



Email: editor.lexrevolution@gmail.com

Volume-VI

Issue-1

Jan-Mar 2020

ISSN 2394-997X  
*Lex Revolution*

Periodical Indexed  
(Journal of Social & Legal Studies)  
in association with  
**Amity Law School, Amity University Haryana (Gurugram)**  
Presents Special Issue  
**Volume-VI, Issue-1, Jan-Mar 2020**



*“The principle of fair trial now informs and energises many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing, and endeavouring to meet the exigencies of the situation - peculiar at times – and related to the nature of crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavour of the higher courts, while interpreting the law, is to strike the right balance.”*

- Navin Sinha, J. in  
*Varinder Kumar v. State of H.P.*,  
(2020) 3 SCC 321, para 14

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## ***Lex Revolution***

Periodical Indexed Journal of Social & Legal Studies

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Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else. The Journal follows double-blind peer review process for selection of the manuscripts for publication.

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- To provide a platform to discuss the problems related to socio-legal and research issues.

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## **MESSAGE FROM THE DESK OF SPECIAL EDITOR-IN-CHIEF**

Amity Law School, Amity University Haryana organised its 3<sup>rd</sup> International Conference, on 08-09 November 2019, on the Theme, “*Criminal Justice System: National and International Perspectives*”. The focal objective of the Conference was to afford an International forum for conversation on issues associated with Criminal Justice System and deliberate upon the possible solutions to reform the Legislative and Administrative aspects of Criminal Justice. The Conference brought together Jurists, Research Scholars, Professionals and Students, National and International, who mulled over and had a healthy discussion on the varied aspects of Criminal Justice. Nearly 150 Papers were received with more than 100 Delegates attending and presenting their research work. It was heartening to see that many new and innovative ideas and legal aspects came up during this Conference, which would pave the way for further research.

It is my pleasure to introduce this Special Edition Issue of Lex Revolution Vol-VI, Issue-1 2020 which focuses exclusively on the National and International Perspectives of the Criminal Justice System.

The Issue explores the depths and levels a country would go to provide proper justice to all its citizens by examining the current established Criminal Justice System. It analyses the extent to which the development and progression of any country is affected by its Justice System. The Issue also highlights the methods whereby the Justice System is continuously tested on the touchstone of preservation and prevention of human dignity and the rights of both the accused and victim.

The Special Issue is a collection of selected Articles that explore, analyse and critically review the various aspects of the Criminal Justice System, both from National and International perspectives.

I hope this Special Edition will appeal to and raise interest among Academicians, Scholars and Practitioners, not only in the field of Criminal Law but other Social Sciences too.

***Maj. Gen. P. K. Sharma (Retd.)***  
Prof. & Director, Amity Law School,  
Dean Faculty of Law, AUH

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## **YEMEN V. INDIA: COURTS OF CRIMES**

Mr. Abdulrahman Abdo Shawqi Subih\* & Dr. Visitsak Nueangnong\*\*

### ***Abstract***

*Yemen is a republic democratic Islamic country, located in the Middle East. After the huge immigration of the Yemeni Jewish to Israel, the whole country's population has turned to be 100 % Muslims. The Islamic rules (Sharia'a's rules) govern the system of the government. The crimes and their punishment are applied in accordance of the Islamic rules. Based on the article (3) of the constitution of Republic of Yemen, any rule of law conflicts with any Islamic rule is avoided. Courts of crimes in Yemen contain of three degrees of litigations; it starts from the primary court of crime and ends up with a Supreme Court's criminal circuit, which is the highest degree trial.*

*This paper will show a brief introduction about the Courts' Criminal Justice System in common. It also will explain the components of Criminal Justice System. Besides that it will clear the confusion between the systems of criminal courts in these selected countries. Short history about Indian Criminal Justice System will be illustrated as part of this article. On one hand, in details with help of diagram, the hierarchy of Indian Judicial System and Indian Courts' Structure will be brought into this paper to manifest different types of Indian courts in general and criminal courts in specific. On the other hand, the same will be applied for explaining the Yemeni Criminal Justice System. This work will conclude the main differences between two courts criminal justice systems.*

**Keywords:** *Criminal Justice System; Courts of Crimes; Customary Law; Supreme Court; High Courts; Appellate Courts; Courts of First Instance.*

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## INTRODUCTION

In very past society, the crimes occurred differently; *i.e.*, the tools of committing the crime of that time were very primitive whereas the tools of today are very fast and technological. Where the offences exist, there will be a criminal justice system to punish the offender and spread the peace and justice in the society. Medieval time showed a severe punishment and unkind torture for offences that today are not offensive. Medieval folks lived in fear, thinking of that kind of punishment. Therefore, the rate of crime at that time was very low.

Head of the tribe was the judge who can punish the offender on based of his/her crime. The criminal justice system in the Catholic community, the Church was the punisher for the criminals; torturing and imprisoning were the ways of taking confessions from the suspects of committing the crime. Suffocation the guilty in the water was a common punishment in the Egyptian civilization. Not only they suffocate the guilty in the water, but also they put him/her into boiled oil.<sup>1</sup>

The slaves only can be tortured and punished in the law of Roman and Greek. But eventually, this law was amended to include the freemen in the punishment and torture.

A thousand and four hundred years ago, the thief's hand was cut off. Women committed an adultery act were stone until death. "*A tooth for a tooth, an eye for an eye, a life for a life*" was the criminal justice system at that time. Then as result of acceptance the compensation for the injured person, the compensation system appeared as part of evolution of criminal justice system. Subsequently, a sliding scale occurred place for satisfying ordinary offences.<sup>2</sup>

For safety of the society and deter wrongful conduct, Criminal Justice System is created. It is a system of legal rules designed to keep the public safe. The one breaks the law face incarceration, fines, and other penalties.<sup>3</sup>

Felony are serious crimes such as murder, rape, and burglary, as well as white collar crimes like embezzlement and money laundering.<sup>4</sup> These crimes have a long term punishments of a year or more in state or federal prison.<sup>5</sup>

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<sup>1</sup> T. Nash, *Crime and Punishment in the middle Ages*, The Finer Times, Available at: <http://www.thefinertimes.com/Ancient-History/crime-and-punishment-in-the-middle-ages.html> (Accessed on Oct 26, 2019, 07:18 pm)

<sup>2</sup> 30 Y. V. Chandrachud & V. R. Manohar, The Indian Penal Code i-ii (30 ed. 2004).

<sup>3</sup> HG.org Legal Resources, *Criminal Law, Guide to Penal Code*, Available at: <https://www.hg.org/crime.html> (Accessed on Feb 01, 2019, 01:33 am)

‘Stare decisis’ is a criminal terms which means precedent. Stare decisis, it is one of principals of interpretation of law; when judges and lawyers turn to previously decided issues under same circumstances that ruling is binding precedent for similar disputes that come before the court on a later date.<sup>6</sup>

The police department is the solo responsible of Law enforcement. It has a responsibility to investigate alleged crimes. Procedural rules are to protect the citizens’ constitutional rights from being violated by the police officers who investigate with the citizens.

### ***Criminal Justice System’s Pillars***

Today’s Criminal Justice System has three pillars and cannot stand without them. The three pillars are in sequence; the Law Enforcement (Police), Criminal Courts, and the Corrections. These three elements are considered as the modern Criminal Justice System in anywhere of the planet. They are explained in details in the below.

#### ***The Criminal Courts***

The court system of any country around the world consists of the prosecution and defence lawyers, judges and juries (but in some countries the juries do not exist as part of courts staffs). They are to make sure offenders are given fair trials. Each one of the court’s force work has different role such as Judge is the finder of the facts, hear the cases and preside over the participants to make sure that all laws are followed while the cases are being tried.<sup>7</sup>

#### ***The Police***

The police force is the most significant part of the criminal justice system. It includes the local police department with its entire staff. They are on the apex of the criminal justice system because they are responsible to enforce the law on the territory. Perpetrators are captured by the law enforcement personnel who are also responsible for bringing forth charges against and ensuring the cases are strong enough to stand up in court.<sup>8</sup>

#### ***Corrections***

<sup>4</sup> 9 Oxford Advanced Leaner’s Dictionary, Definition of Felony,

<sup>5</sup> 30 Y. V. Chandrachud & V. R. Manohar, *Supra note 1*

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> Theresa Smith, *The Three Components of the Criminal Justice System*, LEGAL BEAGLE, Available at: <https://legalbeagle.com/6554727-three-components-criminal-justice-system.html> (Accessed on Feb 16, 2019, 12:55 am)

The corrections are the last element of the criminal justice system. Their function is to uphold and administer sentences handed down by judges. The corrections are twisted with the said two components. Likewise the above components have their corners, the corrections have their components which are for example; jails, prisons, correctional, probation and parole officers who ensure that a defendant's punishment and all of its stipulations are carried out.<sup>9</sup>

## **RESEARCH PROBLEM**

The criminal justice system is an essential need for any civilized society in the world. Security and peace are the result of strong criminal justice system. When the criminal is punished; it is a warning punishment for the individuals of the community who think committing the same crime in future by showing them will happen to them if they did the same. With the advancement of the technology, the criminal justice system has developed positively which coincided with the progress of the crime's tools.

Courts of Crimes are the exclusive entities to decide in the criminal cases. The structure of these courts differentiates from one to another country. For instance, in this research article, the courts' structure of the Republic of Yemen is slightly different from the structure of the courts in India. Therefore, this paper is a humble attempt to explore the differences between the Courts of Crimes in Yemen and the Courts of Crimes in India. This work will be more focused on the structure of the courts of crimes of Yemen. The reason for that is that this research article will be publish in India, and it is an opportunity to show the judicial system of the republic of Yemen and present it in the 3<sup>rd</sup> International Conference on Criminal Justice which is conducted in the State of Haryana, India.

The curiosity to explore the differences between two countries' courts of crime structures was the main goal of this research paper. It is obvious that India is a huge country with a fabulous criminal justice system which is not as same as Yemeni's criminal justice system. This study will help the find some merits of the Indian criminal justice system and apply them to the Yemeni's one.

## **OBJECTIVES OF THE RESEARCH**

- To identify the conceptual framework of the term (criminal justice system) and its components.

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<sup>9</sup>*Ibid.*

- To explore the difference between the courts of crimes' systems of Yemen and India.

## **RESEARCH HYPOTHESES**

- Whether the courts of crimes' system of India are similar to the Yemeni's courts of crimes' system?
- Whether India has a better criminal justice system than Yemeni's one or not?

## **LIMITATIONS OF THE STUDY**

This study is conducted to make comparison between the courts systems of India and Yemen. Hence, the study is confined between these two countries (Yemen and India). Criminal Courts are the main aim to be compared, but the study will extend to show the judicial structure of the courts in general for manifesting where the courts of crimes are located amongst all kinds of courts in common.

## **RESEARCH METHODOLOGY**

The major aim of the current study is to explore the courts of crimes' differences between India and Yemen. Therefore, the most suitable method of research is the exploratory method. It helps to clarify the problem that has not been defined yet; the Yemeni courts of crimes in comparison with Indian courts of crimes have not studied by any researchers before.

For data collection, the study takes its merits through the secondary data, the primary date as well. The primary legal sources of the study were collected from the both Indian Constitution and Yemeni Constitution. Some Statutes were included as primary sources of this legal research like *e.g.*, the Yemeni Ministry of Justice Statutes.

The secondary legal source of this legal research collected from the Central Library of Dr. Babasaheb Ambedkar Marathwada University. Further, the online data were quite enough to enrich this study. The study had advantages of the website of the Supreme Court of India which was vital for this research. In respect of the Yemeni online date, it was available only in the native language (Arabic), so the researchers had to translate it from Arabic into English.

## **YEMENI COURTS OF CRIMES: BACKGROUND**

Understanding the background of the Republic of Yemen will lead to clear picture on its criminal justice system; it shows the different civilizations that controlled and applied there criminal justice system on Yemen for a period of time. North of Yemen was governed by the Ottoman Empire from 1872 to 1918. After the Ottoman Empire, the Kingdom of Mutawakalia took the control over the north of Yemen. Imam Yahya ruled from 1918 to 1948 then his son Ahmed ibn Yahya until the revolution against him in 1961. The south of Yemen was under the British governance.<sup>10</sup>

The criminal justice system during those periods of time witnessed many changes. For example, in the Ottoman Empire, the courts' system was led by the Ottoman Commissioner who was empowered by the Emperor himself to settle the disputes in Yemen and to punish the offenders.

In the second period, Al-Mutawaklia Kingdom, the Imam was the ruler and the dispute settler. He had a full power of control over the north part of Yemen. Imam with help of his nominated Shaks ruled all areas that were under his power. The year of 1961 was the year of converting the whole system of the Mutawaklia Kingdom into the Republic Democratic of Yemen. The government system had changed from kingdom to democratic system on based the election process in choosing the president of Yemen.

## **YEMENI STATE AND NON-STATE CRIMINAL JUSTICE SYSTEM**

The Yemeni Criminal Justice system is a complex system; it is a combination of a unified formal state law, and historically strong informal justice regimen involving classical Sharia'a and customary laws. Those laws are correlated and are not separated. The Yemeni formal laws are derived from the pluralistic sources of law. There are, however, circa 70 Yemeni state laws which incorporate the Islamic laws and customary/tribal laws. They are extracted from the Egyptian, Arab, and International principles.

The Yemeni laws can be categorized into three types of laws as follows:

1. Personal Status Laws
2. Commercial Law
3. Criminal Law
4. Arbitration Law

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<sup>10</sup> Laila Al-Zwaini, State and Non-State Justice in Yemen, United States Institute Of Peace, (1<sup>ST</sup>ed, 2006).

### ***Yemeni Criminal Law***

The first criminal law in Yemen was issued in 1994, before this date; there was not any criminal law. The judges depended on the Sharia'a rules to settle and punish in the disputes. Article (2) of the Yemeni Criminal Law provides that "Criminal liability is personal, and there is no crime or punishment without a statutory law." This article obviously, on one hand, manifests the common liability which is not legitimated by the statutory law. On the other hand, it indicates that crimes and punishments can only be defined by state law.<sup>11</sup>

### ***Arbitration Law***

Law of arbitration is the law which governs the procedural relationship between formal and informal rules of law. It is concerned with the regulation of all procedures of the state and non-state laws. The latest law of arbitration was issued in 1992, the law mentioned in article (3) that all types of arbitration on Yemeni territory fall directly under the state's exclusive jurisdiction. The law also provided that all customary settlements should be based on statutory principles.

The law of arbitration forbade the following cases:

- Al Hudud
- Al Thohar
- Annulment of the marriage contract
- Impeachment and prosecution of judges
- Disputes related to the procedures of compulsory enforcement
- Other matters in which no mediation (*Sulh*) is allowed,
- Everything connected to the public order.<sup>12</sup>

### ***Mediation (Al-Sulh) and Arbitration (Al-Tahkeem) in Yemen***

The mediation and arbitration are the two common Yemeni Non-State Dispute Resolution Mechanisms. The litigants are tribe's members or rural area people. In this kind of disputes, parties are subjected to the traditions of the tribes in resolving the issue. Some folk feel that it is shameful to go to the court to get the dispute settled by the court. Hence, they prefer to resort to the tribe's leader for settlement. All kinds of the disputes can be resolved by this

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<sup>11</sup> *Ibid* at 11

<sup>12</sup> *Ibid*

mechanism. Whether the dispute is criminal or commercial, arbitration and mediation system are the best options for the tribal and rural people in Yemen.<sup>13</sup>

## **YEMENI COURTS OF CRIMES**

The May, 1991 Constitution of Republic of Yemen has guaranteed the separation and the independence of the judicial authority from other authorities of the government. The independence of judiciary stated in Section 3, Article 145 that “the judiciary is an autonomous authority in its judicial, financial, and administrative aspects. The General Prosecution is one of the judiciary’s sub-bodies. The courts shall judge all disputes and crimes, and its judges are independent, and are not subject to any authority but the law.” This Article mentioned the autonomy of the judiciary financially, judicially, and administratively. Furthermore, it gave a protection to the courts’ judges; they must be free of all pressures in deciding all matters. They are only subjected to the law.<sup>14</sup>

Section 3 of the Yemeni Constitution is concerned with the Judicial Authority. Therefore, articles of the Constitution (149, 150, 151, 152, and 153) explained the authority of the judiciary, the process of selection the judges, the constitutional protection for the judges and the prosecutors.

All kinds of litigations in Yemen pass two layers of trial; this first layer is the litigation in the courts of the first instance (Primary Courts). The second layer of the litigation in court trial is the cases that decided by the courts of the first instance have to go to the Appellate Courts, if they were appealed.

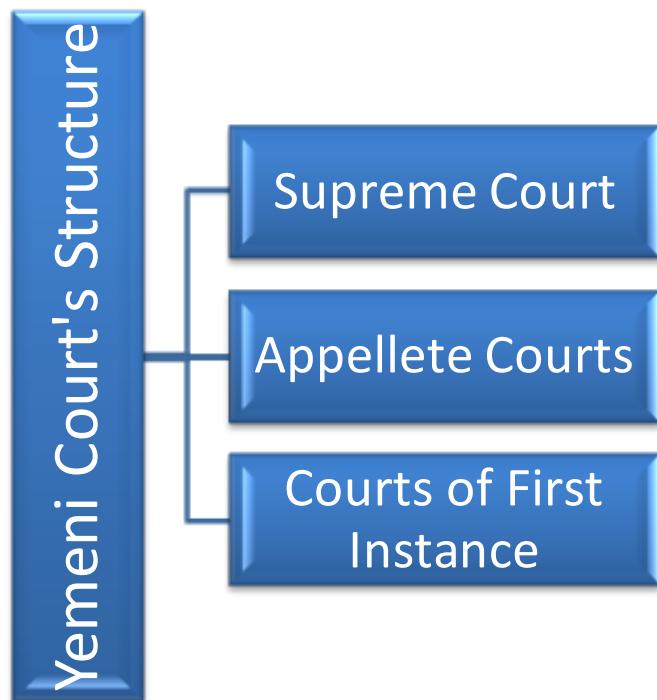
To sum up the Courts of Crimes in Yemen in a few lines; the demonstrations in the below will take the structure of courts’ system in Yemen in general way. To paraphrase that we are going to see where the criminal trial begins and where it ends up. On the contrary, not all criminal cases go to the criminal courts, but as it was previously explained, there are the mediation and arbitration system, which can resolve the criminal issues in the tribes, rural areas as well. In each level of the litigations, the courts of crimes are involved in the same building of other divisions. Even though, there is no a separate court of crime in the courts of first instance to look in the criminal cases, a specialized judge is appointed to look in the criminal disputes. Similarly, the same thing is in the Appellate Courts of Crimes; a criminal

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<sup>13</sup> *Ibid at 3-4*

<sup>14</sup> Yemini Constitution Art. 145, 23

judge or judges are meant to resolve the cases rose from the courts of first instance. Further, the criminal division in the Supreme Court is to settle the cases coming from the Appellate Courts by five specialized judges.



**Figure No. 1**

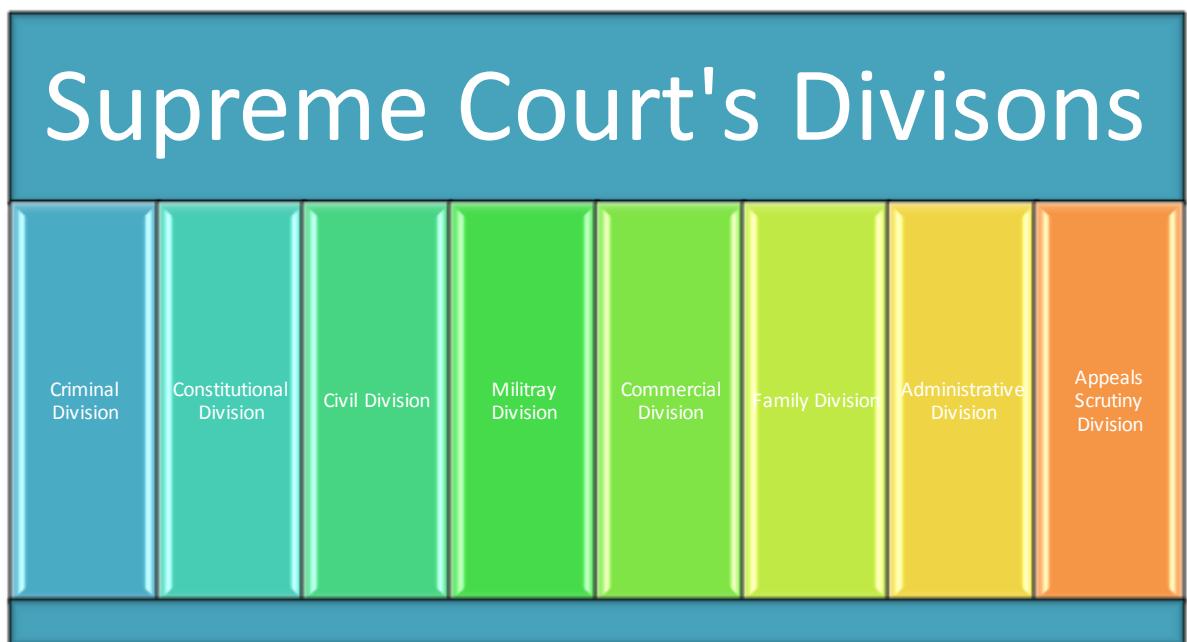
### **THE SUPREME COURT OF YEMEN**

Starting with the highest court in the country, the Yemeni Constitution in Article (153) provides that “the Supreme Court of the Republic is the highest judicial authority.”<sup>15</sup> The Supreme Court of the Republic of Yemen is located on the apex of the judicial authority. Currently, due to the conflicts the location of the Supreme Court has changed to the temporary capital city of Yemen (Aden) in south of the country. The structure of this court consists of the president of the Supreme Court on the top of the structure; the president has two deputies assist him in his work. 50 judges are members of the Supreme Court. These 50 judges work in 8 divisions in sequence; the constitutional, civil, commercial, family, administrative, criminal, military, and appeals scrutiny divisions (See Figure No. 2). Each division contains of five judges *e.g.*, the constitutional division has five judges to look in the constitutional matters that rose to the Supreme Court. The Supreme Court of Yemen’s judges are appointed by the Supreme Judicial Council. The chairperson in committee of selection the

<sup>15</sup> *Ibid.*

Supreme Court's Judges is the president of Yemen, and 10 high profile judicial officers. The appointment of the judges is for lifetime with a mandatory retirement at the age of 65.<sup>16</sup>

Article (152) says that “the judiciary shall set up the supreme judicial council. The law shall organize it; stipulate its jurisdiction and system of nominating and appointing its members.”

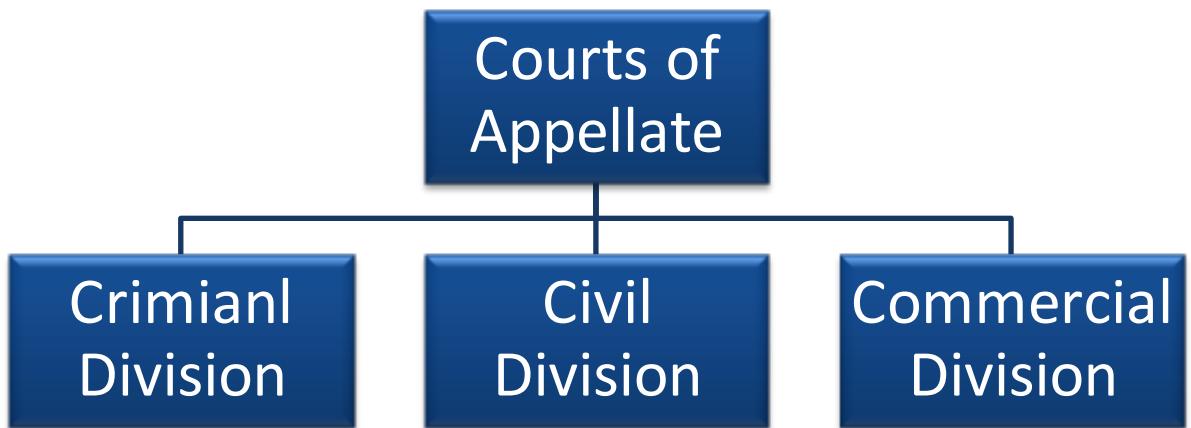


**Figure No. 2**

### THE APPELLATE COURTS

The appellate Courts are established in each province all over the country. These types of courts administer by a president and his vice president. Besides that there are three divisions headed by a single judge such as the commercial division, and criminal divisions *etc.* the heads of the divisions of the Appellate Court with the judges work under the supervision of the president. In the Appellate Courts there are three divisions; Criminal, Commercial, and Civil (See Figure 3).

<sup>16</sup>AneesJamaan, *Legal details about the Organizational Structure of the Yemeni Judicial System*, ADEN NEWS NEWSPAPAR, Available at <https://adenkbr.news/44929/> (Translated into English) (Accessed on: Oct. 27, 2019, 02:44pm),

**Figure No. 3**

### COURTS OF FIRST INSTANCE

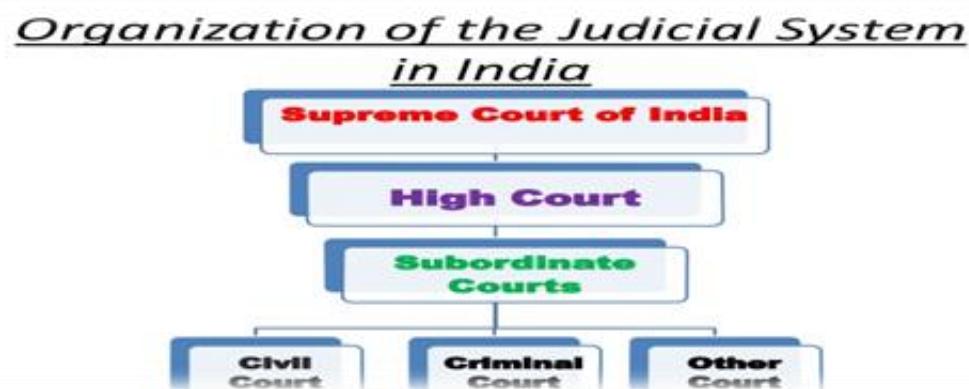
Courts of First Instance are considered as the courts of first degree of trial. The reason for this name is that the dispute comes first to these courts at first. The Courts of First Instance have the jurisdiction to look all kind of cases in Yemen unless the law provided exceptions. A single judge looks each issue; this judge is specialized in one area of law *i.e.*, Commercial law, Criminal law, or Civil law. For the juveniles, there is a juvenile court to look in the cases of the persons who are less than the legal age which is 18 according to Yemeni laws (See Figure 4).

**Figure No. 4**

### INDIAN COURTS OF CRIMES

*Indian Criminal Courts' Structure:*

To study the Indian criminal courts' structure, one has to mention the whole Indian Courts' System. Indeed, courts' system in India has three divisions of courts; begins with the bottom of the hierarchy, where a numerous of courts are existed. On the bottom of Indian Courts, there is the lowest division of courts. This division of courts is known as (the District Courts Division).The second division of court is the middle court division (High Court Division). India has many middle courts (High Courts) throughout the country. Supreme Court is the only court of the highest and top division in the country. It is named as the top division (Top Court Division). The SC is located on the apex of the hierarchy of Indian Judicial System figure (5). Finally, each division will be explained from the lowest to the top division in the following:



**Figure (5) shows the hierarchy of Indian Judicial System**

## **INDIAN DISTRICT COURTS (IDCs)**

Indian Territory is a very huge which makes travelling to attend courts sessions too hard for the parties of the conflict. Hence, the government of India has established in the district level these three kinds of District Courts in sequence; Session Courts, Lower Courts (Subordinate Courts), and Panchayat to facilitate reaching the courts sessions for the citizens.

At the bottom of the judicial system of India, there are the District Courts which are controlled administratively and judicially by High Courts in the same jurisdiction. There are, however, three tiers of District Courts as follows:

- Session Courts
  - Lower Courts
  - Panchayat (See figure 6)

## *Session Courts*

For the people who live in the urban areas in India, it has been created this type of courts. Session Court of the District is the highest court in the district; this kind of courts has power to issue the death penalty in the criminal cases as per Indian Criminal Procedure Code. While the District Court deals with the civil case in nature.<sup>17</sup>

### ***Subordinate Courts (Lower Courts)***

This kind of courts is established all around the districts of the States in India. It was explained above that there are three divisions of Indian courts; the Subordinate Courts are part of the District Courts at the lowest division of Indian Courts. The States' Districts have several Subordinate Courts like *e.g.*, Civil Courts, Criminal Courts, and Revenue Courts. Hearing the civil case is the function of the civil courts at the district level. Likely, the criminal cases are heard by the criminal courts. And finally, the revenue issues are looked by the courts of revenue (See figure 5).<sup>18</sup>

### ***Panchayat***

The word of “Panchayat” indicates to the assembly in English. The Panchayat Council, generally, consists of five elderly wise people selected by the local community. The Members of the Council must have the experience of dispute settlement between the people who are in conflict. As per census of January 2019, there are more than 3 million elected representatives (more than a million are females) all over India.<sup>19</sup>

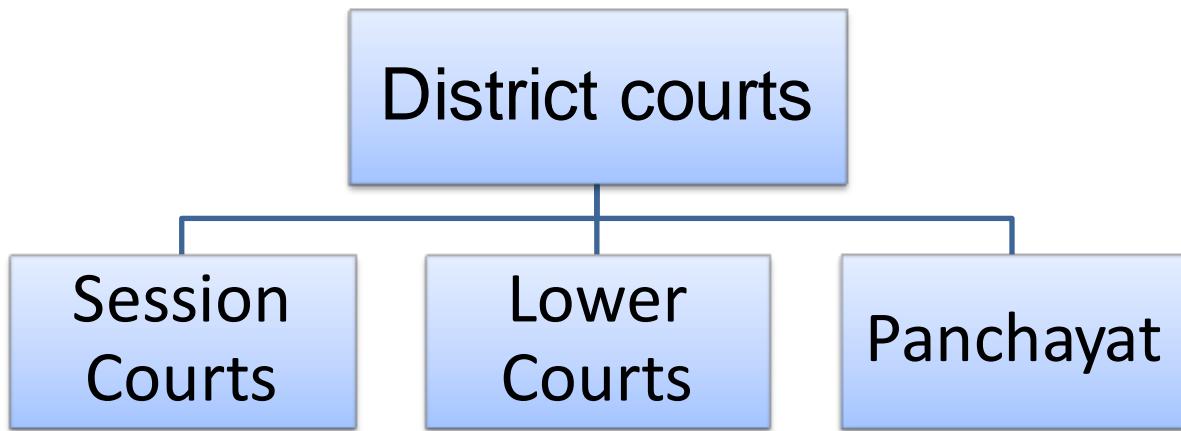
For the dispute occurs in the village level, there is the Panchayat (Village Council). It is an old way to settle the dispute amongst the fighters. It is the oldest system of the local government; it has been created in India for a long time. This system is originally established by old Indian folks to resolve the quarrel. In based on the customary law, the matters are resolved in traditional way. Before 1992, the Panchayat system was not recognized by the Constitution of India.

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<sup>17</sup> Rahul Ajmera, *What is the Distinction between Court of Session Judge and District Judge?*, Available at: <https://www.quora.com/What-is-the-distinction-between-court-of-session-judge-and-district-judge> (Accessed on: Oct. 29, 2019, 05:44 pm)

<sup>18</sup> IAS Planner, *the Judiciary*, IAS PLANNER, Available at: <http://www.iasplanner.com/civilservices/ias-pre/gs-polity/judiciary-subordinate-lower-revenue-courts-judicial-review-india> (Accessed on: Oct. 28, 2019, 07:44pm)

<sup>19</sup> PRIA, *What is a Panchayat?*, PRIA, Available at: [https://pria.org/panchayathub/panchayat\\_text\\_view.php](https://pria.org/panchayathub/panchayat_text_view.php) (Accessed on: Oct. 28, 2019, 08:48pm)



**Figure (6), District's Courts Divisions**

### INDIAN HIGH COURTS (HCS)

On 2<sup>nd</sup> Jan. 2014 a new State born in Indian Territory, Tenlangana is the 29<sup>th</sup> State which has got its bifurcation from Andhra Pradesh. The reason why I have started with this brief information is that Chapter V (THE HIGH COURTS IN THE STATES) Article 214 of the Constitutional law provides that “There shall be a High Court for each State”.<sup>20</sup> The constitution of India, however, empowers the State to establish its own High Court. Thereof, in this assumption, we can assume that there are 29 High Courts in India. Nevertheless, in reality there are 24 High Courts at the union and state territory level in India. On the contrary, Article 231 of the same Chapter provides that “Establishment of a common High Court for two or more States. (1) Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.”<sup>21</sup> Thereby of this article which gives the authority to the Parliament to establish a common High Court for more than one State to operate within its territorial jurisdiction. To paraphrase that Haryana and Punjab States have a common High Court. Likewise Assam, Nagaland, Maghalya, Manipur and Tripura have a common High Court too. In this study I will not go in depth into the other details about High Courts of India.

<sup>20</sup> Constitution of India, Art. 214, Clause 80

<sup>21</sup> *Ibid* at Art. 231(1), Clause 84.

## SUPREME COURT OF INDIA (SCI)

The Post three years of Indian independence 1947 from British, the Indian Territory witnessed crucial change in the Judiciary system which was the announcement of Indian Supreme Court. The top court of India established on 26<sup>th</sup> January, 1950, and it is located in the capital State of India (New Delhi). Nowadays, Supreme Court is a combination of 31 Judges appointed by the president of India. Under certain criteria, the Supreme Court's Judges are hired; to paraphrase that to be appointed as Judge in the top court, one must be an Indian citizen, with five years' work experience as a Judge or an Advocate in a High Court. Or of two or more such courts in succession for at least 10 years or he must be in the opinion of the President of India. The constitutional provisions, however, adapt the independence of Supreme Court's Judges by all means. Therefore, a judge of the Supreme Court is a permanent judge and cannot be fired except in case of misbehavior or incapacity. The removal sentence has to be by an order of the president of India after an address in each House of Parliament supported by a majority of the total members of the House of Parliament. In addition to what said, Judges of Supreme Court are extremely forbidden to appear in front of any court of law or any authority in India. Moreover, the Supreme Court Language is only English for all kinds of litigations.<sup>22</sup> Article 145 (1) of Indian Constitution provides the rules of Court, etc., "Subject to the provisions of any law made by Parliament the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including a) to j) of the article."<sup>23</sup> This article empowered the Supreme Court to regulate the rules of practice and procedures of all courts in India.

## FINDINGS AND CONCLUSIONS

In a few words, the Indian Criminal Justice System is a reflection of unique system globally. Starting from the top of the hierarchy, Indian Supreme Court is considered as the highest criminal body; all lower courts have to follow the Supreme Court's decisions. Additionally, there are no independent courts for hearing the criminal cases in the middle division of Indian courts (High Courts). The High Courts can hear any kind of cases whether criminal or civil. Differ from the middle division of Indian courts; the lowest division of courts has

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<sup>22</sup> Supreme Court of India, *History*, Supreme Court of India, Available at: <https://www.supremecourtofindia.nic.in/history> (Accessed on: Feb. 22, 2019, 07:12 pm)

<sup>23</sup> Constitution of India, Art. 145, 61

independent courts to hear the criminal cases arise in front of them. Besides to the Criminal Courts, the Judicial Magistrates are concerned to hear the criminal cases which are punishable of more than five years imprisonment (Felonies).

In regard of the Indian courts lowest division, District Courts are located on this division. In the districts of State, there are three levels in accordance to the level of the development. For example, for the rural areas, the Panachayat (Village Council) is the judicial authority to settle all kinds of dispute. In contrast, the Semi Urban areas have the Lower Courts to hear the cases that rose before them. Further, Urban Areas, the Session Courts are the only entity that can look into the matter of litigations.

As a small country (comparing with India), Yemeni Courts System is a quite few different from India. Yemen does not have High Courts, but it has Appellate Courts which are as equal as High Courts in India. They are the second degree of litigations in the trial. In Yemeni Courts of Crimes, there are separated Courts for juveniles, even there are independent rehabilitation institutions for the Juvenile Criminals. A specialized criminal judge hears the criminal cases that have come before him. In Supreme Court of Yemen, senior specialized five judges are concerned to look in the criminal cases.

## **CODE OF PENAL PUNISHMENT: A STUDY OF ISLAMIC CRIMINAL JUSTICE SYSTEM**

Dr. Nighat Rasheed\*

### **INTRODUCTION**

The Islamic law is also known as the Shariah Law. The Shariah Law rules and regulates all aspects of public and private behaviour. It prescribes specific rules for prayers, fasting, giving to the poor, and many other religious matters. It also has regulations for personal matters including sexual conduct, and elements of child rearing; as well regulation in transactions and criminal matters. As deducted from the Arabic meaning of Sharia, it is essentially the ‘way’. The Islamic law does not conform to the notion of law as found, for example, in the common law. Rather than a uniform and unequivocal formulation of the law, it is a scholarly discourse consisting of the opinions of religious scholars, who argue based on the text of the Holy Quran, the sacred hadith and the consensus of Muslim scholars. Islam has, in fact, adopted two courses for the preservation of the five indispensables in human life: religion (Islam), life, intellect, offspring and property. The first is through cultivating religious consciousness (**al wazi' al dint**) in the human soul and the awakening of human awareness through moral education. The second is shown by deterrent punishment (**al qanun**), which is the basis of the Islamic criminal system. The Islamic Criminal Law, which is part of the Shariah Law, provides a worldly punishment in addition to that in the hereafter. In the classical textbooks **offiqh**, criminal law is not regarded as a single, unified branch of the law. The regulations regarding offences mentioned in the Quran and Hadith constitute violations of the claims of God (**the right of Allah**), with mandatory fixed punishments; these offences are: apostasy (**riddah**), highway robbery (**hirabah**), unlawful sexual intercourse (**zina**), theft (**sariqah**), the unfounded accusation of unlawful sexual intercourse (**qazaj**) and drinking alcohol (syurb khamr). Provisions for offences against another person, i.e. homicide and wounding, are subdivided into, (i) those regarding retaliation (**qisas**) and, (ii) those regarding financial compensation (**diyat**). And they are provisions concerning discretionary punishment of sinful

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or forbidden behaviour or of acts endangering public order or state security (**ta'zir**)<sup>1</sup>.

The Islamic conception of justice is based on fair dealing and equity. Allah commands men to judge people with justice. To achieve justice in the field of criminal law, Islam has provided various punishments. Punishments as envisaged by Islamic Criminal law fall into three groups, *(i) Hudud; (ii) Qisas and Diyat (Retaliation and Blood money) (iii) Ta 'zir (Discretionary punishment)*

However, when viewed from a comprehensive perspective by any fair person, Islam will be found sensible in all its aspects and practices. Could it be otherwise for a faith that powers one of the greatest living civilizations – one whose dynamism and creativity supplied a foundation for countless aspects of modern society?

Shariah is the Islamic Law in which the disciplines and principles that govern the behaviour of a Muslim individual towards his or herself, family, neighbours, community, city, nation and the Muslim polity as a whole, the Ummah. Similarly Shariah governs the interactions between communities, groups and social and economic organizations<sup>2</sup>. Shariah establishes the criteria by which all social actions are classified, categorized and administered within the overall governance of the state. Shariah first establishes the patterns believers should follow in worshipping Allah: prayers, charity, fasting and pilgrimage. Islam's law comprises a comprehensive outlook on life. As one looks from a satellite at this planet, the Shariah conceives of the earth as a single 'city' with diverse inhabitants—in modern parlance, a 'global village.' Islam looks to the benefit of the society as a whole from a general perspective and presents a theoretical model that if followed provides safety and protection for society. Shariah literally means 'a well-trodden path to water,' the source of all life, representing the Path to Allah, as given by Allah, the Originator of all life.

## **GENERAL NATURE AND PRINCIPLES OF PUNISHMENT**

By contrast, the Law of Islam was sent down to Muhammad, may the mercy and blessings of God be upon him, in its complete form as part of His final message to humanity. Islamic Law pays the most careful attention to this matter and provides a complete legal system. It

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<sup>1</sup> Rudolph Peter. (2005). Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century. UK: Cambridge University Press.

<sup>2</sup> The Purpose of Criminal Punishment" in Ethic and Criminal Justice System, p. 103-25.

takes into consideration the changing circumstances of society as well as the constancy and permanence of human nature. Consequently, it contains comprehensive principles and general rules suitable for dealing with all the problems and circumstances that life may bring in any time or place. Likewise, it has set down immutable punishments for certain crimes that are not affected by changing conditions and circumstances. In this way, Islamic Law combines between stability, flexibility, and firmness.

