbiased judgment. There is also a fine line between a freedom fighter and a cold blooded murderer. That line is not letting one's judgment be clouded by irrational ideologies. The hazard is, more often than not, faced by the irreproachable by-standers. Ever since India's independence, there has been a prevailing threat to the state of Jammu and Kashmir. At first it was because it wanted to be independent and merge with neither India nor Pakistan, which was unacceptable to Pakistan and the newly separated country attacked Kashmir. Then when it finally did merge with India, seeking protection, the threat from Pakistan sustained but another one found its way, the ruthless, dismal actions of the non-civilians in the state (that includes Armed forces and Militants). The consequences of the animosities between the militants and the security forces are faced by the civilians. They are caught in a loop and unless a serious, unbiased action is taken against the pseudo-fascists, innocent civilians will keep suffering. . This paper will deal with the constitutional position of Jammu and Kashmir post-independence along with the massive human rights violation of the people by the armed forces and the militants in the contemporary times and if there is any scope for improvement in the state.

Keywords- Jammu and Kashmir, Militants, Armed Forces, Civilians, Human Rights

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INTRODUCTION

Kashmir was popularly known among the Mughals as *Paradise on Earth*, it was an independent territory, but since its accession to India, the circumstances surrounding the internal peace of the state have changed drastically. After the partition, Jammu & Kashmir was in a vulnerable state and the subject of the conflict between India and Pakistan over whose territory it belonged in.

At the time of British Raj, Kashmir was one of those princely states that were not under the direct control of the Britishers. They handed over the state to Maharaja Gulab Singh by signing a *Treaty of Amritsar, 1846*. Then in 1947, at the time of independence, Maharaja Hari Singh had three choices; to continue to be independent, unify with India or integrate with Pakistan. Maharaja decided to stay independent. However, on being attacked by Pakistan in 1947, the Maharaja in order to protect his territory approached the Indian government for help. India, before sending its troops, urged Kashmir to accede to the Dominion of India. That is when Maharaja Hari Singh agreed to sign the Instrument of Accession on 26th October, 1947. But the instrument was subjective to Kashmir. Clause 5 and 7¹ of the document gave an upper hand to Kashmir over India in terms of control and regulation. Without the consent of the state and the constituent assembly no changes of any kind, be it territorial or legal in nature, could be made to the state of Jammu and Kashmir even by the President of India independently. Moreover, the state continued to be governed by its *Constitution of 1939* by the virtue of this instrument.

ARTICLE 370 AND DELHI AGREEMENT

After the Instrument of Accession was signed, Article 370 was incorporated in *The Constitution of India* which rendered special status to the state of Jammu & Kashmir. It was not framed at the first instance. At first another provision, Article 306A was framed which elaborated on some temporary provisions to design laws in pursuance of certain subjects falling under the state and the concurrent list, which in this case wouldn't apply to the state of Jammu and Kashmir. It was amended several times² until, on 17th October, 1949, Shri N. Gopalaswami Ayyangar came before the parliament and laid the bill for Article 370 on the floor. The drafting of Article 370 was influenced by various factors including political

¹ Instrument of Accession, 1946

² A.G. Noorani, Article 370 A Constitutional Histories Of Jammu & Kashmir, 58-63 (2011).

turmoil, the involvement of U.N. resolutions suggesting plebiscite in the state, the constant state of conflict between India and Pakistan about gaining control over the state etc.³ It was also stated by the minister in the house that;

“Instrument of Accession will be a thing of past in the new Constitution.”

This will become a matter of grave debate in the contemporary times as the “temporary provision” is still functional. A consensus was made and Article 370 was incorporated in *The Constitution of India* which came into force on 26th January, 1950.

This was the situation back in 1950, the present status of the temporary provision was discussed in the case of *Ashok Kumar & Others v. State of J&K*⁴, the court held that regardless of what the title of the provision states (temporary provision), Article 370 is a permanent provision of the Constitution. It further stated;

“It (Article 370) cannot be abrogated, repealed or even amended as mechanism provided under Clause (3) of Article 370 is no more available. Furthermore, Article 368 cannot be pressed into service in this regard, inasmuch as it does not control Article 370 - a self-contained provision of the Constitution.”

Even though the high court established this, the legal nature of Article 370 has diminished over the years. Various number of presidential orders have made plenty provisions (of the constitution of India) applicable to the state. Though few subjects over which the state enjoys independence in true sense is, non-applicability of Emergency Provisions (Article 356), non-alteration of the name and boundary of the state and permanent resident's land rights, which was also challenged. In a case before the Supreme Court of India, *State Bank of India v. Santosh Kumar & Anr.*⁵, questions were raised in reference to a Jammu and Kashmir High Court judgment where the High Court, in many places, has stated the absolute sovereignty of the state, according to section 5⁶ of the Constitution of Jammu and Kashmir, to lay rules in matters regarding immovable property of the permanent residents of the state. The Supreme Court (division bench), on the point of “absolute sovereignty of the state” held against the high court that, in saying that the state has “absolute sovereignty” is going *ultra virus*. That;

³ *Ibid*, at 66-67

⁴ AIR 2016 J&K 1

⁵ (2017) 2 SCC 538

⁶ The Constitution of Jammu and Kashmir, 1956

"It is clear that the state of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India... they (residents of state) are governed first by the Constitution of India and also by the Constitution of Jammu & Kashmir,"⁷

The court further explained how the state comes first and foremost under the ambit of Constitution of India;

"It is necessary to reiterate that Section 3 of the Constitution of Jammu & Kashmir, which was framed by a Constituent Assembly elected on the basis of universal adult franchise, makes a ringing declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India. And this provision is beyond the pale of amendment"

The case was instituted for clarification of whether the SARFAESI Act, 2002 would be applicable in the state of Jammu and Kashmir.

Also, in 1952, to establish the relationship between the union and the state (J&K), an agreement was signed between India (Jawahar Lal Nehru) and Jammu and Kashmir (Sheikh Abdullah). There were a number of questions that were put to rest in *Delhi Agreement of July, 1952* precisely ten points⁸;

- 1.) Residuary Powers: Would rest with the state itself.
- 2.) Citizenship: Article 5 of the Constitution of India would apply and the state had power to make its own law on the subject.
- 3.) Fundamental Rights: No clear stance on the subject was made. India insisted upon applying the Fundamental Rights as provided under Chapter III of the Constitution of India, it was observed that the state was under distress and special circumstance due to which the conditions prevailing were different, but the Kashmir delegation stated that they would like to include Fundamental rights in their own constitution which would be in conformity to the Indian Constitution. India argued that that would create some amount of confusion in the minds of the people but in the end it was agreed upon that the Government of India would be prepared to apply the provision of Part III to Jammu & Kashmir if necessary.

⁷ *Supra* note 2.

⁸ Prof. S.K. Sharma, *The Constitution of J&K: A Perspective with Reference to the Constitution of India*, 38-9 (2011)

- 4.) Supreme Court: Supreme Court of India had original jurisdiction in matters falling under Article 131 and disputes regarding fundamental rights.
- 5.) National Flag: The Union flag will have a unique distinctive place in the state and the state flag will continue to have its historic recognition.
- 6.) President of India: Power to grant, reprieve and commute death sentences etc. will lie with the President.
- 7.) Headship of the State: He will be recognized by the President of the Union and on the recommendation of the state, he will hold office during his pleasure and for a term of five years and he may resign by giving in writing to the President.
- 8.) Financial Integration: Objection analysis on the subject of financial integration between the Union and the State was decided upon.
- 9.) Emergency Powers: Article 352 (State Emergency) would be applied in addition to consultation with the state government regarding internal disturbances. Article 356 and 360 were not given consideration by the Indian Government.
- 10.) Conduct of elections to the Houses of Parliament: Article 324 was applicable.

The Delhi Agreement was not perceived by the people positively and received numerous criticisms but that did not change the situation and the agreement continues to stay in existence.

HUMAN RIGHTS VIOLATION AGAINST THE CIVILIANS

Human Rights is expounded as those basic rights that every individual must enjoy by the virtue of being a part of the human race. These are primary rights that a person possesses for a dignified life in the society. It defines the quality of life of an individual⁹. In the current scenario in India, Human rights Violation are seen as derogation of fundamental principles laid down in the Constitution of India as well as India's involvement in International humanitarian treaties¹⁰. But when it comes to the state of Jammu and Kashmir, the citizens face violations of these Human Rights.

Jawahar Lal Nehru was a profound admirer of Kashmir. In his biography he has been quoted writing about Kashmir as;

⁹ A. K. Das & P. K. Mohanty, *Human Rights In India*, 3 (2007)

¹⁰ Ibid, at 6

“Like some supremely beautiful woman, whose beauty is almost impersonal and above human desire, such was Kashmir in all its feminine beauty of river and valley and lake and graceful tress.”¹¹

Such was his fondness for Kashmir. It was also said that his political inclination towards the state was coloured by his emotional glow¹². He was, in fact, successful in bringing the territory under the geographical umbrella of India after independence as discussed above, but it came with its consequences.

The conflict between India and Pakistan regarding Kashmir has been prevalent since 1947, and even till date the same is under dispute, but the current prevailing scenario of the internal affairs of the state is much worse on moral grounds. The citizens of the state of Jammu & Kashmir have been facing challenges on a daily basis since 1989 since the infamous “Kashmiri Insurgency” (which will be dealt with in detail later). There is a tremendous amount of Human and Legal rights violation in the state ranging from torture to kidnapping to grievous injuries to rape by none other than the military forces that the former Prime Minister had administered in the state to “protect” it from the attack from Pakistan. And not just the Special forces, but also from the local militant groups of the state.

There have been a number of cases where a civilian who is going about his normal day to day chores, disappears. He is either taken hostage by the militants or captured by the paramilitants who claim he is working for the terrorist militant group. Interrogation in the latter case takes place in the form of stripping the civilian down to his innerwear then either electrocuting him or beating him senseless¹³. In the former case the torture is of lesser magnitude but the crime is of the highest, they are directly shot and murdered.

MILITANTS

Kashmir, in terms of religion, has had a very composed situation. It follows a distinctive culture called *Kashmiriyat* which is a combination of three religions; Hinduism, Buddhism and Islam. But over the years, ever since the state has come under the control of India, the Muslim political leaders have experienced resentment because of contrived elections which,

¹¹ Frank Moraes, *Jawahar Lal Nehru: A Biography*, 402 (2007)

¹² Ibid,

¹³ Human rights watch, *The Human Rights Crisis in Kashmir: A Pattern Of Impunity*, 42-46 (1993)

has led to the creation and rise of Muslim militant groups who are devoted to get Independence¹⁴.

In 1964, first militant group was formed, Jammu and Kashmir Liberation Front (JKLF) who were determined to fight for independence. They were irked by the agreement between the then Prime Minister of India, Rajiv Gandhi and Prime Minister of Jammu and Kashmir, Farooq Abdullah, in 1986 who cast a new tender which was widely criticized by the people and gave birth to a new militant group, Muslim United Front (MUF), who then claimed seats in the state assembly¹⁵. This led to bulk arrest of MUF candidates in the election which resulted in deep distrust in the authorities and growing support for the militant groups. It came into common knowledge that Pakistan was supplying these groups with arms and ammunitions which catered to riots in the state by these militant groups. The JKLF started setting off bombs at government buildings, at the houses of government officials and buses¹⁶.