The ultimate objective of every Islamic legal injunction is to secure the welfare of humanity in this world and the next by establishing a righteous society. This is a society that worships God and flourishes on the Earth, one that wields the forces of nature to build a civilization wherein every human being can live in a climate of peace, justice and security. This is a civilization that allows a person to fulfil his every spiritual, intellectual, and material need and cultivate every aspect of his being. This supreme objective is articulated by the Quran in many places. God says: ***“We have sent our Messengers with clear signs and have sent down with them the book and the criterion so that man can establish justice. And we sent down iron of great strength and many benefits for man...”***<sup>3</sup>. ***And He says: “...God wants ease for you, not hardship...” (Quran 2:185)***

And He says:

***“God wants to make things clear for you and to guide you to the ways of those before you and to forgive you. God is the All-knowing, the Wise. God wants to forgive you and wants those who follow their desires to turn wholeheartedly towards (what is right). God wants to lighten your burdens, and He has created man weak.”***<sup>4</sup>

And He says:

***“God commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice...” (Quran 16:90)***

**The Islamic penal system is aimed at preserving these five universal necessities:**

1. *To preserve life, it prescribes the law of retribution;*

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<sup>3</sup>(Quran 57:25)

<sup>4</sup>(Quran 4:26-28)

2. *To preserve religion, it prescribes the punishment for apostasy;*
3. *To preserve reason, it prescribes the punishment for drinking;*
4. *To preserve lineage, it prescribes the punishment for fornication;*
5. *To preserve wealth, it prescribes the punishment for theft and*
6. *To protect all of them, it prescribes the punishment for highway robbery.*

**It should therefore become clear to us why the crimes for which Islam for which the Law has prescribed fixed punishments are as follows:**

1. *Transgression against life (murder or assault);*
2. *Transgression against property (theft);*
3. *Transgression against lineage (fornication and false accusations of adultery);*
4. *Transgression against reason (using intoxicants);*
5. *Transgression against religion (apostasy) and*
6. *Transgression against all of these universal needs (highway robbery).*

### ***Criminal Responsibility***

Islamic criminal law is based on the principle of individual responsibility. Persons are punished for their own acts. Collective punishment is not allowed, although there are exceptional cases of collective liability, such as in the Hanafite qasama doctrine, where the inhabitants of a house or village can be held liable for the financial consequences of a homicide with an<sup>5</sup> unknown perpetrator, committed in the house or village. Under certain circumstances a person who has committed an offence is not responsible for the consequences. Some of these circumstances are connected with the absence of **mens rea**, the ‘guilty mind’ or the blameworthiness of the defendant, for instance because the offence was committed by a minor or an insane person. In such cases the offence cannot be imputed to the offender. Other circumstances cause the offence to lose its unlawful character (*actus reus*): an act which contains all the elements of a crime and can be imputed to the person who has committed it must sometimes be regarded as lawful because of a justifying circumstance,

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<sup>5</sup> Abdul Qadir Oudah, Criminal law of Islam, Karachi, International Islamic Publications Vol. 3 (1987) p. 101.

such as for instance self-defence.

### ***Duress (ikrah)***

Duress can be a defence with regard to had crimes. A person will not be punished if someone forces him to commit a crime by threatening to kill him or to inflict severe injuries, resulting in the loss of bodily organs, if he refuses. Similar threats against one's child and, according to some schools, against one's parents are also regarded as duress. It is not sufficient that such a threat was uttered; the person who acted under duress must have actually believed that the person uttering the threats was ready to carry them out and was capable of doing so. The person who acted under duress is regarded as a mere instrument in the hands of the one who coerced him and the chain of causality (**hukm al-sabab**)<sup>6</sup> between the latter and the offence remains intact. Unlawful orders by the head of state or state officials are also regarded as duress, even if no specific threats were uttered. There is some controversy about when precisely a power relationship is assumed to imply coercion and when not. Opinions differ on the question of whether duress is also a defence in homicide cases. The problematic aspect here is that, objectively, the evils between which one must choose are equal. The discussion of this problem hinges on whether the person who acted under duress can be regarded as having acted out of his own free will, or must be seen as an instrument in the hands of the person who uttered the threats. If he can be assumed to have exercised a choice in killing the victim, even if he did not want to do so, he must be held responsible. The jurists differ on whether the person who uttered the threats may also be sentenced to retaliation. The Malikites, Hanbalites and some Shafiites hold that this is the case, arguing that he has used a method that is usually effective. Otherwise, he is liable to discretionary punishment. The Hanafites, however (with the exception of Abdul Yusuf, d. 798 CE)<sup>7</sup> differ from the other schools and permit duress as a defence in homicide cases. They hold that the person who was forced to kill did not want the victim's death and was no more than an instrument in the hands of the one who forced him to act. They compare him with a man who is thrown from the roof of a house and lands on a passer-by, as a result of which the latter dies.

### ***Actus reus***

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<sup>6</sup> Ibn Tamiyyah, al-Siyasa al-Shamiah, Cairo (1951) pp. 120-121.

<sup>7</sup> Oudah Vol. 3 p. 109.

For behaviour to constitute a punishable offence (*actus reus*), it must be unlawful, i.e. it must infringe upon the claims of men or of God. For some offences the unlawfulness of the act is connected with a person's religion: drinking alcoholic beverages or changing one's religion is only unlawful for Muslims. For others, such as homicide and bodily harm, it is connected by **Mahd-i, Fataw**<sup>8</sup>. **The classical doctrine** with the question of whether the victim's life and body were legally protected (*isma*). Self-defence or halting a crime in progress may also make lawful an act that would normally be a crime. Thus killing or wounding an attacker in defence of life, honour or property of oneself or of one's relatives is lawful if the act of self-defence is proportional to the acts of the attacker, i.e. if such an act does not exceed the level of violence necessary to ward off the aggressor. Self-defence is closely related to, and partly overlaps with, the plea of halting a crime in progress. This plea can be made by a person who used proportional violence against another person to prevent him from continuing with a crime he was in the process of committing.

### ***Aims of punishment and rules of execution***

As in most Western penal systems, punishment is justified in Islamic law by deterrence, retribution, rehabilitation and, finally, the idea of protecting society by incapacitating the offender. In addition, the rules regarding punishment are, as we shall see, closely intertwined with those of redress by means of damages, not only in the law of homicide, but also with regard to theft and unlawful sexual intercourse. Since the Sharia is religious law, some of the laws of punishment also have a 'vertical' dimension, in that they relate to reward and punishment in the hereafter. This is the case with the law of hadd<sup>9</sup> and the institution of kaffara . Deterrence (zajr) is the underlying principle of all fields of Islamic criminal law. Since, according to the jurists, the threat of punishment in the Hereafter does not sufficiently deter people from committing forbidden acts, punishment in this world is a necessity. For the fixed punishments, deterrence is referred to by the words 'an exemplary punishment' in and its importance is clear from the rule that hadd penalties must be carried out in public. Although the law of homicide is based on retribution, the notion of deterrence also plays a role: proclaims: '***And there is life for you in retaliation, O men of understanding, that ye may ward off [evil.]***' This is usually understood as meaning that retaliation will deter people

<sup>8</sup> Sarakshi, Mabsut Vol. 16 p. 145

<sup>9</sup> Matthew Lipman. (1989). "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law" in Boston College of International and Comparative Law Review. Volume 12, Issue 1, 12-1-1989

from killing. The importance of retribution is most evident in the punishment of retaliation for homicide and bodily harm (**qis.as or qawad**), which is based on the idea of ‘a life for a life, an eye for an eye and a tooth for a tooth’. The retributive character is emphasised by the majority view that the way of executing the death penalty for homicide must be similar to the way the victim was killed, and that, under supervision of the authorities, the heirs may carry out the death penalty themselves. Retribution also plays a role in the **hadd penalties**. The classical doctrine characterise the punishments for theft and banditry as the recompense of those who have committed these crimes. Rehabilitation of the offender, i.e. trying to deter a culprit from repeating his crimes and bringing him back to the straight path, is the main justification of discretionary punishment, which, as we shall see, must be meted out in accordance with the special circumstances of the accused in order to achieve an optimal effect. Finally, punishment can be a means of protecting society by incapacitating the offender, by execution, banishment or lifelong imprisonment. It is the main rationale of **siyasa punishment**, i.e. punitive measures imposed by the executive authorities for political expediency or the maintenance of public security. Not all forms of capital punishment serve this objective. The execution of a murderer on the strength of retaliation serves retribution, rather than the protection of society, witness the fact that the imposition of the death penalty depends on the will of private individuals, i.e. the victim’s heirs. Protection of society is also the principal aim in taking action against recidivists: ‘With regard to repeated offenders who are not deterred by the prescribed punishments, the executive officials are allowed, if the people suffer harm from their crimes, to keep them permanently imprisoned until they die, so as to protect the people from their harm<sup>10</sup>. Their food and clothing must be provided from the treasury (**bayt-al-mal**).’ According to all schools except the Hanafites, fixed punishments have a special religious rationale: the notion that by being subjected to the fixed punishment, the culprit atones for his sins and will not be punished for it in the Hereafter. As the Prophet has allegedly said, ‘The hand of the repentant thief precedes him to heaven<sup>11</sup>.’ The Hanafites argue, however, that this atonement is brought about by sincere repentance (**tawba**) and not by the application of the fixed penalty.

Public exposure to scorn (**tashh̄-ir**)<sup>12</sup>. A common form of discretionary punishment was the exposure of the offender to public scorn, which was often imposed in combination with other

<sup>10</sup> Al-Mawardi, Al-ahkam al-Sultaniyyah pp. 236-237.

<sup>11</sup> Ibn al-Qayyim, al-Turuq al-Hukumiyyah pp. 101-102

<sup>12</sup> Hakim, Al-Mustadrak, Vol. IV p. 104.

penalties. Examples are the shaving of a culprit's head, the blackening of his face with soot a punishment especially reserved for false witnesses and parading him through the streets, on foot or seated back-to-front on a donkey accompanied by a town-crier announcing the culprit's offences.

### ***Banishment (nafy, taghr̄ ib)***

Banishment is mentioned as a penalty in connection with two hadd offences. However, banishment as a punishment for banditry is interpreted by most schools as imprisonment until the culprits show repentance. Only the Malikites regard it as real deportation, but apply it only to male bandits<sup>13</sup>. The Malikites and Shiites apply it, however, only to men, since the banishment of women means that they are forced to live far from their male relatives and may, therefore, lead to debauchery. The other schools, for the same reason, require that a woman who is sentenced to banishment must be accompanied, at her own expense, by a close male relative to stay with her and watch over her. In Shiite law, banishment is also an additional penalty for pimping (qiyada). The most common function of imprisonment lies outside the domain of penal law<sup>14</sup>. It is the ultimate means of coercion in private law to force debtors to fulfil their obligations. They can be imprisoned by the qadi until they pay their debts or carry out their obligations or prove that they are indigent or incapable of fulfilling their obligations. The law also allows imprisonment as a form of pre-trial custody, pending the investigation of the crime. As a punitive measure it occurs under two headings. As we have seen in the preceding paragraph, the common interpretation of banishment as a fixed punishment for bandits is imprisonment. The classical doctrine imposed as **tazir** punishment. The length of imprisonment is left to the discretion of the authority imposing it. It can be a matter of some days or months, or until the culprit repents, or even until his death. The Hanafite school adds a third instance of imprisonment, namely as a punishment for theft after two previous sentences of amputation. In principle prisoners must support themselves. However, if they do not have sufficient means, the state must feed and clothe them.

### ***Flogging (jald)***

Flogging, to be administered by a leather whip, is a very common penalty. A generally

<sup>13</sup> Al-Baihaqi, Al-Sunan Al-Kubra, Vol. VI p.53.

<sup>14</sup> al-Kattami abd. Al hay, Nizam al Hukumah al-Nawabwiyyah p. 288.

accepted rule is that the executioner, in administering the lashes, may not raise his hand above his head to the extent that the armpit is visible. The force with which the lashes are administered varies with the crime: flogging for unlawful intercourse must be more painful than flogging for calumny, and the latter more painful than flogging for drinking alcohol. Flogging for drinking alcohol may, therefore, also be inflicted by palm leaves, twined cloth or shoes. The Shafiites and Hanbalites in fact regard this way of inflicting the penalty as compulsory. There is a difference of opinion regarding flogging as tazir punishment. According to some, it must be more severe than whipping for unlawful sex, whereas others hold that it must be milder than flogging for drinking alcohol. Men are as a rule flogged while standing, whereas women are whipped while seated. Men are stripped to the waist (except while being flogged for calumny), unlike women, who may leave their clothes on. However, furs and leather clothing are to be removed as they would protect the offender against the pain.

## **HUMANISM IN ISLAMIC PENAL SYSTEM**

In Islam it is believed that there is no criminal who cannot be cured. Even the worst criminal can be reclaimed. He can repent and can be forgiven. Islamic law not only leaves the door open for repentance but it also strives to cure the criminal's moral life. Social defence in the sense of rehabilitation and treatment of the offender by eradicating of crime has its origin in Islamic Penal system. Islamic Penal law urged on Tamiyyah, al-Siyasa al-Shamiah, Cairo prevention of crime before its commission and this can be achieved by adopting the following measures (i) People should be guided to have faith in religion and protect themselves from going astray, (ii) Generate love of doing good to the people, (iii) Doing good to the people in the society and avoiding evil. Islamic law also prohibits the disclosure of crime so that moral scandals may not widely spread and the offender does not continue with his crimes. People are also encouraged to pardon offenders. Due consideration is given to promote mutual aid and co-operation in financial and moral affairs with a view to provide a prosperous life to everyone. Islamic penal law does recognise what is known in contemporary criminological terminology as 'individualisation of punishment'<sup>15</sup>. It calls upon the judge to consider the circumstances of the criminal that were instrumental in the commission of the crime. Thereafter the steps are taken by the judge to rehabilitate or reform the offender. Punishment

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<sup>15</sup> Hassan EL Sa'aty, "Islamic Criminal Justice System in Legislation and Application", Resource Material UNAFEI (1989) p. 230, Fuchu, Tokyo, Japan.

is awarded in proportion to the harm done and in relation to the criminal's circumstances. The harsh punishment is substituted with lighter one. He may receive medical or psychiatric treatment or moral edification. Islamic law does not prohibit any procedure leading to the disclosure of the criminal's circumstances either through medical investigation or social enquiry.

## CONCLUSION

The object of punishment under Islamic Penal system is to eradicate crime from the society. To attain this object various punishments have been provided. These punishments are imposed in accordance with the nature of injury suffered by the society in order to protect humanity from evil and attain peace and security for them. The punishments in Islamic penal system are clearly and strictly prescribed and no room for discrimination and arbitrariness is left to the Courts. The punishments in Islamic criminal law are fixed for limited number of offences which fall in the category of **Hadd and Qisas**, while punishments for a large number of offences fall under ta 'zir or Penal punishments which give full discretion regarding the measure and form of punishment. Ta 'zir punishments are many and vary between lighter to more severe punishments. It may range from capital punishment to caning, imprisonment to warning, exile to public disclosure and boycott. The Holy Quran and practices of the Prophet (S.A.W.) support these punishments. The Holy Quran says: "**Nor do evil in the land, working mischief**"<sup>16</sup>. The Ruler of the country has absolute discretion to impose these punishments and make rules for the enforcement of these punishments.

In the above view, we have observed that of all the forms of punishment, imprisonment is one of the most widely used form of punishment. The Islamic penal system, although it recognises the role of imprisonment in crime prevention, however discourages its use due to the evils inherent in imprisonment. The imprisonment is to be imposed only in the circumstances when it is not possible to deal with the offender by any other form of ta 'zir punishment. Islamic penal law provides a wide range of punishment in the category of **ta 'zir**. These punishments are both deterrent and reformative in nature and are also easier to administer. It is submitted that due to the inherent evils involved in imprisonment and particularly in short term imprisonment, some of the **ta 'zir** or penal punishment can be helpful in dealing with the problem of petty offenders.

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<sup>16</sup> (Surah ash-Shu'raa (26) :183)

In conclusion, these were the head notes of a very important topic whose cognitive structure is related to a number of intermediate sciences that are purely Islamic and generally humanistic. Moreover, the study of this issue cannot be profoundly fulfilled away from a broad vision that encompasses the sources of Shari`ah, the sciences of fiqh, the achievements of the age, and the reality of Muslims. The Judicial System and Punishments of the Islamic State were implemented throughout every period from the time of the Prophet (PBUH) in Madinah, when he established the first Islamic state. It settled the disputes between the people, protected the legitimate rights of the community, and ensured that those in authority gave the citizens of the state their dues in accordance with the Shari`ah of Islam. All this it did in a superior manner, such that it was acknowledged by all the justice and propriety which it conferred upon those who were protected by it. However, the strength and authority that the judiciary in Islam proffers is not built upon harsh punishments or oppression of the people. Rather, its power lies in the fact that it originates from the Islamic creed (**'aqidah**) which is able to answer all the problems that may arise in life, and that its implementation and the obedience to it are considered as **ibadat** (worship). In this way, the history has shown that in only a relatively small number of cases did the judiciary have to resort to punishment of the people. The mentality of obedience to Allah and disapproval of crime that the systems of the Islamic State which are an integrated whole and of which the judicial system is one part inculcates into the people is enough to ensure that justice and harmony in society prevail, and that crime is a fringe activity. And the aim of Justice in Islam is not to punish the people as much as possible, rather it is to guarantee the rights and the security of the people.

**FEMALE CRIMINALITY AND INTERNATIONAL CRIMINAL JUSTICE  
ADMINISTRATION: JURISPRUDENTIAL EVOLUTION THROUGH THE  
INTERNATIONAL AD HOC CRIMINAL TRIBUNALS**

Dr. A. Vijayalakshmi\*

## INTRODUCTION

The notion of female criminality under the Criminal Justice system is still now a single faced issue. Gender factor plays a vital role in sentencing pattern in the judicial system. Though the fundamentals of the Criminal Law are not a gender biased one either in the substantive or the procedural law, the judicial discrimination classifies shows such leniency while awarding the penal sanction. The interpretation of *mens rea* and the *actus reus* should determine the guilt or innocence and not based on any other factors. Most of the domestic criminal justice systems are lenient towards the female criminals even for the graver offence. The dark side of inequality based on gender should be removed. The protection provided to the disadvantaged or vulnerable groups who is none other than women and children is the most celebrated human rights without understanding that sometimes the women gender itself indulging in heinous crimes against women. In the Indian Criminal Justice system, under Indian Penal Code (herein after referred to be as 'IPC'), some offences are exclusively considered to committed against women only.<sup>1</sup> Apart from the protection through the IPC, special laws are also there to protect women<sup>2</sup> rights and safety. On the other hand, the perpetrators of the crimes under any of these provisions or legislatures are gender biased. The Criminal Justice Administration is providing maximum concentration on the commission of the crime rather than the conspiracy or abetment part. Though the offence of rape is committed by male, is there any trace for either conspiracy or abetment of rape by a woman. Only in limited provisions of laws for heinous crimes such as murder, causing miscarriage to an unborn child, bigamy, acid attack women may be charged. Though they charged with, what sort of penal

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<sup>1</sup> Sections 304B-Dowry death; 354-Outraging modesty of women; 354A & B- Sexual harassment; 354B-Voyeurism; 354D- Stalking; 366- Kidnapping women with the intention to compel her to marry; 366A-Procreation of minor girl; 366B- Importation of girl from foreign country; 498A- Harassment to women by husband or relatives of the husband; 509- talking or through gestures insult the modesty of women.

<sup>2</sup> For instances, The Dowry Prohibition Act, 1961, The Medical Termination of Pregnancy Act, 1971, The Protection of Women from Domestic Violence Act, 2005, Indecent Representation of Women (Prevention) Act, 1986, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 etc.

sanction is awarded for them is debatable issue. The notion of application criminological view while deciding a case is either or partly absent in our criminal system. But the study about the criminological behaviour of the perpetrator is being carried out in a systematic way under the International Criminal Justice System. In this paper the author will discuss about the contributions of International Ad Hoc Criminal Tribunals in interpreting every case with specific reference to women criminality.

## **INTERNATIONAL AD HOC CRIMINAL TRIBUNALS:**

***International Criminal Tribunal for Former Yugoslavia*** (herein after referred to as the “ICTY”)<sup>3</sup>

Due the massive human rights violation committed within the territory of the Former Yugoslavia, the United Nations Security Council (herein after referred to as the ‘UNSC’) voiced alarm based on the reports of the permanent representatives of Yugoslavia. The reports alerted UNSC about widespread and methodical violations of international

<sup>3</sup> Bosnia and Herzegovina were a multi-ethnic in the Former Yugoslavian region for more than 400 years. The maximum population belonging to the Muslim religion and owes their own culture and identity. Croats are the third ethnic group lived other than Bosnia and Herzegovina. During Second World War, Yugoslavia faced severe repression and brutal human rights violations. Three distinct forces of Yugoslavia fought each other and Ustasa forces strongly supported the Axis Power. The Ustasa forces are mainly Serb nationalists and monarchist. They mainly involved in killing non-Christians and converting third group into Christians. During 1946, Marshall Tito took measures to all nationalist tendencies. Under his leadership the country was composed of six republics such as Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro, Vojvodina and Kosovo. During the multi-party election, the nation heading towards breakup. During 1980's the country's economy was worsened. The internal tension started to spread to Croatia and Bosnia and Herzegovina. On 25<sup>th</sup> June, Croatia and Slovenia declared independence and in March 1992 Bosnia and Herzegovina declared independence. Though the referendum was objected by Bosnian Serbs, still the European Community and the United States of America recognised the independence in April 1992. During the first free election, the prominent parties of Muslim Party of Democratic Action and the Serbs Democratic Party and Croats Democratic Union contested with each other. The Muslim Party of Democratic Action won the election. Election reflected the ethnic census, ethnic group voting. It leads to disintegration of multi-ethnic federal Yugoslavia and disintegration of multi-ethnic Bosnia and Herzegovina, which ended in internal armed conflict between Muslim-dominated party and Croatian Serbs. The practise of ethnic cleansing was adopted during this time. The Yugoslav National Army (JNA) incurred into Croatia and the Croatian Government declared JNA as invading force. The entry of large JNA forces into Bosnia and Herzegovina from Croatia brought high tension. Out of which the Muslim Party disassociated from administration and independent Serb Government *Republika Srpska* formed. Military took control over the area. The military actions include shelling, sniping, targeting of non-Serbs in that area. This resulted in death of civilians, imprisonment of non-Serbs, they were assaulted and beaten to sing Chetnik songs and their properties were seized. All these activities were accompanied by widespread and systematic destruction of person and property. The historical background of the Former Yugoslavia was discussed in *The Prosecutor v. Dusko Tadic* decision passed on 7 May, 1997 by the Trial Chambers of the ICTY in case no: IT-94-1-T. to view the full text of the decision in [www.icty.org/cases](http://www.icty.org/cases) (Accessed on 12.09.2019)

humanitarian law (herein after referred to as ‘IHL’). Further the report includes the atrocities such as mass killings, organised and systematic detention and rape of women and continuance practise of ethnic cleansing. In this regard, the UNSC to react and bring out the peace decided to establish an international ad hoc criminal tribunal according to Chapter VII of the Charter of the United Nations (herein after referred to as ‘the UN’). The decision enables the tribunal to achieve and restoration of peace and to prosecute and punish the perpetrators responsible for such serious violations.<sup>4</sup> International criminologist commented that the establishment of ad hoc international criminal tribunal will address the redressal for serious violations of IHL without any immunities and discretions. Though there was difference of comments and objections arose with respect to such establishment<sup>5</sup>, some commenters supported the view with the aid of Art.41 of the Charter of the UN. The International Court of Justice in its Advisory opinion case, “*Effects of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion)*”<sup>6</sup> approved the powers of the UN organs to entrust their powers to subsidiary bodies including tribunals, which authorises the UNSC under Art.29.

The constitution of the ICTY includes Registry (administrative head of the Tribunal), the Office of the Prosecutor (organ responsible for investigation, framing indictments and conducting trials) and the Chambers (main organ of the Tribunal which includes Trial and Appeal Chambers). The Tribunal had its own Charter with 34 Articles and the jurisdiction of the Tribunal was for Grave Breaches of the Geneva Convention, 1949 (War Crimes), Violations of the laws or customs of war, crime of Genocide and Crimes against Humanity.<sup>7</sup>

<sup>4</sup> According to Chapter VII of the Charter of the UN, the UNSC established the ever first international ad hoc criminal tribunal through the resolution UNSC/Res/827/1993 on 25 May 1993. The Security Council thus affirmed that persons indulging in and responsible for serious violations of international humanitarian law and of the Four Geneva Conventions. For the first time the UNSC adopted that ‘ethnic cleansing’ as serious violation of IHL. The full text of the UNSC Report is available at [www.un.org/en/sc/search/view\\_doc.asp?sysbol=S/RES](http://www.un.org/en/sc/search/view_doc.asp?sysbol=S/RES) (Accessed on 12.9.2019)

<sup>5</sup> Some Commenters opined that the UNSC has applied its powers uncertainly, but commenters like Prof. Willian Schabas supported the view of the UNSC from the point of Art.41 of the Charter of the UN. Art.41 of the UN Charter reads as, “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>6</sup> “*Effects of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion)*” 1954 ICJ Reports 47, 21 ILR 310, pp.321.

<sup>7</sup> Art.2 of the Statute of the ICTY states as, “Article 2 Grave breaches of the Geneva Conventions of 1949 The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property

The number of cases indicted before the Tribunal for the prosecution of the above crimes were totally 160- 90 were sentenced, 18 were acquitted, 3 pending before the Appeal Tribunal, 13 referred to National jurisdiction and 37 perpetrators indictments were withdrawn and some died. The Tribunal was officially completed its task and closed on 27.12.2017. From the 160 perpetrators indicted before the Tribunal only one women offender was found guilty as many as 20 perpetrators pleaded guilty. The only one women offender was *Biljana Plavsic* who was indicted for the alleging crimes such as crime of genocide, punishable acts under the Crimes against Humanity *inter alia* persecution, extermination and killing, deportation and inhumane acts.<sup>8</sup> She initially refused to plead guilty and on 2 October 2002, pleaded guilty for persecution and Crimes against Humanity. The Tribunal satisfied about the

protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages”, Art 3 reads as Violations of the laws or customs of war The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property. Art.4 of the Statute defines crime of Genocide as “1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.” and Art.5 of the Statute of the ICTY reads as, Crimes against humanity The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. To view the full text of the Statute visit [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept08\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf) (Accessed on 20.9.2019)

<sup>8</sup> Biljana Plavsic was a Bosnian Serb familiar politician and holding a senior officer position. During the internal conflict she alleged to have participated in the persecution of Bosnian Muslim, Croat and other non-Serb population. She also aided the campaign of ethnic separation which caused death of thousands of civilians. She also participated in expulsion of thousands from the municipalities and actively participated in inviting paramilitaries from Serbia to Bosnia to effect the ethnic separation. The full text of the Trial Chamber judgement cases no: IT-00-39&40/1-S dated 27 February 2003. The full text of the judgement is available at <https://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf> (Accessed on 25.9.2019)

voluntariness of the guilty plea and unequivocal consent. Plea agreement was entered on 30 September and based on the guilty plea, the prosecution agreed to withdraw the remaining counts of indictments. But the Tribunal refused. She was sentenced to eleven years of imprisonment.<sup>9</sup>

## BILJANA PLAVSIC

Biljana Plavsic was aged about 72 at the time of the trial. The background of the accused was that, she was a distinguished academician, Professor of Natural Science and Dean of Faculty at the University of Sarajevo. She joined the politics in 1990. He joined the Serbian Republic Party ('SDS') and soon became a prominent member of the party. She was elected as a Serbian Representative to the Presidency of the Socialistic Republic of Bosnia and Herzegovina. When the sovereign Bosnia and Herzegovina was created, the SDS party voted against the resolution and the party included the accused also and they voted for the creation of Bosnian Serb Assembly.<sup>10</sup> The accused supported the aim of Bosnian Serb, being a co-President, she supported by maintaining the government and military at local and national level, encourages public announcement that justified that genocide was committed against them by Bosnian Muslim and Bosnian Croats, encouraged and invited paramilitaries from Serbia to assist Bosnian Serb Forces to effect the ethnic separation. The act of persecution includes-killing, cruel and inhumane treatment during and after attack, forcible transfer and deportation, unlawful detention, forced labour and use of human shields, destruction of cultural and sacred objects and plunder of property<sup>11</sup>. Though the accused *Biljana Plavsic* disagree with the allegation of ethnic cleansing but she was aware that she had power to prevent and punish the crime and failed to do so.

In the Plea agreement statement the accused stated that accepting her responsibility and remorse unconditionally. She further offered consolation to the innocent victim. She also insisted other accused to come forward to accept their acts and conduct. She realized and understood the nature and gravity of the crime she participated during the conflict.

<sup>9</sup> *The Prosecutor v. Biljana Plavsic* decided on 27 February 2003, Case No: IT-00-39&40/1-S by the Trial Chambers of the ICTY, para.10, p. 2

<sup>10</sup> The SDS Political Council's primary goal was that the Former Yugoslavia shall remain as a one common State. On this strategy, the Council including the accused intended that the separation of the ethnic communities would include the permanent removal of ethnic populations and knew further that any forcible removal of non-Serbs would involve persecution. *Biljana Plavsic* Trial Chamber decision, para.11, pp.3

<sup>11</sup> *Biljana Plavsic* decision, para. 16, p. 5

## APPLICABLE LAWS

The Statute of the ICTY and the Rules of Procedure and Evidence (herein after referred to as the ‘RPE’) are available with the relevant provisions of law. The imposition of penalties shall be in accordance with the prison sentences of the former Yugoslavia and shall be limited to imprisonment. Further the law insists that while awarding sanction the Chamber should consider both aggravating and mitigating factors.<sup>12</sup> The relatable provision for pleading guilty is available under the RPE. If the accused person pleaded guilty the Chamber should satisfies that the guilty was made voluntarily, informed and not equivocal. According the relevant provisions of law, the aggravating factors are gravity of the offence and the individual circumstances of the accused person.<sup>13</sup> The mitigating factors are substantial cooperation with the prosecution.<sup>14</sup> The Trial Chambers (herein after referred to as the ‘TC’) interpreted the sentencing pattern of this case in comparing with the decision passed in *Delalic*<sup>15</sup> and *Aleksovski*<sup>16</sup> as it was held that retribution and deterrence would be the ultimate objective of the sentencing and the consideration should be from the context of the accused. Further it reiterated that the cardinal principle of sentencing should be based on the gravity of the offence.

## GRAVITY OF THE OFFENCE, AGGRAVATING AND MITIGATING FACTORS

The prosecution submitted the aggravating factors of the accused such as crime od persecution (discriminatory intent) was the result of large scale of campaign in which the accused also participated. The campaign was massive and thousands of the civilians were expelled and killed brutally and includes torture and sexual violence.<sup>17</sup> The act includes killing, beating, rapes at Luka Camp of the Muslim, mass killing of nearly 70 Muslim women and children in a crowded bus with only two windows by setting ablaze the bus. This sort of cruel and inhumane treatment was practised in several municipalities. The Trial Chamber considered and satisfied that the repeated occurrence of the above-mentioned events wasenoughto establish the gravity of the offence though the accused was not committed the

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<sup>12</sup> Art.24 of the Statute of the ICTY

<sup>13</sup> Rule 62bis of the RPE of the ICTY, The detailed study of the Rules of Procedure and Evidence is available at [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf) (Accessed on 30.9.2019)

<sup>14</sup> Rule 101 of the RPE

<sup>15</sup> *The Prosecutor v. Delalic et al* Case No. IT-96-21-A dated 20 February 2001, para 806.

<sup>16</sup> *The Prosecutor v. Aleksovski* Case No: IT-94-14/1A dated 24 March 2000, para.185.

<sup>17</sup> *Biljana Plavsic* Trial judgement, para.27, pp.9

offence.<sup>18</sup> The accused in her guilty plea agreement accepted her involvement if the crime of victimisation and persecution. The TC of the ICTY found guilty and accepts the gravity of the offence of massive campaign on ethnic separation which directly resulted in killing of thousands of innocent Bosnian Muslim, Bosnian Serbs and non-Serbs. The findings of the Chambers helps to satisfy the gravity of the offence includes-massive scope and extent of persecution; counts of killings; immense inhumane and cruel treatment and wanton destruction of property and religious building. The aggravating factors of the accused as per the findings of the Trail Chamber were-leadership position of the accused; status of the victims (vulnerability) and depravity of the crime.<sup>19</sup>

Further, the Chamber applied the law evolved in *Krstic* Trial judgement to establish leadership as an aggravating factor.<sup>20</sup> The TC at the same time also found that the accused was not first rank leader as compared to other accused, not involved conspiracy of planning and execution, but only encouraged and supported through her participation. The discussion of sentencing states that in the absence of the guilty plea agreement, the alleged indictment would have been punished with imprisonment for life.

The mitigating factors which helped the accused are-entry of guilty plea; remorse; voluntary surrender; post-conflict conduct; previous good character and age. The Chambers has discretionary powers to consider further factors as mitigating factor as the facts and circumstances of the case differs. The jurisprudence on guilty plea as mitigating factor evolved in varies cases<sup>21</sup>*inter alia* by both the Criminal Tribunal for Former Yugoslavia and Rwanda (the discussion on creation, jurisdiction, Statute and Procedure of the African

<sup>18</sup> The detailed evidence for the gravity of the offence was discussed in paras 31 to 51, pp.9 to 16 of the Trial Chamber judgement, the evidence was for forced expulsion and transfer, widespread killings, cruel and inhumane treatment in detention camps.

<sup>19</sup> *Biljana* judgement paras.52 & 53, pp.18.

<sup>20</sup> *The Prosecutor v. Radislav Krstic*, Case No: IT-9833-T, Trial judgement dated 2 August 2001. The Trail Chamber has consistently opined that leadership position was an aggravating factor. The Chambers interpreted that the accused those who holds the political or military position use that position to commit the crimes. The TC also referred the decision passed by another international criminal tribunal, International Criminal Tribunal for Rwanda in *The Prosecutor v. Jean Kambanda* Trial Judgement ICTR-97-23-S, dated 4 September 1998. In this case, the TC found that Jean Kambanda who was the Prime Minister of Rwanda misused his position.

<sup>21</sup> *The Prosecutor v. Zoran Kupreskic et al* Case No: IT-95-16-A Appeal judgement dated 23 October 2001; *The Prosecutor v. Dragoljub Kunarac et al* Trial judgement IT-96-23-T & IT-96-23/1-T dated 22 February 2001; *The Prosecutor v. Goran Jelisic* Appeal judgement IT-95-10-A dated 5 July 2001; *The Prosecutor v. Ducko Sikirica et al* Trial Judgement IT-95-8-S dated 13 November 2001; *The Prosecutor v. Draen Erdemovic et al* Trial judgement IT-96-22-T dated 5 May 1998; *The Prosecutor v. Milorad Krnojelac* Trial judgement IT-97-25 dated 15 March 2002; *The Prosecutor v. Zlatko Aleksovski* Trial judgement IT-95-14/1-T dated 25 June 1999. To view the full judgements, Available at: [www.icty.org/cases](http://www.icty.org/cases).

Criminal Tribunal will be discussed in the next part of the article). The evolution of jurisprudence on guilty plea as a mitigating factor justified as demonstration of honesty, to assists the Tribunal to achieve the ultimate objective of its creation, it plays a vital role as a fact-finding tool which contributes for the peace-building process, it may reduce the cost and time of the Tribunal and some time it might relieve the stress of the victim witnesses. Further the prosecution in its argument stated that the guilty plea is two folded principles, expression of remorse and steps towards reconciliation. In this case, the accused expressed her remorse “fully and unconditionally”. Though the guilty would lead to discount in the sentencing, the significant circumstance of the same is establishment of truth and reconciliation. This was made by the *Biljana Plavsic* in her guilty plea statement as follows;

*“...There is a justice which demands a life for each innocent life, a death for each wrongful death. It is, of course, not possible for me to meet the demands of such justice. I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive. To achieve any reconciliation or lasting peace in Bosnia and Herzegovina, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility—regardless of their ethnic group. This acknowledgement is an essential first step”<sup>22</sup>*

The guilty plea statement was acknowledged by an expert witness Dr. Alex Boraine, an expert on reconciliation and accountability issues. Another witness Mr.Mirsad Tokaca, noted that refusing or failure to speak up about the crime impedes the establishment of the truth and reconciliatory process and the courageous move of the accused by admitting the allegation was,

*“...an extremely courageous, brave and important gesture and that it represents support to what is the ultimate aim of all of us [...] that at one-point normal conditions of life should be resumed in Bosnia-Herzegovina [...] in the entire region as well”<sup>23</sup>*

The object expressed by the UNSC in its Resolution 827 while creating the ICTY stressed the importance of the ICTY to achieve the process of reconciliation and maintenance of

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<sup>22</sup> *Biljana Plavsic* Trial judgement para.74, pp.24, the full text of the guilty plea statement is available at <https://www.icty.org/en/sid/221> (Accessed on 30.9.2019)

<sup>23</sup> *Biljana* Trial judgement para.78

international peace and security. The other mitigating factors other than guilty plea agreement are voluntary surrender, Post-Conflict conduct, age factor. With respect to age factor, the Trial Chamber referred the decision passed by the European Court on Human Rights (herein after referred to as ‘ECHR’). In *Papon v. France*<sup>24</sup> case the appellant was 90 years old who found guilty of abetting and aiding of crimes against humanity by the French Court. The court referred Art.3 of the European Convention for the Protection of Human Rights and Fundamental Rights regarding rights against torture or inhumane or degrading treatment or punishment. The ECHR observed that,

*“...advanced age is not a bar to sentence...However, age in conjunction with other factors, such as health, may be taken into account either when sentence is passed or while sentence is being served...”*

With the advancement of the argument, the Chamber expressed that the accused who was 72 at the time of the trial proceedings, any imprisonment imposed on her, must be considered of her age. The Defence has submitted several other countries sentencing pattern and consideration of age as a mitigating factor. The decision passed by the Trial Chamber in *Erdemovic* case the penalty was imposed in confirmation with the minimum principle of humanity, dignity which was guaranteed by various human right instruments. Though the Prosecution agreed with the contention of the Defence regarding age as a mitigating factor but disagree with the fact that in the referred decision of *Erdemovic* case, though the TC considered age as a mitigating circumstance, what is the deciding factor of “advanced age” was not evolved in the said case. So, the TC moves outside the jurisdiction of the ICTY and applied jurisprudence evolved by ECHR in *Popan* case and an English case *R. v. C.*<sup>25</sup>. From the above discussion of the decisions, the TC considered advanced of age as a mitigating factor.

### **JURISPRUDENTIAL EVOLUTION:**

The gravity of offence was established from the participation of the accused and misuse of her status. The Chamber opined that the leadership position should either prevent the crime or mitigate its gravity. But the accused supported and encouraged the crime. This will act as an

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<sup>24</sup> *Papon v. French*, European Court of Human Rights, Application No:64666/01, dated 7 June 2001. Reference of this case is at *Biljana Plavsic* Trial Judgement para.95, pp.30.

<sup>25</sup> *R. v. C.* (1993) 14 Cr. App.R.(S.) 562, at 564. In this case, the appellant who was 79 years old, filed an appeal against the conviction of sentence of 7 years of imprisonment for the alleged charges of serious offence of sexual harassment against his five grandchildren-Footnotes 181, *Biljana* Trial Judgement pp. 32.

aggravating factor. The TC appreciated the mitigating factor such as acknowledgement of crime, acceptance of responsibility; remorse and repentance were balanced against the aggravating factor. The Prosecution submitted appropriate sentence for the alleged indictment against the accused as imprisonment not less than 15 years, but which may not more than 25 years. The Chamber considered both mitigating and aggravating circumstances along with the principle of retribution and deterrence. The TC preferred guilty plea as a prominent mitigating factor rather than the advanced age. The point to be noted from the above discussion, nowhere either the accused nor the defence or the Chamber raised any arguments based on gender. The Trial Chamber sentenced the accused to undergo eleven years of imprisonment.<sup>26</sup>

### **International Criminal Tribunal for Rwanda** (herein after referred to as the ‘ICTR’)

#### *Historical background of Rwanda:*

Rwanda is a hill country in Central Africa and occupied by Tutsi, Hutu and Twa ethnic groups. Tutsi ethnic group occupied the higher strata and the Hutu's the lower. Rwanda became the colony of Germany and Belgium. The colonies favoured Tutsis due to their height, colour and intelligence. Belgium introduced the distinction between Hutu, Tutsi and Twa based on the population percentage as Hutu with 84%, Tutsi with 15% and Twa 1% and identity cards were issued. During decolonisation, the Tutsi was aware of independence and due to this the colonies turned their favour towards Hutus. Due to the pressure of the United Nations (herein after referred to as ‘UN’) Belgium conducted the election and Hutu obtained the majority. For the first time ethnicity based political parties were formed-*Movement Democratique repubilicain Paramehutu* (“MDR”) identified for Hutus, *Union Nationale Rwandaise* (“UNAR”) identified for Tutsis, *Rassemblement Democratique Rwandaise* identified for moderate Hutu and Tutsis. On 1.7.1962, Rwanda got independence and Mr. Gregorie Kayibanda became the 1<sup>st</sup> President of Republic of Rwanda.