More such terror attacks followed, but the one that made history was in 1989 that also came to be known as the *Kashmiri Insurgency*. The intolerance of the militant groups had grown to such an extent that they were now acting more in self-interest than in the interest of the state. On 8th December 1989, the JKLF members kidnapped Dr. Rubiya Sayeed, daughter of the then Home Minister of India as she was leaving the hospital premise. The kidnappers demanded the release of the detained members of JKLF in return of releasing the victim. After several discussions and meetings the government agreed to give into the demands of the kidnappers and released several who were incarcerated. This whole incident created a ruckus in the state and various insurgent groups started killing government officials, security personnel and civilians, precisely anyone who crossed their path. Their rationale was freeing Jammu and Kashmir against the Indian rule.¹⁷

Now something that was a political dismal, turned into a religious havoc. Over 200,000 Kashmiri Pandits had to flee from the state because of the Islamic militant groups. More militant groups emerged with varied ideologies. While JKLF was a pro-independence group that wanted an independent Kashmir, there were other groups like Hizb-ul-Mujahideen

¹⁴ Unnamed, *India's Secret Army in Kashmir*, Human Rights Watch (May, 1996), Available at https://www.hrw.org/legacy/reports/1996/India2.htm#P128_23852

¹⁵ Supra note 13 at 36.

¹⁶ Ibid,

¹⁷ Sumit Ganguly, *Explaining the Kashmir Insurgency*, 21 Int. Security 76 (1996)

(HUM), Ikhwanul Muslimeen, who were radical Islamists and pro-Pakistanis, they wanted Kashmir to be wholly a part of Pakistan, not independent and definitely not a part of India¹⁸.

Members of militant groups have also raped women in Kashmir. They have used it as a weapon to humiliate the Muslim community, to bring dishonor to them¹⁹. Women were raped for not following a dress code and other restrictions. Mostly it was done because they were accused of being informants²⁰.

The Militants have also had their share of tiffs with the security forces. To make a statement in one instance, they attacked a police station and killed a number of police officers in gruesome manner. Soon after, they attacked the Central Reserve Police Force (CRPF) and intelligence officials²¹. There have also been reports of militants capturing security personnel and killing and torturing them since there were cases of custodial deaths by the Indian security forces.

In short, the “freedom fighters” of Kashmir in their struggle for attaining freedom, whether as an independent state or merging with Pakistan, committed offences of such enormous scale that their intent has been overshadowed by their crimes.

PARAMILITANTS AND SECURITY FORCES

However difficult and confusing it may be to believe, but if ever a comparison is to be made as to who has been more volatile than whom, then the security forces will defeat the militants hands down. Not just volatile in their discourse, the security forces have been gruesome in their plight. There are ‘n’ numbers of cases that have been reported of human and legal rights violation by these forces but, the state government has always turned a blind eye towards them. The incident may have taken place in public with hundreds of witnesses, but it is treated as if it never happened.

The security forces don’t only have arms and ammunitions, but they also have the authority to detain, harass and kill people who are suspected of being militants/terrorists, and they have complete immunity against such acts. This has been center of various controversies and has

¹⁸ Ibid, at 77

¹⁹ Ayesha Ray, *Kashmiri Women and Politics of Identity SHUR Final Conference on Human Rights and Civil Society*, Luiss University 5 (2009)

²⁰ *Supra* note 13 at 157

²¹ Navnita Chadha Behera, *Demystifying Kashmir* 147 (2007)

been debated upon multiple times but the security forces still have been prevalent in the state since its enactment in 1990²².

The state is surrounded by security personnel, which includes not just the Indian Army but the Central Reserve Police Force (CRPF), the Border Security Forces (BSF), the Central Industrial Security forces (CISF), the Indo-Tibetan Border Police (ITBP), local Jammu and Kashmir Police and also (suspected) Research and Analysis Wing (RAW).

The human rights violation by these groups have touched and crossed roofs. Their abuse of arbitrary power has been the main source of it. The Indian Military and the Paramilitary, which includes men from CRPF, ITBP, BSF and Assam Rifles, are the major contributors in this violation, along with this they are also responsible for, what has been termed as a “Secret Army”, creation of “Renegades”.

If, even for once, the army’s act of detaining a person or killing him on suspicion is accepted by the virtue of AFSPA, how does one justify the incidents of rape that have been committed by them? Not just one or two instances but uncountable.

In 1990 in Kunan, Poshpura, an incident of mass rape by the army personnel came in light. In a report²³ by Senior Journalist and Human Rights activist, Zahir-ud-Din, the incident was described. He stated that on the night of 22nd February, 1991, Kunan was ambushed by soldiers and over “Thirty-two” women were mass raped. He shared the agony of a woman named Khaira who told him that she along with her two daughters were raped. One of the daughters got pregnant and her husband refused to accept her as the baby was the result of the rape and the second daughter tried to commit suicide by jumping from a window, though she survived the fall, she lost both her legs. The government gave these women Rs. 100 as compensation.²⁴ Sheer ignorance of the government is clear from this gesture. Instances like these affect the mind of the victim to an extent that they want to take their own life and the social distress caters to it. The ridicule they face from the society is almost as if getting raped was the woman’s fault.

Rape is used as a medium of humiliating the community of the women who are accused of being sympathetic towards militants. They consider it a punishment for the woman for

²² The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21 of 1990, India.

²³ *Supra* note 2

²⁴ *Ibid*

“allegedly” being pitiful towards the militants. Even in cases when an area was first stormed by militants, they would kill civilians and rape women, accusing them of providing food and shelter to the militants²⁵, and their only fault would be that they were in the area which was raided by the militants first.

In another, rather recent, case in 2009, two women, Asiya Jan (17) and Neelofar Jan (22) were gang raped and murdered and their bodies were dumped in a local stream, one kilometer apart (allegedly) by the CRPF officials. There were no witnesses so the incident cannot be verified factually. But, circumstantially, what could be deduced was, on the night they disappeared, the location where the bodies were found stood between a CRPF and Police camp, which was a high security zone and no one could just wander and reach there²⁶. In the first post mortem report, the doctors confirmed that the women were raped. But in the following reports the facts were immensely fabricated. The case was handed over to the CBI and later in the reports it was stated that the women had died of drowning in the water and that Asiya was in fact, a virgin and that her hymen was intact. After this “alleged” change in facts the situation changed. The focus of the case now shifted from whether the women were raped and murdered to did they die of drowning. In the official reports and statements no one mentioned the involvement of CRPF. Omar Abdullah, former prime minister of the state, also officially announced that the women died of drowning and were not raped and murdered. But the circumstances of their death spoke otherwise. Asiya, who was supposedly a virgin at the time of her death, was found with a laceration on her forehead and her clothes torn apart. That doesn’t sound like a woman who was not raped. All the reports by the investigative team and their official statements are believed to be an attempt to cover up the armed forces involvement in the deaths. The murders made headlines and few angry protestors also compared it to the Nirbhaya gang rape case as that had taken the nation by storm but the Asiya and Neelofer murder case was not given much heed initially because it took place in a small town in Kashmir and not a big city like Delhi²⁷.

Now the *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, is the enabling act of all that the security forces thrive upon. It is codified in such a manner that it is basically the catalyst for the Human rights violation taking place in the state. The act has conferred such

²⁵ Human Rights Watch, *Rape In Kashmir: A Crime Of War* 1-2 (1993).

²⁶ Greeshma Aruna Rai, *Tales from Shopian – Kashmir*, RAIOT (June 20, 2016), <http://raiot.in/tales-from-shopian-kashmir/>

²⁷ Abu Daud, *Story of Asiya & Nilofer, Raped & killed by Indian Army*, Pristine Kashmir (Nov. 20, 2015), <http://pristinekashmir.com/topics/stories/story-of-asiya-nilofar>

powers in the security personnel that it practically authorizes them to go ahead and murder and torture civilians. All they have to say is, it was under the apprehension of suspicion that the civilian was tortured, and by the virtue of Section 4 and Section 7 of the said act, they walk away scot-free.

Section 4 (c) of the said act states;

4. Special powers of the armed forces.- Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-

(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest ;”²⁸

The first part of the provision states that armed personnel can arrest any person who has committed a cognizable offence, which is logically reasoned. But the second part states that an arrest can be made of a person “against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence”, which has only loopholes. There is no precise or legal definition of the term “reasonable suspicion”. Because of the ambiguity of this provision and the others, the armed personnel have created havoc in the state. Why these officers don’t get arrested for the unaccounted acts that they commit is because of section 7²⁹ of the act. This provision rids the armed forces of any responsibility that they may be accountable for, for their act.

Because of these provisions the number of instances of murder and torture and detention that have taken place is uncountable.

But the situation regarding the excessive power of the Armed Forces could change in the near future. In a recent case, *State Bank of India v. Santosh Kumar*³⁰, Supreme Court ruled certain guidelines for the Armed Forces to follow. In the judgment the court reviewed the powers of the Armed forces and their application in the respective state. The case was instituted for Manipur but the judgment delivered affects the administration of armed forces everywhere

²⁸ *Supra* note 22

²⁹ *Ibid*,

³⁰ *Supra* note 5

(which includes Jammu and Kashmir). The court observes upon the excessive use of force in the state by the armed forces and the misuse of the protective shield given by the virtue of AFSPA³¹. AFSPA is not the only legislation that is creating problems in the two states, but also the Disturbed Areas Act³² (DAA) and the Public Safety Act³³, both of which cater to the inhabitable situations in Manipur and Jammu and Kashmir. So now, the Supreme Court has ordered to restrain the army from using “excessive and retaliatory force” in the “Disturbed regions”. This is a landmark decision in the history of Jammu and Kashmir and Manipur, never before this, an action, that could make a difference in the prevailing conditions of the states, had been taken and implemented.

But the Union has filed a curative petition in the Supreme Court to review its decision³⁴. The petition is filed on the grounds stating that the restriction on the use of its power in the states has caused an obstruction in the army’s capability to handle the insurgencies in the two states where military has been administered.

If the curative petition filed by the center reverses the original Supreme Court judgment, and the army is given a free pass to use its powers again, then that would set a precedent which would be close to impossible to reverse.

In another recent incident, in April, 2017, the security forces took matter in their own hands. A 26 year-old man named Farooq Ahmad Dar, was tied to an army jeep, and taken around the village as a human shield. On the day of election in the state, eight civilians were killed during an encounter when mobs tried to attack polling stations in a Srinagar constituency. Dar was picked by the army randomly and mistreated. It was not just mistreatment; the Jammu and Kashmir Human Rights Commission (SHRC) said that it was an act of “Humiliation, torture and wrongful confinement”. In their defense, army has claimed that Dar was a stone pelter. But the commission chairman, Justice (retd) Bilal Nazki said, “*For the humiliation, physical and psychiatric torture, stress, wrongful restraint and confinement, the*

³¹ *Supra* note 22

³² The Disturbed Areas (Special Courts) Act, 1976, No. 77 of 1976, India

³³ Jammu & Kashmir Public Safety Act, 1978, No. VI of 1978, India

³⁴ Bhadra Sinha, *Govt urges Supreme Court to review Afspa decision restraining Army*, Available at <http://www.hindustantimes.com/india-news/govt-urges-sc-to-review-its-decision-restricting-army-s-afspa-power/story-qeNrxi3HTaZx7YX2qXpXkO.html>

commission thinks it appropriate to direct the state government to pay a compensation of Rs. 10 lakh to the victim,”³⁵

What is clearly an act of brutality and ruthlessness has been awarded the Army's chief Commendation card. Major Gogoi, who was responsible for using Dar as a human shield, was rewarded by the Army Chief Rawat³⁶.

SHRC has the authority to give recommendations to the government, and it is the government's prerogative whether it will comply with the recommendation or challenge it further because it is not binding. But the SHRC has no jurisdiction over the acts of the army. So where it has declared the act of Major Gogoi as unlawful, it cannot act upon it as the SHRC is restrained by the special powers given to the armed personnel.

RENEGADES

When it comes to holding somebody liable or holding someone accountable for a murder or torture, there generally are two groups that could be blamed; the militants or the Indian armed forces. But what happens when a person belonging to none of these groups commits a crime? Whom to contest against then?

The Indian Security forces have been, allegedly, operating a secret, illegal army called the “Renegades”. Renegades are militants, who have surrendered their militancy, and now work as informants for the armed forces to capture and bring down other militants³⁷.

This has also caused a considerable amount of havoc in the state because now, it created a loop. The armed forces attack civilians accusing them of being militants, the renegades strike civilians accusing them of being militants and then finally the militants' assault civilians thinking they are renegades. In the end, it's the civilians who suffer in all these shenanigans.

Renegades are “un-uniformed” and un-credited soldiers, who work for the Armed forces but the armed forces, take no legal responsibility for them. All renegades are not officially enrolled in the army but, in 1997 it was admitted by the Director General of Police that the continued service of renegades was, in fact, fruitful and they were successful in rehabilitating

³⁵ Zulfikar Majid, *Human Shield Case: Govt, directed to pay 10L*, Available at <http://www.deccanherald.com/content/621948/human-shield-case-govt-directed.html>

³⁶ Mudasir Ahmad, *Kashmiri Used as Human Shield by Army Awarded Rs 10 Lakh Compensation for Torture*, Available at <https://thewire.in/156276/human-shield-kashmir-army-compensation/>

³⁷ *Supra* note 14

five thousand soldiers and had given them the post of *Special Police Officers* (SPO) in the State Police, and some others were integrated in the security forces³⁸. Hence after an attack from a renegade, the victim or his family has no recourse because there is no one to hold liable and when they do officially come under the purview of the armed forces, they have the immunity granted under the Armed Forces Jammu and Kashmir) Special Powers Act, 1990.

There are a number of cases where human rights activists or medical practitioners or journalists were murdered by “unidentified men” who were not bearing a uniform and posed as civilians.

In an instance in 1992, a human rights activist, Hirdai Nath Wanchoo, was shot and killed by “unidentified men”. Wanchoo was a 67 year-old Human rights activist, who brought to light cases of such violation by armed personnel and militant groups and filed *Habeas Corpus* petitions in the court to seek justice. He was often approached by strangers who wanted help. One day he was approached by two men, whom he had never seen before, who told him that a boy was captured by the security forces and had not been returned and his mother had fallen sick. They requested him to go with them to the mother to reassure her that her son would be alright and would come back home safe. Wanchoo went with the men. After about half an hour after he left, Wanchoo’s body was found on a street. He was shot three times. The case was handed over to the CBI. No information on the investigation was released. The government in its official statement said that the murder of Wanchoo was in fact, executed by the militant group Jamait-ul-Mujahidin, but neither any credible proof or motive was ever provided nor the identity of the perpetrators was ever revealed³⁹.

CONCLUSION

India is democracy. We, the people of India, are sovereign. The citizens, falling under the geographical territory of the country have rights, like Fundamental rights, which include Right to Equality⁴⁰, Right to live with human dignity⁴¹, Right to freedom of speech and expression⁴² and so on. State of Jammu and Kashmir also falls under the geographical territory of India. But then why have the citizens of Jammu and Kashmir not seen this side of

³⁸ Kashmir Nuclear Flashpoint, *Renegade Militants in Kashmir*, Kashmir Library, Available at http://www.kashmirlibrary.org/kashmir_timeline/kashmir_chapters/renegade-militants_detailed.shtml

³⁹ *Supra* note 13 at 150

⁴⁰ Article 14, Constitution of India

⁴¹ Article 21, Constitution of India

⁴² Article 19, Constitution of India

India? Where the people have a right to express, where people belonging to any gender, caste, creed, colour have the right to be treated equally, where Hindus and Muslims are treated alike and most importantly where people have a right to life. Why are these basic rights, which every person needs for a dignified survival in a democratic country, taken away from the citizens of Jammu and Kashmir? If the reason is because the state has its own constitution and Penal Code, then that is not good enough. The fact that they have their own legislations further guarantees that there shouldn't be any human rights violation in the state, especially by the forces of the state.

The sole reason for the integration of Kashmir in India was that it needed protection from the abuse inflicted by Pakistan. But as it can be seen in the past 25-30 years, Kashmir has been falling victim to the abuse by India more than Pakistan. Pakistan has been the Lucifer to India's Michael when it comes to Kashmir, but India has not acted in the most civilized manner either. But the matter is far gone and almost out of hands now, that it is very difficult to gather it back together. Difficult though but not impossible.

After researching on the issue what can be concluded is that there are two kinds of problems prevailing in India when it comes to Kashmir, i.) India and Pakistan's life long struggle over which country Kashmir belongs to and ii.) Kashmir's struggle with India. Had the Human and Legal rights violations that are inflicted by the armed personnel in the state not prevailed, the situation would be different. India doesn't have Kashmir's support because of this violation. As can be concluded from the Farooq Ahmad Dar case, a state where the security forces cannot be trusted, there is not much else the people would trust. It is because of the loopholes in the legislations, the army's actions cannot be controlled. The unlimited power conferred over the army is so arbitrary, that if curtailed, would solve a lot of problems. The Human rights commission has some authority over the government as it can give suggestions, but it doesn't have the authority to even give suggestions for the inhuman acts of Army.

In the case of *State Bank of India v. Santosh Kumar*⁴³, the Supreme Court has taken a step towards the injustice the army inflicts upon the citizens, but the government has filed a curative petition to review that as well.

For the time being, the Supreme Court judgment is the only ray of hope for the citizens of Jammu and Kashmir as such a step has never been taken before.

⁴³ *Supra* note 5

WHITE COLLAR CRIMES WITHIN INDIAN ADMINISTRATIVE AND JUDICIAL SYSTEM

Meenakshi Awasthi* & Aishwarya Pandey **

INTRODUCTION

The thought of white collar crime was evolved by the Edwin. H. Sutherland, in 1939. He defined white collar crime as one committed by a person of respectability. Also, he pointed out that besides the traditional crimes such as assault, robbery, murder, rape; kidnapping and other acts involving violence, there are other certain anti-social activities which the persons of upper class carry on in course of their occupation or business. These activities for a long time were accepted as a part of business strategy necessary for a clever professional man his success in business. Thus, any complaint against such strategy often went overlooked and unpunished.

The concept of white collar crime found its place in criminology for the first time in 1941 when Sutherland published his research paper on white collar criminality in the American Sociological Review. He defined white collar crime as a “crime committed by persons of respectability and high social status in the course of their occupation”. Examples of white collar crimes can be publication of manipulated balance sheets and profit and loss accounts of business, passing of goods and concealment of defects in the commodity for sale etc.

LEGISLATIONS AND ITS SHORTCOMINGS WITH RESPECT TO WHITE COLLAR CRIMES

There is much legislation that have been drafted by the parliament of India and executed to curb the rage of white collar crimes occurring in the society. The well-known legislations in fulfilling this purpose are Essential Commodities Act of 1955, Industrial Development and Regulation Act of 1951, Import and Export (Control) Act of 1947, Foreign Exchange Regulation Act of 1974, Companies Act of 2013, Prevention of Money Laundering Act of 2002, Securities Exchange Board of India, Indian Penal Code and many others. There are many instances where people went contrary to the legislation and the law that was enacted for

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removing the menace of the white collar crimes. The very famous case of Satyam Computers where a fraud of 7000 Cr was committed by Ramalinga Raju and for which he was punished with a penalty of ONLY 5 Cr, the 2G Spectrum Scam, there are other cases where the crime gets unnoticed or voluntarily unacknowledged by the courts involving the very famous industrialists or film stars for that matter, naming a few would be Vijay Mallya who fled from India already convicted in the money laundering case and is still not behind the bars.

The major reasons as to why such crimes are committed are the shortcomings that exist in the legislations in force which has to be dealt with in a serious manner. Firstly, No commission as such is being established to deal in the white collar crimes cases. Secondly, there is no inclusion of white collar crimes in the Indian Penal Code. Thirdly, there is a soft attitude in the law makers and prosecutors towards white collar criminals as such criminals have closer contacts with the social control agencies on account of their social status. Also, top ranking public officials are friendlier with the persons involved in white collar crimes.

The white collar crime costs several times greater than that of traditional crimes like murder theft, rape etc. the financial loss to society from white collar crimes is far greater than the loss from predatory crime committed by persons of lower class. The average loss per burglary is less than 10,000 on the other hand there are crores and crores rupees embezzlement by big industrialist, politician and other big shots of the business industry reported in one year. So, white collar criminals violate trust and create distrust which lowers social morale and results in social disorganization as compared to other crimes.

SUGGESTIONS

- First of all there should be a separate chapter on white collar crimes which should be incorporated in the Indian Penal Court by amending the court so that convicted white collar criminals do not escape punishment because of their high social status.
- There should be special tribunals constituted to award sentence of imprisonment for a long period of time to white collar criminals.
- Strict regulatory laws and serious punishments for white collar criminals may help in reducing these crimes.

- Public awareness program should be done through media of press and other audio visual ads for such crimes.
- There should be a national crime commission which may specially tackle the problem of such crimes and deal with white collar criminals.

CONCLUSION

We can conclude that white collar criminals are master minded as it is carried out in a planned manner by technocrats, big business man, highly qualified persons and corporate officials. These kinds of crimes are done in the form of scams, frauds etc, which are helped by technological advancements. Individuals get victimized with pecuniary loss, also, these offenses damage the economy as a whole. There are various special laws that regulate customs, excise ,taxes, foreign exchange ,trade and commerce relating to export and import and are enacted and enforced by their respective departmental enforcement agencies which are created under statutory but despite these special laws and independent enforcement agencies for handling crime there is no effective implementation of such laws, also there is no effective special legislation to curb the white collar crime , that is why the crime rate has not declined on the contrary, crimes of this nature are constantly rising. It is indeed a high time for all those who are concerned with the administration of justice in the sphere of crimes committed.

ASSESSMENT OF IMPACTS OF OIL POLLUTION ON MARINE ENVIRONMENT: AN ANALYSIS

Khaled Abdalhadi A. Hamad* & Y.P. Rama Subbaah

INTRODUCTION

Over the years, transportation of petroleum has been taking place through vessels and pipelines. Transportation of oil that has been mostly used as a source of energy as well as fuel throughout the world has been very successful through tankers which are specialized vessels for carrying oil.¹

After the Second World War not only the public interest in the environment increased in general. Concerns of coastal states about increasing ship-source marine pollution and oil spills started to grow as well. Some of the occurred incidents with tankers clearly demonstrated that oil spills in an environmentally or economically sensitive area could cause irreparable damage.²

Oil pollution of the ocean comes from shipping activity and offshore oil production. Sea-bed activities on oil exploration and production constitute a relatively small part in the general amount of the pollution of marine environment with oil. The principal cause of marine pollution with oil is shipping. Traditionally shipping is considered to be “a polluting industry”.³ The world’s tanker fleet counts approximately 7 000 vessels with cargo capacities between 76 000 and 175 000 tons.⁴ Usual shipping operations, especially transportation of oil by tankers and accidents, result in the dumping of around 600 000 – 1750 000 tons of oil into the ocean per year.⁵

CAUSES OF OIL POLLUTION

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¹Tumaini S. Gurumo & Lixin Han, *The Role and Challenge of International Oil Pollution Liability Legislations in the Protection of Marin Environment*, International Journal Enviornmental Science and Development, 2012, page 183

²Ekaterina Anyanova, The Institute of State and Law, Russian Academy of Science & OOO “LUKOIL-KMN” Russian Federation

³Anianova E., Ehlers P. & Lagoni R., *Tanker or Speedboat? International Maritime Organizations and their Contribution towards a Sustainable Marine Development*, The International Maritime Organization, LIT Verlag, Hamburg, pages 77-103

⁴Birnie P. & Boyle E., *International Law and the Environment*, Clarendon Press, Oxford, 1992, page 12

⁵Brexendorff A.