After the raise of Hutus, Tutsis moved to the neighbouring countries and evacuation started. The term ‘*Inyenzi*’<sup>27</sup> came to usage to refer Tutsis. The situation becomes very worst and

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<sup>26</sup> *The Prosecutor v. Biljana Plavsic* Trial Judgement Case No.IT-00-39&40/1-S dated 27 February 2003, paras.120 to 132, pp.41.

<sup>27</sup> It means cockroach in the language of Rwandese, Kinyarwanda. It referred to denote that how cockroach comes during night time and vanished during day time, the Tutsis those who shifted to the neighbouring countries comes during night time and left before sunrise.

everywhere there was conflict between Tutsis and Hutus. The President could not control the situation and General Juvenal Habyarimana seized the power and introduced single party system and discrimination against Tutsis confirmed. The exiled Tutsi formed *Rwandan Patriotic Force* ("RPF") in Uganda. They started to attack the Hutus from Uganda and their primary object was to return Rwanda. The *Radio Televisio Libre des Milles Collines* "RTLM" which belonged to the Hutu governed Radio Station spread hate propaganda against the Tutsis. Many Tutsis were killed, tortured, gender based crimes were committed against the women and children. Rwanda government entered into the final Peace Accord (Arusha Accord) by the continuous pressure of the UN. After signing the accord, while returning to Rwanda, the President Habyarimana along with Prime Minister of Brundi and other ministers were killed by a missile attack near Kigali Airport (Kigali is the Capital of Rwanda).

The assassination leads to severe chaos in Rwanda which leads to road blocks, military attack and other human rights violations. Hutus started killing of Tutsis and moderate Hutus. As they killed the members of UN Peace keeping force which resulted in reduction of peace keeping force in Rwanda. From 12<sup>th</sup> to 14<sup>th</sup> of April, killing was at peak. In the span of three months, nearly 8-10 lakhs Tutsis were annihilated.<sup>28</sup>

## **CREATION OF ICTR**

The UNSC received letters from the permanent representatives of Rwanda regarding the situation at Rwanda and serious violations of international humanitarian laws (herein after referred to as the 'IHL'). The UNSC has took measures to stop the violations *inter alia* cease fire, return of displaced person etc <sup>29</sup> on 8 November 1994 the UNSC declared the establishment of the International Criminal Tribunal for Rwanda through the UNSC/Res/955/1993 to prosecute and punish the persons responsible for genocide and other serious violations of the IHL. The Criminal Tribunal is vested with individual criminal responsibility without any immunity. The seat of the ICTR was in Arusha, Tanzania. Totally

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<sup>28</sup> The historical background of Rwanda was discussed in detail in the decision passed by the Trail Chambers of the ICTR in *The Prosecutor v. Jean Paul Akayesu* Case No: ICTR-96-4-T dated 2 September 1998, pp.47-66.

<sup>29</sup> The UNSC in its resolution UNSC/Res/912/1993 expressed regret for the large scale of violence which includes killing of women and children at large and expressed their concern over the safety and security of the peace keeping force personals. On 17 May 1994, the UNSC/Res/918/1993 for the first time condemned the systematic and widespread attack, killing, spreading of ethnic hatred message through mass media and through the resolution UNSC/Res/925/1993 dated 8 June declared that genocide have occurred in Rwanda. The full texts of the Resolution is available at <https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1993> (Accessed on 30.10.2019)

93 persons were indicted under various indictments, 80 cases got concluded, 5 cases were transferred to the National Jurisdiction and 8 were recorded as Fugitives.<sup>30</sup> On 20<sup>th</sup> October the Tribunal passed orders on its final case before the Trial Chambers and completed the strategy. The Appeal cases are only pending before the Appellate Chambers. The jurisdiction of the ICTR was drafted by the UNSC while establishing it, the Statute of the ICTR includes the substantive elements and the Rules of Procedure and Evidence includes the procedural part. Arts.2, 3 and 4 of the statute defines the punishable offences under the Tribunal as Crime of Genocide, Crimes against Humanity (herein after referred to as the ‘CAH’) and Violations of Art 3 Common to the Geneva Convention and of the Additional Protocol II.<sup>31</sup>

The jurisprudence evolved before the ICTR was phenomenal. After 50 years of the Convention on the Prevention and Punishment of Crime of Genocide, 1948.<sup>32</sup> The Trail

<sup>30</sup> The key figure of the ICTR cases is available at <http://www.unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf> the site was updated on October 2019. (Accessed on 25.10.19)

<sup>31</sup> Art.2 defines crime of genocide as, “The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide”, Art.3 defines Crimes Against Humanity as, The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts and Art. 4 speaks about the Violations of Art.3 Common to the Geneva Convention and of the Additional Protocol II as, The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; (h) Threats to commit any of the foregoing acts. The detailed study of the Statute of the ICTR is available at <https://unictr.irmct.org/en/documents/statute-and-creation> (Accessed on 25.10.2019)

<sup>32</sup> Prof Rafael Lemkin in the year 1944 introduced the term ‘Genocide’ to the international community. It is the combination of two terms *genos* from the Greek term which means race or tribe and *cide* from the Latin term means killing. He first introduced the crime in his work titled *Axis Rule in Occupied Europe: Laws of Occupation-Analyse of Government-Proposal for Redressal*. His contribution was recognised by the UN

Chambers of the ICTR has developed the international criminal justice system jurisprudentially. The contribution of the ICTR for the development of legal foundation on the crime of genocide is remarkable. The first decision on punishing the international crime of genocide was passed by the Trial Chambers of the ICTR. The elements of the crime was thoroughly analysed and interpretation on the plain reading of the crime is a source of international crimes. The landmark decisions passed by the ICTR include, *Jean Paul Akayesu, Jean Bosco Baraygwiza, Ferdinand Nahimana and Hassan Ngeze, Jean Kambanda Clement Kayishema, Juvenal Kajelijeli, Musema, Muvunyi and Nyiramasuhuko*. The only women accused under the ICTR were *Nyiramasuhuko*.

## **NYIRAMASUHUKO DECISION AND EVOLUTION OF JURISPRUDENCE**

The first case which convicted a women perpetrator for international crime of genocide was *Pauline Nyiramasuhuko*.<sup>33</sup> She was indicted with crime of genocide, conspiracy to commit genocide, extermination as CAH, rape as CAH, persecution as CAH and other serious violations of 1949 Geneva Convention. She was sentenced to undergo life imprisonment for all the counts. The role of the accused in committing the crime of genocide from the feminist view created substantial legal implications under the international criminal law (herein after referred to as ‘ICL’). *Nyiramasuhuko* was a Minister of Family and Women Development during the interim government in Rwanda which is headed by another accused *Jean Kambanda* as Prime Minister. She helped to formulate the plan to annihilate Tutsis at Butare region. Butare is an intellectual capital of Rwanda and most prominent institutions are situated there. The attacks against Tutsis started at Butare sometimes later after other places. But the accused utilised these times to properly coordinate and analyse the plan to commit genocide.

The findings against the accused person by the Trial Chamber satisfied that the circumstantial evidence against the accused person to prove the special intent *dolus specialis* to commit the crime of genocide was established by the prosecution beyond the reasonable doubt. Her participation, involvement, orders to commit genocide is recorded properly. The *mens rea* of the crime of genocide was established through proving the meetings at Butare region was on

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General Assembly in 1998 by passing a resolution to draft a convention on crime of genocide UNGA/Res/260A (III) dated 9 December 1948.

<sup>33</sup> *The Prosecutor v. Pauline Nyiramasuhuko, Arsene Shalom Ntahaboli, Sylvian Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje* Case No: ICTR-98-42-T dated 24 January 2011.

the agreement made between the Prime Minister and Ministers of the interim government of Rwanda. The plan to commit genocide includes spreading of hatred and ethnic violence, agreement between identified groups, choosing the victims and preparing the list, training the military personnel and finally executing the above.

The mental element was supported and proved through the material element such as, Butare Agreement, entries in diary of the accused regarding events and fulfilment of the planning's, her participation in the meetings and hate speeches.<sup>34</sup> The accused challenged the decision of the Trial Chambers by stating that distribution of safety devices will not attract the *dolus specialis*. But the Appeal Chambers created jurisprudence by opined that distribution of safety devices and ordering of continuous rapes will satisfy the element of ‘...causing serious bodily or mental harm...’ The condoms were not distributed to everyone but only for the selected rapes. The accused had a list of names of the girls and women and by calling them out, ordering the military men including her son to use them to rape Tutsi women so as to prevent and protect themselves from AIDS/HIV<sup>35</sup> and after repeated rape kill them. The Appeal Chambers strongly interpreted that distribution of condoms, and the statement made by the accused shows and recognises her intent.

The ICTR Trail Chambers anywhere does not show any consideration on the accused being a woman. The jurisprudence that the ICL has no gender discrimination was evolved through this decision. The comparative analysis of the decisions of *Akayesu* and *Nyiramasuhuko* was, though both the decisions created jurisprudence over interpreting the mental and material elements of the crime of genocide, the jurisprudence in the *Nyiramasuhuko* case is transcend one. She trashed the image that women can not commit brutal and inhuman crimes against women. Some of the commenter's stated that her act changed the dimension of view about women. Renowned author Mark A. Drumbl stated that ‘...she makes me ashamed to be a

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<sup>34</sup> The Trail Chamber's findings regarding circumstantial evidence to satisfy the *dolus specialis* of the crime of genocide through her presence established the jurisprudence on ‘...to destroy in whole or in part...’ Trail judgement paras. 4847, 5656, 5663, 5666, 5669, 5671, 6014. Further the Trial Chambers indicated that during the swearing-in Ceremony, the accused approved the hate speech of the President and the Prime Minister, her act of distributing condoms to the soldiers and ordered them to rape Tutsi women are the substantial evidence to prove the special intent to commit genocide.

<sup>35</sup> The Appeal Chambers inferred that the accused was aware that the targeted Tutsi women were already tortured and raped by the Hutu men and by having this knowledge only she distributed the safety devices to the military men to rape them again and to protect them from any infectious viruses. *Nyiramasuhuko* Appeal Judgement dated 14 December 2015, paras. 1027 to 1030.

woman...”<sup>36</sup> Several authors exclaimed that the dichotomy on gender through this decision was shuttled. The acts of the accused reversed the perception about women gender can not commit atrocities against women in particular sexual violence against women.

## CONCLUSION

The ICL now reaches its uniqueness by way of creation of International Criminal Court (herein after referred to as the ‘ICC’) through Rome Statute 2002. The two ad hoc international criminal tribunals are the main sources of the establishment of ICL substantially and procedurally. The jurisprudence evolved through the IHL and International Human Rights Law is the foundations of the ICC. The decisions passed by the Trial and Appeal Chambers of the ICTY and the ICTR created jurisprudence over the interpretations of the international crimes. The ICC has inherited the laws from the ad hoc tribunals. The discussion about the two decisions passed by the Yugoslavian and the Rwandan Tribunal passing the message to the national criminal justice system regarding consideration of gender. Female criminality should not be viewed with any leniency. The factor of gender should not be taken into consideration for even the mitigating factor. From the above discussion it is evident that in *Biljana Plavsic* case, the accused showed remorse, repentance and accepted her responsibility. She invited other accused to come forward and accept the serious violations committed by them. But in *Nyiramasuhuko* decision, the accused not only shows any remorse or repentance but she challenged the indictment made against her. She has encouraged her son who is one of the accused along with her in the said case, to commit rape and other serious violations against women. The Trial Chambers of both the Tribunal was very clear in their view that gender has no role in any legal findings of the case.

The data about the severe sentence on women offender for heinous crime is very less in Indian Criminal Justice system. The judiciary should not be predetermined or judgemental when they are presiding over any cases relating to female criminality. The application law should be as the same if the offence would have been committed by a male. Any abetment, attempt, conspiracy to commit any graver offence by a women also treated as same.

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<sup>36</sup> Mark A. Drumbl, 2013 “She makes me Ashamed to be a Woman. The Genocide Conviction on Pauline Nyiramasuhuko 2011”, *Michigan State Journal of International Law*, pp.593 and 594. Carrie Sperling 2011, “Mother of Atrocities: Pauline Nyiramasuhuko’s Role in Rwandan Genocide;”, *Fordham Urban Law Journal* Vol.33, pp.101-127, the author discussed about the involvement of women perpetrators in Rwandan Genocide such as Agathe Habyarimana, wife of the assassinated PM and friend of the accused, two nun sisters who faced trial in Belgium for their involvement in killing of thousands of Tutsis at their convent in Rwanda.

Feminism and protection of women rights includes punishing the women perpetrators also. Let the modern crimes and criminal law is genderless.

# ANALYSING THE CHANGING DIMENSIONS OF PUNISHMENT AND AN ATTEMPT TO RESOLVE THE PROBLEMS OF WOMEN PRISONERS IN THE LIGHT OF RESTORATIVE JUSTICE PRINCIPLES

Dr. Anu Prasannan\*

## *Abstract*

*“You can tell the condition of a nation by looking at the status of its women”*

*These are the words of Pandit Jawaharlal Nehru, the great leader of India's Independence movement and the first Prime Minister of India. Although Indian society has transformed to a great extent by stretching its arms for the protection of women, the question still remains as to whether the nation has fulfilled the dreams of our constitution makers. The answer is reflected in the discrimination against women throughout all stages of their life, even as a foetus in the womb of the mother and continued as an infant, child, adolescent and even as an adult. Indian culture and religious tradition has undermined her status and has subjected her to more and more discrimination. Her position is unimaginable if she is declared an offender by the society and is convicted and subjected to punishment and spends her rest of the life in the prison. Although the system of imprisonment represents a curious combination of different objectives and theories of punishment which have been changing progressively, the plight of women prisoners and their unresolved problems are endless and still remain unresolved. The wide discretion in the hands of police and jail authorities mostly violates the basic human rights of women prisoners. This is increasing in spite of the Indian Constitution, International Conventions and prison based restorative justice that has emerged across the States as well as internationally. Prison reforms introduced from time to time are also not truly implemented by the government and therefore the question pertains as to whether the restorative justice principles and programmes truly come to the rescue of women prisoners or not.*

**Keywords:** Indian Constitution, International Convention, Women Prisoners, Prison Reforms, Restorative Justice, Theories of punishment.

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## INTRODUCTION

Indian society, being a patriarchal society dominated by males, has always looked upon women as inferior to them. Although there is a transformation in recent times, women still come under the discriminated section of society. Woman though an embodiment of goddess Saraswathy, Lakshmi and Durga is dragged to the streets by her own family, humiliated by her own blood, molested and brutally raped by her male counterpart whom she thinks as her own brothers. In situations when she retaliates she becomes an offender and law breaker and once again dumped to the four walls of the dark prison and forgotten by the same society itself thereby violating her basic human rights. Her position is unimaginable if she is declared a habitual offender by the society and is convicted and subjected to punishment and spends her rest of the life in the prison. It is seen that women belonging to lower economic strata because of their economic situations and distressed family environment are dragged to unlawful activities such as prostitution, drug trafficking, drug dealing, theft etc. The major portions of the female prisoner's population are involved in these illegal activities for their own survival and for the fulfilment of basic needs. Although the system of imprisonment represents a curious combination of different objectives and theories of punishment which has been changing progressively, the plight of women prisoners and their unresolved problems are endless and still remain unresolved. The wide discretion in the hands of police and jail authorities mostly violates the basic human rights of women prisoners. This is increasing in spite of various provisions in the Indian Constitution for the protection of women, International Conventions framed by the United Nations and prison based restorative justice that has emerged across the States as well as internationally. Prison reforms introduced from time to time are also not truly implemented by the government and therefore, the question pertains as to whether the restorative justice principles and programmes truly come to the rescue of women. The situation calls for a need to analyse the rights available to them, the problems faced by them in prison, and the restorative justice in prison reforms.

## RELATED PROBLEMS FACED BY WOMEN PRISONERS IN THE MIDST OF EXISTING LEGAL RIGHTS

As of 2016, the Indian prisons are home for 18,498 women wherein, relatively less percentage of women lives in exclusively female prisons and majority are housed in female

enclosures of the general prison.<sup>1</sup> Traditionally most of the prison inmates are males and the prison conditions and environment are therefore, shaped to meet the needs of males and do not cater to the special needs of women prisoners. Women prisoners suffer from double disadvantage that is, being a woman herself and being vulnerable to physical and sexual abuse of the police and jail authorities who themselves are bound to protect her. The gender disadvantage and discrimination gets worsened during imprisonment because of the existing prison conditions. They include:

- Lack of prison capacity<sup>2</sup>
- Shortage of staff<sup>3</sup>
- Lack of basic amenities<sup>4</sup>
- Inhuman treatment towards the children of women prisoners<sup>5</sup>
- Custodial torture<sup>6</sup>
- Inaccessibility of legal services<sup>7</sup>

<sup>1</sup> Recommendation for uniform nationwide collection of prison statistics was made by Committee on Jail Reforms led by Justice A.N. Mulla in 1983 which was taken up by the National Crime Record Bureau (NCRB). NCRB published the first Prison Statistics in 1995 which continued uninterrupted up to 2015. However, statistics for 2016 was released only in 2019 without giving an explanation for the long delay and even without information as to the future steps.

<sup>2</sup> Overcrowding in prison is the prime threat to prison authorities and even to the inmates. The condition worsens if the inmate is a woman

<sup>3</sup> There is shortage of staff and also scarcity of senior level supervisory officers in prison wherein, the National Prison Manual prescribes the appointment of one lady DIG attached to the Prison Headquarters to look after women prisons, staff and prisoners in the state. See GOVERNMENT OF INDIA, WOMEN IN PRISONS INDIA 21 (MINISTRY OF WOMEN AND CHILD DEVELOPMENT 2018).

<sup>4</sup> Most of the women prisoners are mothers and they stay in the prison with their children and the children are denied minimum education and medical facilities. The inadequacy of medical facilities even result in the death of prison inmates.

<sup>5</sup> The Amicus curie appointed in Re-Inhuman Conditions In 1382 prisons informed the bench that the children below the age of 6 years in the prisons of Faridabad, Haryana are not even allowed to leave the prisons and those who crossed 6 years are released from the prison but there was nothing to indicate as to how such children are looked after.

<sup>6</sup> Instances of custodial violence and rape are on the rise. A parliamentary panel has expressed concern over the high occurrences of custodial rape cases in Uttar Pradesh, from where over 90% of such cases have been reported over the past few years. As per the NCRB Statistics New Delhi ranks first in crimes against women. See *Crime in India 2016 Statistics*, NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS. (March 25, 8.30 PM), ncrb.gov.in

Cases like Dharmarajan v. State of Kerala, 2002 Cri. L. J 2571, Aman Kumar, Om Prakash and Satbir Singh v. State 1987(2) DLT319; Ram Kumar v. State of Himachal Pradesh, AIR 1995 SC 1965; Tuka Ram and Another v. State of Maharashtra, 1979 AIR 185 are some of the cases in the long array that reflects violence against women.

<sup>7</sup> Women due to their ignorance do not even avail the benefits provided under Sec. 437 Cr.P.C. Sec. 437 of the Code of Criminal Procedure envisages the provision as regards bail in case of non-bailable offences, which may

However, recently Indian Judiciary has been active in responding to human right violations in Indian jails and has recognised a number of rights of prisoners by giving widest possible interpretation to Articles 21, 19, 22, 37, and 39A of the Constitution of India<sup>8</sup> in a positive and humane way. The Supreme courts and High courts have commented upon the deplorable conditions prevailing inside the prisons resulting violations of prisoner rights which shows a growing concern with the rights of the victims. However, there are cases like Kamalananthan wherein, SC even went to the extent of pronouncing that the police can use third degree on the victim girls in order to make them speak the truth. Such approach of the judiciary has the danger of strengthening the State at the cost of the rights of the citizens.<sup>9</sup> Before analysing the restorative justice programmes an attempt is made once again to glance the rights of the inmate women prisoners that has been analysed time and again without much relief to them. There are a number of rights for women prisoners which are provided by different committees appointed for prison reforms and also by United Nations. These rights incorporated in the Prison Act 1894<sup>10</sup> and the Prisoners Act, 1900<sup>11</sup> are listed as follows:

- The female prisoners have the right to live separately from the male prisoners.
- The search and examination of the female prisoners shall be carried out by the Matron under the general or special order of the Medical Officer; hence, the management and administration of prisons come under the domain of the State Governments
- A person arrested without warrant must be immediately informed the grounds of her arrest and in case of every arrest she is entitled to apply for bail
- On arrest the police are to immediately give intimation of arrest to the Legal Aid Committee and such committee is to take immediate steps to offer legal assistance at state cost.

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or may not be granted depending on the discretion of the court. But proviso to this provision exempts women, and empowers court to grant bail to a woman irrespective of the gravity of the crime

<sup>8</sup> Prison is a State subject under Entry 4 of the State Subjects List of the Seventh Schedule to the Constitution of India.

<sup>9</sup> There are plenty of instances to prove third degree by police authorities wherein, the torture and murder of Thangjam Manorama alias Henthoi, a thirty-two year old woman, by the battalion of the 17th Assam Rifles in Manipur had sent shockwaves across the State. The torture of this young woman drove some elderly women to parade naked sparking protests all over the State. See *Justifying Third Degree*, THEHINDU, August 10, 2004.

<sup>10</sup> The question of cruelty to prisoners is dealt by Prison Act, 1894.

<sup>11</sup> The Prisoners Act, 1900 deals with certain regulations of prison to be followed by Jail authorities.

- Soon after arrest, the Police must obtain the name of any relative or friend to whom she would like to be informed about her arrest
- The Magistrate before whom she is produced shall inquire whether she has any complaint of torture or maltreatment in police custody and to inform her that she has a right under Sec. 54 of the Cr.P.C to be medically examined.<sup>12</sup>
- In case of women prisoners with children, the child shall not be treated as an under trial /convict
- Option for temporary release/parole in order to enable an expectant prisoner to have her delivery outside the prison.
- Women prisoners shall be allowed to keep their children with them till they attain the age of six years.
- Children of women prisoners shall be given proper education and recreational opportunities.<sup>13</sup>
- Jail manuals and other relevant Rules, Regulations, Instructions etc., shall be amended within three months so as to comply with the above directions.<sup>14</sup>

All these directions derived from the judicial pronouncements, Statutory and Constitutional provisions, International Conventions are pointing towards the prison reforms in the lines of reformative approach. The need to prison reforms has come into focus during last few decades and the courts have reiterated that the existing prison conditions are not conducive for their reformation.<sup>15</sup> In T.K. Gopal v. State of Karnataka<sup>16</sup> the court went ahead and advocated therapeutic approach in dealing with the criminal tendencies of prisoners. Court held, the therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the

<sup>12</sup> Sheela Barse v. State of Maharashtra, 1993 Cr.L.J. 642

<sup>13</sup> In many States small children are living in prisons that are not at all equipped to keep small children.

<sup>14</sup> For more details, See MONICA SAKHRANI, CITIZEN'S GUIDE TO CRIMINAL LAW, HRLN, (Universal Law Publishing Co. 2009).

<sup>15</sup> In Rama Murthy v. State of Karnataka (1997)2 SCC 642; the court had identified nine issues facing prisons and needing reforms. They are: (i) over-crowding (ii) delay in trial (iii) torture and ill-treatment (iv) neglect of health and hygiene (v) insubstantial food and inadequate clothing (vi) prison vices (vii) deficiency in communication (viii) streamlining of jail visits (ix) management of open air prisons .

<sup>16</sup> (2000)6 SCC 168

criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy.<sup>17</sup>

In this background, Justice R.C. Lahoti invited attention to the inhuman conditions<sup>18</sup> prevailing in 1382 prisons in India and pointed out that State cannot disown its liability to the life and safety of a prisoner and there are hardly any schemes for reformation for the first time offenders and prisoners in their youth and to save them from coming into contact with hardened prisoners. All these call for the need to look into restorative justice in prison reforms.

## PRINCIPLES OF RESTORATIVE JUSTICE IN PRISON REFORMS

The transitional shift in the criminal justice system, that is, from the pragmatic rigorous legal system towards an enquiry into the detailed behaviours of the wrongdoers and the particulars of the facts and causes and thereby the rehabilitation of the offender comprehends the birth of restorative justice.<sup>19</sup> In the words of Russ Immarigeon, *Restorative justice is a process*

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<sup>17</sup> Justice R.C. Lahoti highlighted on some of the major issues like:

- (i) Overcrowding of prisons
- (ii) Unnatural death of prisoners
- (iii) Gross inadequacy of staff and
- (iv) Available staff being untrained or inadequately trained

For more details see Re-Inhuman Conditions in 1382 Prisons, W.P (Civil) No. 406/2013.

<sup>18</sup> It is pertinent to note that Justice Lahoti has brought an important issue to the forefront and by an order dated 5<sup>th</sup> July, 2013 the letter was registered as a public interest writ petition.

<sup>19</sup> Restorative justice principles show a gradual change from the existing theories of punishment namely, the

- Deterrent theory
- Preventive theory
- Retributive theory
- Reformative theory and
- Expiatory theory.

The word ‘restorative’ means to restore or make restitution, that is, to bring back to an original condition or to put someone back in a former position. On the other hand, ‘justice’ is the quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations; practical conformity to human or divine law; integrity in the dealings of men with each other; rectitude; equity; uprightness or fairness or a scheme or system of law in which every person receives his/her or its due from the system, including all rights, both natural and legal.

*that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each other's backgrounds, and to collectively reach agreement on a 'penalty' or 'sanction'.<sup>20</sup>*

It is in fact, an evolving concept that has given rise to different interpretations in different countries. There are many terms that are used to describe the restorative justice movement. These include "communitarian justice", "making amends", "positive justice", "relational justice", "reparative justice", "community justice" and "restorative justice", among others.<sup>21</sup> A restorative process is one in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.<sup>22</sup>

The five-fold assumptions underlying restorative programmes are as follows<sup>23</sup>:

- the response to crime should repair as much as possible the harm suffered by the victim
- offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community
- the offenders can and should accept responsibility for their action
- victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation and
- that the community has a responsibility to contribute to this process

In 1985, the General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>24</sup> which stated, *informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.*

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<sup>20</sup> RUSS IMMARIGEON, THE IMPACT OF RESTORATIVE JUSTICE SANCTIONS ON THE LIVES AND WELL-BEING OF CRIME VICTIMS: A REVIEW OF THE INTERNATIONAL LITERATURE IN RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 306 (Gordon Bazemore and Lode Walgrave Monsey ed., 1999).

<sup>21</sup> 10 DAVID MIERS, AN INTERNATIONAL REVIEW OF RESTORATIVE JUSTICE, CRIME REDUCTION RESEARCH SERIES PAPER, 88-89, (Research, Development and Statistics Directorate 2001).

<sup>22</sup> Examples of restorative process include mediation, conferencing and sentencing circles. A restorative outcome is therefore, an agreement reached as a result of the restorative process. Examples of restorative outcomes include restitution, community service or any other programme to accomplish reparation of the victim.

<sup>23</sup> See UNITED NATIONS OFFICE ON DRUGS AND CRIME, HAND BOOK ON RESTORATIVE JUSTICE PROGRAMMES, (Criminal Justice Handbook Series, 2006).

<sup>24</sup> General Assembly Resolution 40/34 of 29 November 1985, para. 7.

Further, the United Nations Economic and Social Council with a view to encourage member States to adopt and standardize restorative justice measures in the context of their legal systems adopted the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.<sup>25</sup> The core part of the Basic Principles deal with setting the parameters for the use of restorative justice and the measures that should be adopted by member States to ensure that participants in restorative processes are protected by appropriate legal safeguards.

Some of the restorative programmes adopted in the prisons of western countries in the line of restorative justice are as follows:

- Victim-Offender Mediation (VOM) to address the needs of victims while ensuring that offenders are held accountable for their offences.<sup>26</sup>
- Community and family group conferencing to confront the offender with the consequences of the crime, develop a reparative plan and in more serious cases to determine the need for more restrictive supervision or custody.<sup>27</sup>
- Community service projects in which offenders put back something into the community.<sup>28</sup>
- Victim awareness/ empathy/ impact projects in which offenders learn about the impact of crime on victims, often through experiential exercises and role plays.<sup>29</sup>

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<sup>25</sup> ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

<sup>26</sup> They are the earliest restorative justice initiatives and are generally restricted to less serious offences. These programmes can operate at the pre-charge, the post-charge/pre-trial and post-charge stages, and involve the willing participation of the victim and the offender. It can also offer a pre-sentencing process leading to sentencing recommendations. Victim-Offender Mediation can also be used during the offender's incarceration and can become part of his rehabilitation process even in the case of offenders serving long sentences. There are three basic requirements that must be met before Victim-Offender Mediation can be used:

- The offender must accept or not deny responsibility for the crime
- Both the victim and the offender must be willing to participate
- Both the victim and the offender must consider it safe to be involved in the process.

<sup>27</sup> The focus is much broader than that of regular mediation. Community conferencing is also used sometimes as alternative measure programme through which an offender can be diverted from the criminal justice system. The circle usually consists of those most concerned about the offender and the victim and any other member of the community with an interest in the process.

<sup>28</sup> Here prisoners may undertake some voluntary work that is beneficial to the community.

<sup>29</sup> Sycamore Tree is a victim awareness programme based on the Bible story of Zacchaeus wherein, volunteers who have been victims of crime come into prison to tell their own stories and impact of crime on their lives. At the end of the programme, prisoners are given the opportunity to take part in symbolic acts of restitution, taking the first step towards making amends for their past behaviour. These may include poems, letters and art and craft items. For more information see Arthur Bolks, *Victim Awareness: Helping Offenders Break The 'Cycle Of Victimization'*, PRISON FELLOWSHIP AUSTRALIA, PARLIAMENT OF VICTORIA, (July, 20, 2019, 11.00 PM), <http://www.parliament.vic.gov.au>

## ACCESS TO RESTORATIVE JUSTICE PRINCIPLES BY WOMEN PRISONERS AND CONCLUDING REMARKS

The dissatisfaction and frustration with the formal justice system in strengthening the traditional justice practices, both internationally and nationally, have led to alternative responses to crime and social disorder, which is more evident in the existing prison reforms. Many of these alternatives provide the parties involved, and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. Very recently Supreme Court has issued directions to all State governments to establish ‘open prisons<sup>30</sup>’, as a measure to usher in reforms for inmates and also to prevent over-crowding, appoint counsellors and support persons for counselling prisoners, particularly first time offenders; and to provide telephone and video conferencing facilities to enable the prisoners to speak to their lawyers and family members.<sup>31</sup> In *Rahmath Nisha v. The Additional Director General of Prison and others*<sup>32</sup> recognising that the privacy and dignity of the prisoners should be scrupulously protected court added that conversation between prisoner and his spouse should be unmonitored. Theoretically, the difficulties of the prisoners are over after his release. But in practice, this is rarely the case. The case is totally different in case of women prisoners who will have to face the stigma associated with her years of stay behind the bars. So with this understanding after care programmes are also envisaged at the instance of the Central Government.<sup>33</sup> Therefore, India and Indian prisons live in the lines of therapeutic, reformative and restorative justice. It is true that prison based restorative justice programmes have emerged across the States as well as internationally.

<sup>30</sup> The main objectives of establishing open prisons are to : reduce overcrowding in jails, to reward good behaviour, to give training in self-reliance, to enable prisoners to live with family members (in some States)

<sup>31</sup> *Supreme court passes slew of directions on prison reforms across India*, TIMES OF INDIA, New Delhi, September 15, 2017

<sup>32</sup> WP(MD) No.12488 of 2019. Hon’ble Supreme Court has take note of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) in Re: Inhuman Conditions in 1382 Prisons and referred Rule 58 of the said rules:

58.1. Prisoners shall be allowed , under necessary supervision, to communicate with their family and friends at regular intervals:

(a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and

(b) by receiving visits.

2. where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity”

<sup>33</sup> A few aftercare homes and shelters were set up in some states but because of lack of sustained interest and paucity of funds, most of them were either closed or became defunct. See S.M.A.QADRI, AHMAD SIDDIQUE’S CRIMINOLOGY & PENOLOGY 205-208 (6<sup>th</sup> ed. 2009).

However, while these methods heal harms between victims and offenders but they have little impact on the extent to which prisoners are confined. Much of the efforts even exclude the consideration of restorative justice programmes as a mitigating circumstance to support early release from confinement. They have not lived up to their expectation or possibilities as an alternative to penal confinement.<sup>34</sup> When it comes to women, they commit fewer, less serious crimes and have significantly lower re-involvement in offending than their male counterparts.<sup>35</sup> Therefore, gender matters and plays an important role here. Studies conducted in western countries even show that very less numbers of female offender cases go through to conference, and that there is a perception in the field that women who have committed an offence are more reluctant to engage in restorative justice.<sup>36</sup> There is less awareness on the restorative justice programmes among people and even on prison inmates. No doubt, these practices go a long way in ensuring fairness, for a State like India implementation of these restorative processes is indeed difficult in view of the rising crimes and criminals. What is required is to create more awareness among them so that it could truly heal the harms between victims and offenders and will be a solace for the woman prisoners. For this what is required is coordination between the Government and Judiciary and as an initiative to take stringent measures against those protectors of law who become the real offenders by dragging the women to the darkness of crimes and offences.

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<sup>34</sup> Carolyn Hoyle, *Restorative Justice Critical Concepts In Criminology*, (Routledge 2009).

<sup>35</sup> Rungay, *Scripts For Safer Survival: Pathways Out Of Female Crime*, 43 THE HOWARD JOURNAL OF CRIME AND JUSTICE, ISSUE 4, (2004); J. Graham And B. Bowling, *Young People And Crime*, (Home office 1995);9(1) MCIVOR et al, 2004, CRIMINOLOGY AND CRIMINAL JUSTICE, THERAPEUTIC JURISPRUDENCE AND PROCEDURAL JUSTICE IN SCOTTISH DRUG COURTS, 29-49 (Sage 2009).

<sup>36</sup> Miles, *Income Inequality, Equality of Opportunity, And Intergenerational Mobility*, 27 Journal Of Economic Perspectives, No.3, (2013).

# **A CRITICAL ANALYSIS OF THE CHANGES IN CRIMINAL JUSTICE SYSTEM (LAW AND JUDICIARY) FROM VEDIC PERIOD TO POST - INDEPENDENCE INDIA**

Dr. Santosh Kumar Tripathi\*

## ***Abstract***

*"History of Criminal Justice System in India begins with the Vedic Period in around 3500 years ago. Vedic texts speak about various types of crimes and punishments prescribed for them. Muslims who entered Indian soil in around 1000 A.D. brought with them the legal system and practices of Arab, Turkey, Syria and Persia. Until the coming of British Rule, the Muslim system of administration of criminal justice continued. Charter of 1726 tried to streamline Criminal Justice System in British occupied Presidency Towns whereby the Governor and five Senior Councilors were invested with Criminal jurisdiction in each Presidency Town. Each of them individually acted as Justices of Peace and enjoyed the same power as their counterparts in England. After the Battle of Buxar in 1764, Adalat System was introduced to provide justice in British occupied Mofussil areas of Bengal, Bihar and Orissa. Adalat System worked efficiently under Governor Generalship of Warren Hastings. Many reforms in the system were introduced later by Lord Cornwallis and Lord William Bentinck. Indian High Courts Act of 1861 and Federal Court of India established under Government of India Act, 1935 provided for appellate jurisdiction in civil and criminal matters.*

*In Post- Independence India major change in Criminal Procedure was introduced in the year 1973 which provided a base on which the edifice of Criminal Justice System rested intact for years. Alike this, changes in IPC introduced in the years 1949, 1972, 1983, 1993, 2000, 2006, 2013 and 2018 tried to remove lacunae in Penal Code. Present paper tries to critically analyse the changes made and in our present Criminal Justice System.*

***Keywords:*** History of Law, Criminal Law in British India, CrPC, IPC, Changes in law, Vedic Period, Muslim Rule

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## INTRODUCTION

We are living in the world where ‘Rule of Law’ is the guiding principle of governance. History of Law goes back to the period even when there was no State. It is a pre- political process which was reflected in early human societies in form of customs and practices. Committing crime is a nature of man as reflected in the ‘state of nature’ description by Hobbes. The distinction of bad and good or right and wrong consolidated the idea of Law as a regulatory force to mould individual’s behavior. The basic need for which the State came into being was the protection of life and property of the individuals. Therefore in the development of Legal System, Criminal Justice System perhaps got prominence over the civil laws as administration of Criminal Justice was required even for the existence of human race.

There was no clear cut distinction between administration of justice in regard to criminal offences or civil disputes in the beginning of civilization in Indian sub- continent though in the close of Christian era we find different courts for criminal and civil matters. This was later exhaustively distinguished during the British period. .

## CRIMINAL JUSTICE SYSTEM IN ANCIENT INDIA

At the outset of Indian civilization the very purpose of State was protection of life and property of the people. Vedic literature speaks about the institution of State in form of Jana. Rajan or the king was the authority to regulate individual’s behavior. King gradually organized a system to enforce Law and punish those who violated it. Vedas can be considered as the oldest literature speaking about code of conduct for individuals and duties of the king to punish the offenders. King was known as Gopa Janasya or protector of people. It means he was mainly charged with maintenance of Law and Order. Village Headman, known as Mahattar or Grama Vriddha, along with the Panchayat (Village Council) was responsible for maintaining Law and Order at village level. They were also responsible for delivery of justice to the aggrieved persons in petty offences. This task was assigned to the Nagaraka in later developed urban settlements. Two assemblies are mentioned in Vedic period, named Sabha and Samiti. Out of these, Sabha in later Vedic period acted as the Privy Council of the king and advised him in legal matters.

Dharmasutra and Manu’s Code speak about regular system of state judicial administration for the first time. Megasthenes’s Indica which narrates about the Mauryan society, speaks about the penalties for various offences. Pillar Edict of Ashoka also refers to the practice of deadh

penalty even after Ashoka's conversion to Buddhism. Mahadandnayaka and Dandnayaka like officials refer to the existence of proper Criminal Justice System during Kushan's period. Kautilya mentions two types of Courts namely, Dharmasthiya and Kantakshodhana for criminal and civil matters respectively. This for the first time provides for separate Judicial System for Civil and Criminal cases. Manu also speaks about separate courts for criminal matters. Kautilya prescribes small size Courts for criminal matters. Following are the matters to be taken up in the criminal court- a. Protection of artisans, merchants etc, b. Suppression of the undesirables, c. Detecting criminals by means of spies, d. Arresting the suspicious and real culprits, e. Post Mortem examinations, f. Discipline in various State Departments, g. Punishment for mutilation, h. Capital Punishments, i. Ravishment of immature girls, j. Examination by word and action, k. Miscellaneous offences.

Kantakshodhana was in the nature of the 'Doctrine of Police power'. In fact, the conception of the administration of Criminal Justice went hand in hand with the Police jurisdiction and one completed the other and was completed by the other. For criminals who were cruel in their offences, Kautilya envisages torture to illicit confession. Indeed he devotes a whole chapter to detail this dismal and woeful aspect of Law.

The Smritikaras have discussed at length the classification of crimes and the punishments to be given. The Criminal Code in Arthashastra is rather severe and it has been characterized as 'an eye for an eye and a tooth for a tooth'. Manu prescribes admonition, reproof, a fine, corporal punishment and banishment. A severe type of imprisonment prescribed by Kautilya is forced labour in state mines and other state concerns. Caste and Verna considerations seem to influence type and quantum of punishment. In the above discourse, it can be easily concluded that, though administration of justice was in sedimentary stage during ancient India but distinctive features of civil and criminal jurisdictions were well defined <sup>[4]</sup>.

## **ADMINISTRATION OF CRIMINAL JUSTICE DURING MUSLIM RULE**

With the intrusion of Muslims in the beginning of second millennium of Christian era a new jurisprudence was introduced in Indian subcontinent particularly with regard to Criminal Justice system. System of administration of justice was not well organized in the beginning of Muslim rule when Sultans ruled over major part of the country. The Mughals tried to streamline the system particularly during the reign of Aurangzeb who enthusiastically tried to enforce Islamic laws for the offences. Fatwa-i-Alamgiri is the legal digest produced during

his reign only. The Farmans (royal orders) issued by him on Criminal Laws supplemented the theoretical Muslim Criminal Law prescribed in Quran and Hadis.

Under Islamic jurisprudence, three kinds of offences are recognized- offences against God, offences against the State and offences against the individuals. There is no other punishment but death for the offences against God which includes apostasy. The Law of Islam compounded offences against the State and private individuals. Even punishment for murder could be compensated with money if deceased men's relatives did not insist on retaliation. Discrimination in punishment with regard to Muslims and non-Muslims was practiced in favor of Muslims.

Judicial organization was well defined particularly during later years of Mughal Rule. Quazis' Courts decided criminal offences, which in special circumstances reached to the Quazi-ul-Quazzat (Chief Quazi) and King's Court. Emperor was regarded the fountain head of judiciary and the final tribunal of appeal. He was assisted in dispensation of justice by Chief Sudra and Chief Quazi. The Chief Quazi stood next to Sultan in judiciary and under him there were a number of Quazi's deployed in provincial capitals and headquarters of District and Pargana (sub division). Subehdar (Provincial Governor), Fauzdar (Head of Sarkar or District) and Shiqdar (Head of Shiq or Pargana) also enjoyed magisterial power in regard to offences committed in their respective areas. Jagirdars and local Zamindars also took cognizance of petty offences committed in their respective jurisdiction. Kotwal was the Police Head responsible for not only maintenance of Law and Order but also sorted out some criminal cases. Overall, the system was fragmented particularly in far flung areas though in urban centres it worked efficiently.

## **FOUNDATION OF MODERN SYSTEM OF CRIMINAL JUSTICE DURING THE BRITISH RULE**

Three early settlements of British Company in 17<sup>th</sup> century were Madras, Bombay and Calcutta which were given status of Presidency Towns and developed as centers of trade and became nucleus of British administrative machinery in India. The Company's main concern was to evolve a system of judicial administration for its servants particularly the Englishmen. Indians in these regions were left with their own system of judicial administration with regard to their civil disputes and petty offences. For example, in Black Town area of Madras, Adigar or the Village Headman presided over the Choultry Court which was authorized to decide

civil disputes and petty offences. In later period, these native Courts also came under the British supervision. Agent along with the Council (later Governor-in Council) was the dispute deciding machinery in the White town of Madras. It was also empowered to decide criminal and other matters despite being deficient in legal training. Serious cases were sent to England which was cumbersome and time taking. The system of Jury trial had been adopted to decide matters in these Presidency towns. Governor and his Council acted as High Court of Judicature for all civil and criminal matters in the Presidency towns. This Court also heard appeals against the decisions of Choultry Court in Madras. Admiralty Court in Madras opened in 1686 A.D. It dispensed justice in all civil, criminal and maritime cases. In criminal cases the court was assisted by the Jury. Judges of the Court were not expert of Law but the civil servants of the Company judged the matters on the principles of equity, justice and good conscience. Another Court, known as Mayor's Court, also took up all types of cases and tried criminal cases with the help of Jury. This Court comprised of the Mayor and Aldermen of the Municipal Corporation.

A uniform judicial pattern was ensured in Presidency Towns through the Charter of 1726 A.D., which continued working of Mayor's Court from where the appeal reached to Governor- in- Council, who were actually the executive head. Native Courts still worked outside the Presidencies. Thus we do not find clear distinction between the judicial machineries meant for civil and criminal cases during this period.

Territories of Bengal, Bihar and Orissa which came under British Company after the Battle of Buxar of 1764, were known as Mofussil areas. These territories were different from Presidency Towns as the responsibility of the whole region was vested with the Company now. Judicial administration thus provided to this region was known as Adalat system where we see clear cut division of Civil and Criminal Courts known as Diwani Adalat and Nizamat Adalat respectively. This system later on extended to the Mofussils of Bombay and Madras also.

Warren Hastings, Lord Cornwallis and Lord William Bentinck brought various reforms in existing Adalat system. Mofussil Fauzdari Adalat established in each district was presided over by an Indian Officers of the Company with the help of Quazi, Mufti or Maulvi. Muslim Law was followed in respect of criminal cases. Sadar Nizamat Adalat headed by Deputy Nazim was the Court of Appeal for criminal matters in the region. Some Magisterial power was given to Collector with regard to petty offences including corporal punishment. Lord

Cornwallis replaced District Fauzdari Adalats with four Circuit Courts. Lord William Bentinck who was the Governor General of India from 1828 A.D. to 1835 A.D. is known for his reforms in criminal judiciary. He gave power to government to invest the judges of District Diwani Adalat the duties of the Session i.e. the administration of Criminal Justice. The Session Judges tried cases committed to them by Magistrates. While not in Session, they sat as District Judges and disposed the civil matters. This led to the emergence of District and Session Judges doing civil and criminal justice side by side. He also replaced Persian with the vernacular language in Lower Court while English emerged as a language in Higher Courts. Supreme Court established in Calcutta in 1774, A. D. was the ultimate Court of Appeal in criminal matters as well. But it remained only for the British citizens or the servants of the company. Such Supreme Courts were also opened in Madras and Bombay in the years 1801 and 1824 respectively.

In order to bring uniformity in judicial set up, First Law Commission headed by Lord Macaulay prepared the Criminal Code which became an Act after revision by Second Law Commission in 1860 A.D., named as Indian Penal Code. Second Law Commission also prepared a draft on Criminal Procedure which was passed in the year 1861 A.D. Both the Acts became operative from January 1, 1862 A.D. Another major development was the Act of 1861 which provided for establishment of three High Courts in Presidency Towns. These High Courts were given supervisory power over the Subordinate Courts falling under it. Supreme Courts and Sadar Adalats were abolished and their power and functions were taken over by the respective High Courts. Three High Courts came into being in Calcutta, Madras and Bombay in the year 1862. Another High Court was inaugurated in Allahabad in 1866 A.D. to cater the judicial needs of North Western Provinces. The hierarchy of Indian courts was formally organized after coming of Federal Court of India through The Government of India Act, 1935. The Court had original, Appellate and Advisory Jurisdictions. It also had supervisory powers over all other Subordinate Courts. Privy Council situated in England heard Appeals against decisions of Federal Court and High Courts. Jurisdiction of Privy Council and Federal Court was inherited by Supreme Court of India after independence.

## **CHANGES IN POST-INDEPENDENCE ERA**

The major change in Criminal Procedure was introduced in the year 1973 with the enactment of a comprehensive Code of Criminal Procedure to be operative in almost whole of Indian territories which was being governed by the Constitution of India 1950 after the departure of

the British. Section 6 of Code of Criminal Procedure, 1973 states- “ Besides High Courts and the courts constituted under any law, other than this Code there shall be, in every State, the following classes of criminal courts, namely-

1. Courts of Session;
2. Judicial Magistrate of the First Class and; in any Metropolitan Magistrates;
3. Judicial Magistrates of the Second Class; and
4. Executive Magistrates

Special Tribunals have also been established ‘to regulate activities of trade, commerce, industry and the like and for effecting socio- economic reforms’ and to decide disputes arising out of legislative enactments.

Indian Constitution placed Criminal Law and Criminal Procedure in the Concurrent List authorizing Union and State Legislatures to make Laws in relation with these subjects. Consequently, a lot of changes have been introduced in the Criminal Justice System from time to time. Major changes were introduced in the Penal Code in the years 1949, 1972, 1983, 1993, 2000, 2006, 2013 and 2018 in order to remove lacunae in the said Code.

## **CONCLUSION**

We have seen in the preceding pages, how have Law and judiciary changed in long course of Indian history since the very beginning. The system of enactment of law may not be well organized in ancient and medieval period but Indians were well aware of the basic tenets of Criminal Justice System and, therefore, laid a system based on their religious texts, perhaps also because of the God fearing nature of the people who accepted prevention of crimes as their religious and moral duties. Various levels of judicial set up fulfilled the need of adjudication efficiently for thousands of years. A new era of Law and Justice based on the western ideas of justice, rights and equity were introduced by the British which was further elaborated in free India where the principles of Criminal Justice System are well understood and implemented.

# **ANALYZING INTERNATIONAL COUNTER-TERRORISM LAWS: CONTEXTUALIZING THE FEASIBILITY OF EXISTING LAWS AND THE WAY FORWARD**

Dr. Chandni Sengupta\*

## ***Abstract***

*Terrorism is defined as “acts of violence that target civilians in pursuit of ideological and political aims.” A scrutiny of official charters and state documents from countries around the world reveal that terrorism does not have a single definition but is defined according to specific contexts. According to the United States Code Section 2656 F (D), “terrorism means premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents intended to influence an audience.” Every country has specific counter-terrorism laws. Apart from this, there are fifteen international counter-terrorism conventions in force. This paper attempts to critically analyze all the Conventions and Security Council Resolutions on anti-terrorism. It also aims at scrutinizing the gaps in international laws in order to make a case for more effective counter-terrorism legislations.*

**Keywords:** Terrorism, Counter-Terrorism, Laws, International, United Nations, Convention

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## INTRODUCTION

Terrorism as a global phenomenon has a long and chequered history. It has manifested itself in minor and major acts of terror across the world over centuries. The late-nineteenth and early-twentieth century has been described as the “Golden Age” off terrorism by some scholars. In this period, many international terrorist movements arose. The most ghastly act of terrorism in the early-twentieth century was the assassination of Archduke Franz Ferdinand by a Serbian terrorist, Gavrilo Princep, on 28<sup>th</sup> June 1914 in the Bosnian capital of Sarajevo. This act became the trigger point for the First World War.

There are four distinguishable turning points in the history of contemporary terrorism—1968, 1979, 1983, and 2001. In the year 1968, the Latin American insurgents launched their urban guerrilla strategy and in the Middle East, the Palestinians adopted the strategy of violence to garner support. In 1979, the Iranian Revolution led to the victory of radical Islamic Shiism. This led to the glorification of martyrdom as the end result and suicide bombing as a means to the end. In the same year, the Soviet intervention in Afghanistan gave the United States an opportunity to inflict defeat on USSR. For this, Saudi Arabia and Pakistan were used as allies. Yet another significant landmark in the history of contemporary terrorism was the Beirut Bombings in 1983 which claimed the lives of 241 American Marines and 53 French Paratroopers.

In the twenty-first century, the most heinous act of terror against humanity was perpetrated by a terrorist organization called Al-Qaeda on September 11, 2001 when a flight hijacking eventually led to the destruction of the World Trade Towers in New York and a partial destruction of the Pentagon in Arlington County, Virginia.

## DEFINING TERRORISM: AN ANALYTICAL APPROACH

Strategists and experts have worked towards arriving at a consensus as far as defining terrorism is concerned, however, the term terrorism does not have a single definition. It means different things to different people. Two Dutch researchers, Alex Schmid and Albert Jongman, adopted an academic approach to the problem of defining terrorism. Schmid and Jongman collected 109 definitions of terrorism and analysed their main components. They

discovered that violence was included in 83.5 per cent of the definitions, while in 65 per cent of the definitions, political goals were present.<sup>1</sup>

The official definitions of terrorism are fairly similar. The Office for the Protection of the Constitution of the Federal Republic of Germany states that “Terrorism is the enduringly conducted struggle for political goals which is intended to be achieved by means of assaults on the life and property of other persons especially by means of severe crimes or by means of other acts of violence, which serve as preparation for such criminal acts.”<sup>2</sup> The British legal definition of terrorism explains, terrorism is the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.<sup>3</sup>

In 1994, the United Nations General Assembly adopted the Declaration on Measures to Eliminate International Terrorism. It defined terrorism as “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes. These acts are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them.”<sup>4</sup>

An analysis of the definitions of terrorism, therefore, has three critical components: a) the use of violence as a means, b) political objectives, c) intention of generating fear among the target group. Given its nature and objective, many scholars have used the term “political violence” interchangeably with the word terrorism.

It is imperative to state that despite several official and academic definitions of terrorism, the UN has not been able to reach a consensus as to the exact definition of the word. The UN has, therefore, adopted a fragmented approach and instead of attempting a consensus, it has brought forth specific conventions to outlaw the types of methods used by terrorists. At present, there are fifteen such resolutions in place which cover acts such as hijacking, bombings, and attacks on diplomats. These resolutions form the basis of the counter-terrorism

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<sup>1</sup> Schmid and Jongman, *Political Terrorism* (1983, 1988, 2005)

<sup>2</sup> Ibid., p. 33-34

<sup>3</sup> Op.cit, p. 34

<sup>4</sup> Resolution 49/60. Measures to eliminate international terrorism A/RES/49/60 9 December 1994; Available at: <http://www.un.org/documents/ga/res/49/a49r060.htm> (Accessed 29 October 2019)

measures adopted by countries across the globe. Collectively, they can be defined as International Counter-Terrorism Laws.

## COUNTER TERRORISM: MEANING AND IMPLICATIONS

Counter terrorism is defined as “the practices, tactics, techniques, and strategies that governments, militaries, police departments, and corporations adopt in response to terrorist threats and/or acts, both real and imputed.”<sup>5</sup> Counter terrorism is a complex subject that encompasses a plethora of strategies for dealing with violent extremism. The central purpose of counter terrorism is to devise methods and policies to prevent non-state groups to stop the use of violence for attaining their political objectives.<sup>6</sup> Alex Schmid has divided these strategies into two distinct categories: a) those efforts that fight the manifestations of terrorism and b) those that attempt to address the conditions conducive to the spread of terrorism.<sup>7</sup>

Preventive counter-terrorism strategies have been adopted by many nations. After the 9/11 incident, the UN Security Council adopted a resolution which made it binding on all the member states to freeze the financial assets of individuals of organizations that have committed or are likely to commit acts of terror. This UN Security Council Resolution 1373 has become the basis for counter-terrorism strategies of countries across the globe. The preventive counter-terrorism strategies of the United States, the European Union and the United Kingdom can be taken as examples to explain the strategic interventions made so far.

The counter terrorism strategy of the United States of America focusses on the following objectives: i) eliminating terrorist threat to the United States, ii) Securing the borders and ports of entry of the country against any terrorist threat, iii) Preventing radicalism and violent extremist ideologies from undermining the American way of life, iv) Encouraging foreign partners to address terrorist threats so that these threats do not jeopardize the collective interests of the United States and its partner.<sup>8</sup>

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<sup>5</sup> U.S Foreign Policy, Available at: <http://usforeignpolicy.about.com/od/defense/a/what-is-counterterrorism> (Accessed 29 October 2019)

<sup>6</sup> Robert J. Art and Louise Richardson, ‘Introduction,’ in Robert J. Art and Louise Richardson (eds.), *Democracy & Counter-Terrorism: Lessons from the Past*, Washington, United States Institute of Peace Press, 2007, p.1

<sup>7</sup> Alex P. Schmid, ‘Prevention of Terrorism: Towards a Multi-Pronged Approach,’ in Tore Bjørjo (ed.), *Root Causes of Terrorism: Myths, Reality and Ways Forward*, London, Routledge, 2005, p. 223

<sup>8</sup> Available at: <https://www.whitehouse.gov/wp-content/uploads/2018/10/NSCT.pdf>

The counter-terrorism strategy of the European Union constitutes four strands: prevent, protect, pursue, and respond. The preventive aspect of this strategy has three segments—i) disrupting radicalization and terrorist recruitment, ii) ensuring that mainstream opinion prevails over extremist views, and iii) promoting security, justice, democracy, and equal opportunity.<sup>9</sup>

The counter-terrorism strategy of United Kingdom, called Contest, consists of four strands: pursue, prevent, protect, and prepare. The British government has focussed on three significant components—i) respond to the ideological challenges of terrorism, ii) identify and support vulnerable individuals, and iii) cooperate with institutions and organizations where there are risks of radicalization.

Despite the specific counter-terrorism strategies adopted by countries, the International Counter-Terrorism Resolutions adopted by the United Nations are binding on all member states, and hence, in the following sections an attempt would be made to analyse the resolutions and its critical components in order to ascertain the efficacy of these laws.

## **INTERNATIONAL COUNTER-TERRORISM LAWS: UN AND ITS COMMITMENT TO COMBATING TERRORISM**

Over the past three decades, the geographical reach of acts of terrorism has expanded. The frequency and magnitude of such acts have taken an unprecedented shape. Terrorism is the major threat to international peace, development and security. Terrorism is, therefore, the most profound challenge faced by the world community at large, and there is perhaps no country in the world which can claim to be immune to the acts of terror. The cross-border nature of planning, financing and recruitment of acts of terrorism imply that terrorism is a common phenomenon and that countries cannot deal with this challenge alone. Therefore, in order to defeat the threat of terrorism, a collective response is mandatory.

The United Nations has developed fifteen international conventions which deal with specific aspects of terrorism. The first convention came into force on 4<sup>th</sup> December 1969. The Convention on Offences and Certain Other Acts Committed on Board Aircraft, also known as the Tokyo Convention, applies to acts affecting in-flight safety. This Convention authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he

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<sup>9</sup> Available at: <https://www.icct.nl/download/file/ICCT-Eijkman-Preventative-CT-and-Non-Discrimination-EU-July-2011.pdf> (Accessed 29 October 2019)

or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander. However, this Convention does not focus on the role of the passengers in case of an in-flight crisis in which the passengers are the victims.

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, also known as The Hague Hijacking Convention, was adopted by the International Conference on Air Law at The Hague on 16<sup>th</sup> December 1970. It came into force on 14<sup>th</sup> October 1971. This Convention makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft” or to attempt to do so; it requires parties to the convention to make hijackings punishable by ‘severe penalties’; it requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and it requires parties to assist each other in connection with criminal proceedings brought under the Convention. A major drawback of this Convention is that it does not apply to customs, law enforcement or military aircraft, thus it applies exclusively to civilian aircraft. The convention only addresses situations in which an aircraft takes off or lands in a place different from its country of registration. Ten Member States have not ratified this Convention, including Burundi, East Timor, Eritrea, Kiribati, Solomon Islands, Somalia, San Marino, South Sudan, Tuvalu, Federal States of Micronesia. Burundi has signed the Convention but not ratified it yet.

The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, also known as the Sabotage Convention or Montreal Convention, was adopted by the International Conference on Air Law at Montreal on 23<sup>rd</sup> September 1971. It came into force on 26<sup>th</sup> January 1973. This Convention makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts; it requires parties to the Convention to make offences punishable by ‘severe penalties’; and requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution. Seven Member States of the UN have not ratified this Convention. These include East Timor, Eritrea, Kiribati, San Marino, Somalia, South Sudan, Tuvalu.

On 24<sup>th</sup> February 1988 in Montreal, the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation was signed as a supplement to the Convention. The Protocol makes it an offence to commit similarly violent, dangerous, or damaging acts in airports that serve civil aviation. The Protocol came into force on 6 August 1989 and as of February 2018 has been ratified by 175 states. However, this Protocol is also not binding on member states and Afghanistan, Nepal, Sierra Leone, Solomon Islands, Swaziland, Haiti, Burundi, have not ratified this Protocol.

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, also known as the Diplomatic Agents Convention, was adopted as a resolution of the United Nations General Assembly on 14<sup>th</sup> December 1973. It was adopted in response to a series of kidnappings and murders of diplomatic agents, beginning in the 1960s.<sup>10</sup> Parties to the convention agree to criminalize the commission of murders or kidnappings of internationally protected persons as well as violent attacks against the official premises, private accommodation, or means of transport of such persons. Parties to the convention also agree to criminalize the attempted commission or threatened commission of such acts. "Internationally protected persons" is a term created by the convention, and refers explicitly to heads of state, heads of government, foreign ministers, ambassadors, other official diplomats, and members of their families. A large number of UN member states, primarily African nations, have not ratified this Convention, such as Angola, Chad, Republic of the Congo, East Timor, Eritrea, Gambia, Indonesia, Samoa, Solomon Islands, Somalia, South Sudan, Suriname, Tanzania, Tuvalu, Vanuatu, and Zimbabwe.

The 1979 International Convention against the Taking of Hostages or the Hostages Convention was adopted on 17<sup>th</sup> December 1979. The creation of an anti-hostage-taking treaty was a project initiated by the Federal Republic of Germany in 1976. The Convention on the Physical Protection of Nuclear Material was adopted on 26 October 1979 in Vienna, Austria. In July 2005, a diplomatic conference was convened to amend the Convention and strengthen its provisions. Member States such as Bulgaria, Hungary, Mongolia, Poland, and Russia, have denounced the Convention after having ratified it.

The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation or the Airport Protocol was brought into force to extend the

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<sup>10</sup> Blumenau, Bernhard, *The United Nations and Terrorism: Germany, Multilateralism, and Antiterrorism Efforts in the 1970s*, Basingstoke: Palgrave Macmillan, 2014, pp. 40–45, 104–105

provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation. In the same year, the Maritime Convention was also brought into force. Twenty Nine member states of the UN have not signed the Maritime Convention, out of which some are landlocked and hence the Convention is not binding on them. For example, Bhutan, Zimbabwe, Nepal, Zambia. Some countries which are not landlocked have also not signed, for example, Indonesia, North Korea, Malaysia, Angola, Belize, Thailand, Venezuela, among others.

In 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf or Fixed Platform Protocol came into force. It establishes a legal regime applicable to acts against fixed platforms on the continental shelf. On 14<sup>th</sup> October 2005, a supplementary Protocol to SUA PROT was concluded. The 2005 Protocol adds provisions which criminalize the use of fixed platforms to discharge biological, chemical, or nuclear weapons. It also prohibits ships from discharging oil, liquefied natural gas, radioactive materials, or other hazardous or noxious substances in quantities or concentrations that are likely to cause death or serious injury or damage. Thirty Seven member states have not signed the SUA PROT.

The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, also known as the Plastic Explosives Convention was concluded at the ICAO International Conference on Air Law in Montreal on 1<sup>st</sup> March 1991. It entered into force on 21<sup>st</sup> June 1998. The Convention was designed to control and limit the use of unmarked and undetectable plastic explosives. Parties are obligated in their respective territories to ensure effective control over "unmarked" plastic explosives. The 1997 International Convention for the Suppression of Terrorist Bombings, also known as the Terrorist Bombing Convention was drafted on 15<sup>th</sup> December 1997, signed on 12<sup>th</sup> January 1998, and was made effective on 23<sup>rd</sup> May 2001. This Convention aimed to create a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

In 1999, the International Convention for the Suppression of the Financing of Terrorism or the Terrorist Financing Convention was adopted. The treaty entered into force on 10<sup>th</sup> April 2002. It requires parties to take steps to prevent and counteract the financing of terrorists. It also requires states to hold those who finance terrorism, and provides for the identification,

freezing and seizure of funds allocated for terrorist activities. This Convention has not been ratified by member states such as Burundi, Chad, Eritrea, Iran, Somalia, South Sudan, and Tuvalu. Burundi and Somalia have signed the convention but have not yet ratified it.

In 2005 the International Convention for the Suppression of Acts of Nuclear Terrorism or the Nuclear Terrorism Convention was adopted. It was signed 14<sup>th</sup> September 2005 and became effective from 7<sup>th</sup> July 2007. The Convention covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors. It encourages states to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings. Thirty Five Member States have not ratified the convention, including Egypt, Ireland, Israel, Syria, Malaysia, Tajikistan, among others.

In 2010 the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation or the Beijing Convention came into force. In the same year, the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft was also adopted. It criminalizes the act of using civil aircraft as a weapon to cause death, injury or damage; the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons; the act of unlawful transport of BCN weapons or certain related material. It also makes cyber-attack on air navigation facilities constitutes an offence. It also outlines that a threat to commit an offence may be an offence by itself, if the threat is credible. Conspiracy to commit an offence, or its equivalence, is punishable as part of the Convention. A major drawback of the Convention is that it has been ratified by only 27 Member States.

## **ADOPTION OF SPECIAL RESOLUTIONS AFTER 9/11 ATTACKS**

The United Nations Security Council Resolution 1373, adopted unanimously on 28<sup>th</sup> September 2001, is a counter-terrorism measure passed following the 11<sup>th</sup> September terrorist attacks on the United States. However, the resolution failed to define 'Terrorism', and the working group initially only added Al-Qaeda and the Taliban regime of Afghanistan on the sanctions list. This also entailed the possibility that authoritarian regimes could label even non-violent activities as terrorist acts, thus infringing upon basic human rights.

The UN Security Council Resolution 1566 picked up loose ends from 1373 by actually spelling out what the Security Council sees as terrorism:

"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act."

Although this definition has operative effect for the purposes of Security Council action, it does not represent a definition of "terrorism" which binds all states in international law.

The United Nations High-level Conference of Heads of Counter-Terrorism Agencies of Member States, was held at United Nations Headquarters on 28-29 June 2018. This was envisaged as the first step towards building a new partnership for multilateral cooperation and a step closer towards depoliticizing the international community's counter-terrorism efforts. The theme of the conference was "Strengthening International Cooperation to Combat the Evolving Threat of Terrorism". The Conference was supposed to bring together the heads of national counter-terrorism agencies for operational and practical exchanges and consensus-building on key terrorism issues affecting Member States.<sup>11</sup>

## **COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM (16TH CONVENTION): THE WAY FORWARD**

Negotiations are deadlocked due to dispute over the definition of terrorism. India proposed the 16<sup>th</sup> Convention in 1996 and has since demanded consistently, especially in the wake of the 2008 Mumbai attacks. The issue was once again pushed by the Indian Prime Minister, Narendra Modi in his address at the 69<sup>th</sup> Session of the UN General Assembly held in September 2014.<sup>12</sup> India further pressed for the adoption of CCIT following the July 2016 Dhaka attack.<sup>13</sup>

The definition of the crime of terrorism which has been on the negotiating table of the Comprehensive Convention since 2002 reads as follows:

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<sup>11</sup> Seventy-Second Session, The United Nations Counter Terrorism Strategy, Report of the Secretary General; Available at: <https://undocs.org/pdf?symbol=en/A/72/840> (Accessed on 21 February 2020)

<sup>12</sup> "India to garner support for anti-terror initiative CCIT at BRICS." *The Economic Times*, 15 October 2016; Available at: <https://economictimes.indiatimes.com/news/defence/india-to-garner-support-for-anti-terror-initiative-ccit-at-brics/articleshow/54859024.cms> (Accessed 3<sup>rd</sup> November 2019)

<sup>13</sup> "Dhaka Attack: India calls for quick adoption of CCIT IN UN General Assembly." *The Financial Express*, 2 July 2016; Available at: <https://www.financialexpress.com/india-news/dhaka-attack-india-calls-for-quick-adoption-of-ccit-in-un-general-assembly/304246/> (Accessed 3<sup>rd</sup> November 2019)

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

- a) Death or serious bodily injury to any person; or
- b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."

This definition is not controversial in itself; however, the deadlock in the negotiations arises instead from the opposing views on whether such a definition would be applicable to the armed forces of a state and to self-determination movements.

## **CONCLUSION**

The United Nations has promulgated an effective anti-terrorism strategy, with fifteen conventions in place, however, most of these conventions are not binding on Member States and, therefore, many countries have not ratified these conventions till date. Furthermore, the crisis of developing a consensus over the definition of terrorism has led to a serious deadlock. It is incumbent on the United Nations and all the Member States to adopt a comprehensive definition of terrorism, thereby making it easier to expedite more stringent laws for dealing with acts of terror.

## **THE EFFICACY OF EXTRADITION LAWS IN INDIA**

Dr. Jaishree Umale\*

### ***Abstract***

*Crimes have crossed territorial borders. It's easier for a fugitive to commit crime in his native country and flee to another country to escape prosecution. Globalization and technological advances have provided better connectivity, which is exploited by the fugitives to flee the country after committing crime and find a safe haven in another country. India's record has been abysmal in utilizing Extradition Laws in bringing back criminals. This Paper tries to assess the efficacy of the Extradition laws and find out the challenges faced by India in executing these. It also makes suggestions to improve the Law to book the culprits and bring them to justice.*

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## INTRODUCTION

In the olden days it was very difficult to leave one's own country and visit another. Getting information and processing papers took a long time. Globalization and technological advances have provided better connectivity. It is easier to get information and even to process papers sitting at home. This is exploited by fugitives to flee the parent country after committing a crime to find a safe haven in another country, in order to escape prosecution. Extradition Laws are in existence but they are not enough to bring back the culprits as they may have taken citizenship of the country they have fled to. Political offenders do not come under the purview of extradition and these people are generally granted asylum. Other social and judicial factors play an important role in taking the final decision. The process is intricate and the existing laws are not enough to extradite the fugitive criminals and try them in a Court of Law. A treaty should be in existence for extradition and the principle of reciprocity is generally followed but many a times it's not possible to have treaties with all the nations and to accede to their requests. Human Rights concern and Laws of the foreign jurisdiction also affects extradition. There are many cultural instances as well affecting extradition i.e. exploitation for dowry which is unique to India and which would not be considered a crime in other countries. Hence, getting criminals offending this Law in India would be difficult as they would not be extradited by other countries. As it is, India's record has been abysmal in utilizing Extradition Laws in bringing back criminals. Extradition process is complex but necessary to provide timely justice. It also serves as a deterrent against criminal fugitives who undermine the Laws of the land and flee to other countries to escape prosecution. India was not successful in bringing back Vijay Mallya, David Headley, Nirav Modi, Mehul Choksi, Lalit Modi etc., hence, it is necessary to look at the problems that the Law faces in bringing back criminals to India.

### What is Extradition?

Extradition is derived from the words 'ex' and 'traditum' which means 'delivery of criminals' or 'handover of criminals'<sup>1</sup>. Oppenheim says --- "Extradition is a delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of

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<sup>1</sup> Agarwal, I. (2016). Extradition Under International Law-Aid for the Angst of Fugitives. International Journal of Law and Legal Jurisprudence Studies, Vol 3(3) pp. 453-466

a crime, by the state on whose territory he happens for the time to be.”<sup>2</sup>

The extradition of a person is governed by the Indian Extradition Act, 1962. The basis could be a treaty between India and a foreign country. Information regarding the fugitive criminal is received from the affected country through the General Secretariat of the ICPO – Interpol in the form of Red Notices.

### **Extradition Rules and Regulations**

#### *Extradition Treaty*

It is a legal framework which states the principles and rules of extradition governing the return of fugitive criminals to the land where the crime was committed. India has bilateral Extradition Treaties with 43 countries<sup>3</sup> (Table 1). This treaty contains a list of crimes for which a fugitive will be surrendered and also the condition that the punishment is more than one year imprisonment. The crime must be recognized in both the countries. This is known as Dual Criminality Treaty.

**Table 1. Extradition Treaties with other countries**

Azerbaijan (2013)	Egypt (2008)	Nepal (1953)	Tajikistan (2003)
Australia (2008)	France (2003)	Netherlands (1898)	Thailand (2013)
Bahrain (2004)	Germany (2001)	Oman (2004)	Tunisia (2000)
Bangladesh (2013)	Hong Kong (1997)	Poland (2003)	Turkey (2001)
Belarus (2007)	Indonesia (2011)	Philippines (2004)	UAE (1999)
Belgium (1901)	Iran (2001)	Russia (1998)	UK (1992)
Bhutan (1996)	Kuwait (2004)	Saudi Arabia (2010)	Ukraine (2002)
Brazil (2008)	Malaysia (2010)	South Africa (2003)	USA (1997)
Bulgaria (2003)	Mauritius (2003)	South Korea (2004)	Uzbekistan (2000)

<sup>2</sup> ‘International Law’ Vol. I, Ninth Edition (1992), p. 949.

<sup>3</sup> Ministry of External Affairs, Available at <https://mea.gov.in/leta.html>; (Accessed 21 October 2019)

Canada (1987)	Mexico (2007)	Spain (2002)	Vietnam (2011)
Chile (1897)	Mongolia (2001)	Switzerland (1880)	Malawi (2018) <sup>IV</sup>

*Extradition Arrangements*

India also has extradition arrangements with 10 countries<sup>4</sup> (Table 2) but these arrangements are not binding and do not impose any legal obligations. Requests can be made to these States for extradition of fugitives and they may be considered according to the Laws of their country and on the Principle of Reciprocity from the ‘Requesting State.’

**Table 2. Extradition Treaties with other countries**

Sweden (1963)	Fiji (1979)
Tanzania (1966)	Italy (2003)
Singapore (1972)	Antigua & Barbuda (2001)
Papua New Guinea (1978)	Croatia (2011)
Sri Lanka (1978)	Peru (2011)

*Multilateral Conventions*

India has signed several Conventions that provide a legal framework for Extradition to minimize transnational crimes like Terrorism, Hijacking, Money Laundering, Drug Peddling etc.<sup>5</sup> (Table 3)

**Table 3. Extradition Conventions**

1	United Nations Convention Against Corruption (2003)	Article 44
2	United Nations Convention against Transnational Organized Crime (2000)	Article 16
3	United Nations Convention Against Illicit Traffic in Narcotic Drugs and	Article 6

<sup>4</sup> CBI, Available at <http://www.cbi.gov.in/interpol/extradition.php#pos> (Accessed 21 October 2019).

<sup>5</sup> United Nation Convention Against Transnational Organized Crime And The Protocols Thereto

	Psychotropic Substances (1988)	
4	International Convention for the Suppression of the Financing of Terrorism (1999)	Article 11
5	International Convention on the Suppression of Terrorist Bombings (1997)	Article 9
6	Convention for the Suppression of Unlawful Seizure of Aircraft (1970)	Article 8

## EXTRADITION PROCESS<sup>6</sup>

The Ministry of External Affairs (MEA) is responsible for sending Extradition requests to other countries. The Ministry is intimated by the investigating agencies like the CID or Court of Law. When the foreign government receives this request it begins the enquiry and the Magistrate issues an Order to extradite the fugitive. If the fugitive challenges the Order then the matter is brought before the foreign courts for judicial review. If the foreign government finalizes the Extradition Order then it makes arrangement with the Requesting State to send back the fugitive.

## CHALLENGES TO EXTRADITION<sup>7</sup>

There are laid out formats for Extradition under Treaties that are signed. The offences are listed and through this ‘list system’ fugitives can be extradited. In newer treaties the crime should be listed in both the countries. In spite of this, the process of Extradition throws various challenges as discussed below:

- a) **Political and Religious Offenders:** Extradition is not granted for political offences. Extradition is not granted if there is potential discrimination on the basis of religion, race and nationality. There is no clarity as to what constitutes political and religious offence in the law of extradition.
- b) **Death Penalty:** Extradition is not granted if death penalty would be imposed but for heinous crimes death penalty is still practiced and favored.
- c) **Double Jeopardy:** Extradition is not granted in the cases of ‘**Double Jeopardy**’ that is a person cannot be punished for the same crime twice. This is the reason why David Headley, the American terrorist involved in 29/11 Mumbai attacks have not

<sup>6</sup> CBI; Available at <http://www.cbi.gov.in/interpol/extradition.php#pos> (Accessed 21st October 2019)

<sup>7</sup> Tirkey A. (2018). India’s Challenges in extraditing fugitives from foreign countries; Available at <https://www.orfonline.org/research/indias-challenges-in-extraditing-fugitives-from-foreign-countries-45809/>; (Accessed 21st October 2019)

been tried in India as he is undergoing trial for killing six Americans<sup>8</sup>. He is responsible for the deaths of 140 Indian Nationals.

- d) **Human Rights Violation and Jail Conditions:** Some Human Rights violation like torture or denial of fair trial, cruel and inhuman treatment etc. may not allow Extradition. America does not enquire regarding the conditions prevalent in the Requesting Country but UK and Europe have rejected Extradition on Human Rights concern. Over crowded Prisons with dilapidated infrastructure, poor hygiene and amenities, police torture and violence, misconduct etc. are categorized under inhuman or degrading treatment and Extradition requests are denied. British Courts rejected Extradition of Sanjeev Kumar Chawla<sup>9</sup> and Netherland refused to extradite Neils Holck accused in Purulia Arms Drop Case due to Prison conditions in India as a Human Rights violation<sup>10</sup>. Vijay Mallay's lawyers argued that Arthur Road Jail's condition is also inhabitable and degrading<sup>11</sup>. Hence, these countries prove a safe haven for fugitives. Protection of Human Rights of fugitives sometimes is an obstacle to Extradition.
- e) **Absence of bilateral Extradition Treaties:** India does not have bilateral Extradition Treaties with its neighbours like Pakistan, Afghanistan, Myanmar, China etc. The borders are porous and the climate very harsh. To add to it the terrain is also very difficult hence, it is very easy for fugitives to cross borders after committing crime without detection and bringing them back is a herculean task.
- f) **Rule of Specialty:** It is mandatory to take legal action against a fugitive criminal only for the offences he was extradited for. This rule is known as Rule of Specialty. Sometimes the fugitive commits fresh crime which needs investigation. India brought Abu Salem from Portugal and the law enforcement agencies framed additional charges on him for his role in 1993 Mumbai Serial Blast<sup>12</sup>. Portugal widely criticized it and the treaty seems to have been revoked. Computer crimes can be committed anytime and anywhere.

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<sup>8</sup> David Headley: India for US Mumbai attacker's extradition”, BBC News

<sup>9</sup> UK rejects two Indian extradition requests”, The Times of India, November 5, 2017

<sup>10</sup> Danish court says Davy cannot be extradited to India, Livemint, June 30, 2011.

<sup>11</sup> Extradition hearing: U.K. judge asks for video of jail where Vijay Mallya would be held”, The Hindu, July 31, 2018.

<sup>12</sup> Charul Shah, “Gangster Abu Salem moves European Court of Human Rights to cancel his extradition to India”, Hindustan Times, February 10, 2018.

- g) **Financial Irregularities are treated as Civil Offences:** Financial irregularities are treated as civil offence rather than a criminal one as it is not an immediate threat to foreign nations. There is no urgency to return these criminals to the requesting state. This is the reason why Nirav Modi and Mehul Choksi who duped PNB to INR 140 billion are not back in India.
- h) **Different Domestic Laws in Countries:** Domestic Laws are different in different countries and the documentary proofs as evidence must comply with such Laws. The documents required by foreign countries, differ. There can be delays in investigation, misbehavior by Police, fabricated documents, incorrect affidavits etc. These may only be detected at the end when a judicial review is going on in a foreign land. When issues fall below standards of the foreign countries, Extradition can be denied.

The UK Court denied the request for Extradition of an Indian couple Jatinder and Asha Rani Angurala, criticizing<sup>13</sup> CBI for delays and the case has been pending for 25 years. No request for Extradition has been received from investigating agencies for the return of Lalit Modi, the Chairman of Indian Premier League accused of financial irregularities in the tournament in 2009<sup>14</sup>. There are factors involved in Extradition over which India could exercise control. It could adopt a targeted approach to resolve these issues.

- i) **The Burden of Costs:** The cost incurred in buying the tickets and bringing back the fugitive has to be borne by the Requesting Country and sometimes the cost can be high. Extradition of a fugitive is not undertaken because of financial constraints.
- j) **Use of Executive Discretion:** In matters of Extradition, the decision taken by the Secretary is final in spite of Extradition Laws. This leaves one with no option.
- k) **Effect of State Succession on Extradition Treaties:** What happens when a Parent State refuses to recognize the official status of the Succeeding State? What if that State becomes part of another State which the Parent State has refused to recognize?

A new Treaty will be required before Extradition. The time, expense and hassles

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<sup>13</sup> Supra note 10

<sup>14</sup> "No formal extradition request submitted against Lalit Modi to MEA", Hindustan Times, May 14, 2017

involved may decrease the Parent State's desire to continue with Extradition.

- l) **Effect on Treaty during War:** War terminates all existing obligations between the two countries.

## SUGGESTED REFORMS

The challenges facing the Extradition Law have been discussed above. Some reforms are suggested below to make the Law more effective so suit the transnational nature of the crime the criminals have perfected.