There are many chemicals carried at sea are intrinsically far more harmful to the marine environment. Although the impact of the oil pollution constitutes only a small part of a general pollution to the maritime environment, the consequences of oil spills and oil wastes are extremely damaging for marine landscape and ocean's inhabitants.⁶

In general, oil spills can affect animals and plants in two ways: from the oil itself and from the response or cleanup operations. Understanding both types of impacts can help spill responders minimize overall impacts to ecological communities and help them to recover much more quickly.⁷

Spilled oil can harm living things because its chemical constituents are poisonous. This can affect organisms both from internal exposure to oil through ingestion or inhalation and from external exposure through skin and eye irritation. Oil can also smother some small species of fish or invertebrates and coat feathers and fur, reducing birds' and mammals' ability to maintain their body temperatures.⁸

Spilled oil is very toxic. It can be lethal to adult animals even in relatively low concentrations. It may also cause physiological or behavioral disruptions of species. Oil spills also cause death through the prevention of normal feeding, respiration and movement functions not only of ocean wildlife, but also of marine life at the sea shore. Particularly dangerous oil spills are for birds. Oil spill can lead sometime to the tainting of fish and shellfish. Sometimes one can feel the consequences of the oil spills through the oily taste or smell to the seafood. An oil spill directly damages not only animals, plants and corals, fisheries, but also affects human activity in the area of fisheries through damaging of fishing boats, fishing gear, floating fishing equipment.⁹

Under the right conditions the marine environment recovery natural process is incredibly quick and *painless*, however, the internal mechanisms of the nature are not endless and marine environment needs proper treatment and protection. The new oil and gas development projects also raise more and more serious concerns of the environmentalists. For example, the recent decision to start the drilling in the Arctic seriously worried the environmentalists

⁶ Brubaker D., *Marine Pollution and international law: Principles and practice*

⁷ Clark R.B., *Marine Pollution* (2nd Ed.), 1989

⁸ Dahm G., Delbrueck, J., & Wolfrum, R., *Voelkerrecht Band I/2* (2nd ed.), Walter der Gruyter, Berlin, 2002

⁹ Dzurek D.J. & Schofield C. *Parting the Red Sea: Boundaries Offshore Resources and Transit*, IBRU, Durham, 2001, page 34

especially in light of the climate change issue, which have been widely discussed in the mass media.¹⁰ On 29 August 2011 Exxon Mobil Corp and Rosneft signed an agreement on the development of oil and gas in the Russian sector of the Arctic.¹¹ The region presumably obtains around 13% of the undiscovered oil resources and 30% of its natural gas. Although this project is considered to be highly beneficial for both sides, it is stressed by both sides that environmental safety is very important in this area¹², since this area is considered to be ecologically fragile. Partly the concerns address the transportation of oil and possible oil incidents.¹³

INTERNATIONAL MEASURES FOR THE PROTECTION OF MARINE POLLUTION

In the international law in the course of time a comprehensive regulatory regime on prevention of marine oil pollution (particularly oil spills) was developed. Special attention was paid to the regulation of marine oil pollution by shipping,¹⁴ so the existing rules cover mostly vessel-source pollution. The most effective instruments in the marine environment protection are regional treaties. Almost all regional treaties include a general obligation for signatory states to prevent, reduce and control all forms of maritime pollution. In the Helsinki convention¹⁵ and the Convention for the Protection of the Marine Environment of the North-East Atlantic¹⁶ one can find more concrete clauses like the precautionary concept, polluter pays concept, best available technology, and best environmental practice. However, the elaborated rules need to be enforced and complied with. A closer co-operation and sharing of informational resources within the international community is urgently required, especially in the cases of conventions and their amendments ratification.¹⁷ This chapter is devoted to the existing rules of international law and certain unilateral legislation on the issue of marine

¹⁰ Gautam D., *Trans-Boundary Marine Oil Pollution and Its International Legal Aspects*, Private Law: Rights, Duties and Conflicts, Kierkegaard, S.M. (Ed.), pages 980-988. Copenhagen page 12

¹¹ Gavouneli M., *Pollution from Offshore Installations*, Graham and Trotman, London, 1995 page 288

¹² Gelberg, L., *Rechtsprobleme der Ostsee*, Sample, Hamburg (1979)

¹³ Gennaro, M., *Oil Pollution Liability and Control under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, Vanderbilt Journal of Transnational Law, Vol. 37:265, No. 1, (January 2004), page 265-298

¹⁴ Gold E., *Handbook on Marine Pollution* (2nd Ed.), Assuranceforeningen Gard, Arendal (1998)

¹⁵ Graham S., *Environmental Effects of Exxon Valdez Spill Still Being Felt*, In: *Scientific American*, Available at www.scientificamerican.com/article.cfm?id=environmental-effects-of

¹⁶ Howard R. *How Arctic oil could break new ground*, The Guardian, Available at <http://www.guardian.co.uk/commentisfree/2011/sep/02/arctic-oil-exxonmobil-russian-deal>

¹⁷ *International Oil Pollution Compensation Fund 1992*, ITOPF, London (2002)

environment pollution with oil as well as their development in the XX-XXI centuries. The liability and compensation schemes in cases of occurred oil pollution are also analyzed. The chapter also deals with the existing regional conventions on marine oil pollution and makes certain proposals on the improvement of the existing at present legislation.

The first international convention on oil pollution was adopted in 1926 by the International Maritime Conference in Washington. This document however was not ratified. Because of the significant pollution especially of the Atlantic Ocean during the World War II (military operations with submarines, torpedoes etc.), since 1945 the issue of oil pollution became very acute and more and more important.¹⁸

Marine pollution particularly with oil is not clearly regulated in any particular global environmental convention. This form of pollution is considered in some of the international legal documents. The provisions of the international conventions on this issue are, however, relatively limited.¹⁹

- ***Stockholm Declaration***

The Declaration on the Human Environment (Stockholm Declaration)²⁰ and Action Plan²¹ were adopted at the United Nations Conference on the Human Environment (UNCHE) held in Stockholm in June 1972. Both documents have special sections on marine pollution. This conference was one of the first attempts of the integrated approach to the global environmental issues.

- ***Global Conventions on the Law of the Sea***

As a separate issue oil pollution is not regulated in the global conventions on the law of the sea. However, the Geneva Conventions of 1958 contain the provisions on environmental protection of the ocean against oil pollution through oil pipelines or continental shelf development (Art. 5(1) and 5(7) of the Geneva Convention on the Continental Shelf²² and Art. 24 of the Geneva Convention on the High Seas)²³. These

¹⁸ Korsunskaya D. & Reddall B. Exxon, *Rosneft tie up in Russian Arctic*, U.S. (Reuters), Available at <http://www.reuters.com/article/2011/08/30/us-rosneft-exxon-idUSTRE77T2OM20110830>

¹⁹ Valencia M., *Maritime Regime Building*, Martinus Nijhoff Publishers, The Hague, (2001)

²⁰ Declaration of the United Nations Conference on the Human Environment, 1972, Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>

²¹ Action Plan for the Human Environment, 1972, Available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1492&l=en>

²² Convention on the Continental Shelf, 1958, United Nations, Treaty Series

²³ Convention on the High Seas, 1958, United Nations, Treaty Series

provisions are, however, rather superficial. Geneva Convention on the High Seas in its Art. 24 proclaim the obligation of states to draft national legislation on pollution prevention from ships or pipelines or sea-bed activities. Art. 5(1) and 5(7) of the Geneva Convention on the Continental Shelf concern the exploration and exploitation of the continental shelf and its natural resources. The coastal state has to ensure that there is no unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, oceanographic or other scientific research. The coastal states shall also establish safety zones around the offshore installations and take measures for the protection of the living resources of the sea from harmful agents.

- ***Agenda 21 – Programme of action for sustainable development:***

Another international conference – The Earth Summit, which took place in Rio de Janeiro, Brazil from 3-14 June 1992 – was also very important for the environmental and development issues. This meeting was prepared by the United Nations Conference on Environment and Development (UNCED). The outcome of this conference was the adoption of several non-binding legal instruments, including Agenda 218. Agenda 21 is a programme of action for sustainable action world-wide.

INTERNATIONAL LIABILITY REGIME FOR OIL POLLUTION

The “Torrey Canyon” incident demonstrated that in case of the oil pollution of the ocean there were no rules of international law making the polluter liable. OILPOL’54 left the issue of liability for pollution to the national law.

It was decided to develop international legal scheme with the liability regime for oil spills. The present international regime of compensation for damage caused by oil pollution is based on two conventions: International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1969)²⁴ and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND 1971)²⁵.

The CLC 1969 was elaborated within the Inter-Governmental Maritime Consultative Organization and signed on 29 November 1969 in Brussels. It ensures the compensation to be paid. The general principle provided in the convention is that causing oil pollution should pay compensation. The convention aims to ensure the adequate compensation to victims of

²⁴ International Convention on Civil Liability for Oil Pollution Damage, 1969. United Nations, Treaty Series

²⁵ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, Available at http://www.iopcfund.org/npdf/Text%20of%20Conventions_e.pdf

oil pollution damage resulting from maritime casualties involving oil-carrying ships. The convention applies to the pollution damage caused on the territory of the Member States to the Convention and related preventive measures (Art. II). The CLC does not apply to ships or vessels owned or operated by a State and used for non-commercial service. The CLC applies to State-owned merchant fleets.

Convention for the prevention of marine pollution from land-based sources²⁶ held at Paris on 4 June 1974. Art. 1 puts an obligation on the Contracting Parties to take all possible steps to prevent and combat pollution of the sea from land-based sources. The pollution from land based sources also covers the maritime pollution from installations under the jurisdiction of the member states to the convention including offshore installations and structures.

International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957²⁷ was developed by the Comité Maritime International. It includes the principle of limitation of liability. Besides the liability is limited for ship owners in cases of death, personal injury and property damage claims depending on the tonnage of the vessel. This provision of the convention was often overruled by the courts, so the convention was replaced by the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976)²⁵. This document sets general limitation of liability. The limitation-rule does not apply in cases of intentional or reckless personal act or omission. By the limitation rule ship owner, charterer, manager, operator, salvors and insurers are covered. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration of SeabedMineral Resources, 1977 (CLEE 1977)²⁸ is a liability convention for offshore oil and gas operations. The convention did not enter into force since there is a developed liability regime for oil industry under the bilateral agreements with the involved coastal states. The issue of oil pollution offshore drilling and exploration and exploitation activities is also concerned in a voluntary agreement amongst oil companies operating in northwestern

²⁶ Convention for the Prevention of Marine Pollution from Land-Based Sources, 1974, Available at <http://www.opcw.org/chemical-weapons-convention/related-international-agreements/toxic-chemicals-and-the-environment/marine-pollution-from-land-based-sources/>

²⁷ International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957, Available at <http://www.admiraltylawguide.com/conven/limitation1957.html>

²⁸ Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, 1977, Available at <http://www.dipublico.com.ar/english/convention-on-civil-liability-for-oil-pollution-damageresulting-from-exploration-and-exploitation-of-seabed-mineral-resources/>

Europe the Offshore Pollution Liability Agreement (OPOL)²⁹, According to its provisions operators accept strict liability for pollution damage and remedial measures. In aftermath of the “Exxon Valdez” catastrophe under the pressure of the USA the

International Convention on Oil Pollution Preparedness, Response and Co-Operation (OPRC 1990)³⁰ was adopted in London on 30 November 1990 addressing the issues of response and preparedness of the international community to the oil spills. By means of this convention the International Maritime Organization developed a framework for the international cooperation in combating major oil pollution incidents. The convention stresses in its preamble the serious threat posed to the marine environment by oil pollution incidents and reminds that in case of the oil pollution incident, prompt and effective action is essential in order to minimize the damage. In Art. 6 Convention puts an obligation upon Party States to establish a national system addressing the oil pollution incidents. The convention recognizes the importance of mutual assistance and international cooperation and establishes the basis for the exchange of information respecting the capabilities of states to respond to oil pollution incidents, the preparation of oil pollution contingency plans, the exchange of reports of incidents of significance which may affect the marine environment or the coastline and related interests of states, as well as research and development respecting means of combating oil pollution in the marine environment. The convention also sets a requirement for vessels and offshore units to have on board oil pollution emergency plans.

International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER), 2001³¹ was adopted to reduce a number of gaps in the CLC regime. This document provides for prompt compensation system for the damage caused by oil spills, when oil was carried as fuel in ships’ bunkers. This convention is applied to the territorial seas and exclusive economic zones of the States Parties. The registered owner of the vessel is under the obligation to maintain compulsory insurance cover. A claim for pollution damage could be brought directly against an insurer.