- a. **Issues with Dual Criminality:** Issues like dowry are cultural and cannot be found in dual criminality list<sup>7</sup> so this should not be a reason for non-extradition of fugitives. If the offence is not a crime under the Law of both the nations, a separate list of such areas should be made. Person should be extraditable for all crimes and offences punishable by Law.
- b. **Multilateral Treaties are Recommended:** India has only 43 bilateral Extradition Treaties as compared to the following countries:

US UK- 100	Russia – 64	Canada 49	China- 50
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India should increase Extradition Treaties. In fact, India should have multilateral Treaties based on geographical or political affinities e.g. Arab League Extradition Agreement. In this case the withdrawal of a single party will not dissolve the agreement.

- c. **Creation of a Single World Convention on a Global Scale:** A single world convention on Extradition should be created on the global scale to prevent abuse of the system. The convention will work as a watch dog against the integrity of the system paying greater attention to individual rights and liberties. It should also cater to grant Extradition even when a Treaty is not signed.
- d. **Initiating Strict Preventive Law and Policy Measures:** India should come up with strict preventive law and policy measures to prevent offenders from committing crimes and escaping to safe havens. They must be deterred in the parent country itself.

- e. **Using Diplomatic Skills and Bilateral Negotiations:** Diplomacy can come in handy when Rules and Laws are not that stringent and bilateral negotiations will certainly help in getting the criminals extradited.
- f. **Prison Conditions should be changed:** Prison conditions in India are stated as inhuman by developed nations and requests for Extradition are not granted. Hence, Prison conditions must be changed. Police handling and behaviour should adhere to accepted standards. Fugitives who have not committed violent crimes can be detained in well maintained Prisons. Slowly systematic Prison reforms can be introduced.
- g. **Establishing a Central Agency like FBI:** Extradition is a complex process and takes a lot of time. A central agency on the lines of FBI can be set up to expedite the cases and manage Extradition in India. Rejection of requests can be mitigated by providing expert legal advice, assistance on drafting, certification and translation of evidence.

## **CONCLUSION**

India must introduce these reforms to get full results from Extradition Laws. India has suffered heavy financial losses on account of financial frauds by Indian fugitives like Lalit Modi, Vijay Mallaya, Nirav Modi, Mehul Choksi etc. because of Extradition Laws that could be twisted. The time is ripe to understand the modus operandi of the criminals and frame stringent Extradition Laws to bring them to justice as well as sew the loopholes aiding fugitives take undue advantage of the existing laws.

## **REFORMS IN CRIMINAL LAW ON THE TOUCH STONE OF CONSTITUTIONAL PROVISIONS**

Dr. M. Kalimullah\* & Aqsa Sikandar Fatima\*\*

### ***Abstract***

*When a crime occurs in a society, there are two parties involved in it, an accused the perpetrator and a Victim of that Crime. Sir Hans Von Henting and Sir Mendelson named it as the Penal Couple. It is the responsibility of the state to provide protection to their citizens and when there is a failure on the part of state machinery, then matter is dealt by the state itself, where the state usually provides the punishment to the offender. There are different theories behind this punishment concept and deterrence is one of them. Providing Death penalty is one the best example of deterrent theory but is it really a good method for giving justice to the Victim of the Crime? Would it really help the Victim seeing his wrongdoer dead or there can be something else which may help the victim of the crime better than this? When we talk about Criminal Justice System, it involves both the parties in it and the reform has to be made for both of them equally as suggested by Justice Malimath in his report in 2003. Unfortunately our legal system put more emphasis on the reforms and rights of accused than the rights of Victim of the crime and the victim of the crime plays a very passive role or a mere witness in the Court of Law. The Legislatures of our Nation like the Constitution of India 1950, the Code of Criminal Procedure 1973 as well as certain International documents like Universal Declaration Human Rights 1948, International Covenant on Civil and Political Rights-1966 also put more emphasis on the rights of the accused more and less on the rights of the victims.*

*In 1985 the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (United Nations General Assembly, 1985) introduced the Criminal Justice System about the rights of the Victims though it took our legal system a long time to incorporate some of those rights in our Criminal Justice System but we still have achieved some part of it. Today is the era where Restorative Justice is emerging through case laws or through certain amendments like the amendment of the Code of Criminal Procedure 1973 in 2005, the concept of Plea Bargaining has been introduced in the Criminal Procedure Code on recommendation*

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*of 154<sup>th</sup> Report of the Law Commission as an alternative method to deal with huge arrears of criminal cases and to provide speedy justice to the Victims of the Crime as well as to the accused. The 2008 amendment which incorporated Victim's Compensation Scheme. Now we should focus on how we can help the victim of the crime than on providing death penalty to the offender because a Victim's justice may rely on financial needs, old age care, finances of his/her children's education etc. The accused may be utilized better in this way by the consent of the victims than to award him death penalty where he/she will be of no use.*

**Keywords:** Criminal Justice System, Accused, Victim, Death Penalty, Restorative Justice

## INTRODUCTION

Often we discuss about the occurrence of crime in the society and we know that crime in any society is inevitable. Today we are in need to focus and realise this occurrence of crime from a different angle. We all know at the commission of crime, there is involvement of two parties in it, one is called the offender and the other is the victim of crime. Sir Hans Von Hentig and Sir Mendelson named it as the ‘Penal Couple’.

In the primitive society, whenever there was a crime or wrong committed against the person, that person had all the rights to take revenge/avenge against the perpetrator. Then men came into ‘Social Contract’; before this social contract, man lived in natural state where there was no government and no laws. The defect of that system was anybody, whoever was strong physically or by weapons used to kill or harm the other person, for some people this era was a hardship and oppression and for some it was bliss or joy. After entering in this agreement of ‘Pactum Unionis’ by which man undertook to obey an authority and surrendered his liberty to that authority who had to protect his life or liberty<sup>1</sup>. This is how the concept of Government is established, which we are still following by surrendering our whole/part of freedom and liberty to the state and state in return protect our life and property. It is the responsibility of the state to protect its people from the occurrence of any crime and despite that if any crime happens in the society, the state takes action against the offender. For the sake of maintaining peace and order in the society, the state set up certain machinery like Police, Bureaucrats, legislative team, Judicial System etc. These machineries do their assigned work to maintain the stability and peace. The laws made by the Legislature are implemented and checked by the Police and executives and in case of failure the decision or the punishment to the wrongdoer is awarded by the judicial system.

## STATE’S ROLE IN PUNISHING OFFENDER BY THEORIES OF PUNISHMENT

Basically there are different theories behind this punishment concept as follows:

- i) Preventive
- ii) Retributory
- iii) Deterrence
- iv) Reformative

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<sup>1</sup>Jurisprudence; Legal Theory, Prof B. N. Mani Tripathi, Allahabad Law Agency

For the better understanding of this paper, all these above mentioned theories are necessary to understand. Primitive theory of punishment makes the wrongdoer bound or prevents the accused to commit crime further. Putting someone in jail as punishment would leave no scope to the accused to commit crime anymore. The theory of Retribution fulfils the concept of revenge and avenge. The purpose behind this theory of punishment is that one has to face the same/similar pain or trauma which is faced by the victim of crime. An eye for an eye and a tooth for a tooth, a limb for a limb and a life for a life is the gist of this punishment. The next we can discuss about is the deterrence theory. The aim of proving punishment in this theory is to deter the other people of the society for not committing the crime. The punishment under this system is given to set an example for the others. The best example of this punishment is ‘Death Penalty’ which puts instant fear in the mind of society that commission of crime may lead to someone losing his own life as well. Earlier this kind of harsh punishment were not so rear in fact there are instances where the death penalty was provided to the offenders even for some petty offences also.<sup>2</sup> But now in this era of Human Rights this kind of punishments are discouraged at most.

Democracy and Constitutionalism are two important things which are adopted by most of the countries and world at large have adopted the principles of Human Rights in their Constitutions. India in its Constitution under Article 21<sup>3</sup> secures the fundamental right of everyone, whether a citizen or non-citizen the “right to life and liberty”. This right of life and personal liberty cannot be taken by anyone unless there is a procedure established by law i.e., state itself. Now the question is why to take the life of a person if state itself is giving it as a matter of fundamental right? Why to establish such a procedure which takes the life of a human being? Can Justice be done only by killing a human in retribution or by creating a deter impact on the society? Is it really controlling the crime rate?

There are number of countries mostly of first nations which have abolished the ‘Death Penalty’ considering the human rights of a human being. Still there are countries like India, United States, China, Japan, South Korea and most of the countries of Islamic States which are having Death Penalty as a method of punishment. The United Nations in its Charter of Rights has declared death penalty or capital punishment as a crime against humanity and had

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<sup>2</sup> The 'Code of Hammurabi' provides death penalty even for the petty offence of stealing grapes. Available at: [https://www.jstor.org/stable/3153895?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/3153895?seq=1#metadata_info_tab_contents) Accessed on (01.11.2019)

<sup>3</sup> Article 21 of the Constitution of India, 1950 provides that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

also asked its member countries to abolish it. One of the member countries of the United Nations – India, has still not got rid of capital punishment even though the Constitution of India has stated that the government has no right to take the life of any person as per article 21. Consequently, India's International stand on the Moratorium on death penalty both at the General Assembly and at the Human Rights Council has always been against the resolution saying, it goes against the statutory law of the country where an execution is carried out in the “rarest of rare” cases.<sup>4</sup> In India it has been carried out four times<sup>5</sup> since the Law Commission on India has submitted its report recommending the abolition of death Penalty in 1995. The Constitutional validity of Death penalty has been questioned many times in India and the Supreme Court of India has made it very clear that the punishment of Death Penalty can only be awarded in rarest of rare cases.<sup>6</sup> But we have not yet abolished it. We do have number of cases where the Death Penalty is awarded as a matter of Punishment with an object of preventing the society from crime by setting an example; but is crime really controlled even after that? Or if it is awarded to give Justice to the Victim of Crime; is it really Justice from the Victim's point of view? Would it really help the Victim seeing his wrongdoer dead or there can be something else which may help the victim of the crime better than this?

When we talk about Criminal Justice System, it involves both the parties in it and the reform has to be made for both of them equally as suggested by Justice Malimath in his report in 2003<sup>7</sup>. Unfortunately our legal system put more emphasis on the reforms and rights of accused than the rights of Victim of the crime and the victim of the crime plays a very passive role or a mere witness in the Court of Law and an informer of the Police. The Legislatures of our Nation like the Constitution of India 1950, the Code of Criminal Procedure 1973 as well as certain International documents like Universal Declaration Human Rights 1948, International Covenant on Civil and Political Rights-1966 also put more emphasis on the rights of the accused more and less on the rights of the victims. Despite that there are certain provisions which put emphasis on the rights of the victims which cannot be ignored.

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<sup>4</sup> Critical Analysis of Death Penalty in India, written by Srishti Chawla, student, BA.LLB, Final Year, Amity Law School, Noida. Available at: <https://blog.ipleaders.in/death-penalty/> (Accessed on 02.11.2019)

<sup>5</sup> As per National Crime Record Bureau, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_India](https://en.wikipedia.org/wiki/Capital_punishment_in_India) (Accessed on: 01.11.2019)

<sup>6</sup> Bhagwan Das v. Union Territory of Delhi (AIR2011SC1863) Supreme Court directed, the courts to view ‘honour killing’ as cases of ‘rarest of rare’ category for awarding death penalty to the accused.

<sup>7</sup> Available at: <https://www.legal-tools.org/doc/70d1c6/pdf/>

The Constitution of India, which is the Supreme Law of the land provides many provisions in favour of accused's rights but there are certain provisions which if not expressly but by the interpretation provides rights in favour of Victims of crime also. The idea of 'brotherhood' enriched in our Preamble gives strength to the rights of the victim of crime. Article 14 insures 'equal protection of laws' which also protects the victim. Also Fundamental right to life and personal liberty, enshrined in Article 21<sup>8</sup> of the Constitution is wide enough to include greater protection to the victims of crime and, as it insures human dignity to all, it must recognize rights of victim by providing them better care and protection. In case of *Nirmal Singh Kahilon v. State of Punjab*<sup>9</sup>, the Hon'ble Apex Court observed that the right to fair investigation and trial is applicable to the accused as well as the victim and such a right to a victim is provided under Article 21 of the Constitution of India. Therefore, a victim of a crime is equally entitled to a fair investigation. Article 41<sup>10</sup> there is an insurance that the state shall make effective provision for securing public assistance in cases of disablement and in other cases of undeserved want." This provision has great visions to victimology, in a wider perspective, as it mandates that public assistance must be provided to such vulnerable sections of society. In fact, crime victims and other victimized people fall into the domain of Article 41.

Another set of provision is Article 51-A<sup>11</sup>, which provides a fundamental duty to every citizen of India to protect and improve the natural environment and to have "compassion for living creatures" and "to develop humanism".

Even the Code of Criminal Procedure which provides number of provisions in favour of accused's rights is not fully silent on the rights of victim. Most of these rights are added recently by the amendment made in 2008. The Definition of Victim is provided under its section 2(wa)<sup>12</sup>. Other provisions like Sections 154(2)<sup>13</sup>, Section 160,<sup>14</sup> Sections 190,<sup>15</sup>

<sup>8</sup> Ibid note 3

<sup>9</sup> (2009) 1 SCC 441

<sup>10</sup> Right to work, to education and to public assistance in certain cases

<sup>11</sup> Fundamental Duties

<sup>12</sup> Code of Criminal Procedure, 1973

<sup>13</sup> A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

<sup>14</sup> Police officer's power to require attendance of witness

<sup>15</sup> Cognizance of offences by Magistrates:

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence ;

Sections 406<sup>16</sup> and most importantly Sections 375A which introduced a Victim Compensation Scheme. Up to 2008 amendment there was no statutory scheme as such for victims in criminal procedure code 1973 that allow the victim to get compensation from state or the wrong doer. There were 357 to provide compensation to victim that is also depending up on the wishes of courts which was sparingly used by courts.

A new Chapter, which is Chapter XXI on Plea Bargaining, has been introduced in the Criminal Procedure Code. It was introduced through the Criminal Law (Amendment) Act, 2005, on the recommendation of 154th Report of the Law Commission as an alternative method to deal with huge arrears of criminal cases and to provide speedy justice to the Victims of the Crime as well as to the accused. But it was not proved to be a successful programme for many years. In case of restorative Justice this plea Bargaining is the major step as it was a big step towards the pleading guilty and asking for reducing the sentence through judicial system. Initially judiciary was not ready to accept the Plea of guilty in Plea Bargaining process as they found it against the public policy.<sup>17</sup> The apex court has shown its anguish in the following words in case of *Madanlal Ram Chandra Daga v. State of Maharashtra*<sup>18</sup>.

In our opinion it is very wrong for a court to enter into bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case, it may impose a lighter sentence. But the court should never be party to a bargain by which money is recovered for the complainant through their agency.<sup>19</sup>

For many years this reluctance continued and then finally the trend started changing through some judgements, like the Supreme Court of India awarded a lenient sentence to a student who admitted his guilt.<sup>20</sup> In case of *Rajinder Kumar Sharma v. State*,<sup>21</sup> the Supreme Court of

- (b) upon a police report of such facts;
- (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

<sup>16</sup> Power of Supreme Court to transfer cases and appeals.

<sup>17</sup> Kasambhai, AIR 1980 SC 854

<sup>18</sup> 3 SCR 34 (1986)

<sup>19</sup> MehakBajpai , Advancing of Restorative Justice in Criminal Law in India and Germany: A Comparative Study, Journal of Victimology and Victim Justice, Published in June 2018

<sup>20</sup> State of Karnataka v. Benoy Thomas, 397 ILR 186 (KAR 1977)

India, finally started changing its behaviour towards the plea bargaining.

It was after the Second World War, some Criminologist realized the importance of studying the Victim's perspective in Criminology branch and today it is because of their initiatives, United Nations passed a charter for Victim's rights. In 1985 the Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power for the first time expressly mentioned the rights of the Victims at International level. This declaration is treated as 'Magna Carta' of the Rights of Victims Universally. This declaration deals with certain aspects of problems of victims of the Crime including victims of Abuse of power. Then the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure also came in the year of 1985. After this another initiative was taken as the Statement of the Victim's Rights in the Process of Criminal Justice, issued by the European Forum for Victim's Services in 1996. In June, 2006 Council of Europe Recommendations on assistance to Crime victims was adopted.<sup>22</sup>

The rights and Justice of the victim of crime has to be recognised by the Criminal Justice System statutorily then only we can give the real Justice to the victims of Crime. Lord Chief Justice Hewart in an English leading case, *R v. Sussex Justices*<sup>23</sup>, on the impartiality and recusal of judges quoted that Justice should not only be done, but should manifestly and undoubtedly be seen to be done, which was later on followed by many judges of India in several judgements. So this Justice is a notion which differs from person to person. For someone justice may be seeing his offender behind the bars on his wrongful act, for the other person justice may rely in getting the things fixed again, justice for someone can be getting a chance to make the offender realise his wrongful act and getting a chance of forgiving the offender. So it depend upon person to person what is justice for them. In this paper we will try to understand the concept of Justice from the victim's point of view. This can be understood better by the following illustrations:

*Illustration 1:* 'A' commits the offence of theft against 'B'. A dishonestly took the gold bangle of B without her consent and cashed it.

Now there will be different impact on different people at A's position.

'A' as person 1, might only be concern about the financial loss and can get the justice by

<sup>21</sup> 63 DLT 682 (1996)

<sup>22</sup> Available at: <https://indiankanoon.org/docfragment/42131728/?formInput=restorative%20justice>

<sup>23</sup> [1924] 1 KB 256, [1923] All ER Rep 233)

getting the value of gold bangle. ‘A’ as Person 2 may be attached to the bangles for some sentimental reasons, so justice for that person might be getting the original bangle only. ‘A’ as Person 3 might be a person who wants to take the value and the compensation of the property loss as Justice. So the concept of justice differs from person to person and situation to situation.

*Illustration 2:* ‘X’ commits the offence of Murder against ‘Y’, who was the sole earner of the family.

The Criminal Justice System in this case by a fair trial awarded the Death Penalty to the accused. Now the indirect victims of crime i.e., the family members of the primary victim of crime get the justice as per law. Later on it was observed that the wife of the victim since was not able to earn started begging in the streets, children of the victim had to leave their studies and involved into earning which increased the Child Labour and sometimes even crime like theft and snatching which again created the problem for the society. On the other hand the wife and children of the accused who was hanged for death were also incapacitate for earning faced the similar conditions as the Criminal Justice System takes no responsibility of the family of Victim as well as family of the accused who is hanged by the procedure established by law.

So again the question remains the same, is it really Justice? what better could be done here is instead of awarding ‘Death Penalty’ to the offender, the Criminal Justice System should make the offender responsible for the financial needs of the Victim’s family so that the victim’s family should never have to face such circumstances as well as the family of the offender could also be protected. This way we can save both the families and the harm can actually be restored. Mahatma Gandhi said, an eye for an eye would make half of the world blind. He also emphasised on the forth theory of Punishment, which is called Reformatory Theory of Punishment.

Reformatory theory of punishment aims at reforming the offender even after punishing him/her. Under this theory the offender is sent to jail or Juvenile Homes in case of child in conflict with laws and is made involved in such activities which actually helps the person in realising his wrongful act and push him to be a good person for the society. This is how the offender is saved from remaining a wicked person, his life is saved by not punishing him ‘Death Penalty’ as well as he is utilised as a good Human Resource. This concept of Reformatory punishment has given birth to a new justice system- Restorative Justice.

## **RESTORATIVE JUSTICE**

Restorative Justice is a problem solving approach in which the victim and offender voluntarily participate to restore, repair, reconcile and reintegrate the harm caused by the offender through the Criminal Justice system.

It is a kind of justice which ensures a balanced system of justice for the victims and the offender. Unlike our conventional Criminal Justice System, here the victim as well as his family members and community have the scope of participation which turns into an effective interaction. Basically, the purpose of Restorative Justice is to resolve the conflict where both the parties come together and discuss the harm caused to them with a positive approach of healing the consequences. Restorative justice is different from the Compoundable offences because in compoundable offences the matter is settled outside the court and judge/s is/are only informed but in restorative justice the judges of that matter plays an active role in resolving the matter through Restorative Justice. In case of *Anupam Sharma v. NCT of Delhi and Another*<sup>24</sup>, Justice Pradeep Nandrajog has observed that, “Restorative Justice may be used as a synonym for mediation. The Object and nature of Restorative Justice aims at restoring the interest of Victim, involvement of the victim in the settlement process is welcome in the process of restorative justice. It is a process of voluntary negotiation and concentration, directly or between the offender and victim.

In the year 1977 Albert Eglash coined the term ‘Restorative Justice, in his article ‘Beyond Restitution: Creative Restitution’<sup>25</sup>. He also mentioned in this article that this idea of Justice is not something recent but we can find this concept in history as well. This system of justice has emerged in two decades and is developing significantly in the field of Victimology. Though the system is developing rapidly but it is not a recent/new concept of legal system, we can see the marks of restorative justice in different legal systems. Some of the significant marks can be traced from the primitive legal systems like Code of Hammurabi, in pre-colonial New Zealand Maori had a fully integrated system of Restorative Justice, in Ancient Hindu Law and also in Islamic law where the scope of Restorative justice was available even in cases of homicide. According to John Braithwaite, “Restorative Justice has been the dominant model of Criminal Justice throughout most of human history for all the world’s

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<sup>24</sup> 146 (2008) DLT 497

<sup>25</sup> Available at: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=47998>

people.”<sup>26</sup>

In our Conventional Criminal Justice System the participation of Victims is almost negligible and the court did not consult anything with the victim at the time of awarding punishment. Sometimes the victims are not even informed that their offender is punished. Restorative Justice provides a platform to the victim and his/her family members where they can participate and tell about their grievances and situation they faced by the act of offender. The real purpose of restorative justice is to repair, restore, reconcile and reintegrate the harm happened to the parties and to bring them back to their original situation as much as possible. It provides the opportunity to the offender to make the good of bad done by him and to realise his sin/crime and reforming himself in a good person. The good thing of restorative justice is that it focuses on the victims.

## **PRINCIPLES OF RESTORATIVE JUSTICE**

The following are the basic principles of restorative Justice:

- i. Victim is the most important aspect of the whole process.
- ii. The focus of Restorative justice is on repairing the harm caused and reducing the future harm.
- iii. Balance has to maintain by the Justice agency between the Victim and Offender.
- iv. Participation of Victim, Offender and Community members is ensured for productive interaction.
- v. It sees the conflict from the Social perspective.

Belgrave J. in his Discussion Paper<sup>27</sup> has mentioned about the three different stages of the restorative Justice as follows:

- i. Pre Conventional: this stage is operated when the defendant does not deny guilt or do not intend to defend the case.
- ii. Pre sentenced: this stage is operated on the admission or proving of guilt.
- iii. Post sentenced: in this stage of restorative justice, certain mediation programmes

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<sup>26</sup> Principle of Restorative Justice available at [www.academia.edu](http://www.academia.edu) last visited on 2.11.19

<sup>27</sup> Belgrave J. Restorative Justice: A discussion paper, Wellington, N.Z. Ministry of Justice

are operated after the offender is sentenced to community based sentences or imprisonment.

The process of Restorative Justice is done through different Methods and Programs like Victim Offender Mediation (VOM), Circles etc. In Victim-Offender Mediation Program, the parties participate voluntarily and the mediation is done by a professional and trained person. The families of both the parties are also allowed to participate in such mediation and counselling sessions. In Circles, participants, including community members, each have a chance to speak in turn, typically in a circle, about the crime to address the crime's underlying cause and decide how to repair the harm. Circles Restorative circles bring together impacted stakeholders to speak and listen in turn to one another. Participants sit in a circle and often pass a 'talking piece' to give each person equal voice in the discussion. Circles vary in size and can have different purposes, including, Sentencing circles: which bring together the victim, offender, family and community members to meet representatives of the criminal justice system to give input on the sentence the accused should receive. Healing circles, which helps victim process harm with one another and collectively arrive at ways to heal. Reintegration circles/circles of support and accountability, which hold former prisoners accountable within their communities while providing them support to transition into mainstream society and to lead meaningful lives.

In *State of Gujarat v. Raghubhai Vashrambhai & Others*<sup>28</sup>, it was held by the honourable Supreme Court by Justice J. N. Bhatt that," in a realm of Victimology the decision is one of the aspect towards the fulfilling the design and desideratum and restorative justice to the victims of crime.

## **RESTORATIVE JUSTICE:A BETTER WAY THAN DEATH PENALTY TO REFORM THE CRIMINAL JUSTICE SYSTEM**

Death Penalty is still not abolished completely in our Criminal Justice System and when the Court of law award Death Penalty even in rarest cases, the crime of offender is considered a wrong against the whole society/State not against the Victim because victim is not consulted by the court at the time of awarding punishment, who is the ultimate sufferer of the circumstances and situations. In case of Restorative Justice Crime is considered against the Victim of Crime and his wish is considered in case of punishing the offender.

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<sup>28</sup> (2003) 1 GLR 205

Death Penalty leaves no scope for the offender and victim to reconcile and restore the harm caused whereas restorative Justice provides a chance to the offender to do the good of his bad act and for victim to get at least some good out of all worst happened to him.

Reformation of offender is not possible through Death Penalty, rather it creates a psychological disturbance since the punishment is awarded on the offender as well as on his family but there are high chances of reformation of offender through Restorative Justice as the offender can be made realise if his bad deeds through the victims words, the people involved in the process like community and Judges.

Death Penalty leaves stigma on the family of accused who are innocent in most cases and it creates a psychological frustration on the family of accused even after his death, while restorative justice saves the family from such dishonour and stigma and provides a better atmosphere even for the family of accused as it is a balanced victim-criminal justice system.

## **CONCLUSION**

Society changes with the change of time and thus the reforms and amendments are required in any legal system. Our Conventional Legal system is lacking behind with a lot of lacunas and it is the high time to adopt certain required change. The Criminal Justice System of India focus more on the rights of accused and Justice is delivered to the victim of crime as per the wish of Criminal Justice System. The victim of the crime is neither consulted nor ever asked the kind of justice he is seeking. Our Criminal Justice System is harsh and chances for reformation even for the offender are less with such harsher punishments. We still have not abolished Death Penalty, which is against the Human rights as per the declaration of United Nations and India is a member of United Nations.

We can better ways of providing Justice by adopting the new methods of Justice like Restorative Justice. Restorative Justice encourages the Victim-Offender mediation process by involving Community in their process of Justice. It is a better of understanding the sentiments of victims of crime by involving victim in the process. It also dos not ignore the accused of the crime. Restorative Justice is emerging very slowly through case laws and we can aspect better future of Criminal Justice by adopting such a method of justice.

On the basis of provided information the hypothesis one is proved as our criminal Justice System did not consult the Victim of the crime at the time of awarding punishment to the offender. If we go back to the Mahatma Gandhi's philosophy that eye for eye will make the

half world blind, we can understand how the reformative punishment and reformatory Justice is required. The offender of Crime can better be reformed by Restorative Justice. The cases mentioned in this paper reveal that Restorative Justice can be a healing process for both the offender and the Victim.

## SUGGESTIONS

- i. Criminal Justice System has to see Justice from the Victim's point of view
- ii. This is the high time for abolishing Death Penalty as India is a member of United Nations which is very much against of Death Penalty.
- iii. Legislature has to make laws on the rights of Victims
- iv. Judiciary has to encourage Restorative Justice System
- v. Awareness of Restorative Justice is very much required.

## **HUMAN RIGHTS OF PRISONERS IN CRIMINAL JUSTICE SYSTEM WITH SPECIAL REFERENCE TO REFORMATION PERSPECTIVE**

Dr. Gurmeet Kaur\* & Manjula Raghav\*\*

### ***Abstract***

*Human rights are basic rights which are available to all human beings. The development in human rights perspective has widened the perspectives and, dimensions of life initiating new saga which needs more State attention towards the miserable condition of prisoners and the appalling approach of criminal justice system towards them. It is true that there is no society which is free from crimes and criminals and that's why there is a need of prisons to provide the convicted person the reformative environment though at the same time it provides punitive measures that work towards retribution, deterrence and prevention of crimes. Incarceration is the widely used practice of punishment inflicted upon the prisoners. However, a prisoner does have certain basic rights which cannot be denied to him unreasonably by virtue of being a human being. It is the responsibility of any criminal justice system to maintain a balance between the rights of prisoners and the challenges of correction, rehabilitation and reformation during the time of incarceration in the prison. In India, there are several issues related to the miserable plight of the prisoners and violation of their rights as there are many flaws in the criminal justice system. In the present paper, the author will discuss and analyse the issues present in criminal justice system regarding the rights and questionable plight of the prisoners and focus on suggesting the remedial measures from the reformation perspectives and for the welfare of prisoners.*

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## INTRODUCTION

Human rights are the basic or fundamental rights which are available to every individual since his or her birth for being a human. They are universal and self-evident. In this social structure, every person carries and enjoys some rights and duties towards his society and community which work on mutual co-operation. These rights are rudimentary for the identity and development of a person which cannot be taken away by anyone. The existence of these basic rights is known as human rights which have social ends as well as individual ends. In the line, the idea of human rights is also stand on the same footing for the prisoners as well. International societies as well as States now have started taking care of the prisoners in criminal justice system. Now, they are no more left out without human rights. Generally, the term prisoner includes the convicted as well as under trial prisoners or an accused person.

## HISTORICAL DEVELOPMENT OF HUMAN RIGHTS

Human rights are a twentieth century name of the practice which has been known as Natural Rights from ages. The rights of man have been the focal point of all civilizations from time immemorial. The roots of human rights can be found in the ancient cultures of the world. Perhaps, the Greeks were the first civilization to develop a clearly articulated and comprehensive idea of rights that further led towards the development of human rights globally. Originally, Human rights are originated from the philosophy of natural law or *jus naturalis*. It is believed that Greek philosophers developed the concept of natural law and defined it coherently. Natural rights are the offspring of natural law and these rights are not provided by any government under special circumstances, but these are possessed by every individual by virtue of being a human being, rational creature<sup>1</sup>.

The development of global history of human rights is the product of the Greek Philosophy, the Judeo-Christian tradition and Renaissance. Thus, the Western Europe was the centre stage of the happening of the events took place in the role of human rights. The Greek citizens used to enjoy certain rights as *isonomia* (equality before law), *isotimia* (equal respect for all) and *isogoria* (equal freedom of speech). At the time of Hellenistic period, the Stoic philosophers developed the philosophy of natural rights which was for all human beings in all times. The Romans followed the steps of the Stoics in this regard. In middle ages, Thomas Aquinas provided firm backing to natural law and considered it higher than the positive law

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<sup>1</sup> Richa Sharma, *History and Law Relating to Human Rights*, (1<sup>st</sup> ed. Satyam law International 2017), pp.1-15

which is believed and obeyed by all.

Despite the knowledge of the concept of human right, the plight of human beings was not good. Natural rights were in fetters and they got liberated after the advent of renaissance. With the *Magna Carta*, a new era of liberties and rights started that proved a torch bearer for several revolutions in Europe for freedom and against atrocities of the ruler. The Magna Carta was signed in 1215 A.D. which made about the protection of rights very clear. The Declaration of Bill of Rights accomplished the task which Magana Carta started off.

In the 17<sup>th</sup> Century, the social contract philosophy of Thomas Hobbes, John Locke and J.J. Rousseau deeply put a great impact on the development of human rights. *American Declaration of Independence* was adopted on 4<sup>th</sup> July, 1776 that was the result of the philosophies of those great philosophers who had great impact on the masses. The Declaration clearly stated that all men are created equal and they have inalienable right which cannot be taken away by any force.

Human rights are the result of aftermaths of the Second World War. The brutality, cruelty and holocaust that the world experienced were horrible and cannot be defined in words. The consequences of the Second World War were intolerable and gruesome. Such circumstances and dissatisfaction among the masses lead to the development of an organisation, United Nations Organisation, which could ensure safety, security, peace, tranquillity and happiness to the world. The Preamble of the U.N. charter pledges for the re-affirmation of human rights which is one of the objects of the U.N. Before the formulation of U.N.O., after the First World War the League of Nations was established this proved to be ineffective and resulted in sheer failure.

After the Second World War, the Charter of United Nations asserted to protect weak nations from the ravages of future wars and avert the possibilities of any war. It aims to protect human rights for all. The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December, 1948 that became a water mark in the world history and enshrined a new era of humanity and compassion. To provide a binding effect to the human rights through Universal Declaration of Human Rights, the General Assembly adopted two Covenants (1) The International Covenant of Civil and Political Rights (ICCPR) and (2) The International Covenant on Economic, Social and Cultural Rights (ICESCR).

## **DEVELOPMENT OF HUMAN RIGHTS IN INDIA**

The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the extracts of Confucius' Philosophy are the great and oldest written source of human rights which recognise the idea of duty, rights, reasonable restrictions and responsibilities to all human beings to be followed in their life. There are several religions also as Jainism, Buddhism and in later years Bhakti movement which contributed a lot in the development of human rights. These religious practices taught humans about peace, brotherhood, togetherness, and righteous principles to be followed in life. Essential features of human rights are portrayed in Vedas, Smritis and Kautilaya's Arth Shastra and these are recognised and adopted by the United Nations Organisation in the most prominent document of human rights i.e. Universal Declaration of Human rights and Indian Constitution also stands on this footing.

In Hindu way of life, *Dharma* plays a vital role. It is applicable to all human beings in all spheres of human life without any exception and excuses. Rule of Dharma used to regulate individual conduct and protects the rights of individual. Concisely, Dharma used to regulate and balance the mutual obligations of the person and the society in which he lives.<sup>2</sup>

India had a great sense and sensibility of human rights in its tradition and culture since time immemorial. Indian philosophers, scriptures and literature available clearly vouch the existence of human rights since Vedic Age. Rig Veda advocates three basic rights for all human beings, (i) *Tana* (body), (ii) *Skridhi* (dwelling place), (iii) *Jibhasi* (life).

## **MEANING OF HUMAN RIGHTS**

According to U.N., “*Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.*”<sup>3</sup>

Section 2(d) of the Protection of Human Rights Act, 1993 defines human rights in these words, “*human rights are the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and*

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<sup>2</sup> Justice H. R. Khanna, *Rule of Law and Human Rights In India*, (Universal Law Publication Co. Pvt.Ltd; 2012), pp.3-7

<sup>3</sup> Human Rights, *United Nations*, Available at: <https://www.un.org/en/sections/issues-depth/human-rights.html> (Accessed on: 22.10.2019, 2pm)

*enforceable by Courts in India".*

## **INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF THE PRISONERS**

International community also recognise the rights of prisoners. It is considered that a prisoner (convicted or under trial) is also a human being due to the fact that he is in custody doesn't stop to be a human being. He has certain rights with some restrictions off Corse. There are several conventions and treaties formed to protect and ensure certain rights to the victims that cannot wither away.

The Universal Declaration of Human Rights<sup>4</sup> ensures a prisoner some rights which as follow:

1. It ensures the right to life, liberty and security of person<sup>5</sup>.
2. It provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>6</sup>
3. It provides equality before the law and equal protection of law. It deals with right to equality to all human beings.<sup>7</sup>
4. It ensures effective remedy in case of violation of fundamental rights.<sup>8</sup>
5. It guards from arbitrary arrest and detention to everybody<sup>9</sup>.
6. Everyone has right to fair trial and hearing<sup>10</sup>.
7. No person shall be considered innocent until proved guilty<sup>11</sup>.
8. Ex post facto law which states that the accused will be punished as per the law which is applicable at the time of the commission of the offence. No extra and heavy penalty will be inflicted upon the person.<sup>12</sup>

<sup>4</sup> UDHR, United Nations, Available at: <https://www.un.org/en/universal-declaration-human-rights.html> (Accessed on 22.1.2019, 2pm)

<sup>5</sup> Article 3

<sup>6</sup> Article 5

<sup>7</sup> Article 7

<sup>8</sup> Article 8

<sup>9</sup> Article 9

<sup>10</sup> Article 10

<sup>11</sup> Article 11(1)

<sup>12</sup> Article 11(2)

Likewise, to strengthen the human rights and the rights of the prisoner, the General Assembly of United Nations adopted the International Covenant on Civil and Political Rights, 1966<sup>13</sup> on 19 December, 1966. Some of the rights are mentioned as follows;

1. Everyone has right to life and no one shall be deprived of his right to life. This right shall be protected by law<sup>14</sup>.
2. In case of death sentence, it can be imposed only as per the law and in the most serious crimes. It can be provided to the person only after the final judgement of the competent court.<sup>15</sup>
3. The accused got the death sentence has right to appeal for pardon or commutation of the death sentence<sup>16</sup>.
4. No one shall be subject to inhuman, degrading treatment or punishment.<sup>17</sup>
5. No person shall be subject to arbitrary arrest and detention. No person shall be deprived of his liberty except the procedure established by law on reasonable grounds.<sup>18</sup>
6. If any person is arrested shall be informed about the grounds of his arrest<sup>19</sup>.
7. The arrested person shall be presented in front of the court for the appropriate trial proceedings.<sup>20</sup>
8. If anyone is arrested on the basis of unlawful arrest and detention shall be compensated.<sup>21</sup>
9. The accused person shall be treated with dignity and humanity. No humiliation of the accused person will be allowed in any circumstances.<sup>22</sup>

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<sup>13</sup> ICCPR 1966, United Nations; Available at:  
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.html> (Accessed on. 22.10.2019, 2pm)

<sup>14</sup> Article 6 (1)

<sup>15</sup> Article 6(2)

<sup>16</sup> Article 6(4)

<sup>17</sup> Article 7

<sup>18</sup> Article 9(1)

<sup>19</sup> Article 9 (2)

<sup>20</sup> Article 9(3)

<sup>21</sup> Article 9(5)

<sup>22</sup> Article 10 (1)

10. Reformation and social rehabilitation of the prisoner will be paid attention for their improvements. Juvenile offenders shall be segregated from the adult prisoners as per the legal status and due to their tender age<sup>23</sup>.
11. All will be treated impartially and equally in front of the courts and tribunals.<sup>24</sup>
12. The accused person shall be presumed innocent until he is proved guilty<sup>25</sup>.
13. The accused person shall be informed of the charges put against him. Proper time will be provided to him to prepare for his defence. Trial will be conducted to provide witnesses and proper opportunity will be provided to him to cross examine the witnesses<sup>26</sup>.
14. Everybody is has equal protection of law and equality before the law. No discrimination will take place on the basis of race, cast, sex, Religion and nationality etc.<sup>27</sup>

In this direction to protect the rights of prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988<sup>28</sup>. Amnesty International in 1955 provided certain rules for treatment of prisoners. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) were adopted by the General Assembly of the UN on 17 December, 2015. These rules are revised rules of “United Nations Standard Minimum Rules for the Treatment of Prisoners”<sup>29</sup>.

## **RIGHTS OF THE PRISONERS IN INDIA**

With the span of time and with the efforts of international bodies, a great concern and attention is being paid towards the human rights particularly towards the criminal justice

<sup>23</sup> Article 10(3)

<sup>24</sup> Article 14(1)

<sup>25</sup> Article 14(2)

<sup>26</sup> Article 14(3)

<sup>27</sup> Article 26

<sup>28</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, United Nations; Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx.html> (Accessed on 22.10.2019, 2pm)

<sup>29</sup> The Nelsen Mandela Rules, *The United Nations Standard Minimum Rules for The Treatment of prisoners*; Available at: [https://www.un.org/en/events/mandeladay/mandela\\_rules.shtml](https://www.un.org/en/events/mandeladay/mandela_rules.shtml) (Accessed on 22.10.2019, 2pm)

system. India is also following these footsteps to implement human rights of the prisoners in criminal justice system which is discussed as below.

### **Constitutional Law**

Constitutional law is the supreme law of the country. All laws derive their authority from the Constitution of India. It is the supreme law of the land provides powers and define the domain of the organs of the State. On the other hand, it renders fundamental rights to its citizens. Likewise, it provides certain rights to the prisoners to protect them from the dark side of the criminal justice system. These rights are enshrined in part 3 of the Constitution discussed as follows:

#### **1. Protection in respect of conviction for offences**

Article 20 of the Constitution ensures some safeguards to the prisoner to protect himself. These provisions are mentioned below;

- a. *Ex post facto law* states, “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

The rule is sound and clear in its message that the accused person shall not be convicted retrospectively and the penalty shall imposed on him as per the law applicable at the time of the commission of the offence. Thus no increased or heavy punishment shall be inflicted upon the accused person.

In **Kedar Nath v. State of West Bengal<sup>30</sup>**, the Supreme Court denied to impose enhanced penalty on the accused for the act committed in 1947 and clearly set aside the additional fine put by the amended act.

- b. *Protection against Double Jeopardy* says, “no person shall be prosecuted and punished for the same offence more than once.” It protects an accused from to be put twice in peril for the same wrong or crime.