CONCLUSION

²⁹ Offshore Pollution Liability Agreement, Available at <http://www.opol.org.uk/agreement.htm>

³⁰ International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, Available at <http://www.admiraltylawguide.com/conven/oilpolresponse1990.html>

³¹ Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, 1977, Available at <http://www.dipublico.com.ar/english/convention-on-civil-liability-for-oil-pollution-damageresulting-from-exploration-and-exploitation-of-seabed-mineral-resources/>

Although it was scientifically proved that many chemicals carried at sea are intrinsically far more harmful to the marine environment, the impact of oil upon the ocean and its ecosystem is very dangerous. The spillage of even few tons of oil into sea causes a thin film on the water surface, what is deadly for marine life.³² Since the middle of the XX century not only numerous international legislative measures were adopted in the area of oil pollution prevention for the marine environment, but also national laws and regulations. This new legislation reflected not only the development of the legal position on the certain issues, but also the new developments in construction technology like, for example, improved tank stripping pumps, the load-on-top system, and other technological advances. All these preventive measures considerably reduced both vessel-source and offshore oil development pollution.

Beside the main legal documents on oil pollution and marine environment protection, general principles of international environmental law are also applicable to the cases of oil pollution. Such soft concepts as the “precautionary principle” and “polluter pays principle” could be applied besides these principles being a substantive element of sustainable development are reflected in conventions on liability and compensation in case of pollution (e.g. CLC, FUND etc.)

In comparison to the oil pollution prevention during the offshore oil development pollution, measures against the vessel-source oil pollution represent the better and more detailed regulated area of marine environmental law (the 1954 Brussels Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) was superseded from 2 October 1983 by the 1978 protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

The statistics demonstrates that since the beginning of the international legislation on the oceans protection against the oil pollution there had been considerable improvements in the prevention of ship-generated oil pollution. It is not surprising, since the environmental regulation of the industry is becoming wider in its scope and tougher in its implementation.

³² Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended, United Nations, Treaty Series

Tanker incident at sea especially close to the coasts always raises the significant attention of the publicity. It should be stressed that 99% of the transported oil (about 1,9 billion tons of oil by some 3 000 tankers) is delivered safely (Gold, 1998).

However, even this tiny amount of the spilled oil is sufficient to cause the irreparable damage. Damage to coastal amenities, beaches, tourist and recreational areas, harbors, offshore installations depends on the geographical location of each spill. For example, a relatively small spill, due to the holing of the tanker "American trader" off the coast of California in 1990, caused serious damage. Claims for damage, clean-up costs and fines amounted to over USD³³ million. In the case of the oil spill of the VLCC "Haven" off Genoa in 1991, the French, Italian and even Spanish Mediterranean coasts were damaged. 1 300 Italian claims alone amounted to GBP 705 million.

There exist very good means and instruments to combat the oil pollution, what was demonstrated by clean-up operations after the "Exxon-Valdez" oil spill. There are four major options of responding to marine spills: mechanical containment and collection; use of chemical dispersants; physical shoreline clean-up; and natural removal, requiring no cleanup action. Other counter-measures that are less frequently used due to their limitations are burning, sinking, gelling and enhanced biodegradation. A decision, which clean-up action shall be applied, depends upon a given situation.³⁴ However, the best clean-up operations won't recover the existed ecosystem. So let the oil pollution never had happened.

³³ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended, United Nations, Treaty Series

³⁴ Gautam D, *Trans-Boundary Marine Oil Pollution and Its International Legal Aspects*, Private Law: Rights, Duties and Conflicts, Kierkegaard, S.M. (Ed.), page 980-988

ARBITRATION IN ARAB COUNTRIES (MIDDLE EAST) WITH SPECIAL REFERENCE TO OIL CONTRACT – AN ANALYSIS

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INTRODUCTION

The Middle East is made up of diverse economies and is one of the largest exporters of oil and fastest growing regions in the world. There are ongoing efforts across the Middle East to reduce national dependency on oil and attract international trade.¹ This has seen rapid infrastructure development in many countries across the region as a result of increased capital investment. The large-scale infrastructure investment programmes and the upcoming international events such as Qatar's 2022 World Cup together with the 2020 Dubai World Expo evidence the magnitude of the construction industry in the Middle East.²

Disputes are a common feature of the construction industry typically arising out of time, cost or quality issues. The implications of a construction dispute can be far-reaching and have adverse consequences on, not only the delivery of a construction project, but the economic growth of the region as the failure to resolve such disputes and enforce decisions may lead to a withdrawal of international investment over the long term.³ This is just one of many reasons why states in the region are keen to establish a comprehensive arbitration framework and successful arbitration centres to deal with such disputes, that are effective, reputable and in line with international standards.⁴

A BRIEF HISTORY OF ARBITRATION IN THE MIDDLE EAST

The notion of deferring to an objective and neutral personality is a recognised dispute resolution custom in the Middle East. Traditionally, Islamic law encourages the use of arbitration (or certainly conciliation) to settle disputes. One well-known story of the Prophet Mohammad's early life involved him being chosen by feuding tribes, who could not agree on

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¹ Middle East Consumer Confidence Index-March 2015, www.bayt.com

² J.E. Peterson, Bahrain: Reform-Promise and Reality, page 157

³ Bahrain's economy praised for diversity and sustainability, Bahrain Economic Development Board, Archived from the original on December 28, 2010

⁴ Marcus Noland and Howard Pack, *Arab Economies in a Changing World*, Washington D.C.: Peterson Institute for International Economics, 2007, page 119

a vital element of the reconstruction of the Ka'aba, to resolve the dispute. The Prophet bridged the gaps between the quarrelling parties by suggesting an original solution that was essentially a win-win for all.⁵

Historically, there has been a reluctance to use arbitration as a form of dispute resolution in the context of trade between the Arab and Western worlds. The 1950s and 1960s saw several international arbitration awards determined against Arab governments in favour of private Western companies. These adverse decisions led to a questioning of the process's legitimacy and ultimately the Saudi Arabian Council of Ministers and Libyan government refused to accept arbitration as an appropriate forum for any dispute with any ministry or government agency.⁶ In Libya, this decision was eventually reversed as the Libyan economy was affected as the value of contracts with Libyan governments dropped to reflect the risk that the contracting parties would not be able to arbitrate. There have also been a number of international arbitration awards in favour of Middle Eastern governments that helped to convince Middle Eastern countries of the effectiveness of arbitration in the context of trade between the Arab and Western worlds.⁷ In 1973, the Kuwaiti government obtained a significant arbitral award against a private British firm in relation to the construction of the Kuwaiti airport. The award was enforced in the United Kingdom pursuant to the New York Arbitration Convention, following Kuwait's accession to the Convention in 1978.⁸

In the Middle East, countries are resolving to upgrade their arbitration laws to international best practice standards. This is evidenced by the fact that most Middle Eastern countries have adopted the Convention. Jordan and Syria were among the first countries to adopt the Convention, which came into effect in 1959. Since then, Kuwait became a contracting party in 1978, Bahrain in 1988, Saudi Arabia in 1994, Oman in 1999, Iran in 2001 and, more recently, Qatar in 2002 and the United Arab Emirates in 2006. Iraq, Libya and Yemen are among a few countries that are not signatories to the Convention. Further, Middle East states are increasingly adopting the UNCITRAL⁹Model Law on International Commercial Arbitration (the Model Law) in arbitration centers throughout the region. The Model Law

⁵ Alan Richards and John Waterbury, *A Political Economy of the Middle East*, Boulder, CO: Westview Press, 2008, page 31

⁶ Global consortium to inject \$50m in Egypt commodity exchange, MUBASHER, 26 November 2015

⁷ World Economic Forum: Iran ranks 69th out of 139 in global competitiveness.

⁸ Iran offers incentives to draw investors, www.presstv.com

⁹ United Nations Commission on International Trade Law

was drafted by UNCITRAL with a view to assisting countries seeking to improve their laws in such a way as to ensure the best possible procedures for commercial arbitration.¹⁰

ARBITRATION CENTRES IN THE REGION

The earlier period of reluctance by Middle East countries to use Western arbitration centres to resolve disputes has contributed to the development of arbitral systems in the region. Now, as the enthusiasm for Middle East countries to be used as a platform for international trade increases, some arbitration centers have been growing in line with international standards. The Middle East now offers a wide range of regional options for arbitration that include the following.¹¹

THE UAE

Arbitration in the UAE is governed by articles 203 to 218 of the Civil Procedure Law. Under the Civil Procedure Law contracting parties are permitted to refer any dispute concerning the implementation of a specified contract to one or more arbitrators. The UAE increasingly favour arbitration as a suitable mechanism for alternative dispute resolution (ADR) and is home to the following arbitration centers.¹²

ABU DHABI COMMERCIAL, CONCILIATION AND ARBITRATION CENTRE (ADCCAC)

The ADCCAC were inaugurated in 1993 and oversee a number of construction disputes for Abu Dhabi-based parties. Since early 2007, construction contracts by the Abu Dhabi government have provided for disputes to be referred first to an ad hoc dispute adjudication board, in line with International Federation of Consulting Engineers (FIDIC) forms, and then to ADCCAC arbitration. In October 2013, the ADCCAC implemented new procedural regulations for the conduct of arbitration. The new ADCCAC Regulations introduced good

¹⁰ The N-11: More Than an Acronym, Archived March 31, 2010, at the Wayback Machine, Goldman Sachs study of N-11 nations, Global Economics Paper No: 153, March 28, 2007

¹¹ Available at <http://www.siliconindia.com/finance/news/10-Most-Valuable-Currencies-in-the-World-nid-109953.html>

¹² Baten Jörg, *A History of the Global Economy From 1500 to the Present*, Cambridge University Press. page 226

modern arbitration practice to the ADCCAC arbitration process in an effort to encourage more parties to consider the ADCCAC as a forum for ADR.¹³

DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)

DIAC was established in May 2003, as a successor to the Centre for Commercial Conciliation and Arbitration. The DIAC has in place its own Arbitration Rules acting as an appointed authority under the UNCITRAL Arbitration Rules and is now one of the busiest arbitration centres in the Middle East for construction disputes. In 2006, the UAE acceded to the Convention and in 2007 DIAC implemented its revised Arbitration Rules to bring the centre up to international standards.¹⁴

DUBAI INTERNATIONAL FINANCIAL CENTRE-LONDON COMMERCIAL ARBITRATION CENTRE (DIFC-LCIA)

The most recent addition to the forums available to handle construction disputes in the region is the DIFC-LCIA, which was officially founded in 2008. DIFC-LCIA is a branch of the LCIA and it follows the LCIA rules very closely. As at 6 December 2015, the DIFC-LCIA had around 30 open arbitration or other ADR proceedings.¹⁵

The DIFC is an autonomous common law jurisdiction, empowered by Federal Law No. 8 of 2004 to enact its own regulatory and legal framework for all civil matters. The DIFC Arbitration Law No.1 of 2008 is based upon the Model Law. The DIFC is an opt-in jurisdiction which does not require parties to have any ‘connection’ with the DIFC in order to refer arbitration to its jurisdiction. Anyone, from any jurisdiction, can opt for the DIFC as an arbitration seat. Pursuant to the Judicial Authority Law¹⁶, DIFC awards, once ratified by the DIFC courts are enforceable by the Dubai courts. Once the award is ratified by Dubai courts it can also be enforced in the GCC under the 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council for enforcement. The DIFC/LCIA centre is fast becoming a

¹³ Ibid at 216f

¹⁴ Ibid at 214ff

¹⁵ The Bayt.com Middle East Job Index Survey, February 2015

¹⁶ Law No. 12 of 2004

popular choice for resolving construction disputes in the UAE. The DIFC-LCIA Rules will shortly be updated to reflect changes and improvements contained in the 2014 LCIA Rules.¹⁷

QATAR

The adoption of arbitration as a forum for resolving construction disputes is also growing in Qatar. Nonetheless, Qatar is yet to implement a comprehensive arbitration law. A draft law has been in circulation for over a year and is expected to come into force in the coming months. The Draft Qatari Law is based largely on the Model Law and is meant to replace the existing provisions under articles 190-210 of the Civil and Commercial Procedure Law No. 13 of 1990, which currently govern arbitration in Qatar.¹⁸

QATAR INTERNATIONAL CENTRE FOR CONCILIATION AND ARBITRATION (QICCA)

QICCA was established in May 2012 and is now more frequently being adopted as a forum for the resolution of disputes arising from construction contracts. Generally, parties are free to agree to an arbitration process in a construction contract.¹⁹

In addition, the Qatar financial centre has its own arbitration rules and regulations under the jurisdiction of the Qatar International Court and Dispute Resolution Centre, a wholly separate jurisdiction to the state of Qatar in its own right although at present of limited significance in the context of construction arbitrations.²⁰

IRAQ

On paper, Iraq has established three arbitration centers in Baghdad, Basrah and Najaf. Arbitration has been recognised as a mode for dispute resolution under the Iraqi Civil Procedure Code since 1956, and was modernized in 1969 when the present Civil Procedure Code came into force. When compared to other Arab countries, this early legal development

¹⁷ N. Gregory Mankiw, *Principles of Economics*, (4th Ed.) (2007)

¹⁸ David Waugh, *Manufacturing industries (Chapter 19)*, *World development (Chapter 22)*, Geography: An Integrated Approach (3rd Ed.) (2000) pages 563, 576–579, 633, and 640

¹⁹ The World Bank: World Economic Indicators Database, GDP (Nominal) 2008, Data for the year 2008.

²⁰ Ibid

was hardly surprising as the British-backed monarchy that ruled Iraq during the 1920s to 1958 was interested in modernizing Iraq's legal system.²¹

However, in the early 1970s when the Ba'ath Party came to rule Iraq, a shift took place after the regime started consolidating powers domestically. This stymied earlier efforts to reform Iraq's interactions with foreign investors. Despite a construction boom throughout the 1970s, arbitration continued to dwindle in the background as Iraqi judges tended to interfere in arbitrations based on 'public policy' grounds. The anti-arbitration sentiment permeated commercial relationships, particularly in government-backed projects involving foreign contractors. Unreliability and uncertainty became synonymous with arbitration.²²

In 2006, the first democratically elected Iraqi parliament enacted the Investment Law to attract foreign investment, which recognised arbitration as a mode for resolving commercial disputes. However, it was not restricted to Iraqi arbitration, which in practice resulted in further desertion of the local arbitration centers as foreign entities resorted to more developed institutions. Today, only Najaf's arbitration centre is somewhat active. While the arbitration centers in Baghdad and Basrah continue to exist on record, they are not really utilized.²³

SAUDI ARABIA

Last year, Saudi Arabia's first commercial arbitration centre was formed to handle local and international commercial and civil disputes. The centre is currently drafting its own rules of arbitration. Historically, arbitration in Saudi Arabia has been under-utilized as a method of dispute resolution. The new centre represents Saudi Arabia's efforts to provide a forum for arbitration locally and worldwide. However, under local law, government bodies are restricted from using arbitration as a means of dispute resolution.²⁴

OTHER COUNTRIES

Other arbitration centers in the Middle East include the following:

- The Bahrain Chamber for Dispute Resolution;

²¹ Press Statement - Un Humanitarian Coordinator: Gaza Blockade Suffocating Agriculture Sector, Creating Food Insecurity, UN Office for the Coordination of Humanitarian Affairs, OPT (OCHA)

²² *Supra* note 4

²³ Richards and Waterbury, 203

²⁴ Alt Robert, *Index of Economic Freedom*, www.heritage.org

- The Cairo Regional Centre for International Commercial Arbitration;
- The GCC Commercial Arbitration Centre;
- The International Islamic Centre for Reconciliation and Arbitration;
- The Istanbul Chamber of Commerce Arbitration Centre;
- The International Court of Arbitration;
- The Lebanese Arbitration Centre;
- The Tehran Regional Arbitration Centre; and
- The Yemen Centre for Conciliation and Arbitration.²⁵

REFORMS

Not surprisingly, arbitration developments continue to take place across the region owing to the evolving role of arbitration in the Middle East. The reforms are not directed specifically at the construction sector but would apply generally across all sectors. The developments are anticipated to open up arbitration as the preferred dispute resolution tool across the Middle East for all disputes.

In Qatar, the Draft Qatari Law is expected to introduce numerous positive changes and new concepts to the existing arbitration provisions. As currently drafted, it unambiguously states that the decision to submit disputes to arbitration is solely that of the parties and the agreement to arbitrate may be documented in a separate stand-alone agreement or a clause contained in the contract. It also suggests that the arbitration agreement could be evidenced through correspondence in paper or electronic form. This should put an end to any arguments that an arbitration clause in a contract is not sufficiently clear to satisfy the requirements of Article 190 of the Civil and Commercial Procedure Law and that an agreement for arbitration should be a separate signed agreement. It may also eventually open up the possibility for parties to opt in, by agreement, to using arbitration as a method to resolve construction disputes where it was not envisaged when the contract was originally entered into. Where there is a valid arbitration agreement, the local courts are obligated not to accept jurisdiction

²⁵ *Supra* note 21

over a dispute which the parties previously agreed should be resolved by arbitration. It is clear, however, that the Draft Qatari Law grants the court controlling power of the legitimacy and enforceability of such arbitration agreements but the courts are limited to this review because if the agreement is valid, the courts must honour it. Nevertheless, if such a claim was raised before a national court, this would not stop the arbitration proceedings from being commenced or continued.

There is also a draft UAE Federal Arbitration Law that has been in circulation since 2006 with the latest draft being issued by the UAE Ministry of Economy in 2013. It intends to replace Articles 203 to 218 of the Civil Procedure Code and introduce a modern legislative framework for arbitration in UAE, in line with the UNCITRAL Model law.²⁶ It includes an intention to provide that no arbitration order is issued without verifying that it is not ‘in conflict with a ruling on subject of dispute passed by any UAE court of law’. Construed broadly, it may be interpreted to mean that an arbitration award may be prevented from being issued in a construction dispute where the nature of that dispute has already been tested by any UAE court of law. However, construed narrowly, it may only apply when dealing with the same cause of action between the same parties.²⁷

There are also rumors that influential Iraqi politicians are more likely to consider signing the Convention after 2020 as it becomes more challenging to enforce legacy-based claims in Iraq due to the statute of limitation.

CONCLUSION

Arbitration centers in the Middle East are growing in significance and are being used increasingly in construction disputes. This is reflective of the developments in legislation setting the framework for arbitrations and enforcement of awards and encouraging government bodies in the Middle East to use arbitration as a method of dispute resolution. Global construction companies are increasingly getting more comfortable dealing with disputes in the region as the arbitration centers embed international standards. This is a positive step, contributing to developing market confidence of the international business community and encourages foreign direct investment. This is critical for countries in the Middle East to diversify their economies.

²⁶ *Supra* note 4

²⁷ Iran offers incentives to draw investors, www.presstv.com

PROSTITUTION: A REASON FOR HUMAN TRAFFICKING

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Abstract

Human trafficking is evidently violation of human rights. As per the statistical data, the most heinous racket of human trafficking involves commercial sex. Presently, prostitution is a criminal transgression in India. Victims of human trafficking are mostly females and the enormous majority finish off being sexually exploited through prostitution. In this regard the law can play a vital role in combating prostitution and it would reduce human trafficking. Apart from the role of the State, social organizations like NGO's can play vital role in reducing human trafficking. Prostitution promotes Human Trafficking in regard to the increasing rate of child sexual exploitation. Sex trafficking would not have existed without the demand for commercial sex. In this racket there is no identity of the individuals but they are known as commercial exploits. But there is another side to this story. The Law governing prostitution in India is the Immoral Traffic (Prevention) Act, 1986 and it explains that the law does not criminalize prostitution but it prevents organized form of prostitution. Sex work can be legalized only when it is controlled by the government as a means to reduce crimes and atrocities on women. The NGO's and the State should take initiatives in providing the victims the means of livelihood and dignity so that they may not necessarily go back to the old profession. If this is to happen, these girls and women must be rescued from the clutches of the traffickers.

This will help in regaining their health position and honor in the society.

Keywords: child sexual exploitation, commercial sex, government initiative, human trafficking, legalizing prostitution.

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INTRODUCTION

Trafficking is caused by an amalgamation of factors which include poverty, corruption, and financial deprivation, incompetent legal systems and the inducement of financial gain in the trade. With the increase in migration across the world and the continued restrictions on movement of labour, irregular migration such as trafficking and smuggling has increased significantly. Trafficking is regarded a specific, gender-based harm. The majority of trafficked persons are women. Women are trafficked for the purposes of exploitation in - most often - typical gender-specific labour, such as forced prostitution, sex tourism, domestic work or into commercial marriages and suffer gender-specific harm. Unequal access to education, traditional practices, limited possibilities for women to access or own land and property and other forms of gender discrimination increase the vulnerability of women and girls to trafficking.¹ Trafficking is not prostitution. As per the, Immoral Traffic (Prevention) Act 1956 (ITPA) prostitution becomes an offence when there is commercial exploitation of a person. If a woman or child is sexually exploited and any person gains out of the same, it amounts to commercial sexual exploitation (CSE), which is a legally punishable offence wherein the culpability lies against all exploiters. Trafficking is the process of recruiting, contracting, procuring or hiring a person for CSE. Therefore, trafficking is a process and CSE is the result. The ‘demand’ in CSE generates, promotes and perpetuates trafficking. This is a vicious cycle². Human trafficking has recently emerged as an important social issue in our country. Prostitution is the oldest profession in the world and therefore women are either forced or induced into the trade. Trafficking continues to be a problem mostly due to lack of action. Law enforcer and local police are often customers and deal with traffickers. Another reason that trafficking continues to increase with relative ease is because the legal system in India and its neighborhood have lax rules in dealing with these problems. Primarily human trafficking is done, to fulfill the purposes of, bonded labour, forced labour, sex work and organs trafficking. Amongst these, human trafficking for sexual purposes, known as sex trafficking, is the major thrust area. That prostitution has been going on in most of the countries is universally recognized. Unfortunately, no serious attempt has been made by the state and the society to control the menace.

¹Annette Lansink, *Human Rights Focus on Trafficked Women: An International Law and Feminist Perspective*, Agenda: Empowering Women for Gender Equity, No. 70, Gender-Based Violence Trilogy, Volume 1, 2: Trafficking (2006), page 45-56

² P.M. Nair, *Trafficking women and children for sexual exploitation*, United Nations Development Fund for Women, 2007

HISTORICAL BACKGROUND

Prostitution is the worst form of exploitation of women and as an institution it speaks of man's tolerance of this exploitation on an organized level in society. Women are vied solely as a sex object and as an outlet for man's baser instincts. Some societies have continued to regard prostitution as a necessary evil and have tolerated it as such.³ Human Trafficking in women is considered as both a cause and effect of human rights violations.

In the 19th century, certain social customs were responsible for any women restoring to this profession, who were otherwise outside the hereditary and customary groups of prostitutes. The spread of child marriages, early widowhood, social taboos on widow remarriages, caste rigidity, dowry system and the practice of polygamy and polyandry among certain communities, the decay in the joint family system, and the generally low status accorded to women in society contributed to women being driven to prostitution as the only occupation for livelihood. At the same time, the beginning of industrialization and consequent urbanization in the latter part of the 19th and early 20th century drew in large number of women other than hereditary prostitutes into this profession. One reason was the wide sex disparity in the big cities when the migrant worker who had to leave his family behind in the village for mainly economic reasons, became a customer for the prostitutes.⁴

In India, the Devadasi system, a Hindu practice of temple prostitution, has existed for more than 5,000 years. The system which was so widespread in pre independence India that it necessitated legal measures such as the madras Devadasi Prevention and Dedication Act of 1947 and the Bombay Devadasi Protection Act of Mysore, Andhra Pradesh and Orissa, practiced particularly by the lower castes. A study conducted in Bombay in the mid sixties reported that as many as 30 percent of Bombay prostitutes were of Devadasi origin. In a study of the Bijapur district, girls are still dedicated to the temples amongst certain sections of the lower castes and enter the occupation with the consent of the parents. No social stigma is attached to this. The reason is mainly economic. These girls are also taken out of the town or village by an agent and a large part of the earnings of the Devadasi goes to the family members and agents.⁵ It has been described as 'the world's oldest profession'⁶.