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<sup>30</sup>AIR1953 SC404

In **Zahira habibullah H. Sheikh v. State of Gujarat<sup>31</sup>**, (2004)4 SCC 158, in this case Article 20(2) was not allowed by the Supreme Court and directed retrial of the accused after the acquittal by the trial court .The Court stated that to invoke the principle of double jeopardy, it is mandatory that the first trial was conducted before the competent court.

- c. *Protection against self-incrimination* protects an accused person against the compulsion of accused to give evidence against him.<sup>32</sup> This protection is provided to the accused person in criminal justice system under Article 20 (3).

In **M.P. Sharma v. Satish Chnadra<sup>33</sup>**, the Supreme Court provides the embodiment of the principle in these features:

- a. It is a right belongs to a person who is an accused of a crime.
  - b. It is a protection against compulsion to be a witness.
  - c. It is a protection against any kind of compulsion put on him to give evidence against him.
2. *Protection of life and personal liberty* is provided under Article 21 of the Constitution which is having very wide application. This right is so dynamic and organic and fulfilling the requirement s of the people on great scale. This right is the outcome of the judicial creativity and activism which has added several dimensions to it. Consequently, this right carries variety of rights. Article 21 says that “no person shall be deprived of his right to life and liberty except the procedure prescribed by law. Initially, before the arrival of **Maneka Gandhi v. Union of India<sup>34</sup>**, Article 21 provided protection only against the arbitrary action of the execute but not against the legislature. This case is a landmark in the development of fundamental rights and provided a wider approach to the judiciary to understand the scope of the rights in India.

Likewise, it provides several safeguards to the accused person and protects his life from any kind of unreasonable and unjustified encroachment. These rights are

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<sup>31</sup> (2004)4 SCC 158

<sup>32</sup> Kavita Singh, *Custody Jurisprudence*, (Eastern Law House, 2018).

<sup>33</sup> AIR1954 SC300

<sup>34</sup> AIR 1978 SC 597

listed below:

a. *Protection from police atrocities and custodial violence*: In India, custodial violence is not a new phenomenon. There are various ways of custodial violence by the police as rape, torture brutally, death, inhuman treatment etc. Custodial violence is prevent and common due to extort information and conduct investigation. However, law provides a proper procedure to the investigating agencies to conduct investigation and extort information. It is mandatory on the part of the system to maintain discipline and a balance between the requirements of the police and the rights of the accused person but the reality is not hidden.

In this regard, a landmark judgement can be discussed which tries to curb the arbitrary police power and custodial violence. In **D.K. Basu v. State of West Bengal**<sup>35</sup>, the Supreme Court laid down certain guidelines to be followed by the police authority.

- b. *Right to free legal aid*: Right to free legal aid is the part of Article 21 of the Constitution as well as it is an obligation on the State to provide free legal aid to promote justice and provide equal opportunity to all to defend and protect. Any action against the accused person without providing him free legal aid is fatal and futile so it is a fundamental right to the accused.
- c. *Right to bail*: It is necessary on the part of the criminal justice system to maintain a balance between individual's interest and the interest of the society. It is apparent that no right is absolute and reasonable restrictions can be imposed. In **Babu Singh v. State of Uttar Pradesh**<sup>36</sup> the Court stated that denial of grant of bail in murder case without any reasonable ground would amount to denial of personal liberty under Article 21 of the constitution.
- d. *Right against solitary confinement*: Solitary confinement is a total seclusion of the prisoner from the other prisoners. Deprivation of comingling and talking with other prisoners. In **Sunil Batra (No1) v Delhi Administration**<sup>37</sup> the question was raised by the prisoner about the validity of solitary confinement.

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<sup>35</sup>AIR 1997SC610

<sup>36</sup>AIR 1978 SC 527

<sup>37</sup>AIR1978SC1575

In this case, the Supreme Court held that solitary confinement encroaches the Article 21 of the Constitution if not justified and not supported by the law in any sense.

- e. *Right to reformation and rehabilitation:* Under the pursuit of article 21 and the landmark judgement provided in *Maneka Gandhi case* has added a new dimension to the right to life. Every prisoner is entitled to the right to reform and rehabilitation in the prison for a better life. They have right to life in jail with dignity and right to get equal treatment.
- f. *Right to speedy trial:* It is the integral part of the criminal justice system to provide speedy and fair trial to the accused person otherwise it will be violation of the right of the person and failure of the system as well. Speedy justice is the essence of justice because justice delayed is justice denied. In **Hussainara Khatoon (no 1) v. Home Secretary, State of Bihar**<sup>38</sup>, a petition was filed to by a number of under trail prisoners waiting for their trials for several years. The Supreme Court held that right to speedy trial is fundamental aright under Article 21. Speedy trial is the essential part of the criminal justice system that cannot be avoided.
- g. *Right to socialise with family and friends:* It is clearly stated by the Supreme Court in **Francis Coralie v. Union Territory of Delhi**<sup>39</sup>that every arrested person has a right to meet his family member and to consult his lawyer. If a detenu is deprived of his right to socialise them without any reasonable cause, it will to violation of is fundamental right under Article 21 of the constitution. So, it cannot be denied to the arrested person as being part of personal liberty.
- h. *Right against handcuffing:* In **Prem Shankar v. Delhi Administration**<sup>40</sup>,the Supreme Court criticised the practice of handcuffing in these words; “*Handcuffing is prima facie inhuman and, therefore, unreasonable , is over harsh and at the first flush, arbitrary .Absent of fair procedure and objective monitoring to inflict "irons" is to resort to zoological strategies repugnant to Article 21 .....*”

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<sup>38</sup> AIR 1979 SC 1360

<sup>39</sup> AIR 1981 SC746

<sup>40</sup> AIR 1980 SC1535

- i. *Right to compensation:* Whenever a person is victimized and tortured by the system, it is the responsibility of the State under criminal justice system to compensate that person at any cost. The right to compensation is provided under Article 21 of the Constitution to compensate the loss, the injury, death and suffering caused due to the crime.

In **People's Union for Civil Liberties v. Union of India**<sup>41</sup>, the court followed Nilabati Behera case and stated, "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights, are enforceable".

- j. *Right to wages:* Prisoners have right to get appropriate wages in lieu of the labour provided by them. Directive Principles of State's Policy also emphasis on right to wages.

### 3. Right against arbitrary arrest and detention

Article 22 of the Constitution provides safeguards against arbitrary arrest and detention. It provides a procedure by applying which a person be deprived of his personal liberty. Article 22 deals with two kinds of procedural matters, one deal with when a person is arrested under any ordinary criminal law and second one is applicable when a person is detained under preventive detention. Those rights are mentioned under Article 22(1) and Article 22 (2). They as follows;

- a) The grounds of arrest should be informed to the person,
- b) The right to consult the lawyer of his choice,
- c) The right to be produced before a Magistrate within 24 hours and
- d) The freedom from detention beyond 24 hours except by the order of the Magistrate.

In **Joginder v. State of U.P.**<sup>42</sup>, the Supreme Court provided guidelines governing arrest of a person during investigation. It tries to create a balance between the needs of the police on the one hand and the protection of rights of the citizens from the atrocities of the police department.

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<sup>41</sup> AIR 1997 SC 1203

<sup>42</sup> (1994) 4 SCC 260

*A. Rights of the prisoners provided in Criminal Procedure Code, 1973*

1. An accused person is protected against arbitrary and unlawful arrest .(Section 41, 41-A, 55, 151),
2. Protection from unlawful and arbitrary searches. (Section 93, 94, 100, 165),
3. Protection from unnecessary restraint.(Section 49),
4. Right to be informed of grounds of arrest ( Section 50),
5. Right to be released on bail (Section 436, 436 –A, 50 (2),
6. Right to obtain a receipt in case of seizure of the property. (Section 100),
7. Right to be medically examined. (Section 54),
8. Right to fair and speedy investigation. (Section 309),
9. Right to be defended (Section 303),
10. Right to legal aid. (Section 304),
11. Right to plea bargain,
12. Protection from Double jeopardy. (Section 300),
13. Right of the accused not to be detained more than 24 hours. (Section 57),
14. Protection against answering to which can expose the accused to any criminal charge or to a penalty or forfeiture. [Section 161(2)] and
15. Right of the accused at the time of recording of confession. (Section 164 (2)

*B. Indian Evidence Act*

Confession to police is inadmissible in front of the court of law in evidence against him. (Section 25 and 26)

*C. Prisons Act, 1984, Prisoner's Act,1900 and Prison Attendance Act 1955* also casts several rights upon the prisoners regarding separation of male and female prisoners, solitary confinement, under trials, civil prisoners, work, physical protection etc.

**SUGGESTIONS FOR REFORMATION IN PRISON TO STRENGTHEN HUMAN RIGHTS OF PRISONERS**

- i. There are several issues pertaining in prisons as lack of space, prison violence by peers, drugs, sexual abuse, torture, mental and physical sickness, mal treatment by prison authorities etc. With the span of time and with human rights initiatives, several steps have been taken place against such issues existing in prisons and affecting the rights of the prisoners. Not only this, there are several fake encounters have been

reported on the part of India police which are condemnable. No doubt that arrest, detention and investigation these are the parts of the duty of the police but the police officials should take notice of the fact that nowhere in the constitution and in any legal framework arbitrary and unlawful behaviour is allowed.

- ii. However, some remedial measures and suggestions are provided to protect the human rights of the prisoners herein as follows;
- iii. There should be regular programmes and workshops to sensitise and educate the police personnel and jail authorities towards their role and duties. They should be well informed about the value of human rights and their importance in criminal justice system.
- iv. Senior officers should monitor the functioning of the subordinates to keep a check and balance on prison violence.
- v. The court should be pro-active and efficient in dissolving the complaints of prison violence, custodial violence and police atrocities quickly without taking much time. It should not prolong and delay in punishing the culprit.
- vi. Time to time, some cultural and sports activities should take place to bridge eth gap between the jail authorities and the prisoners in healthy manner.
- vii. Legal aid programmes should be organised constructively time to time.
- viii. There should be counselling programmes and proper training of vocation courses to help the prisoners learn and earn after their incarceration. Some financial help should be provided to the prisoners in their rehabilitation after the fulfilment of punishment.
- ix. The labour of prisoners should be used in near locality community so that they would be able to interact with people outside. This will motivate them in following discipline properly in jail.
- x. Prisoners should be made aware of their rights. National Human Rights commission and NGOs can join their hands and take initiatives to educate prisoners about their rights and remedial measures in case of violations.
- xi. To motivate discipline in prisons, the government can work on constructing open prisons. It will be a great step in the reformation of prisoners. Reformation and rehabilitation that take place in open space will be very different from reformation and rehabilitation practices in closed prisons or conventional prisons.

## **CONCLUSION**

Human Rights are the basic rights of an individual in society to lead life happily. Every person has and is entitled to rights in society to enjoy several benefits. Every human being has a right to live with dignity and respect. In prison also, a person does not stop to be a human being. He still possesses some rights over there. However, despite all human rights and legislative frameworks provided for the protection of the prisoners, the truth is that their condition is troublesome and appalling. Still constant, tenacious and audacious steps will have to be taken to achieve the objectives of human rights for the prisoners and the State will have to make its intention very clear to do so.

## INDIAN PHARMACEUTICALS AND COMPETITION ISSUES: A LEGAL ANALYSIS

Sugato Mukherjee\*

### INTRODUCTION

*“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.”<sup>1</sup>*

Various International human rights agreements, significantly the Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right to health. The urgency to take action by all governments has been expressed in the Declaration of Alma Ata<sup>2</sup>. Right to health in India as a derived fundamental right under Article 21 of our Constitution which is the cornerstone of our Constitution. Access to healthcare is a global problem and India too is no exception in this case .more than one-third of the world populace is deprived of access to healthcare and pays heavy price. A large portion of the developing countries lacks proper access to medicines in developing countries. According to an estimate only some 35 percent of Indians have access to essential medicines.<sup>3</sup> The matter of healthcare, like most other development issues is simply gigantic and it is impossible for the government to do anything single handedly without cooperation of the people. It is possible to bring the paper pledges into action only with the support of the people.

Two vital institutions which are of prime importance for ensuring access to medicine and healthcare are health delivery system and the pharmaceutical industry. The healthcare mainly

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<sup>1</sup> Preamble to the WHO Constitution

<sup>2</sup> The Declaration of Alma-Ata was adopted at the International Conference on Primary Health Care (PHC), Almaty (formerly Alma-Ata), Kazakhstan (formerly Kazakh Soviet Socialist Republic), 6-12 September 1978. It expressed the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world. It was the first international declaration underlining the importance of primary health care. The primary health care approach has since then been accepted by member countries of the World Health Organization (WHO) as the key to achieving the goal of “Health for All”.

<sup>3</sup> World Health Organization Office Of The Who Representative To India & Ministry Of Health And Family Welfare Government Of India , Cuts Centre For Competition, Investment & Economic Regulation (CUTS C-CIER) Cuts International Jaipur, India 2006 ,*Options For Using Competition Law/Policy Tools In Dealing With Anti-Competitive Practices In The Pharmaceutical Industry And The Health Delivery System available*

comprises doctors hospitals (both public and private), diagnostic labs, pharmacists and primary health centres and the pharmaceuticals industry is mainly involved manufacturing and marketing medicines and inventing new medicines.

There are five aspects to access to medicines and healthcare: availability of supply, price, quality, ability to pay and access to proper and affordable consultations. All these aspects are vitiated in our country by a number of factors, which range from poverty and poor infrastructure to corruption, market malpractices and lack of awareness. A market malpractice in general and in particular, anti-competitive conduct in the pharmaceutical industry has serious implications for access to healthcare by people. Examining legal and policy options to effectively curb such anti-competitive practices will be the focal point of this study. Anti-competitive practices in the pharmaceutical sector amongst others, price fixing, abuse of dominance, collusive agreements and tied selling. Even practices such as kickbacks to doctors and pharmacists may be deemed as anti-competitive as they result in depriving patients of best possible medicines and services at the lowest possible prices. The principal effect of anticompetitive practices on the health sector is that medicines and services are rendered expensive.<sup>4</sup> With the advent of India's new patent regime and the increasingly deregulated environment new concerns have arisen particularly in regards to access to medicine and healthcare.

The concerns are enumerated below:

- Will there be rise in prices due to the abuse of the monopoly rights of the patent holder?
- Will relaxation in price controls lead to rising prices?
- Will the inevitable increase in MNC presence, post-TRIPS, usher in the many anti-competitive practices?
- Will the current spurt in mergers and acquisitions create market structures, which may result in abuse of dominance?

## **INDIAN PHARMACEUTICALS INDUSTRY**

The Indian pharmaceutical industry is currently acknowledged as one of the foremost industries. The launching of the new products has led to a significant increase in the growth

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<sup>4</sup> CUTS C-CIER, *Supra note 2*, p. 14

rate. According to statistics almost 3000 new products were launched between 2002 and 2004, with sales estimated at US\$280mn<sup>5</sup> India is ranked among the top 15 drug manufacturing countries in the world. Globally, the output of India ranks 4<sup>th</sup> in terms of volume and 13<sup>th</sup> in terms of value.<sup>6</sup> The Indian pharmaceutical industry, however, only has a one percent share of the world pharmaceutical export market. India's export market is expected to strengthen substantially in the coming years. One vital characteristic of the industry is that drug prices in India are arguably amongst the lowest in the world.

The pharmaceutical industry avails of global recognition for its following strengths.<sup>7</sup>

- Availability of a large pool of low-cost and highly skilled pool of scientists and medical professionals
- Chemistry and synthesis skills
- Successful scaling up of laboratory processes to plant scale
- Cost effective and commercially viable non-infringing processes
- Manufacturing facilities of international standards
- Quicker adoption of new technology

Despite the all the heartening indicators and the significant promise of the pharmaceutical industry in India, the sector is today in a state of flux. Many domestic companies are being confronted by the very issue of survival in face of the sweeping changes introduced in the patent regime and the increasingly de-regulated environment.<sup>8</sup>

## **BACKGROUND AND HISTORY**

In order to understand the pharmaceutical industry in India it is essential to understand the Indian patent regime. The pharmaceutical industry in India is at the zenith of success and the

<sup>5</sup> Khan, A., & Nanda, N., (2006), Competition Policy for the Pharmaceuticals Sector in India, CUTS International In: Mehta, P.S. (2004) (ed.), Towards a Functional Competition Policy for India, [E-Book] Pp.188-189. Jaipur. Academic Foundation; Available at: [http://books.google.co.in/books?id=YrkMLy9Z6OwC&pg=PA189&lpg=PA189&dq=Nitya+Nanda+and+Amir+ullah+Khan,+Competition+Policy+for+the+Pharmaceuticals&source=bl&ots=L7yN\\_RgZG&sig=eAO0R3J1UarJELgy8IwkLbJ\\_3P0&hl=en&sa=X&ei=juZqT7KfHJsAfSo4vfAg&redir\\_esc=y#v=onepage&q=Nitya%20Nanda%20and%20Amirullah%20Khan%2C%20Competition%20Policy%20for%20the%20Pharmaceuticals&f=false](http://books.google.co.in/books?id=YrkMLy9Z6OwC&pg=PA189&lpg=PA189&dq=Nitya+Nanda+and+Amir+ullah+Khan,+Competition+Policy+for+the+Pharmaceuticals&source=bl&ots=L7yN_RgZG&sig=eAO0R3J1UarJELgy8IwkLbJ_3P0&hl=en&sa=X&ei=juZqT7KfHJsAfSo4vfAg&redir_esc=y#v=onepage&q=Nitya%20Nanda%20and%20Amirullah%20Khan%2C%20Competition%20Policy%20for%20the%20Pharmaceuticals&f=false) (Accessed on: 20<sup>th</sup> May, 2020)

<sup>6</sup> Industry Overview: Drugs and Pharmaceuticals ; Available at: <http://www.directories-today.com/drugs.html> (Accessed on: 17th May, 2020)

<sup>7</sup> Nitya Nanda,*supra notes 4*

<sup>8</sup> Ibid.

key factor responsible for this is the transition from the product patent regime for medicines to that of process patent patents in the 1970. The product patenting system protects the patent-holders' rights to the new drug or molecule invented while process patents protect the method used to create a drug or molecule, but not the product itself. A process patent, therefore, permits manufacturers to produce the same or similar molecule, if they are able to devise an alternative method of developing the molecule.

The patent regime gave opportunities to manufacturer to manufacture generics<sup>9</sup> using reverse engineering<sup>10</sup> method. The companies involved in the manufacture of generics did not have to recover any substantial research and development cost therefore they priced in such a manner that it was available at affordable price to the *aam aadmi*. The availability of cheap medicine at affordable price was of utmost significance in a country with such a high percentage of underprivileged citizens.

Based on the flexibilities of the process patent system and a range of protectionist measures, a self-reliant domestic drug industry emerged with the capacity to manufacture and provide at a low cost a wide array of bulk and finished drugs. The milieu against which the industry achieved its success is now set to radically change. The era of liberalisation and integration with the global markets in India has ushered out the earlier protectionist measures. Since 2001, automatic approval has allowed up to 100 percent foreign equity in the pharmaceutical sector and the Indian law now treats TNCs as equal to Indian companies. The process patent regime was fundamentally liable for the domestic industry maintaining its competitive edge.

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<sup>9</sup> Unfortunately there is no precise definition. Generics is a term, which is used in a number of different contexts, primarily three. A drug's generic name is the pharmacological name of the compound assigned either by WHO's International Non-proprietary Names Committee or by the US Adopted Name Council. Drugs whose patents have expired are also included in the category of generics. (See Zafrullah Chowdhury, *The Politics of Essential Drugs: The Making of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, p. 8). Also copies of patented drugs in the erstwhile process patent regime in India were loosely termed as generic copies of patented drugs. Generic drugs are broadly classified into commodity generics and branded generics. Commodity generics, which have been on the market since 1950s are simply generic name products marketed by a wide variety of companies. Branded generics are either unpatented drugs sold under a brand name or patent-expired products sold under a generic name prefixed by the company's initial(s)- a practice which helps differentiation from other generic manufacturers and is supposed to provide an assurance of quality.

<sup>10</sup> Reverse engineering is the process of discovering the technological principles of a device, object, or system through analysis of its structure, function, and operation. It often involves taking something (e.g., a mechanical device, electronic component, software program, or biological, chemical, or organic matter) apart and analyzing its workings in detail to be used in maintenance, or to try to make a new device or program that does the same thing without using or simply duplicating (without understanding) the original.

## LAWS REGULATING THE PHARMACEUTICAL INDUSTRY IN INDIA

### Laws Pertaining to Manufacture and Sale off Drugs in India<sup>11</sup>

- The Drugs and Cosmetics Act,, 1940
- The Pharmacy Act,, 1948
- The Drugs and Magic Remedies Act,, 1954
- The Narcotic Drugs and Psychotropic Substances Act,, 1985
- The Medicinal and Toilet Preparations Act,1956

### *The Approval Process for Manufacturing and Marketing*

The pharmaceutical industry is regulated by the Drugs and Cosmetics Act 1940 (DCA), and the Drugs and Cosmetics Rules (DCR) made there under. This legislation enjoys jurisdiction in the whole of India and to all products whether they are manufactured in India or imported from other countries. The office of the Drug Controller of India (DCI) has the primary accountability of enforcing the law. Notwithstanding anything enforcement at the field level is done by the individual state government through their Food and drug administration. Matters of product approval and standards, clinical trials, introduction of new drugs, and import licenses for new drugs are handled by the DCI. However, the approvals for setting up manufacturing facilities, and obtaining licenses to sell and stock drugs are provided by the State Governments. There is no requirement for any registration of a drug in India. However, there is need for approval from the DCI to import, market, or manufacture a “new drug.” All new drugs (drugs not previously used in India or in use for less than four years) proposed to be introduced must be approved for import or manufacture in India by the DCI. The application for permission to import or manufacture must be accompanied by the appropriate dossier on the following aspects:

- Introduction: description of drug and therapeutic class
- Clinical and pharmaceutical information
- Animal pharmacology
- Animal toxicology
- Human/ clinical pharmacology (Phase I)

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<sup>11</sup> Indian Pharmaceutical Industry and Laws Governing Manufacture and Sale off Drugs D.. Sreedhar Maniipall Collllege off Pharmaceutical Sciences,, Mani pall

- Exploratory clinical trials (Phase II)
- Confirmatory clinical trials (Phase III)
- Special studies
- Regulatory status in other countries
- Marketing information

In case the drug is already permitted and marketed abroad, then only Phase III trials may be mandatory in India. Further, such trials would need to be conducted on at least 100 persons spread over 3-4 locations in the country. However, the DCI may agree to mete out with the need for local clinical trials, if it is in the public interest and if it can use the data of trials carried out in other countries.

All manufacturing of drugs in India requires a license. A license is required for each such location at which drugs are to be manufactured, and also for each drug to be manufactured. The license has to be renewed from time to time.

## **THE COMPETITION ASPECTS OF THE PHARMACEUTICAL INDUSTRY**

The competition aspects of the pharmaceutical industry are very distinct from those in most markets. There are certain exclusive characteristics of the pharmaceutical industry, which account for a distinctive competition scenario, although this is pertaining to primarily the formulations sector and not the bulk drugs industry. There is archetypal competition in the bulk drug sector mainly because, there are a large number of players with none enjoying market dominance, and secondly, the sector is characterized by a homogenous product range. Supplementary the buyers in the bulk drug sector are aware consumers and there is lack of asymmetry of information as is the case with the formulation sector:

### *The Barriers to Effective Price Competition<sup>12</sup>*

In a normal market, firms try to improve sales, and accordingly, profits, by reducing prices. Competition between firms to provide the highest quality product for the lowest price ensures efficient allocation of resources in the economy. It also means that the benefits of augmented efficiency are shared between consumers, in the form of lower prices and higher quality; and firms, in the form of profits. However, the scenario changes drastically in the case pharmaceutical sector with specific reference to formulations. The very essentiality of the

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<sup>12</sup> CUTS C-CIER ,*Supra note 2*, p. 27

product being sold, namely medicines, is facilitative to distortion in competition in the pharmaceutical market. Consumption patterns are not affected by price and therefore there is absolutely no incentive to keep prices low. In case of developed countries the consumption pattern is untouched mainly because of two reasons. Firstly, the essentiality of the commodity and secondly, due to coverage of the consumers either by private or public insurance companies.

In most countries the insurance providers are generally the governments and therefore it's the government that bears the most or all cost of medicines which may result in reasonable drug pricing, since as a monopolist, the government may be able to control drug prices, at least to some extent, and prevent drug companies from exploiting the market <sup>13</sup>. However, in India and most developing countries, the situation is quite different. Majority of people are covered neither by public nor private insurance. The coverage of public provisioning of healthcare services and medicines is also limited.

#### *Consumer Choice –The Dependence Involved due to Asymmetry of information*

Another area of concern in this sector is the fact that the consumers in case of formulations are not the decision makers. They are more than often guided by their doctors and pharmacist and this way the doctors and pharmacist assume a significant role in the sale of drugs often leading to manipulation of the system, with drug companies seeking to exploit this influence, sometimes via huge incentives. Such practices are detrimental to the interest of the ignorant consumers who are misled into buying expensive medicines. This vitiates dance mentoring by the doctor deprives patients from availing the best possible products at the lowest possible prices, which is a basic competition principle. Empowering consumers is a task fraught with difficulties, since medicine is a highly specialized field in which miscalculations in the decision making process may lead to severe repercussions on health.

#### *Anti-competitive Practices<sup>14</sup>*

A number of anti-competitive practices encompass the pharmaceutical industry internationally including in India. Such practices include, amid others, collusive activities, merger and acquisition associated anti-competitive practices and abuse of dominance. To control the distorted competition in the pharmaceutical industry basically all countries in the

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<sup>13</sup> Ibid.

<sup>14</sup> CUTS C-CIER, *Supra note 2*, p. 28

world have mechanisms to police the industry, particularly drug prices.

### *In the Context of Access to Medicines<sup>15</sup>*

Skewed competition despite the fact that there is no uncertainty as to the technological sophistication, entrepreneurial flair and export success of the pharmaceutical industry. But in the framework of one yardstick, namely, the contribution of the pharmaceutical industry in facilitating access to drugs, despite significant contribution by the industry, the overall situation has been disappointing. As mentioned previously, only some 35 percent of Indians can access essential drugs. There are a number of factors, which would give explanation for the lack of access to drugs. However, responsibility lies with the industry as well. The health delivery system shares a large part of the responsibility for ensuring access to affordable medicines and healthcare to the people and will be briefly examined hereafter.

## **COMPETITION CONCERNS IN THE PHARMACEUTICAL INDUSTRY**

In the previous chapter it was reflected how the pharmaceutical industry was affected by a range of market failures and as to how the condition was further exaggerated by the prevalence of anti-competitive practices in the market. In this chapter the researcher focuses on the various violations of competition norms in the pharmaceutical industry.

### *Intellectual Property Rights Related Anti-competitive practices*

Patents by nature impose monopoly rights to pharmaceutical companies and the patent-holder is given the exclusive rights to make, use or sell a product for a specified period. Conferment of such rights to the patent-holder very often leads to effects which are detrimental to the interest of the consumers leading to the abuse of dominance by companies which enjoy such patent rights. These companies price their products at monopolistic profit -maximizing levels and restricting access to affordable and essential medicines.

As far as India was concerned the abuse of monopoly power was easily avoided with India following the process patent regime. However with the advent of product patent regime in 2005 any product entering the market is being marketed by a monopolist .Now with this new regime in action there are chances of abuse of dominance which was almost negligible in the earlier process patent regime.

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<sup>15</sup> Ibid.

In this regard it is essential to consider the Novartis case<sup>16</sup> which involved IPR-related issues in the health sector. In this case Novartis filed an application for patenting its cancer drug Gleevac used for the treatment of leukemia which was rejected by the Indian Government<sup>17</sup>. Novartis further filed a case at the Madras High Court and challenged this decision of the Indian Government. It is pertinent to mention here that while treatment of leukemia with Gleevac costs around Rs.1,20,000 per month for a patient whereas the treatment of the same with its counterpart generic cost a patient only Rs.8000. The people who supported the decision of the Indian Government have argued that India is a source of cheap medicines and if patent were granted to Novartis then it will lead to a dearth in the availability of affordable medicine in the Indian Market.<sup>18</sup>

In the context of patents and pricing it becomes very important to talk about the grant of exclusive marketing rights (EMRs)<sup>19</sup> in India. Out of the seventeen applications filed for grant of EMR so far, only four have been granted in the pharmaceutical sector to Novartis's Glivec, Wockhardt's tropical antibiotic Nadoxin, United Phosphorous' pesticide product Saaf and Eli Lili's Tadalafil.<sup>20</sup> But the conduct in which Novartis exercised these rights gives cause for apprehension with respect to what might be expected in the new patent regime. Novartis' Glivec is used for treatment of Chronic Myeloid Leukaemia ('CML'). There was an increase in the price of the drug from \$90 to \$2610 after the grant of EMR, which will successfully put the drug out of reach of 24,000 patients in India who suffer from CML.

<sup>16</sup> Dea, C.O., (2012) Novartis awaits cancer drug ruling in India [Online] (March, 13) Available at: <http://www.swissinfo.ch/eng/business/novartis-awaits-cancer-drug-ruling-in-india/32197530> (Accessed on: 16<sup>th</sup> October, 2019)

<sup>17</sup> Bennet WJ,(2014), Indian Pharmaceutical Patent Law and the Effects of Novartis Ag v. Union of India [E-Journal] Washington University Global Studies Law Review 13(3). Available at: [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1500&context=law\\_globalstudies](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1500&context=law_globalstudies) Pp.535-557. (Accessed on: 22<sup>nd</sup> October 2019)

<sup>18</sup> Sec 2(m) of the Indian Patent Act

<sup>19</sup> The term EMR means the exclusive marketing rights to sell or distribute the article or substance covered in a patent or patent application in the country. The purpose of EMRs is to ensure that the innovator can market free copies of his product. To comply with the requirements of TRIPS, pending the transition to a full-fledged product patent regime, provisions relating to exclusive marketing rights in the areas of drugs and agro chemical products were incorporated in the Patents Act, 1970 with cut off date from January 1, 1995. Chapter IV A incorporated the relevant provisions. Section 24 of the Act stipulates that India has to receive applications for patents containing claims for drugs and agro chemical products with the condition that such applications can be taken up for consideration of granting EMR if an application is made.

<sup>20</sup> Centre for Trade and Development. (2010). Competition Law and Indian Pharmaceutical Industry, NEW DELHI, CENTAD. Pp.113-119. See Also: Angell, Marcia, (2005) "The Truth About Drug Companies: How They Deceive US and What to Do About it", New York, RandomHouse. Pp. 56-58. (Centad), New Delhi 2010, *Competition Law and Indian Pharmaceutical Industry*

shows clear abuse of dominance through excessive pricing. It also shows the ramifications of the abolition of the process patent regime. There is another case, which may be noted here. Natco Pharma is now manufacturing a generic version of AstraZeneca's Iressa, which is an anti-cancer drug.<sup>21</sup> The drug priced at Rs 325 per tablet of 250 mg is at 1/10th of the cost of the international brand presently available in the market. It is conceivable that Natco could face a litigation problem as AstraZeneca is considering the drug for EMR and is in consultation with the government agencies to do so. In all likelihood, the price set by Astra Zeneca will be elevated than that at which Natco is presently selling the drug.

## MERGERS & ACQUISITIONS

The Indian pharmaceuticals industry at present is highly fragmented. However it is anticipated that in the years to come it will witness intense consolidation activities. In fact, most of the top global pharmaceutical companies are consolidating their market positions, either through product rationalisation, brand acquisitions, or company acquisitions. Sun Pharma, Nicholas Piramal and Dr. Reddy's Labs have opted for brand/company acquisitions to increase their therapeutic extent and market diffusion. Large Indian pharmaceutical companies are also intensifying their reach overseas through acquisitions abroad. Examples include Ranbaxy's acquisition of RPG Aventis; and Wockhardt's acquisition of CP The primary reason which has led the companies to resort to mergers and alliances is the increasing pressure to trim down drug prices .The mega-mergers in the global pharmaceuticals industry, in the last few years, have been Sanofi-Aventis, Glaxo-Wellcome-SmithKline Beecham; Hoechst-Marion-Merrell Dow-Roussel; Pfizer-Warner Lambert; Ciba-Sandoz (to form Novartis); and Hoechst Marion Roussel-Rhone Poulenc (to form Aventis).<sup>22</sup> It is anticipated that the trend is likely to continue and such mega-mergers in the global market are likely to raise competition concerns in several markets, including India. Indian pharmaceutical industry has witnessed quite a few cases of M&A over the last few years, both as a direct fall out of mergers of global players, as well as M&A of domestic players, and in some cases between global and domestic players. Several of these cases involved companies that had medicines that were used for the same therapy and hence were competing directly.

Now the question that arises is how can we say mergers and acquisitions are anti-competitive

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<sup>21</sup> CUTS C-CIER, *Supra note 2*

<sup>22</sup> CUTS C-CIER, *Supra note 2*,

in nature? Mergers are not necessarily anti-competitive and may lead to creation of efficiencies. The trends of mergers and acquisitions in the global pharmaceutical market seem to reveal that for the pharmaceutical industry, these transactions are an appropriate way of counteracting competition and achieving more profitable returns and high market shares. However, the concern is whether the mergers, the acquisitions or the joint ventures will enable parties to achieve or strengthen a dominant position in the markets in which they compete and whether there will be abuse of dominance leading to higher prices, reduced output or less innovation. In a mega merger case<sup>23</sup> two large pharmaceutical giants merged to become GlaxoSmithKline (or GSK). This merger produced a leading global pharmaceutical company, with sales of £18.1bn in the year 2000. Headquartered in the United Kingdom, GSK supplies products to 140 markets in the world. Evidently, the merger created competition concerns in several countries, yet it went uncontested in most of them. India did not have a merger review provision in its extant competition law, the MRTPA, so the merger was not investigated. In Sri Lanka, the competition authority did not even take up the case of merger between Glaxo Wellcome and SmithKline Beecham, saying that it did not have jurisdiction, even though both the companies had commercial presence in the country.

The handling of the merger case by South Africa is quite illustrative. Upon investigation and evaluation of the merger, the Competition Commission reached the conclusion that the transaction should be prohibited, on competition and public interest grounds. In particular, the Commission was concerned that the merger would result in the merging parties having high market shares in two therapeutic categories. The Commission stipulated that there would be unacceptable levels of concentration with respect to Bactroban, Zelitrex and Famir, and there were no appropriate substitutes to counter any price gouging, or ease of entry, to offset the concern.

Upon prohibition of the merger by the Commission, the merging parties volunteered to out license some of their products identified, by the Commission, to be the cause of the competition concerns. The merging parties, and the Commission, reached an agreement and the merger was allowed, conditionally. Interestingly, the conclusion of the Commission, in making its recommendations to the Competition Tribunal, was substantially the same as the conclusions of the EC, in so far as the overlap of products was concerned. This may partly be due to the fact that the Commission sought, and received, extensive cooperation from both

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<sup>23</sup> Involving Glaxo Wellcome and SmithKline Beecham

the US and EC. However, it may be noted that the Commission completed its investigation long before the case was decided by the EC.

## **COLLUSIVE PRACTICES IN THE PHARMACEUTICAL INDUSTRY**

Collusive practices in the pharmaceutical industries can vary from cartelisation to bid-rigging. Although there haven't been evidence of existence cartels in the Indian Pharma Industry but the existence and operation of the same cannot be denied keeping in mind the fact that India has been a prey to the International Vitamins Cartel for quite some. According to one estimate, this vitamins cartel cost India about US\$25mn, in the 1990s, due to overcharging.<sup>24</sup>

Therefore, the subsistence of a tendency towards collusive behaviour in certain segments, where there are just a few manufacturers, cannot be altogether neglected specifically looking into the fact that India has been affected by the Great Global Vitamins Cartel.

## **PROVIDING INCENTIVES**

Often we will find companies giving incentives to doctors and pharmacists which lead to an absolute violation of free and fair competition. This might be motivated by longing to generate a bigger market share or to gain better profits by pushing overpriced drugs and the same is achieved through insistent promotional strategies designed at doctors, and by providing well-paid margins to chemists. In India pharmacists are given incentives to buy large quantities of prescription drugs and thousands of drug manufacturers compete for shelf space, and the country's half-million pharmacists wield an unusual amount of clout.<sup>25</sup>

In a recent study conducted by Interlink Healthcare Consultancy it was found out that all but one of the top 25 drug companies, in India, presented heavy discounting deals at least once a month. A correspondence to pharmacists from Blue Cross Laboratories Ltd, a Mumbai company, outlined agreement that offered pharmacists up to a 103 percent profit margin on assortment of prescription drugs<sup>26</sup>

## **MISDIAGNOSIS**

Certain companies also make assistance of anti-competitive practices to make a market for

<sup>24</sup> CUTS C-CIER, *Supra note 2*

<sup>25</sup> CUTS C-CIER, *Supra note 2*, p. 53

<sup>26</sup> *ibid*

their products. For example, Novartis, a company that has a large market share in India has been recently accused of fuelling the misdiagnosis of Attention Deficit Disorder (ADD) through its close relationship with psychiatric associations and its presentations at their meetings, and conspiring thereby to shape a niche in the market for Ritalin, their drug for ADD through expanding the use of the drug by being responsible for millions of children being misdiagnosed with ADD.<sup>27</sup>

## **AVAILABLE LEGAL OPTIONS**

There are numerous legal and policy options, which may be utilized to deal with anticompetitive practices in the pharmaceutical industry .These options, are to be considered in light of facilitating access to medicines and healthcare by the poor. Competition law apart, patent law and drug price control are essential for successful eradication of competition violations in the health sector.

Using competition law is an obvious legal remedy to deal with anti-competitive practices in the pharmaceutical, industry. The key element in successfully enforcing the provisions of competition law is building the capacity of the competition agencies.

The three central areas of anti-competitive conduct covered by the Indian Competition Act, 2002, as amended by The Competition (Amendment) Act, 2007, relate to: anti-competitive agreements; abuse of dominance; and combinations – all three of which bestow competition concerns in the pharmaceutical industry and the health delivery system. The specific anti-competitive practices of the pharmaceutical system, covered by the Act are collusive agreements including cartels, tied-selling, exclusive supply agreements, exclusive distribution agreements, refusal to deal, and resale price maintenance.

The Competition Act, 2002, as amended by The Competition (Amendment) Act, 2007 prohibits the abuse of dominance and, therefore, if pharmaceutical companies do engage in overpricing patented products or are unreasonable with respect to licensing terms and so on, the competition law may be resorted to for redressal.

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<sup>27</sup> See Generally: Anonymous (2013), *Fraud and the Pharmaceutical Industry*. Available at: <http://www.uow.edu.au/~bmartin/dissent/documents/health/pharmfraud.html#Novartis> (Accessed on: 22<sup>nd</sup> December 2019). See Also: Kesselheim A.S., (2010), *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, Available at: <http://www.nejm.org/doi/full/10.1056/NEJMsr0912039#t=article> (Accessed Date: 15<sup>th</sup> May, 2020)

The Patent (Amendments) Act, 2005 introduces product patents in India, invalidating Section 5 of the Indian Patent Act, which granted only process patents for food, medicines and other drug substances. Under the Patent (Amendments) Act, 2005, monopoly status is awarded to patent-holders. The Indian Patent (Amendment) Act, 2005, also provides compulsory licensing under Section 84 and 90. Generally, three years after a patent is granted (sealed), any interested party can allege that the invention is not reasonably available to the public and can request the grant of a compulsory licence.

Price control is a tool that is used in a situation when maintaining a competitive market is extremely difficult. India has been following a price control regime for pharmaceutical products since the 1960s. However, there has been significant decontrol in this regard since the 1990s, with the effect that prices of many medicines have seen an unprecedented rise. Under the Drug Price Control Order (DPCO) 1995, only 74 drugs are under price control. The DPCO is to be succeeded by the National Pharmaceutical Policy of 2002, which contains several important policy changes.