³ Maya Majumdar, *An Unfortunate Lot, Social Status of Women in India*, Wisdom Press, Delhi, 2012, page 64

⁴ Ibid

⁵ Ibid at page 65

⁶ Keegan Anne, *World's oldest profession has the night off*, Chicago Tribune, July 10 1974

A recent study of the immoral trafficking of women from the Purola Block of Uttarkashi district (UP), reveals that a large number of girls from the lower socio-economic communities go for prostitution. In 1969, 45 women had entered and remained in this profession for three years. It was estimated that about approximately 500 families were dependent on this profession on account of extreme poverty. 60 percent of girls from Rawain area were operating in Delhi and 77 agents were engaged in procuring women for prostitution.⁷

Prostitution must not be observed from the conventional or chronological aspect, but it should be viewed as a form of exploitation of women. According to Mahatma Gandhi, "Man is primarily responsible for the existence of these unfortunate members of society." It has been commercialized and a large number of mediators, brothel keeper, etc., for whom the profit earning has become the vital principle, and this has amplified the exploitation of the females.

PRESENT SCENARIO

Undeniable is the fact that trafficking of women and children and forcing them to sell their bodies for sexual exploitation is a grave violation of human rights. The traffickers in India by playing on the relationship of trust and affection, with promises of easy earnings are able to acquire the assent of families to take girls and young women away to what their families see as improved opportunities in life and later those women are end up being sexually exploited and a victim of sex trafficking.

UN definition of trafficking: Trafficking is not a new phenomenon. Yet, only recently international consensus was reached on a precise and unambiguous definition of trafficking. The four early international treaties on trafficking (1904, 1910, 1921 and 1933) were consolidated in 1949 by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This treaty connects trafficking to prostitution across borders and within a country. The preamble of the 1949 convention states that '*prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community*'. It aims at punishing those who

⁷ *Supra* note 3

procure, entice, lead away or exploit a person for the purposes of prostitution *even with the consent of that person* as well as those keeping or financing brothels.⁸

Men who frequently visit brothels, strip clubs, massage parlors, escort agencies and street corners want limitless access to the supply of females from different countries, cultures and backgrounds. This invariable demand for ‘new merchandise’ is what dictates the international trade in women and girls. If men did not take for granted that they have the explicit right to buy and sexually exploit women and girls, the trade in females would not exist.⁹

Human Trafficking has become a global phenomenon which has gained impetus in recent years. The response systems are incapable to address or redress their grievances and, often, exacerbate the harm and sufferings of these women and children. According to estimates by the United

Nations, up to 200 million women and girls are demographically ‘missing’.¹⁰ Prostituted women have a very high probability of acquiring sexually transmitted diseases, including HIV/AIDS. They usually suffer unwanted pregnancies, infertility and miscarriage.

Many experience serious post-traumatic stress disorder. Many slide into drug and alcohol abuse. Suicide rates are high. Prostitution is often also the means of rape of children. The UNFPA estimates that each year 2 million girls aged between 5 and 15 are introduced into the commercial sex market.¹¹

Susceptibility of sex trafficking resulting into prostitution mainly arises because of the pitiable economic state of affairs, existence of gender-based violence and political instability like wars, internal disturbances etc. Conflict-ridden areas which have actual war or the mere presence of military bases create demand. These areas are characterised by the presence of sex workers and child soldiers. Government power in such areas is limited. Economic and social conditions like poverty and its resultant factors of social and cultural exclusion is a major problem. Socially and culturally excluded sections of the society are more prone to get trapped in to the trade.

⁸ *Supra* note 1

⁹ Monica o’Connor and Grainne Healy, *The links between prostitution and sex trafficking*, 2006

¹⁰ A. Diamantopoulos, Speech at the conference ‘Violence against Women: Zero Tolerance’, (Lisbon,4 May 2000), Available at http://www.eurowrc.org/13.institutions/1.ec/ecen/05.ec_en.html

¹¹ Marie Vlachovd and Lea Biason, *Women in an insecure world*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), September 2005

India is unable to combat the widespread virus of human trafficking especially in the area of commercial sex where people are enforced to do activities in order to satisfy the customers.

SEXUAL VIOLENCE DURING ARMED CONFLICT:

During armed conflicts the women are exposed to marginalization, prostitution, rapes, and unwanted pregnancies. Women are the worst sufferers as they are trafficked due to the demand from both the combatants on the frontlines and by the peacekeepers present to maintain the peace. Current conflicts have tinted the methodical and precise targeting of women for sexual brutality. Sexual violence is used as a method of warfare mainly to humiliate and demoralize the opponent. The consequence of sexual violence in armed conflicts has severe social, cultural, conjugal, bodily and psychological repercussions. There has been a prominent increase in HIV/AIDS infection along the corridors of armed conflict.

A woman who has suffered sexual violence is often ostracized by her family or the wider community, due to the perception that the woman has brought ‘dishonor’ upon them. Children born of sexual violence may need particular protection and assistance, as share the stigma of the rape. Those who work with survivors of sexual violence testify that breaking down the taboos surrounding rape and sexual assault takes a long time. Survivors of sexual violence may experience severe, ongoing physical injuries. The nature of physical injury after sexual torture (such as cutting off breasts) is an ever present, horrific reminder of the rape. Some of the most frequent psychological symptoms are anxiety, sleep disorders, nightmares loss of self-confidence, depression and, in more severe cases, psychosis. Self-loathing and suicide are not uncommon responses.¹²

LEGAL PERSPECTIVE:

In the context of ITPA especially S.5 ITPA states that Procuring, inducing, trafficking or taking persons for the sake of prostitution. Even attempt to procure or take would constitute this Offence¹³. ITPA provides punishment even for attempt to traffic a person. Therefore, even before the person is physically trafficked, the law comes into operation.

¹² Ibid

¹³ Section 5, ITPA

All those who abet or support the exploitation or any process involved in trafficking are triable under ITPA (sections 3, 4, 5, 6, 7, 9 ITPA, read with Chapter V of IPC dealing with abetment of offences).

As a typical example, under the **Indian Penal Code**, a trafficked girl child has been subjected to a multitude of violations. She has been:

- Displaced from her community, which tantamount to kidnapping/
- Abduction (Sections 361, 362, 365, 366 IPC may apply).
- Procured illegally (S.366 A IPC).
- Sold by somebody (S.372 IPC).
- Bought by somebody (S.373 IPC).
- Imported from a foreign country (if she hails from a foreign country, or even from J & K State, and is under 21 years of age – S.366 B IPC).
- Wrongfully restrained (S.339 IPC).
- Wrongfully confined (S 340 IPC).
- Physically tortured/injured (S.327, 329 IPC).
- Subjected to criminal force (S. 350 IPC).
- Mentally tortured/harassed/assaulted (S. 351 IPC).
- Criminally intimidated (S.506 IPC).
- Outraged of her modesty (S 354 IPC).
- Raped/gang raped/repeatedly raped (S 375 IPC).
- Subjected to perverse sexual exploitation ('unnatural offences') (S.377 IPC).
Defamed (S 499 IPC).
- Subjected to unlawful compulsory labour (S.374 IPC).
- Victim of criminal conspiracy (S 120 B IPC)¹⁴

The constitution of India prohibits trafficking under article 23. It specifically prohibits traffic in human beings and beggars and other forms of similar forced labour.¹⁵ The inclusion of article 23 which prohibits trafficking has indeed helped the aggrieved to seek redressal but unfortunately it has failed to provide adequate protection to the sex workers in regard to the

¹⁴ *Supra* note 2

¹⁵ Article 23, Constitution of India

vulnerability of violence in their work places and also to the sexually transmitted diseases. The role of the society or the NGO's in this regard is very important.

Section 8 of The Immoral Traffic Prevention Act, 1956 allows arresting of those who are engaged in acts of prostitution like seducing or soliciting for the purpose of prostitution.¹⁶ The consequence of the Section 8 of the ITPA act is that the victims of the trafficking constitutes the largest number of arrestees rather than the trafficker which is affecting the victims of trafficking and has failed to provide sufficient attention to the aggrieved sex workers.

Although India has number of laws relating to the prohibition of the immoral acts, yet it has failed either to reduce the atrocities on the sex worker or to stop the diseases associated with the trade. The NGO's and the State should take initiatives in providing the victims the means of livelihood and dignity so that they may not necessarily go back to the old profession. If this is to happen, these girls and women must be rescued from the clutches of the traffickers.

CONCLUSION

The conditions of the trafficked women need to be improved and their emotional and psychosomatic problems are to be tackled with understanding. Prostitution has to be curbed and essential preclusion has to be done. Counseling services could help them and prevent their taking recourse to this profession. Counseling centres should also have homes for such women.

The scale effect of legalizing prostitution leads to an expansion of the prostitution market and thus an increase in human trafficking, while the substitution effect reduces demand for trafficked prostitutes by favouring prostitutes who have legal residence in a country. Our central finding, i.e., countries with legalized prostitution experience a larger reported incidence of trafficking inflows, is therefore best regarded as being based on the most reliable existing data, but needs to be subjected to future scrutiny. More research in this area is definitely warranted, but it will require the collection of more reliable data to establish firmer conclusions.¹⁷ In the profession of prostitution, there is also a precise sort of dehumanization experienced by women who are prostituted. Most of the women experience being treated like

¹⁶ Section 8, Immoral Traffic Prevention Act, 1956

¹⁷ Seo-Young Cho and Axel Dreher, *Does Legalized Prostitution Increase Human Trafficking?*, World Development, Vol. 41, page 67–82, (2013), www.elsevier.com

a certain kind of object. They do experience a certain kind of abhorrence towards their body. In a male dominated society like India what prostitution does is that it establishes a social bottom beneath which there is no bottom. It is being believed that prostituted women are all on the bottom and all men are above it. In the earlier days women are treated as chattel by men but the society has changed from that period. The women are more empowered now. And the waves of feminism have contributed a lot in this regard. Women have been fighting continuously for their rights. But the existence of prostitution still indicates male dominance. It shows that though the time has passed, but even now the women are being used and abused by the men. Prostitution is a dreadful harm to women, it is abusive in its very nature, and that prostitution amounts to men paying for a woman for the right to exploit her. So, we can say that prostitution leads to human trafficking. Elimination of prostitution may also elevate complicated matters concerning to liberty of selection of both the potential suppliers and clients of prostitution services. Whether to allow prostitution or not to allow is beyond the scope of this article. Men and women are differently situated when accessing human rights. They are also trafficked in different ways and for different reasons. Trafficking violates the right to dignity and integrity of the trafficked person but is also a specific gender-based harm. Advocating for a human rights approach to trafficking does not diminish the importance of a criminal justice approach to human trafficking but rather integrates human rights into prevention, protection and prosecution.¹⁸

Legalizing prostitution is a dreadful idea, instead of it the government should work very dynamically at ending prostitution, which in our opinion would significantly contribute to the elimination of trafficking in persons and human sexual slavery. Prostitution is intensely rooted in a double standard of morality for men and women. Evidently, maintaining prostitution maintains that double standard rooted in that inequality. That is why legalizing prostitution is wrong as it indicates women's subordination.