## **CONCLUSION AND SUGGESTIONS**

Thus, after carrying out this study we try to look for some strategies which can be used for the elimination of anti-competitive practices from Indian pharmaceuticals industry. The healthcare market suffers from a peculiar feature which is invisible in other industrial sectors and which is particularly exclusive to the pharmaceuticals. If a patient needs emergency healthcare services then he lands up at the nearest hospital leaving him completely at the hands of that particular hospital and the doctors available therein. In such a case the authorities have all the discretion as to what kind of treatment is to be given, what type of diagnostics tests are to be carried on and what type of medication is to be given to them. Now in such a case the hospitals might take advantage of such a position and thus leading to financial exploitation of the ignorant patients who have submitted themselves at the mercy of such authorities. Thus it would be better to promote competitive results and efficiency rather than promoting competition *per se*. After carrying out a study on the prevalence of anti-competitive practices in the Indian Pharmaceuticals the researcher has come to the following conclusion and suggestion:

- *Generics have to be promoted:* The doctors often indulge in accepting incentives from pharmaceutical companies and help the companies in selling their products

which are often more expensive than the other alternatives available in the market and this is a gross violation of the competition principle of “best possible goods and services at the least possible prices”. This primarily happens due to the existence of the traditional system of drugs by prescription. In order that the consumers avail of the “best possible goods and services at the least possible prices” it is essential to break the nexus between doctors and companies and to further promote the use of generics. This promotion may be done by de-branding prescriptions for essential generic medicine.

- *IPR Related issues need to be dealt efficaciously:* One very effective method for the elimination of IPR related anti-competitive practices from the pharmaceutical industry is compulsory licensing. Compulsory licensing can prove to be the most efficacious to deal with the abuse of monopoly rights by the pharmaceutical companies. It is suggested that it would be more apt to give the competition authority the responsibility of granting compulsory licences in consultation with the patent office, rather than doing it the other way around. , Bureaucratic delays in the grant of compulsory license have to be eliminated .In this regard India may look up to the policies of other countries such as Canada, France and the UK.

The IPR related agreements have been exempted in the Indian Competition Act, 2002, as amended by The Competition (Amendment) Act, 2007, even if they contain anti-competitive provisions which are reasonable, without defining what is reasonable. This will create confusion. Moreover, some of the provisions can be purely anti-competitive and cannot be justified in the interests of promoting innovation and hence should not be exempted even with a rider of reasonableness. Subjects like abuse of dominant positions relating to IPRs like monopoly pricing, exclusive dealing, tied sales, restrictions on end users, etc have altogether been exempted from the Indian Competition Act, 2002, as amended by The Competition (Amendment) Act, 2007.

- *Presence of Collusive Activities needs to be scrutinized:* Collusive activities among Indian manufacturers of pharmaceuticals have not yet been discovered. However, their pervasiveness cannot be ruled out. Pharmacies engage in collusive practices in India to ensure higher trade margins. The government has created deterrence mechanisms, though these have limitations and need to be re-examined. There exists a strong need to eliminate collusive practices by pharmacies to ensure growth of the

industry, including that of ensuring a fair deal for consumers.

- *Health Insurance:* The most significant way for the elimination of anti-competitive practices from the Indian Pharmaceuticals is the pervasive introduction and assimilation of health insurance services. The most evil effect of almost all anti-competitive practices in the health sector is the ensuing hike in the prices of medicines and health services therefore the best thing that can be done in these circumstances is insurance and thus shifting the financial burden on the insurance companies which may be private or public or PPP. More awareness needs to be spread about insurance facilities which can be availed by the consumers.
- *Creating Awareness:* The Central Government, State Governments, and all interested non-governmental organisations (NGOs) need to be drawn in creating awareness. The Clinical Establishments (Registration and Regulation Bill), 2007, has been introduced in the Indian Parliament, which proposes for the creation of a National Council for Regulation and Standardisation of Clinical Establishments. Once enacted, it can change the scenario relating to availability, accessibility, quality of service provided in the Indian health sector.

## **CYBER CRIMES AND CRIMINAL JUSTICE SYSTEM IN INDIA**

Dr. Shiv Raman\*

### **INTRODUCTION**

The Criminal Justice System is an integral part of strong and developed democratic system of India. After the evolution of civilization, we felt the requirement of a developed administration of the Criminal Justice System. In due course, many institutions have been established for the administration of an impartial Judicial System. A strong Criminal Justice System has four constituent elements:

1. Police and other agencies, as Investigative Units.
2. Prosecution, to prosecute in Court of law.
3. Impartial, Independent and Transparent Courts, for adjudication of disputes.
4. The Prison and Correctional Institutions.

In the present Digital World, new technologies and new inventions are taking place and many more technological developments are under process. Computer-based technology is used for enhancing the modern life everywhere including education, commercial sectors and Govt. organizations, etc. It ensures the efficiency and productivity. On the other side, '*the excessive dependence*' over technology is the root cause of Cyber Criminals for committing unlawful and unethical activities with the use of Computers and the Internet.

The collection and compilation of Digital Evidence from Computer and IT-based devices is the most challenging job for all investigating agencies in India. The investigation and collection of evidence from Computers require expertise, special knowledge and skill, which is lacking in most technical personnel of our country.<sup>1</sup>

Nowadays India has developed as a favorite nucleus for Cyber Criminals, especially hackers and other malevolent users, who use the Internet as a tool for Cyber Crimes. The rising trend of Cyber Crimes includes Cyber-spamming, Hacking, Cyber Stacking including theft, phishing, etc. Time has come for the Indian Police to overhaul and reform investigating methodology for a successful prosecution of Cyber cases in country. Indian traditional system

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<sup>1</sup> Vanthi J. Jayaprasana S, *A study of Cyber Crimes in the digital world, International Journal on recent & Innovation trends in computing & communication*, 2014 Sep. 2(9): pp.1-4.

of policing and criminal investigation is out dated, our extracting, gathering information and obtaining confession by beating. The Police force is still untrained in modern methods of criminal investigation, which needs special skills for managing and operating highly sophisticated technologies.

For the investigation of Cyber Crimes, jurisdiction remains the highly controversial issue for the maintainability of criminal or civil prosecution. Due to the development of cyberspace, the territorial boundaries seem to have disappeared but we still depend on Section 16 of Criminal Procedure Code, 1973 and Section 2 of Indian Penal Code, 1860.

The laws relating to computer-related crimes include Cyber Crimes, E-commerce, Copy Rights, IPR rights, Freedom of Expression & Privacy related rights, both in the physical & virtual world. In the 'Cyber Criminal Justice System', the investigation into the Cyber Crimes and collection of Evidences is worthless unless the prosecution secures the conviction of criminals including Computer/ Internet-related or involved crimes. The discovery of Digital Evidence is not an easy task. All or some of the evidences may be in E- form without 'any fact-filled story' or human Evidences. There the Computer Forensics Examiner will have a vital role. The Cyber Forensics Examiner must be able to convince the court and the reliability of electronic Evidence.

## **THE INDIAN CYBER CRIMINAL JUSTICE SYSTEM**

India has an established Criminal Justice System inclusive of Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and other penal laws & provisions in other laws. The registered Cyber Crimes in India are of various categories i.e.; under Information Technology (IT) Act, 2000, Indian Penal Code, 1860 and other State levels Legislations (SLL).

### *The Legal Regulations for handling Cyber Crime cases*

In India, the Ministry of Home Affairs has advised the Union Territories and State Governments to tackle Cyber Crime cases by establishing- Cyber Cells equipped with the latest modern technical structures. These are:

- Cyber Police Stations;
- Experienced/trained Cyber Analysts/ Experts for Cyber Crime detections and filing of cases.

- Expert Cyber Prosecutors and
- Govt. of India has implemented a plan for the expansion of Cyber- Forensics tools and establishing Cyber- Forensics labs.

*Cyber Crimes and preventive measures to deal with Cyber Crimes*

Before dealing with agencies, steps and processes of Cyber Crime's Investigation and Cyber-Forensics, it is necessary to know the preventive measures to deal with Cyber related or involved Crimes. The Govt. of India's Department of Electronics & Information Technology, Ministry of Communications & Information Technology has established CERT-IN( Indian Computer Emergency Response Team) and issues advisories regularly for the common use of:

- Mobile Phone & Data Security;
- Desktop Security;
- Broadband Internet Security;
- USB and Storage devices Security and
- Secure use of Debit/Credit Card and phishing of Attacks, which are disseminated through the portals.

Through the under mentioned web portals or with the assistance of other portals may be developed in this behalf:

- [www.secureyourelectronics.in](http://www.secureyourelectronics.in)[www.secureyourpc.in](http://www.secureyourpc.in)
- [www.cert-in.org.in](http://www.cert-in.org.in)<sup>2</sup>

*Indian Computer Emergency Response Team (CERT-IN)*

Whenever an incident relating to Computer Security occurs then we can report to the CERT-IN, the National Agency. Section 70B of Information Technology Act, 2000 and IT Amendment Act, 2008 has designated CERT-IN to serve as with the following objectives in the fields of:

**A. Dissemination and Analysis of information on Cyber incidents**

- To alert and forecast of Cyber Security incidents;

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<sup>2</sup> Available at: <http://infosecawareness.in/cybercrimes-cells-in-india>

- Urgent and Emergency measures for handling incidents of Cyber Security;
- Coordination with Cyber incident response activities;
- Issue Advisories, Guidelines, vulnerably- Notes and White Papers relating to information security, practice, prevention, procedure reporting and response to cyber incidents.

#### **B. Matters to be reported to CERT-IN**

The System Administrators and users can report Computer Security incidents and vulnerabilities to CERT-IN. The CERT-IN provides technical assistance for:

- Denial and disruption of services;
- Storage and processing of data by unauthorized use of Computer system;
- Gain or attempts to gain unauthorized access to a system in India and
- Issues related to Electronic Mail Security, Mail Bombing, Spamming, etc.<sup>3</sup>

#### **C. The procedure of filing report to CERT-IN**

The Cyber Victims can report Cyber related incidents by filling up online form, Electronic Mail, by Fax or Telephone hotline or by postal services<sup>4</sup>. In fact, the most appropriate way for reporting a Cyber Crime is to follow the procedure enshrined in Sec. 69A<sup>5</sup> of IT Act, 2000 read with Procedure and Safeguards for Blocking for Access of Information by Public Rules, 2009 of IT Act, 2000. It gives the power to Central Govt. to issue directions for blocking public access of any information through any Computer resource and Sec. 79(3) (b)<sup>6</sup> of the said Act exempts the liability of intermediary<sup>7</sup> in certain cases about particular E-record including Telecom Service, Network Service, Internet Service, Web- Hosting Service, Search Engines, E- Payment Sites, E-Auction Sites, Cybercafés, and E- market places.

#### **D. Cyber Police to deal with Cyber Crimes in India**

Another way for the protection and detection of Cyber Crimes in India is- Crime and

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<sup>3</sup> How to Report Cyber Crime in Indian territory, Ompal, Tarun Pandey, Basir Alam, Ministry of Electronics & Information Technology, Dept. of Computer engineering, Faculty of Engineering & Technology Jamia Millia Islami, New Delhi (India), International Journal of Science Technology & Management, Vol. No. 6, Issue No. 04. April 2017. [www.ijstm.com](http://www.ijstm.com), ISSN (O) 2394-1537 and ISSN (P) 2394-1529.

<sup>4</sup> Email- [info@cert-in.org.in](mailto:info@cert-in.org.in), Phone: +91-11-24368572, Fax: +91-11-24368546.

<sup>5</sup> Sec. 69A, IT Act

<sup>6</sup> Sec. 79, IT Act

<sup>7</sup> Sec. 2(1)(w)

Criminal Tracking System, which was approved by the Central Govt. in 2009 under the National E-Governance project however, by using IT-enabled tracking and Crime detection system. But unfortunately, until today it is not completed by all the States in India. The Investigation process of such crimes is often not exactly similar to other crimes.

#### **E. The Process of Cyber Investigation**

Cyber Crimes usually transgress geographical hurdles. Cyber Crime is a fast-growing meadows of crimes. Cyber criminals are exploiting the speed barriers and anonymity of the internet for commission of different types of criminal activities. No border, virtual or physical, can cause serious harm and rise real threats to worldwide victims other than Cyber Crimes.<sup>8</sup> To deal with the issue of Cyber Crimes, the Criminal Investigation Department (CID) established, Cyber Crime Cells (CCC). The IT Act, 2000 makes it clear that- '*whenever a Cybercrime has been committed, it has a global jurisdiction and hence a complaint can be filed at any Cyber cell*'.<sup>9</sup> Further, to combat Cyber Crimes, the CBI (Central Bureau of Investigation) has created specialized units:

- Cyber Crimes Investigation Cell (CCIC);
- Cyber Crimes Research & Development Unit (CCRDU);
- Cyber Forensics Laboratory (CFL);
- Network Monitoring Centre;<sup>10</sup>

#### **F. Cyber Crimes Investigation Cell (CCIC)**

The CCIC was established in Sep. 1999. It has jurisdiction all over India. It acts as a part of economic offense. CCIC is empowered to investigate all the Cyber Crimes under IT Act, 2000. It also acts round the clock as the Nodal Point of contact with Interpol to report Cyber Crimes in India. The CCIC of India is also a member of the 'Cyber Crimes Technology Information Network System, Japan'.

#### **G. Cyber Crimes Research and Development Unit (CCRDU)**

It is the responsibility of CCRDU to track the development and changes, which take place in

<sup>8</sup> IJSTM.com, Vol. No. 6, Issue No. 04, April 2017.

<sup>9</sup> How to Register Cyber Crime Complaint with Cyber Cell of Police- online Complaint procedure- by Ramanuj, May 25, 2014.

<sup>10</sup> Available at: <https://www.yumpu.com/en/document/view/28923514/crime-manual-2005-full-in-pdf-central-bureau-of-investigation>

ever-changing area. It has the following functions:

- To ensure cooperation and coordination with State Police Forces;
- To collect and compile the data of reported Cybercrime cases to Police for investigation;
- To coordinate with software experts in the identification of areas, which require the attention of State Police and
- To obtain the information of Cyber Crimes cases reported in other countries and prepare a monthly Cyber Crime digest.

#### **H. Cyber Forensics Laboratories (CFL)**

Cyber Forensic Laboratories are one of the primary wings of Cyber Investigation to provide investigative services in Computer Forensics (Digital Forensics), Forensic Data Revival, and Digital Evidence Detection. CFL can analyze the forensic data and recover Digital Evidence while maintaining the veracity of the electronic Evidence for detection and trial. The basic functions of the Cyber Forensics Laboratory (CFL) are to:

- Ascertain and scientifically Scientific analysis of Digital Foot- Print;
- Provide scientific analysis in support of the Crimes Investigation by Law Enforcement Agencies and CBI;
- Assist on-site for Computer seizure and search, on request;
- Provide consultation services for activities or investigations, where media analysis is probably occurring;
- Provide expert testimony and
- Provide adequate research and development in Cyber Forensics.

The information so collected and analysis thereof can be used as evidence in s Court of Law.

#### **I. Cybercrime Investigations**

Cyber Crimes can be defined as- '*a crime in which a computer is the object of the crime or is used as a tool for the commission of cyber offense*'.

Cyber Crime can also be defined as – '*a crime where Computer is the target or a crime committed through the use of a Computer*'. There is a long list of identified Cyber Crimes. All the crimes have different legal punishments provided in Information Technology Laws.

The Cyber Crime Investigation is almost similar to the investigation of regular crimes, except

that the Cyber investigators use Computers as a tool of Investigation and data as sources of evidence. The investigation of Cyber Crime has consequently become a highly specialized professional field.<sup>11</sup>

#### **J. Relevant Legal Provision in Cr.Pc, 1973 for Cyber Investigation**

The Code of Criminal Procedure, 1973 contains various legal provisions regarding the investigation of Criminal offenses which are also applicable to investigation of Cyber Crimes offenses. Here below is a list of those legal provisions:

- Power of Police to arrest without warrant-Sec. 41
- Power to search place entered by person sought to be arrested- Sec. 47
- Issuing Summons to produce document or other things- Sec. 91
- Grounds when search warrant may be issued- Sec. 93
- Power to search place suspected to contain stolen property, forged documents, etc.- Sec. 94
- Power of Police Officer to seize certain property- Sec. 102
- Power of Police to arrest to prevent commission of cognizable offenses- Sec. 151
- Procedure to be adopted for investigation- Sec. 157
- Investigation Report to be submitted to magistrate- Sec. 158
- Police Officer's power to require attendance of witnesses- Sec. 160
- Power of Police for examination of witnesses- Sec. 161
- Power of search by Police officer- Sec. 165
- When Officer Incharge of Police Station may require another to issue search warrant- Sec. 166
- Letter of request to the competent authority for investigation in a country or place outside India- Sec. 166A
- Procedure when investigation cannot be completed within twenty-four hours- Sec. 167
- Police Diary of proceedings in investigation- Sec. 172
- Report of Police Officer on completion of investigation- Sec. 173
- Power to summon persons- Sec. 175<sup>12</sup>

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<sup>11</sup> Available at: <https://www.yumpu.com/en/document/view/28923514/crime-manual-2005-full-in-pdf-central-bureau-of-investigation>

<sup>12</sup> Bare Act, The Code of Criminal Procedure, 1973.

## K. Determination of Cyber Crime Jurisdiction: Provisions in Cr. PC, 1973 and IT Act, 2000:

The word jurisdiction derives its origin from the Latin word ‘*jus, Juris* and *diare*’ meaning thereby ‘*Law*’ and ‘*Speak*’. Jurisdiction and competency of the Court is the most important aspect of every Criminal Justice System. Every jurisdictional error and incompetency of Court is always an error of law of court. Every Court has an inherent right to decide these things. A decision without jurisdiction and incompetency is a *coram non judice* and *denial of justice*. Jurisdiction is the legal and statutory right of the court to hear and decide a case.

Today cyber-world has no geological precincts. It can establish instant remote communications with anyone who can have access to the computer or the Internet. Generally, a web-user is unaware of the source and the network and servers/routes exactly from where the information on a site is being accessed. Jurisdictional issues are of primary importance in Cyber-world. World Wide Web (www) does not make a clear geographical and jurisdiction border. The web user though physically is one place but maybe in the jurisdiction of another country virtually or technologically. Even a single Cyber /web- transaction may engross the laws of at least three jurisdictions. Below is the list of legal provisions enumerated in Code of Criminal Procedure Code, 1973 and Information Technology Act, 2000 which deal with the determination of jurisdiction for Investigation of Cyber Offences:

- Place of Trial/ Inquiry where the offense was committed- Sec. 177;
- If the offense committed in more than one jurisdiction- any of the relevant jurisdictions- Sec. 178;
- Where the accused is found to possess the property obtained in theft, extortion or stolen property- Sec. 181;
- Offenses committed by letters, massages- where send or received- Sec. 182;
- Offenses committed outside India by an Indian citizen, on aircraft registered in India, tried as if the offense committed in India with the prior sanction of Central Govt.- Sec. 188;
- Period of limitation to take cognizance- Sec. 468;
- Confiscation of any Computer or accessory liable to be confiscated if used for commission of offense- Sec. 77 r/w Sec. 81 of IT Act, 2000;
- Compensation, penalty, confiscation not to interfere with other remedies under statutes;

- Compounding of offenses, where the sentence is below 3 years Sec. 77A of IT Act, 2000;
- Offense with 3-years punishment are bailable- Sec. 77B;
- Power to the investigate is given to Inspector and above the rank of Inspector-Sec. 78 of IT Act, 2000 and
- Inspection provision- to be consistent with Sec. 80 of IT Act, 2000, which gives the power of Police Inspector/ Officer to search and arrest, without warrant any person who has committed, is committing or about to commit any offense under IT Act, 2000- Sec. 80.

#### **L. Rules in CBI Manual, 2005 for Investigation of Cyber Crimes, Chapter 18**

To deal with Cyber Crimes effectively, the Central Bureau of Investigation (CBI) is empowered with its other Units under Chapter-18 of the CBI Manual, 2005, The important provision in this regard are:

- Cartridges or disk- can be used for the restoration of copies of files from Computer, useful for investigation.
- Labeling of Evidence- Label cables, where they are plug-in, disks, the various other parts of a computer and to write /protect disks.
- Dismantle the hardware with screwdrivers other tools for seizure.
- Use of Gloves- Often latest prints can be taken from disks or other storage hardware or media.
- Material needed for packing- Tapes, boxes, rubber bands, bubble wrap and if he does not have access to anti-static wrap then papers, bags can be used.
- Recording Equipment- to video graph and taking photographs of the crime scene
- Custody of report sheets and other paper for inventories and seize Evidence.<sup>13</sup>

#### **CONCLUSION**

As in depth analysis of *cyber-crimes* and laws related thereto reveal acquainted various problems being countenanced by India, is Criminal Justice System while implementing and protecting Cyber world from the ultra-tech Cybercriminals. Even though Cyber Crime is

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<sup>13</sup> Available at: <https://www.yumpu.com/en/document/view/28923514/crime-manual-2005-full-in-pdf-central-bureau-of-investigation>

global issue of international concern, but still- every country has its different definition of ‘Cyber-crime’. The common consensus of a harmonious definition is an illusion to imagine. This poses severe issues while implementing Cyber Laws and policies and provides ample opportunities for cyber perpetrators to get away from the judicial process and punishment. Further, the misuse of powers even by Police and cyber authorities cannot be ruled out. Simultaneously it is also required to be considered that the hazards of the ‘virtual offenses’ are increasing day by day. So, Cyber Law Enforcement Agencies are required to give the Police ample powers to apprehend offenders for commission of these crimes.

## **INTERNATIONAL JUSTICE SYSTEM: ANALYSING GENERAL PRINCIPLES OF CRIMINAL PROSECUTIONS**

Dr. M. Kalimullah\* & Afreen Rizvi\*\*

### ***Abstract***

*The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests. The clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems and obstacles they face. A number of principles have been invoked as the basis for extraterritorial jurisdiction. Individual criminal responsibility International criminal law allows for individuals to be held criminally responsible not only for committing war crimes, crimes against humanity and genocide, but also for attempting, assisting in, facilitating or aiding and abetting the commission of such crimes. Nullum crimen, nullapoena sine lege also known as the principle of legality which is enshrined in Article 15 of the International Covenant on Civil and Political Rights, states that no one may be convicted or punished for an act or omission that did not violate a penal law in existence at the time it was committed. Ne bis in idem enunciates the principle that "no person should be tried or punished more than once for the same crime". It ensures fairness for defendants since they can be sure that the judgment will be final and protects against arbitrary or malicious prosecution at both domestic and international level. Therefore, the existence of a particular crime depends on the existence of legislation stating that the particular act is an offence, and for a specific penalty to be imposed for that offence, the legislation in force at the time of its commission must include that particular penalty as one of the possible sanctions for that crime. There is need to balance State power and individual liberty, and sets out the minimum guarantees that States must observe throughout their criminal justice process.*

**Keywords:** Criminal Justice System; International tribunal, Courts of Crimes; Customary Law; Courts of First Instance.

### **INTRODUCTION**

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International crime has been broadly defined as “*an act universally recognized as criminal, which is considered as a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances*”. Today, international criminal liability exists at least in respect of war crimes, crimes against humanity, genocide and torture. Other crimes such as terrorism-related crimes, enforced disappearances and extrajudicial killings can arguably also be considered international crimes.

*International criminal law is a “hybrid branch of law”, as it is the child of a tripartite marriage between international human rights law, international humanitarian law and domestic criminal law*<sup>1</sup>. Whereas the fundamental principles underpinning a liberal criminal justice system are those of personal culpability, legality and fair labelling, international human rights law is focused on state responsibility and harm to the victim.

General principles of law, which derive from domestic legal jurisdictions, have greatly shaped the substantive part of international criminal law. These principles have played a varying role as a source of law in the jurisprudence of international criminal courts and tribunals, which may be explained by the different legal and political settings in which these judicial bodies were established and have functioned. The statutes of the ad hoc tribunals encompass only a few substantive law provisions and do not provide for a hierarchy of sources of law. This is not particularly surprising given that the statutes were hastily drafted by mostly diplomats, who were not necessarily criminal law experts, in an atmosphere of disbelief that the grand project of international criminal justice would take off the ground. The establishment of international criminal courts was not a routine measure employed by the UN Security Council to restore peace and security in troubled regions of the world, which to some extent expounds the imperfect nature of legal instruments that laid down the jurisdictional basis for the ICTY and ICTR. As a result, the judges of the ad hoc tribunals had to work with the poorly articulated statutes in terms of substantive law. The recourse to customary law and general principles was inevitable, since it was the only way to render legitimacy to the judgments.

The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests. The clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems

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<sup>1</sup> P Clark & N Waddell, ‘Dilemmas of justice’, *Prospect Magazine*, 134, 2007

and obstacles they face. A number of principles have been invoked as the basis for extraterritorial jurisdiction. There is truth in the assertion that international tribunals are better enabled to deliver justice in the fairest and most efficient manner possible with tailored institutional frameworks and procedures. On the other hand, the existence in the law of international criminal procedure of multiple legislative solutions that address the same procedural issues somewhat differently might call in question the coherence and authority of that body of law. In particular, in their quest for the highest standards of international procedural justice and the best trial practices in cases of international crimes, national criminal justice systems have increasingly turned, and may be expected to continue doing so in the future, to the seminal experience of international courts. However, for now, it is our view that the guidance they could draw from the latter is on many essential matters too contradictory, unprincipled or inconclusive to be useful.

## **COLLECTIVE ACTION AND INDIVIDUAL RESPONSIBILITY**

The imminent prosecution of suspected authors of international crimes before the ICC represents a fundamental shift from international law to criminal law. Although these concepts have been blurred together through the formation of international criminal law, it is important to remember that the source of this nascent enterprise is two disciplines with distinct goals. Historically, international law aimed its direction at the collective level, i.e. at the actions of nations and states, their interactions and their peaceful coexistence. When there was adjudication, it was directed at the collective level, where states were criticized for their collective illegal conduct under international norms, either through treaty or custom. Punishments for collective crimes included sanctions, reparations and loss of international comity. Criminal law, however, aimed its gaze at the individual, attributing legal responsibility for individual culpability and punishing offenders on that basis. Historically, criminal law was pursued by domestic officials only under domestic statutes. The emergence of modern international criminal law culminating in the creation of the ICC brings these two historical strains of legality together<sup>2</sup>. While this convergence seems natural and desirable, a failure to appreciate these distinctions has produced a conceptual muddle.

The allegations presented in the Report of the UN Commission of Inquiry on Darfur enumerate several instances where militia groups were said to act in conjunction with

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<sup>2</sup> Cryer, R., Friman, H., Robinson, D., and Wilmshurst, E., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* (2d ed.) (Cambridge University Press, 2010)

military officers exercising official state discretion. In such a case, there may be liability at both the individual and state levels. If the state itself is involved in the criminality, it may face the appropriate consequences under international law. But it is crucial to remember that during an ICC criminal prosecution; only the individual will be punished. The defendant alone will serve the jail time. It is for this reason that we urge fidelity to basic principles of criminal law that ensure that defendants are punished only for crimes that they are personally responsible for, as opposed to crimes of state. For these crimes, the state as a whole bears ultimate responsibility. Article 7 of the Statute defines crimes against humanity with sufficient clarity and precision, including murder, extermination, enslavement, torture, rape, etc., and there is no need to appeal to human rights law to unpack these relatively straightforward criminal concepts. Indeed, if there is any place to look for relevant illumination, it is domestic criminal legal systems all of which make use of these primary concepts. Furthermore, appealing to international human rights law for interpretation only increases the possibility that criminal defendants will be subject to greater personal liability than envisioned by the Rome Statute. This is explicitly prohibited by Article 22(2)<sup>3</sup>.

## **PRINCIPLES OF LEGALITY**

The principles of legality are the new shape of the international criminal justice system emerging from the practice of the international tribunals. The principles deal with the justifications for criminalizing conduct of an individual. It recognizes specific inculpatory doctrines relating to conduct, rather than position, or general matters underlying a rule of law criminal justice system. The principle of legality makes prosecution compulsory and discretion in charging impermissible unless specifically authorized by statute. The legality principle played a major role at the Nuremberg trials<sup>4</sup>. The Nuremberg International Military Tribunal took the defences of ex post facto argument as an opportunity to examine and affirm the criminal nature of crimes against peace at the time the acts were committed by the defendants<sup>5</sup>. The validity of the principle frequently affirmed by the Yugoslavia and the Rwanda tribunals. The principle consists of the norms that must have existed at the time the crime had been committed upon which the criminality of certain conduct is based. The ICTY

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<sup>3</sup> According to Art 22(2) Rome Statute, '*The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted*'.

<sup>4</sup> Werle, G, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (T.M.C. Asser Press, 2005).

<sup>5</sup> Antony Duff and R. A. Duff, (2007), *Answering for Crime: Responsibility and Liability in The Criminal Law*, Hart Publishing Ltd.

states that the principle of legality aims at preventing the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission.

***Principle of ne bis in idem Article 20 of the Rome Statute curves out the principle of ne bis in idem***, which states that same person cannot be tried and punished more than once for the same act or crime that forms the basis of crimes within the jurisdiction of the ICC. The principle is recognized in the law of most national criminal justice systems and it has also been incorporated in various international convention, like the **International Covenant on Civil and Political (ICCPR) Rights (Article 14 (7)) and the European Convention on Human Rights (Article 4 Protocol 7)**, as well as the conventions dealing with cooperation in criminal matters, such as extradition conventions and conventions on mutual assistance. Consequently, the principle is considered as a generally accepted principle of fairness of criminal justice system and even as a principle of customary international law. Since the principle in national legislation widely differs from international instruments, that could not define the rule in such a way that it would reflect the positive law of most nations or of conventional international law. While most states entrusted many qualifications and restrictions to the principle that it is difficult to describe its states in international law or in comparative criminal law. Here, it is impossible to analyse as aspects of the principle systematically, for the present purpose, the chapter limits itself to the most important aspects of the rule together with its applicability in the statutes of ad hoc international criminal tribunals in general, and of Article 20 of the Rome Statute in particular. Ne bis in idem is an internationally protected human rights principle. *Article 14 (7) of the International Covenant on Civil and Political, Rights (ICCPR), states that ‘no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’*. In a national contest, the principle operates within single jurisdictional unit. In an international context, ne bis in idem problems may arise from situations where there is concurrent jurisdiction of more than one state over the same person. In some situations, it has been argued that criminal proceedings in one state should not be hampered by the law or proceedings undertaken in another state. By refusing to exercise criminal proceeding because another state has already adjudicated it, may even amount to giving up of sovereign power of a state. All the instruments mentioned above limit themselves to the national level. It means that the *ne bis in idem*<sup>6</sup> protection is only

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<sup>6</sup> Lackner and Ku'hl (2004), p. 104; Tro'ndle and Fischer (2006), p. 106

guaranteed within one and the same state. No international *ne bis in idem* protection exists under the international human rights instruments. Consequently, the international human rights protection is limited in scope and does not guarantee a transitional *ne bis in idem* protection.

### *NullumCrimen sine lege*

*The maxim nullumcrimen sine lege* prescribes that an individual shall not be considered criminally responsible unless the conduct in question was unambiguously criminal at the time of its commission within the jurisdiction of the court. The principle is explicitly laid down in Article 20 of the Rome Statute, which states that a person can only be punished for an act which was codified in the statute at the time of its commission that was defined with sufficient clarity and was not extended by analogy. The principle of *nullumcrimen* is explicitly laid down in it four different forms: *a) a person can only be punished for an act which was codified in the statute at the time of its commission, that is, a written law; b) the act in question was defined with sufficient clarity, that is the value of legal certainty; c) it was not extended by analogy, that is, the prohibition on analogy; and d) the criminal act was committed after the law entry into force, that is, non-retroactivity.*

Although the purpose of Article 22 (3) of the Rome Statute is similar to that underlying Article 10, the two provisions are clearly distinct in their scope and effect. Article 22 (3) applies to limit any perceptions as to the impact of Article 22 alone, while Article 10 does not so with respect to all of Part 2 of the ICC Statute with regard to jurisdiction admissibility and applicable law. Article 22 (3) applied only to the characterization of conduct as criminal under international law; where Article 10 applies to all existing and developing rules of international law in so far as the statute might be required to impact on them.<sup>7</sup>

### *Principle of Non-Retroactivity*

One of the elements of the principle of legality and the corollary of the *nullumcrimen sine lege* principle is the rule of non-retroactivity. According to the rule, no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charge as an offence within the jurisdiction of the ICC. It means conduct may be punished only on the basis of a norm that came into force prior to when the conduct occurred.

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<sup>7</sup> Heller, Kevin. 2012. *A Sentence-Based Theory of Complementarity*, Harvard International Law Journal 53:202-249.

Under **Article 24** the long-standing legal principle of non-retroactivity is included. **Article 24 (1)** of the ICC statute states that the court cannot exercise its jurisdiction to the individuals criminally responsible for the conduct that occurred prior to the entry into force of the statute<sup>8</sup>. It reads as follows:

1. No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply. The article spells out that with regard to the states that become parties to the statute subsequent to its entry into force, the ICC has jurisdiction over crimes committed after the Rome Statute entry into force with respect to such states. Article 24 regulates the temporal limits of criminal responsibility.

#### *Nulla Poena Sine Lege*

Article 23 of the Rome Statute recognizes *nullapoena sine lege* principle declaring that a person convicted by the court may only be punished with penalties laid down in the statute. The article sets out that there is no punishment except in accordance with the law, with regard to the jurisdiction of the ICC. The principle requires that there are defined penalties attached to criminal prohibitions. Various international human rights instruments have incorporated the *nullapoena* principle, and prohibit the imposition of a punishment that is heavier than the one applicable at the offence was committed. For example, Article 15 (1) of the ICCPR incorporates the *nullapoena* principle, in the form of a non-derogable provision, which forms part of the core human rights protection<sup>9</sup>.

#### *Merits of Regionalization of International Criminal Law Enforcement*

Enforcement mechanism at the regional level has proven to be effective for various international legal regime which can be seen in the case of regional enforcement for money laundering, protection of human rights, pollution, piracy etc. The most effective enforcement system at the regional level has been the maintenance of international security and peace by various international and regional organizations working together. The effective enforcement

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<sup>8</sup> G.P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale Law Journal (2002), at 1526^1527.

<sup>9</sup> Gerhard Werle, *Principles of International Criminal Law*, (2005), p. 90.

mechanism by the regional organizations for maintaining international peace and security is actually derived from Article 52 of the UN Charter which states nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action<sup>10</sup>. Thus, these effective regional enforcement mechanisms have resulted in strengthening the International Law. In the recent times, when the international criminal justice system is an upcoming phenomenon, the status of International Law and its enforcement focused on two major and crucial points first being the delegation of authority by the States to the ICC and other international tribunals for prosecuting international crimes and second is the delegation of authority to the National Courts for the enforcement of International Criminal Law which is done through the establishment of specialized international courts under the judicial system of the state and or by exercising the universal jurisdiction. But the enforcement mechanism of the international criminal law at the international as well as the national level are often conflicting and are thus criticized for various reasons. In case of International tribunals, the costs of enforcement are very high and expensive, often unmanageable and are physically and psychologically away from the actual region of the crime whereas, in case of courts at national level, the costs are less and are situated nearer the region of the crimes which are being prosecuted but these courts lack resources to enforce and prosecute the crime<sup>11</sup>. They also have the risk of unfairness, prejudice and political manipulation. Hence the costs and benefits of international and national enforcement mechanisms are always in conflict with each other and this is seen when the benefits of regional or domestic adjudication are reaped while those of international adjudication is not received.

#### *The Collective Nature of Genocidal Intent*

The dialectic between individual responsibility under criminal law and collective responsibility under international law becomes most pressing when the crime in question is genocide. Indeed, the definition of the crime itself places it at the intersection of collective and individual responsibility, and we urge a careful consideration of this nexus when attempting to attribute criminal responsibility for this crime. Genocide is both collective and

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<sup>10</sup> Bassiouni, C., *Principle of Legality in International and Comparative Criminal Law in International Criminal Law*, (Vol. 1) (Martinus Nijhoff, 2008).

<sup>11</sup> Wald, P. M., To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 HARV. INT'L L.J. 535, 536 (2001)

individual. It is collective in the sense that both the perpetrator and the victim are groups. While scholarly attention has focused on the collective nature of the victims, and indeed catalogues the kinds of groups (including racial, ethnic and religious groups) that can be victimized by genocide, less attention has been paid to the collective nature of the perpetrators<sup>12</sup>. Genocide is not merely one individual seeking to annihilate an entire ethnic group. History teaches us that genocide is the attempt to wipe out an ethnic group by another ethnic group. It is for this reason that genocide brings strong collective shame and guilt to a nation that has perpetrated it. Indeed, this shame and collective guilt may very well persist even after the individuals involved have passed from the scene. Despite this collective aspect to the crime of genocide, the international law of war since Nuremberg, including Yugoslavia and Rwanda, and now Sudan as well, represents an attempt to hold individuals accountable for a collective action. But accomplishing this task has been insufficiently theorized at two levels. The first is the objective element, when it is clear that many individuals may have participated in small ways. The second is the subjective element of genocidal intent.

## **CONCLUSION**

Consequentialist defences of international criminal law punishment focus naturally on the question of general deterrence, and here indeed there would seem to be a close match between the arguments' pros and cons on the international and domestic levels. In both contexts, the question of deterrence through punishment is empirical, and hence shares the challenges characteristics of under-supported empirical claims. After all, for the consequentialist defence of the narrow conception of impunity to succeed, one would have to show that the failure to punish is a serious disvalue in its own right, and not a mere proxy or indirect indicator of other disvalues such as a lack of legal certainty or physical security, or seriously reduced prospects of a successful democratic transition, or loss of trust in State authority. Further, one would also have to prove that the available means for reducing the disvalue of impunity to an acceptable level are themselves available, at an acceptable cost, without identifiable alternatives. International criminal law has always asserted, as a sort of promissory note never (yet) redeemed, that threatened sanctions deter would-be perpetrators of international crimes. It has not sufficiently responded to the openness of the empirical question of deterrence. We are to think with Pal about global criminal justice and also against him, renouncing his ethically troubling apologia for non-Western sovereignty and sovereign

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<sup>12</sup> Aggarwal, H. O., *International Law and Human Rights*, Allahabad, Central Law Publications.

violence, we need to think of action which gradually uncouples global criminal justice from the force of sovereign regimes. Rather than a momentous transformation right now, we need to deliberate with others, and especially with those in subalternised locations who suffer the most from acts of sovereign violence – from brutal behaviour committed by States, big corporations exercising State-like power (and/or in connivance with States) to commit exploitation, and sectarian militants and hierarchical religion-legitimated communities which all too often assert some form of superordinate political and legal authority. We need to establish Tran's local social solidarities and simultaneously call for deeply individuated ethical transformations, while renouncing any belief in the sovereignty of our interests and dogmas. Such transformations in our individual, as well as social, selves are not only necessary for legal actors, the judges and lawyers who carry out the practical task of criminal justice, but for everyone who wishes to support the end of sovereign atrocities.

## **VALUE OF CONFESSION: AN ANALYTICAL STUDY OF CO-ACCUSED'S CONFESSION AND RETRACTED CONFESSION**

Dr. Vijay Pal Singh \*

### **INTRODUCTION**

A confession may be defined as a voluntary and full acknowledgment of guilt made by the guilty person. The etymological meaning of the word “confession” conveys the meaning of completeness, for this comes from a Latin word “*confiteri*” --- (*Con* signifies completeness, and *fateri-fari*, to speak) so a confession in strictness, must be an unreserved and total avowal by the accused person of his guilt; and such a statement must be wholly free from outside influence, either in the nature of threats or inducement.”<sup>1</sup> A confession will be usually an outcome of the irresistible prompting of a conscience burdened with guilt and contrition. The reason for making a confession as far as the accused person is concerned is to lighten his oppressive mental feelings, and the solace is a feeling that he is boldly facing the consequences of his guilty act by telling the truth. So, very often prisoners admit that the pain of sufferings of their repeated embarrassment is more terrible and oppressive than the suffering of jail life. This is the highest form of a confession, and was made with a view, probably, to bring upon oneself the deserved punishment. “The first uniform legislation on Evidence was drafted by the Indian Law Commission.”<sup>2</sup> The Bill was however, dropped as it was faulty and it would not be suitable in India. J.F. Stephen then drafted a new Bill, which later became the Indian Evidence Act, 1872.

### **CONFESSION IN THE EYE OF LAW**

We have seen what is strictly meant by a confession. But an “absolute confession” or the “plenary confession” as it is sometimes called is not the only variety that comes up before court for consideration. There may come cases, where prisoners do not make absolute confessions but make statements, which though do not contain direct admission of guilt, yet give rise to inference of guilt. Thus, if a prisoner states that he killed another person, it is a clear confession. But, on the other hand, suppose he states “If I speak, I will be exposing B as murderer who shared with me the jewels from the person of deceased”. This statement

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<sup>1</sup> Gopal S. Chaturvedi (ed.) *C.D. Field's, Law on Admissions and Confessions* (Delhi Law House, Delhi, 2014).