¹⁸ *Supra* note 1

BOOK REVIEW

BIOTECHNOLOGY AND INTELLECTUAL PROPERTY RIGHTS- LEGAL SOCIAL IMPLICATIONS

Author(s): Dr. Kshitij Kumar Singh, Year: 2014, **Format:** Hard Cover, **Edition:** First,
Publisher – Springer New Delhi, India

Dr. Manish Yadav* & Dr. Himanshu Pandey**

Undertakes the analysis of legal as well as social implications of biotechnology and Intellectual Property Rights by focusing particularly on human gene Provides insights of biotech patent trend and its implications in different social, political and economic set up Presents interpretation of facts and theories that suggests meaningful solutions to the contemporary problems

This book offers a valuable contribution to contemporary legal literature, providing deep insights into the interface between law and genetics, highlighting emerging issues and providing meaningful solutions to current problems. It will be of interest to a broad readership, including academics, lawyers, policy makers and scholars engaged in interdisciplinary research.

In the context of examining and analyzing the legal and social implications arising from the recent conjunction of biotechnology and intellectual property rights, the book particularly focuses on human genes and gene variations. Emphasis is placed on “patent law,” as a considerable percentage of genetic inventions are covered by patents. The book presents a comparative and critical examination of patent laws and practices related to biotechnology patents in the United States, Canada, European Union and India, in order to gather the common issues and the differences between them. The international patent approach regarding biotechnology is also analyzed in light of the constant conflict between differentiation and harmonization of patent laws. The book highlights the potential gaps and uncertainties as to the scope of numerous terms such as invention, microorganisms, microbiological processes, and essential biological processes under TRIPS. Also analyzed are

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the social and policy implications of patents relating to genetic research tools and genetic testing. The intricacies involved in providing effective intellectual property protection to bioinformatics and genomic databases are also examined. Bearing in mind the collaborative nature of bioinformatics and genomic databases, the book evaluates the pros and cons of open biotechnology and assesses the implications of extending intellectual property rights to human genetic resources, before explaining the ownership puzzle concerning human genetic material used in genetic research.

Recent conjunction of biotechnology and intellectual property rights has long-term implications for law and society. Intellectual property laws that were framed in industrial age have proved to be insufficient in the current information age. In the present age, modern biotechnological inventions, particularly genetic inventions differ markedly from chemical and mechanical inventions that have been the traditional subject matter of patents. With the development of human genomics and success of Human Genome Project, gene becomes more important because of its informational content rather than its material qualities (physical attributes). Moreover, the emergence of bioinformatics and genomic databases has changed the face of biotechnology from lab-based technology to computer-based science, posing new challenges for intellectual property laws. In addition to legal implications, patents on gene and gene fragments have significant social and policy implications. Overbroad patent claims on genetic research tools and diagnostic genetic testing and aggressive licensing practices relating to them have serious implications for genetic innovation, health policies, patients' rights and society at large. In genetic research, increased extension of intellectual property rights to human genetic material may have an adverse impact upon the interests of research subjects from whom the human genetic material is extracted. Against this backdrop, the book analyses the legal and social implications arising from the conjunction of biotechnology and intellectual property rights, focusing particularly on human gene and genetic variations.

The book locates emerging legal, social and policy issues pertaining to biotechnology and intellectual property laws and suggests some meaningful solutions to them. The discussion in the book is streamlined to respond to few important questions: whether existing intellectual property laws at national and international levels can cope up with the challenges posed by biotechnology (especially genetic technology); whether aggressive assertion of intellectual property rights to genetic research tools, fundamental genetic research and human genetic resources stands in conflict with the rights of patients, independent researchers and research

subjects; and whether open and collaborative biotechnology promotes genetic research and innovation. There are numerous books on intellectual property rights which deal with biotechnology, however, the present book provides a comprehensive overview of biotechnology and intellectual property rights and connects various aspects of the topic in an integrated manner, providing a fresh insight of law–biotechnology interface in tune with the current information age. It is aimed at providing basic and comprehensive knowledge pertaining to the topic to a wide range of audience comprising legal practitioners, law students, researchers and scholars interested in interdisciplinary research, policymakers and others interested in biotechnology and intellectual property rights.

The book is divided into seven chapters. *Chapter 1* introduces the theme of the book and contains the background of the book, the concepts of biotechnology and intellectual property rights and the framework of the book. In *Chapter 2*, the book analyses the patent approaches of the USA, European Union, Canada and India on the basis of patent laws, administrative decisions and case law, bringing common points and differences among and between them. The book concludes that the selected countries for the study vary significantly in their approach to biotechnology in degree of patent protection and patent exclusions; however, all of them recognise patenting of biotechnology invention, given its commercial potential. In *Chapter 3*, the book analyses the international patent regime dealing with biotechnology, highlighting the potential gaps and uncertainties as to the scope of numerous terms such as invention, microorganisms, microbiological processes, essentially biological processes under TRIPS. It also discusses the impact of such uncertainties on developing countries given their relatively slow pace of scientific and technological development and the persistent conflict between developed and developing countries regarding the harmonization of patent laws. *Chapter 4* of the book undertakes the analysis of the social and policy implications of patents on genetic research tools and genetic testing and comes up with the conclusion that these concerns cannot be adequately addressed only by making changes in the patent systems as patent law is not expected to provide solutions to broad social and policy issues. It insists upon formulating policies and making legislations specific to genetic patents to regulate the patent practices such as patent licensing in order to provide viable solutions to such issues. The book analyses the ill effects of Myriad Genetics' patent claims on BRCA-1 and BRCA-2 gene, which prevents patients from taking a second opinion and verification testing. It concludes that in diagnostic field, exclusive licensing of genetic tests often obstructs the accessibility of genetic innovation or diagnostic genetic testing and advocates for non-

exclusive licensing. In *Chapter 5*, the book examines the intricacies involved in providing effective intellectual property protection to bioinformatics and genomic databases and suggests a comprehensive review of existing intellectual property laws in the light of present information age.

Keeping in view the collaborative nature of bioinformatics and genomic databases, the book evaluates the pros and cons of open biotechnology. The book analyses the extension of intellectual property rights to human genetic resources in the light of benefit sharing and informed consent in *Chapter 6*. It explains the ownership puzzle of human genetic material used in genetic research and suggests that ownership rights of research subjects in their extracted genetic material must be recognised.

The book insists upon a careful application of intellectual property rights to human genetic resources. The concluding observations and possible way outs are provided in *Chapter 7*.

Despite the complex nature of the topic, the book approaches the issues pertaining to the topic in a clear, integrated and meaningful way. Though the analysis of the patentability of biotechnology in the book is limited to four jurisdictions, it gives fresh insights of biotech patent trends in different social, political and economic setups. It would be helpful in striking a balance between harmonization and differentiation of patent laws. The analysis of social and policy implications of genetic patents is limited to available literature and supporting data. Since the science involved in biotechnology is of evolving nature, it is difficult to come up with definite solutions, however, the book provides an insight of law–biotechnology interface, highlighting emerging issues and providing some possible solutions to the existing problems.

NATURE, PURPOSE AND FOCUS OF THE BOOK

In the line of the foregoing discussion, the book analyses the legal and social implications arising from the conjunction of biotechnology (specifically, genetic technology) and IPR. The study concentrates on a particular aspect of biotechnology i.e. the human gene. Since the traces of human gene patents are deeply rooted in the development of biotechnology patents as a whole, the present study carries discussion on biotechnology patents. For the purpose of the book, legal implications mean the challenges posed by biotechnology (especially genetic technology) before the existing IP laws. Social implications mean the wider implications of the genetic patents on the society, comprising various stake holders as patients, researchers,

scientists, indigenous people and other social groups. The nature of the study is interdisciplinary, which focuses upon the interface of law and technology. In the discussion of the law-human genetic interface, ethical concerns are bound to come. These ethical concerns sometimes guide law to promote social good and reach legal excellence. Therefore, though the present study is primarily concerned with the legal and social implications, it also includes concerns relating to bioethics.

The book adds to the existing knowledge, giving fresh insights regarding the patent approaches of various countries to human gene patents. It analyses the potential gaps and ambiguities in international patent laws in the light of harmonisation and differentiation of patent laws. The book would be useful for India to develop better understanding of biotechnology patents by looking into the IP approaches of different countries and international practices and select the best, most appropriately suited to its own conditions.

THE FRAMEWORK OF THE BOOK

The book is divided into seven chapters. *Chapter 1* introduces the topic in a lucid way, giving a proper legal and scientific background and connecting various aspects of the study. It contains the background of the book, conceptual framework of biotechnology and IPR, nature, purpose and focus of the book and the theme of the chapters.

Chapter 2 analyses the different patent approaches adopted by the USA, Canada, European Union and India regarding biotechnological inventions (especially genetic inventions) to bring about common issues and differences among these jurisdictions.

In Chap. 2, the author analyses the patent approaches of the USA, European Union, Canada and India on the basis of patent laws, administrative decisions and case laws, bringing common points and differences among and between them. The author comes up with the conclusion that the selected countries for the study vary significantly in their approach to biotechnology in the degree of patent protection and patent exclusions; however, the common point among them is that they all recognize patenting of biotechnology invention, given its economic value. He concludes that patent laws in the entire four jurisdictions struggle to cope up with new biotechnology inventions. In the light of such struggle, the author insists upon a comprehensive review of existing patent laws to address the genetic inventions in tune with the information age. He maintains that lack of such approach may prevent some useful inventions from society. As regards to the divergence in patent approaches of countries opted

for the study, the author emphasizes that the patent approach should always follow the socio-economic conditions of a particular country. He adds further that while making a distinction between patentable and non-patentable subject matter, the degree of human intervention should be considered.

In *Chapter 3*, the author analyses the international patent regime dealing with biotechnology, highlighting the potential gaps and uncertainties as to the scope of numerous terms such as invention, microorganisms, microbiological processes, essentially biological processes under TRIPS. He also discusses the impact of such uncertainties on developing countries given their relatively slow pace of scientific and technological development. The author explains the intricacies involved in providing an effective patent protection to new biotechnology inventions (that differ markedly from traditional subject matters of patents) at the international level in the light of technology neutral character of TRIPS.

Chapter 4 includes the study regarding the implications of patenting of genetic research tools and basic genetic research on the accessibility of genetic innovation. It discusses the viability of research exemption clauses under patent laws, and other relevant statutes regarding the accessibility of genetic research tools. The emphasis is on the patenting of genetic tests for diagnostic purposes and their impact on the rights of patients, researchers and other stakeholders. In this chapter, the author undertakes a detailed study of Myriad Genetics' patents on BRCA1 and BRCA2 genes, which prevents patients from taking a second opinion and verification testing.

The author maintains that the social and policy implications of patents on genetic research tools and genetic testing cannot be adequately addressed only by making changes in the patent systems as patent law is not expected to provide solution to broad social and policy issues. He insists upon formulating policies and making legislations specific to genetic patents to regulate the patent practices such as patent licensing in order to provide viable solutions to such issues. The author adds that exclusivity provided by aggressive patent licensing strategies may not be in the public interest, and there is a continuing need for active defence of open science.

In *Chapter 5*, the author examines the intricacies involved in providing effective intellectual property protection to bioinformatics and genomic databases and suggests a comprehensive review of existing intellectual property laws in the light of the present information age.

Keeping in view the collaborative nature of bioinformatics and genomic databases, the author evaluates the pros and cons of open biotechnology. He suggests that a variety of licensing schemes with or without intellectual property should be used to support the open nature of bioinformatics and genomic databases. The author adds that the intellectual property approach to bioinformatics should be balanced in such a way that it should not only incentivize the inventor or creator but also ensure the open and collaborative nature of bioinformatics.

In *Chapter 6*, the author analyses the extension of IPR to human genetic resources in the light of benefit sharing and informed consent. He explains the ownership puzzle of human genetic material used in genetic research and suggests that ownership rights of research subjects in their extracted genetic material must be recognized.

Further, if researcher or sponsor conducting the research gains any benefit, the equitable sharing of that benefit must also be recognized. The author insists upon a careful application of IPR to human genetic resources. He also suggests that a clear distinction should be made between human genetic resources and nonhuman genetic resources and demands a specific legal approach to the former at the international level.