<sup>2</sup> The Draft of Indian Evidence Act, prepared by India Law Commission in 1868.

undoubtedly contains incrementing material and from “If I speak, I will be also exposing B as a murderer” there follows an implied admission that the accused person is in some way guilty for the casualty of the deceased. If the prisoner had stated nothing more than this, question of some refinement arises as to whether this statement can be regarded as confession. If it is regarded as a confession, the safeguards allowed by law, attach to it; if not, it will go without these safe guards<sup>3</sup>.

### ***Rule of Prudence (Regard to Corroboration)***

The rule of prudence does not require that “each and every circumstance mentioned in the confession with regard to participation of the accused person in the crime must be separately and independently corroborated, nor is it essential that the cooperation must come from facts and circumstances discovered after the confession was made.”<sup>4</sup> If the rule required that every circumstance mentioned in the confessional statement must be separately and independently corroborated, then the rule would be meaningless.<sup>5</sup>

Where the circumstances, such as, recovery of bloodstained clothes or the ornaments of the deceased, and similar circumstances connecting the accused with the crime of murder are conspicuous by their absence, the subsequent conduct of the accused in making an attempt to commit suicide, for which the accused had offered possible explanation, would not be sufficient corroboration of a confession by the accused<sup>6</sup>. The extent and the nature of the corroboration required, before a Court can act upon a confession will “depend upon the circumstances of each case.”<sup>7</sup> The absence of details in the confession is not a reason to treat it as untrue, when there is nothing in the confession which is contrary to the oral evidence.<sup>8</sup> Law does not presume that such confessions are untrue, but because of the danger of receiving such evidence, judges thought it is better to reject it for the due administration of justice. When hope or fear in respect of the confession was not in question, such statements were admitted as relevant, though with some reluctance and subject to strong warnings as to

<sup>3</sup> *Rabindra Kumar Pal @ Dara Singh v. Republic of India*, AIR 2011 SC 1436.

<sup>4</sup> *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru*, 2005 CrLJ 3950.

<sup>5</sup> *Balbir Singh v. State of Punjab*, AIR 1957 S.C. 216; *Hem Raj Devilal v. State of Ajmer*, AIR 1954 S.C. 462.

<sup>6</sup> *Raghavan v. State of Kerala*, (1962) Ker. L.T. 476. No corroboration, *Pokar Ram v. State of Rajasthan*, (1994) Cr.L.J. NOC 143 (Raj.)

<sup>7</sup> In re: *Vasamsetti Appa Rao*, AIR 1953 Mad. 1004.

<sup>8</sup> *Subramania Goundan v. State of Madras*, AIR 1958 S.C. 66.

the weight to be attached to them.<sup>9</sup>

### **THE PRINCIPLE UNDERPLAYING IN SEC. 30**

Where more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the individual alone who made it. It appears to be very strange that the confession of one person is to be taken into consideration against another. Where the confession of one accused is proved at the trial, other accused persons have no opportunity to cross-examine him. It is opposed to principles of jurisprudence to use a statement against the person without giving him the opportunity to cross examine the person making the statement.<sup>10</sup> This section, is an exception to the rule that the confession of one person is entirely inadmissible against another. The principle underlying this section is stated by Phear,J. : “it seems to me that it is the implication of himself by the confessing person which is intended by the legislature to take the place, as it were of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. Where a person admits guilt to the fullest extent and expose himself to the pains and the penalties provided for his guilt, there is guarantee for his truth and legislature provides that his statement may be considered against his fellow prisoners charged with the same offence.” But this principle is not very sound because it does not necessary that a man has truly implicated himself, therefore his implication of another is also true<sup>11</sup>.

Before the confession of one accused may be taken into consideration against others it has to be shown that:-

1. The person confessing and the others are being tried jointly,
2. They are being tried for the same offence.
3. The confession (to be taken into consideration) is affecting the confessing person and the others.

Under Section 30 the “statement of one accused is admissible as against his co-accused only when they were tried jointly.”<sup>12</sup> Persons originally charged with accused but discharged on

<sup>9</sup> *Reg v. Baldry*, 5 Cox CC 523; *Ibrahim v. Emperor*, AIR 1914 P.C. 155.

<sup>10</sup> *State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari*, AIR 2013 SC 1441.

<sup>11</sup> *State of Gujarat v. Mohammed Atik*, AIR 1998 SC 1686.

<sup>12</sup> AIR 1937 Sind 218.

withdrawal of case against him is a competent witness and his confession cannot be used against the other accused. If the person making the confession died and was never brought to trial, his confession would not be admissible under this section as to the confession of co-accused.<sup>13</sup> But “where during the course of joint trial of two accused, one died but before his death his confession had been put on record, it was held that the confession could be used against the other accused.”<sup>14</sup>

### **ACQUITTAL OF CONFESSING CO-ACCUSED**

Where the confessing co-accused was acquitted of the main offence and the other accused raised the plea that the confessions of such accused should cease to be admissible, the Apex Court held that such plea was not tenable<sup>15</sup>. The confessional statement of the co-accused was recorded by the Magistrate under Section 164; Criminal Procedure Code and both the accused were jointly tried. Thus, the requirements of Section 30 were satisfied as the evidence became relevant and did not cease to be so because of the acquittal.<sup>16</sup> The decision of the Apex Court in *Aghnoo Nagendra v. State of Bihar*,<sup>17</sup> clearly stated that “a confessional statement includes not only the admission of the offence but also other admissions of incriminating facts relevant to the offence such as motives, preparation, absence of provocation, concealment of weapons, and subsequent conduct which throw light on the gravity of the offence and the intention and knowledge of the accused.” Each and every admission of incriminating facts contained in the statement is a part of the confessions. The Supreme Court also observed in another case<sup>18</sup> that the word *offence* used in Section 30 includes the abatement of, or attempt to commit, the offence.<sup>19</sup>

### **CONFESION OF CO-ACCUSED CANNOT BE TREATED AS SUBSTANTIVE EVIDENCE**

It is now well a settled Law that confession of a co-accused cannot be treated as substantive evidence. In dealing with the case, against the accused person, the Court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and

<sup>13</sup> *Dengo Kendero v. Emperor*, AIR 1938 Sind 94.

<sup>14</sup> *Ram Swaroop v. Emperor*, AIR 1937 Cal 39.

<sup>15</sup> *Rameshbhai Chandubhai Rathod v. State of Gujarat*, (2009) 5 SCC 740.

<sup>16</sup> *Prakash Dhawal v. State of Maharashtra*, AIR 2002 S.C. 340.

<sup>17</sup> AIR 1966 S.C. 119.

<sup>18</sup> *State v. Nalini*, AIR 1999 S.C. 2640.

<sup>19</sup> *Jayendra Saraswathi Swamigal v. State of Tamil Nadu*, AIR 2005 SC 716.

after it has formed its opinion with regard to the quality and effects of said evidence, then it is permissible to turn to confession in order to receive assurance to the conclusion of guilt if the judicial mind is about to reach on the said other evidence. In other words, confession by co accused can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.<sup>20</sup>

The general rule is that confession of an accused is not evidence against anyone but himself. Section 30 of the Evidence Act, is one of the exceptions to that general rule, point is, it permits a Court to take into consideration the confession made by one person as against certain other persons also, but only subject to the conditions mentioned in this action. The conditions are:

1. More persons than one are being jointly tried for the same offence.
2. Confession should have been made by one of them.
3. The confession should affect the maker and the others who are sought to be fastened with the confession.<sup>21</sup>

Explanation to the Section shows that the offence mentioned in it includes abetment of the offence as well. The Section seems to be based on the view that an admission made by an accused of his own guilt, afford some sort of sanction in support of the truth of his confession against other, as well as himself.

## **CONFESSON OF A CO-ACCUSED REQUIRES CORROBORATION**

The statement of a confessing co-accused will not be sufficient corroboration of an accomplice's testimony in order to make a conviction.<sup>22</sup> An accused person cannot be convicted solely on the confession of a co-prisoners jointly tried with him for the same offence.<sup>23</sup> The statement of a confessing prisoner stands on and even lowers footing than the testimony of accomplices.<sup>24</sup> In *Queen Emperor v. Dosa Jiva*, it was further held that the mere production of a stolen property by one accused was not a sufficient corroboration of the Confession of the other.

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<sup>20</sup> *Balbir Singh v. State of Orissa*, (1995) Cr.L.J. 1762 at p. 1764 Orissa.

<sup>21</sup> *Shanti Devi v. State of Rajasthan*, (2012) 12 SCC 158.

<sup>22</sup> *Queen v. Naga*, 23 W.R. (Cr.) 2.

<sup>23</sup> *Emppress v. Ashootosh Chuckerbutty*, I.L.R. 4 Cal. (F.B.).

<sup>24</sup> *Ibid.*

The Court in the instant case held that, even though the confession of the co-accused is a weaker piece of evidence yet the same can be taken into consideration in order to supplement the other evidence available on record.<sup>25</sup>

## **CONFESSON OF A CO-ACCUSED WHO IS DEAD**

In *Ram Sarup Singh v. Emperor*,<sup>26</sup> it was held that “J, was put on his trial along with L; the trial proceeds from some time and about 6 months before the delivery of judgment, when trial had proceeded for about a year, J, died. Before his death, J’s confession had been put on the record, R.C. Mitter, J. (Henderson, J., *dubitante*) allowed the confession to go in for corroboration of other evidence but not as substantive evidence by itself. Of course, the confession of a person who is dead and never been brought for trial is not admissible under Section 30 which insists upon a joint trial. The statement becomes relevant under Section 30 read with Section 32 (3) of Evidence Act.”<sup>27</sup>

## **MAIN USE OF CO-ACCUSED’S CONFESSON**

Under Section 30 the Evidence Act, “confession of a co-accused can only be taken into consideration but is not in itself substantive evidence.”<sup>28</sup> Where such statement is exculpatory, it cannot be used against another accused in support of his conviction. It would be dangerous to do so.<sup>29</sup> In *Nathu v. State of U.P.*<sup>30</sup>, it has been laid down that “confession of co-accused are not evidence as defined in Section 3 and no conviction can be founded thereon, but, if there was other evidence on which a conviction can be based, they can be referred to as lending assurance to that conclusion and for fortifying it”. In *B.B. Subbarao v. State of Andhra*,<sup>31</sup> the observations made are of the following effect: “A co-accused’s confession can be used not as any substantive evidence but only as an aid the judges mind to scrutinize other evidences. A confession could be used only to lend assurance to the other evidence.”

Thus, the Law is well settled that the confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and Section 30 has merely given the

<sup>25</sup> *Ollala Kamlakar v. State of Maharashtra*, (2003) (1) Mh. LJ. 849.

<sup>26</sup> AIR 1937 Cal. 39.

<sup>27</sup> *Haroom Haji Abdulla v. State of Maharashtra*, AIR 1968 S.C. 832 at p. 835.

<sup>28</sup> *Ram Chandra v. State of U.P.*, AIR 1957 S.C. 381 at p. 388.

<sup>29</sup> *Rajnikant Keshav v. State*, AIR 1967 Goa 21 at p. 25.

<sup>30</sup> AIR 1956 S.C. 56

<sup>31</sup> (1955) Andh. L. T. (Cr.) 99.

Court the discretion to call it in aid in appropriate cases<sup>32</sup>. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case. If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused<sup>33</sup>. It cannot be called in aid to supplement evidence otherwise insufficient and in no case can it be used to fill up gaps in the prosecution evidence.<sup>34</sup>

### **VALUE OF THE CONFESSION GIVEN BY CO-ACCUSED**

The weight to be attached to the confession of accused person jointly tried, as against each other after their admission, as evidence, will depend upon the probable force of such confessions.<sup>35</sup> The utmost value that can be claimed for the confession made by prisoners implicating persons other than themselves is that, if there is other untainted evidence against the accused, they may be considered together with such evidence. But, when the other evidence is not untainted, such statements are no legal corroboration of the tainted evidence of an approver.<sup>36</sup> The value of a confession of a co-accused was comparatively, recently considered by the Privy Council in case of *Bhuboni Sahua v. King*,<sup>37</sup> where it was laid down that it cannot be made the basis of a conviction.

It seems clear that, the view of the Privy Council was that a confession of a co-accused can be used to support other evidence. In other words, it can be used to corroborate other evidence. The conviction must be based on the other evidence. The confession can only be used to help to satisfy a Court that the other evidence is true.<sup>38</sup>

### **EVIDENCE OF ACCOMPLICE**

An accomplice means a person who has taken part in the commission of a crime.<sup>39</sup> When an offence is committed by more than one person in concert, everyone participating in its commission is an accomplice. Conspirator laid their plot in secret; they execute it ruthlessly and do not leave much evidence behind. Therefore, the police have to select one of them for

<sup>32</sup> *Baldev Singh v. State of Punjab*, (2000) 6SCC 564.

<sup>33</sup> *Gulam Mohd. @ Gulal Shaikh v. State of Gujarat*, AIR 2009 SC 509.

<sup>34</sup> *In re. Kodur Thimma Reddi*, AIR 1957 A.P. 758. At p. 761.

<sup>35</sup> 6 M.L.J. Art., p. 90.

<sup>36</sup> 2 Weir 742 at p. 744.

<sup>37</sup> 53 C.W.W.N. 609 (P.C.).

<sup>38</sup> *Gunadhar Das v. State*, AIR 1952 Cal. 618 at p. 621.

<sup>39</sup> *D. Velayutham v. State*, AIR 2015 SC 2506.

the purpose of being converted into a witness. He is pardoned, subject to the condition that, he will give evidence against his former partners in the crime. He is then known as accomplice, turned witness or an approver. He appears as a witness for the prosecution against the accused person with whom he acted together in the commission of the crime<sup>40</sup>. The question is to what extent his evidence or testimony can be relied upon to convict his former associate and to deprive them off their life and liberty? What is the value of the evidence of a former criminal turned witness?

Two provisions in the Act touch this problem. First is, Section 133, which categorically, declared that an accomplice is a competent witness and the court may convict on the basis of such evidence and the conviction will not be illegal, simply because, it proceeds upon the uncorroborated testimony of an accomplice. The other provision dealing with the matter is in illustration (b) to Section 114, which says that the Court may presume that an accomplice is unworthy of credit unless corroborated in material particular. These provisions should first be reproduced.

### **SECTION 133 ACCOMPLICE AND SECTION 114 (B) OF EVIDENCE ACT**

An “accomplice shall be a competent witness against an accused person”<sup>41</sup>; and “conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice”.<sup>42</sup>In reference to the requirement of corroboration, the word used is “may” and not “must”, and no decision of a Court can make it “must”. It ultimately depends upon the Court’s view as to the credibility of evidence tendered by an accomplice. If, it is found credible and cogent, the Court can record conviction on its basis even if uncorroborated. Corroboration in material particulars means that there should be some additional or independent evidence;

1. rendering it probable that the story revealed by accomplice is true and that it is reasonably safe to act upon it;
2. identify the accused as one of those, or among those, who committed the offence;
3. showing the circumstantial evidence of his connection with the crime, though it may not be direct evidence; and

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<sup>40</sup> *Parmananda Pegu v. State of Assam*, AIR 2004 SC 4197

<sup>41</sup> *Chandra Prakash v. State of Rajasthan*, 2014 CrLJ 2884.

<sup>42</sup> *Adamnbhai Suleman Bhai Ajmeri v. State of Gujarat*, (2014) 7 SCC 716

4. ordinarily, the testimony of an accomplice should not be sufficient to corroborate that of the other.<sup>43</sup>

**Section 114 illustration (b):** the Court may presume that an accomplice is unworthy of credit, unless he is corroborative in material particular:

The apparent contradiction between these two declarations should be first resolved. Section 133, is a clear authorization to the Courts to convict on the uncorroborated testimony of an accomplice, but since such a witness, being criminal himself, may not always be trustworthy, the Courts are guided by the illustration of Section 114 that, if it is necessary the Court should presume that he is unreliable unless the statement is supported and verified by some independent evidence. A statement to this effect to be found in judgment of Chandrachud, J., (afterwards C.J.), in *Dagdu v. State of Maharashtra*,<sup>44</sup> “there is no antithesis between Section 133 and illustration (b) of Section 114, because the illustration only says that the Court ‘may’ presume a certain state of affairs. It does not seek to raise a conclusive and irrefutable presumption. Reading the two provisions together, the position which emerges is that though an accomplice is a competent witness and though conviction may lawfully rest on his uncorroborated testimony yet the Court is entitled to presume and may indeed be justified in presuming that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which it is meant that there has been some independent Evidence tending to incriminate a particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of self-confessed criminal, who in so far as approver in concern has to testify in terms of pardon tendered to him.”

**Comparison of Evidence of Co-Accused and Accomplice:** It may be noted that the confession of co-accused, must implicate him as well as some other accused. Further, the confession made at previous trial will not be relevant. When they are jointly tried but for different offences, then also the confession will be irrelevant. Furthermore, the confession must not have been made under force or fraud<sup>45</sup>. The confession of a co-accused is not treated in the same way as the testimony of an accomplice:

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<sup>43</sup> *K. Hashim v. State of T.N.*, (2005) 1 S.C.C. 237.

<sup>44</sup> (1977) 3 S.C.C. at pp. 74-75.

<sup>45</sup> *Mrinal Das v. The State of Tripura*, AIR 2011 SC 3753.

1. The confession of accused is not *evidence*, as it is not recorded on oath, nor it is given in the presence of the accused, nor its truth can be tested by cross examination. The accomplice's evidence is taken on oath and tested by cross examination; a higher probative value is thus given to it.
2. The confession of a co-accused must only be taken into consideration along with other evidence in the case, and it cannot alone form the basis of conviction. A conviction is not legal merely because it proceeds upon the corroborated testimony of an accomplice.
3. The philosophy of Section 30 is that confession of co-accused affords some sort of sanction in support of the truth of confession against others and himself.

Accomplice evidence is also not free from criticism. "An approver is the most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court."<sup>46</sup> However, the Supreme Court has taken care of it by insisting on corroboration. In many cases of prosecution of members of organized crime, an approver and few co-accused maybe the only evidence and it is obvious that such persons would never be convicted if Section 133 was not there in the statute book.

## **RETRACTED CONFESSIO**

The Supreme Court in *Vadivelu Thevar v. State of Madras*<sup>47</sup> has held that "Court should be circumspect and look for corroboration in material particulars, reliable testimony, direct or circumstantial, before accepting the testimony of a partially unreliable witness." This means that a Court has to sift, from evidence before it, parts which are wholly reliable and parts which are wholly unreliable and those which are partly reliable and partly unreliable. Even a partly reliable part of evidence may form the basis of a conviction where it is corroborated in material particulars by some reliable evidence.<sup>48</sup> Of course, if a witness or any part of his version is wholly unreliable, no use can be made of the wholly unreliable evidence. But, before this is done, there has to be findings, based on sound and reasonable grounds that witness or a piece of evidence to be rejected is wholly unreliable.<sup>49</sup>

## **BELATED RETRACTION IS NOT TREATED AS GENUINE**

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<sup>46</sup> *State of Rajasthan v. Balveer @ Balli*, AIR 2014 SC 1117.

<sup>47</sup> AIR 1957 S.C. 614

<sup>48</sup> *A. Tajudeen v. Union of India*, (2015) 4 SCC 435.

<sup>49</sup> *Devi Prasad v. State*, AIR 1967 All. 64. At p. 71.

A confessional statement can be used as Corroborative evidence but in the absence of any positive and substantive evidence, it would be highly unsafe to act upon confessional statement, which has been retracted.<sup>50</sup> Had retraction been genuine, it would have been made earlier and not after 5 years after the statement of the appellant had been recorded under section 108 of Custom Act. The appellant has stated that as a result of the torture by the custom authority, he had suffered a neck injury and was made to sign on blank paper. If this was true, he would have pointed it out to the Magistrate when he was produced before him on the following day. Between 28<sup>th</sup> December 1989, the date on which the confession was made and 25<sup>th</sup> July 1994, the date when it was retracted, the appellant had tons of opportunity to make the said retraction.<sup>51</sup>

### **CIRCUMSTANCES WHICH WEAKEN THE VALUE OF A RETRACTED CONFESSION**

A confession retracted at the earliest possible moment after the accused got out of police influence, is held to be deserving of no weight.<sup>52</sup> But, it has to be rejected. Similarly, where there was misconduct of the police and the confession was retracted, it would not be possible to convict the person on strength of retracted confession alone. Where the confession was recorded by the magistrate in jail, with the police officer in the next room, and was subsequently retracted, it cannot be acted upon unless sufficiently corroborated. Where there are two sets of evidence , neither of which can alone be accepted without corroboration , they cannot , each in its truth be taken to corroborate the other, and the two sets of evidence cannot be pieced together so as to justify any Court placing reliance on the two sets of evidence. So, evidence brought under Criminal Procedure Code, cannot be accepted as a proper corroboration of a retracted confession.<sup>53</sup>

### **IMPORTANT PRINCIPLES REGARDING RETRACTED CONFESSION**

To sum up, the following important principles are to be observed before a court uses the confession of an accused and, particularly, a retracted confession:

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<sup>50</sup> *Safeeq Ahmad v. State of U.P.* (1989) All. L.J. 699 at p. 1002.

<sup>51</sup> *Sule Kareem v. Asstt. Collector of Customs (R&I)* (1998) Cr.L.J. 3052 at p. 3060 (Bom.).

<sup>52</sup> *Shankar @ Gauri Shankar v. State of Tamil Nadu*, (1994) 4SCC 478.

<sup>53</sup> *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230.

1. The provisions of the evidence after do not prevent the court from taking into consideration confession of an accused against his co-accused.
2. A confession is not to be regarded as involuntary merely because it has been retracted, by the maker, at the trial.
3. The confession must implicate the maker substantially and to the same extent as the other accused person against whom it is sought to be taken into consideration.
4. If it appears, on a reading of the whole confession, to be exculpatory, it cannot be used as a confession particularly against the other accused, even though it contains grave incriminating statements.
5. Before using the retracted confession, it should be proved as voluntary and true.
6. Though there is no rule of law requiring a retracted confession to be supported by corroboration on material particulars, as a matter of prudence and practice, the Court would not ordinarily act upon it to convict a co-accused without the strongest and fullest corroboration on material particulars.<sup>54</sup>
7. Such corroboration should not only relate to the *factum* of the crime but also as to the connection of co-accused with the trial.
8. It is only when the Court is not in a position to come to a conclusion on the evidence adduced, that it can call for such confessions in aid to lend assurance to the other evidence.
9. It shall not be used as the foundation of a conviction, nor to support as a corroborative piece of evidence, to the evidence of accomplice or approvers.

It has been held that though a retracted confession is admissible, it can only be used to support the other evidence of the witness, but can neither be made the foundation of a conviction nor to support the evidence of other accomplice or approvers.<sup>55</sup> Where the appellant was charged with murder, the Apex Court held that it is retracted judicial confession of another accused and could not be used against the appellant as the appellant who was tried along with other accused had been acquitted by the High Court under the charge of conspiracy to murder and the other accused was not charged for the offence of murder. But, they relied on the evidence of the approver and the retracted confession of the appellant which was corroborated by the recovery of a blood stained razor and medical

<sup>54</sup> *Budha Majhi v. State of Orissa*, (1964) 1 Cr.L.J. 487.

<sup>55</sup> *Mohammad Hussain v. Dalip Singhji*, AIR 1970 S.C. 45.

evidence and held that there was sufficient evidence to prove the guilt of the appellant in respecting the charge of murder.<sup>56</sup>

## **CONCLUSION**

The above analysis of judicial decisions puts forth the approach towards retracted confessions of the Judiciary to be that just because a confession has been retracted the statement need not be discarded. If corroboration as to the facts stated in the confession is available through independent evidences then reliance can be placed on such statements.

The reliability of retracted confession in some accounts although diminishes due to retraction but does not get completely wiped out. The Courts also have held that a confession can form the sole basis of conviction but when it is retracted it deserves to be tested as to its voluntariness and truthfulness. It is basically a rule of prudence and practice that the courts have evolved this mechanism over the years.

While analyzing the law on the subject, a need was felt for development of the rule of prudence into a Rule of Laws specifically pertaining to the subject, which is in accordance to the practice and procedure laid down by the Supreme Court through catena of decisions.

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<sup>56</sup> *Vinayak v. State of Maharashtra*, AIR 1984 S.C. 1793

## **WOMEN: PROSTITUTION IN THE 21<sup>ST</sup> CENTURY'S INDIA**

Rishabh Jain\* & Sanjum Bedi\*\*

### ***Abstract***

*Gender-based violence is a phenomenon deeply rooted in gender inequality, and continues to be one of the most notable human rights violations within all societies. Gender-based violence is a violence directed against a person because of their gender. Women and men experience gender-based violence but the majority of victims are women and girls. Gender-based violence and violence against women are terms that are often used interchangeably as it has been widely acknowledged that most gender-based violence is inflicted on women and girls, by men.<sup>1</sup>*

*In India prostitution is legal in India but the other related activities such as soliciting, pimping and brothels are illegal. There are more than 20 million prostitutes in India if a Human Rights Watch report is to be believed — and as many as 35% of them enter at an age less than 18. Prostitution was once upon a time a theme of Indian literature and arts for centuries.*

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<sup>1</sup> GENDER SENSITIZATION MODULE, ‘Gender Sensitization and Legal Awareness Programme in collaboration with Kendriya Vidyalaya Sangathan for Class 11<sup>th</sup> and 12<sup>th</sup> of Kendriya Vidyalayas’, NATIONAL COMMISSION FOR WOMEN, NEW DELHI, September 2019, page 28. Available at: [http://ncw.nic.in/sites/default/files/Module-%20Gender%20Sensitization\\_0.pdf](http://ncw.nic.in/sites/default/files/Module-%20Gender%20Sensitization_0.pdf) (Accessed on: 01.09.2019)

## INTRODUCTION

The present world is changing dynamically, where the concept of rights and duties has achieved a new horizon. The psyche that all men are equal is disturbing as a concept because no two men can be equal, but one thing is forgotten here that men included women (all submissions hereinafter specifically distinguish man and woman mutatis mutandis). Therefore, in itself it is prejudiced when we consider the term ‘women’ inclusive in the term ‘men’.

The development of human civilisation has been predominated by men and patriarchy, but eclectic concept of rights and duties of men and women, third gender and flora and fauna has gradually taken shape over the year which is influenced by the human psyche.

The submission of the phase of formation of human psyche unto the present scenario’s mind-set of the society is based on my personal understanding and observation. Unfortunately, man has been seen as a provider, protector and procreator (three Ps)<sup>2</sup> of the rights and duties towards the family and the society, whereas woman is seen as a follower of these rights and duties who belong to the world of motherhood and wifehood, nurture and care, and to put her family’s welfare before her own; be loving, compassionate, caring, nurturing, and sympathetic<sup>3</sup>.

## THE HISTORIC EVOLUTION OF THE HUMAN PSYCHE TOWARDS WOMEN

History suggests that ever since the beginning of the human civilisation into organised systems of political, cultural and social groups’ men have moved out of houses to earn for the family and represent the family or a group on various platforms. The role of women has been seen on occasions where there is absence of man in the house and consequently the woman is bold enough to fight and speak for herself and the family, unfortunately the fight here is not against any enemy but it is with the allies defying the role of such women.

The point of question at this stage which must come in one’s mind is that, what made this mind-set evolve since the onset of the society. The reason for formation of human psyche in such a way is generally not indicated by any research and study, whereas some development can be seen by differentiating the concepts of gender and sex. But the skewed answer to this

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<sup>2</sup> Ibid at page 12

<sup>3</sup> Ibid

question is that the society has evolved naturally in such a way. Unfortunately, the widely acknowledged theories of human existence also talks about such mind-set, it being the story of Adam and Eve or the concepts of Manusmriti where woman is considered inferior or rather dependent on man.

Scientifically, the western theory of evolution is based on biological genesis of man and woman through several stages of development, immediately preceding is the ape and chimpanzees, whereas “another view regarding the origin of man/woman is that Lord Brahma, the Creator of this universe, wished, “*EkohamBahushyama*” (I am One, let me be many)..... Thus, every human being is an incarnation of God; indeed, a constituent of the Total Consciousness. Swami Vivekananda argued unless each one is part of the whole and in continuous communication, how else can one transfer the thought to another?”<sup>4</sup> Therefore, it appears that the old concepts of human existence being it scientific or spiritual are even relevant today, but it is also true that the disparities in gender are framed by the humans for their self-development.

Another query which touches my mind, every time I think of a utopian society<sup>5</sup>, is that whether we have developed theories based on our prejudices that man is superior to woman, or we are blindly following the traditions of the past which have been established out of practice without the incidence of logic. But in both the cases the present world does not accept any of the dichotomies because the archaic doctrines are evading.

In the present world there is no logical existence of the fact that man is superior or even woman is superior. The stories of god and goddess are mainly premised on principle of acceptance. A person accepts what suits her/him the best, which may be based on reasoning or the teachings she/he has got since her/his childhood. The acceptance by majority seemingly becomes the acceptance of all or evolves as a common notion widely accepted by people, and if a minority or an individual differs from the opinion then based on the system of the society either the old theory is bifurcated and a new theory emanates, or the group or the individual is rested into the death for peace.

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<sup>4</sup> Marmar Mukhopadhyay, Total Quality Management in Education, June 2002, p. 19

<sup>5</sup> In 1516 Sir Thomas More wrote the first ‘Utopia’. He coined the word ‘utopia’ from the Greek ou-topos meaning ‘no place’ or ‘nowhere’. But this was a pun - the almost identical Greek word eu-topos means a good place. So at the very heart of the word is a vital question: can a perfect world ever be realised? Available at: <http://www.bl.uk/learning/histcitizen/21cc/utopia/utopia.html> (Accessed on: 25.09.2019)

The theory of acceptance is based on the concept of influence, which may be political, social, cultural, linguistic etc. People accept the notions with which they are most influenced and pass the similar point of view to future generations due to which ongoing future mind-sets are always prejudiced. For a mind to think and evolve in the constant newness, it shall not be influenced or prejudice, otherwise liberalism will never evolve or its development will slow down. Fetters to liberalism are not only based on old thinking and psychology, but impediments in accepting a new theory or principle is a blockade to liberal development and evolution of future.

In the recent past the transnational organisations have also played an important role of influencing the world. The Seneca Falls Convention, 1848 marked the beginning of seeking rights for women, especially voting rights in America. The Seneca Falls Convention is considered the official beginning of the women's movement suffrage, but it is important to understand that the goal of early women's rights movement was not limited to the demand for suffrage<sup>6</sup>, but a greater autonomy and respect for women in terms of equality and liberty.

Similarly, the condition of women in today's world is better than what the history suggests, but the accepted notions of history that women are weak, she is a feeble creation of god to produce children and obey men, her labour at the time of giving birth is her destiny of past ill deeds, limitations due to impurity after giving birth and during menstruation, and many such other notions act as an influence and prejudice over the development and evolution of the condition of women even at present. It appears to be logical that certain limitations on women were put in past due to lack of awareness, knowledge and resources to deal with problems related to her biology, but with the evolution unfortunately the mind-set has not grown logically.

Fortunately, the world is changing but the change is slow as more than awareness it is difficult to change the mind-set. People may pose to aid women outside their house but behave in same way inside the closed doors.

## **THE REAL PROBLEMS**

The bigger question is whether there is a solution to such malady. Unfortunately, at the back of their mind women also somehow feel the same that they are to obey the dictates of men

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<sup>6</sup> Dr Mamta Rao, *Law Relating to Women and Children 5* (Eastern Book Company, 2018).

until those dictates are severely against them and only men can raise their voices. One big reason is lack of independence of women and their dependency on men.

Another important question which came to my mind, while reading one of the leading political party's manifesto for 2014 elections in India, is that whether security of women is more important than their empowerment. The manifesto suggested that there is a need for women's security as a precondition to women's empowerment. By prioritising security over empowerment of women we are signifying that women is weak and therefore, before women is empowered an environment conducive for her empowerment is important. Therefore, we are prejudiced that a woman is weak and she cannot be empowered unless and until the environment is safe enough, whereas the actual notion should be that if a woman is taught to be strong than she is empowered.

But what about the conditions of prostitutes or the third gender? Why people are afraid to associate themselves with such segments of the society? And still many want the pleasure of their company behind the closed doors. The reason of such analogy is the regular working of the profit making industry.

The basic concept of management suggests that a business cannot run for long if it incur losses, wherefore the prostitution business and the buying and selling of women at brothels is constantly working and increasing<sup>7</sup>. Legality of any business is based on the interference of the State, but it does not intervene unless there is a vested interest. But why do women and men get involved in such business, is a bigger question, is it due to lack of resources or the pleasure principle or their worsen condition of livelihood. Well the limelight of porn stars is considered good on screens but there still exist the taboo, and certainly the reel life is different from the real life. Whether the occupation of buying and selling sex is fair, just and reasonable, if it is done with free will and consent, is also a bigger question? Whether it really works on the pleasure principle or the libido as suggested by Sigmund Freud<sup>8</sup>? In any way it is not important to answer these questions but the better part is to search for solutions if these are problems created by the system. Unfortunately, men and women have become the victims of their own created evils.

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<sup>7</sup> Gaurav Jain v. Union of India, 1990 AIR 292

<sup>8</sup> Chapter 2 – Self and Personality, Psychology, Class 12, NCERT, 2019 edition.

## PROSTITUTION IN PRACTISE: DEVELOPMENTS IN INDIA SINCE INDEPENDENCE

During the framing of the Indian Constitution it was said in the Constituent Assembly that, “..... *It is quite true that it is perhaps impossible to eradicate from the face of the earth for good and for ever these three vices the use of liquor in one shape or other by some few people, the evil of gambling and the evil of prostitution: but it shall be the endeavour of every civilised government to prevent all these three cankers of human society, if it is their object that society should be healthy and happy and moral.....*”<sup>9</sup> Even the framers of the Indian constitution suggested that prostitution was an evil which “...is a very old institution as old as the hills and it cannot be abolished. The roots of this institution lie deep in our human nature. The only thing that we can do is to regulate it....”<sup>10</sup> Therefore, the Indian Constitution makers were not clear on how to deal with the problem of prostitution? It is believed that prostitution has existed in our country from time immemorial.

The Constitution of India does not directly deal with the problem, whereas it is true that not every problem can be mentioned in a Constitution, but certainly prostitution is big problem. Consequently, Article 23 of the Constitution of India deals with the prohibition of traffic in human beings and forced labour, but what if prostitution is out of wish and will? Can it be a trade or business within the meaning of Article 19 (1) (g)? Certainly such situations came before the State, and efforts were made but not to improve the condition rather to suppress the oppressed, if not in legality then in the practical working of the system.

It is true that the State had made efforts to aware the people, for instance, during the initial few years, especially in 1950 (beginning of a new Constitution for India), the Films Division of India produced short documentary films for compulsory screening before the start of any feature film<sup>11</sup>, although the exhibitors complained about such compulsory screening and certain taxation policies<sup>12</sup>but the effort was fair enough to spread awareness in a new country with a new Constitution. One such visual in the State produced short films include an

<sup>9</sup> Shri B. G. Kher, CONSTITUENT ASSEMBLY OF INDIA, VOLUME VII, Wednesday, 24<sup>th</sup> November 1948.

<sup>10</sup> Shri Brajeshwar Prasad, CONSTITUENT ASSEMBLY OF INDIA, VOLUME IX, Saturday, 3<sup>rd</sup> September 1949.

<sup>11</sup> Roy, Beyond Belief, p.33.

<sup>12</sup> ‘The film industry strike’ in Indian Documentary, Vol. 1, No. 3, 1949, p. 4. See also Karanja, B. K., ‘Some Reflections on An Editorial’, in Indian Documentary, Vol. 1, No. 4, 1949, pp. 4-5. Available at: <https://digital.lib.hkbu.edu.hk/documentary-film/india.php> (Accessed on: 05.11.2019)

expensively dressed young woman with eyes downcast, leaning against a pillar and the anglicized voice-over announced that the State had abolished trafficking in human beings<sup>13</sup>.

The Suppression of Immoral Traffic in Women and Girls Act, 1956 or popular as SITA (now known as '*the Immoral Traffic (Prevention) Act, 1956*' after the amendment by Act 44 of 1986) was challenged at its very birth, even before it was really born, by a petition of a twenty four year old Muslim woman, Husna Bai, who openly advocated for her profession of a prostitute by filing a writ petition under Article 226 of the Indian Constitution in the Allahabad High Court. Her petition sought focus of the country as the news agencies covered her story, the Ministry of Home Affairs was tensed on the fact that if the Act is declared unconstitutional and the social rights activists especially women, were troubled by the idea as to if the Constitution permit prostitution to a trade and business. HusnaBai's petition was beyond the belief of lay man as the very idea that 'prostitution can be a wish' is horrifying, and also shattered the argument that the prostitute was a victim coerced by men or economic conditions.

SITA was enacted in 1956 but came into force only on 1<sup>st</sup> May, 1958, many years after the commitment to end trafficking had been enshrined in the Constitution of India as a fundamental right, delay in acting on Article 23 reflected the political disinterest of the central government. The SITA is believed to have been implemented to meet India's international legal obligations under the New York convention for the suppression of immoral traffic<sup>14</sup>. Another important reason for the need of SITA which was also discussed during the Constituent Assembly Debates was a need to develop a unified system for the whole country. Before SITA, there were many municipal laws governing the prostitute and the prostitution, but they faced challenges by the prostitutes based on the working of the municipalities.

Husna Bai's petition has challenged the SITA mainly on two grounds; first is that she had no other source of livelihood other than prostitution and was unlikely to have marriage prospects, she contended that SITA would render her trade to be illegal which is unconstitutional from the prospect of Article 19 (1) (g) and will defeat the goal of welfare State as laid in the Constitution, and secondly, she challenged section 20 of SITA which gave

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<sup>13</sup> Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic*, p. 171.

<sup>14</sup> Statements of Objectives and Reasons, SITA, 1956.

power to the magistrate to remove any women or girl from the limits of his jurisdiction upon receiving information, which she contended was arbitrary.

Unfortunately for Husna Bai, Justice Jagdish Sahai opined in her favour, but her petition was dismissed on technical grounds within two weeks of filing, whereas even during those days it took five to six years for a civil petition to be decided. The reason for dismissal was that her petition was premature as SITA has not been applied on her, and the challenges could be entertained only after the issue had been forced on her—that is, she had been arrested or had found herself evicted from their homes. Thus, the oppressed was rested to face suppression and then seek for justice.

Even though her petition did not have any legal force and was only in the nature of an obiter dictum, it was referred as an important precedent in most of the cases<sup>15</sup> because it echoed the voice the community of prostitutes wanted. And in other cases of the High Court the decision was acknowledged and consequently Section 20 of SITA was held unconstitutional<sup>16</sup>.

Another prostitute, Begum Kalawat, challenged Section 20 of SITA in the Bombay High Court, wherein the Court held Section 20 as unconstitutional noting that, “one must remember that women do not choose their vocation because they like it. It has been recognised that in a large measure they are forced into this vocation by social conditions and most often against their will. One may not, therefore, judge these cases with any amount of harshness.”<sup>17</sup>

The Andhra Pradesh High Court adopted a divergent opinion<sup>18</sup> by upholding the constitutionality of Section 20 of SITA. The logic of Andhra High Court included two points; firstly the SITA has been passed in order to enforce Article 23 of the Constitution, and thus hold a superior presumption of constitutionality, and secondly the magistrate did not have unchecked discretionary and arbitrary powers under the Act and there is prescribed procedure which is to be followed in all the cases.

The unsettled constitutionality of SITA was settled by the Supreme Court of India in case of *State of Uttar Pradesh v. Kaushalya & Others*<sup>19</sup>. The Supreme Court upheld the validity of

<sup>15</sup> *Supra note* 13, p. 203

<sup>16</sup> *Kaushalya v. State of Uttar Pradesh*, AIR 1954 All 71.

<sup>17</sup> *Begum Do Hussain Saheb Kalawat and Another v. State of Bombay*, 1963 (1) CrLJ 148

<sup>18</sup> *Vanga Seetharamamma v. Chitta Sambasiva Rao & Another*, AIR 1964 AP 400

<sup>19</sup> AIR 1964 SC 416

the Section 20 of SITA and clarified that powers provided to the magistrate were neither discretionary nor arbitrary. Chief Justice Koka Subbarao held that the reasonable-classification test was founded on the idea of an intelligible difference that had a rational nexus with the law's objective. The court distinguished between a prostitute living in a sparsely populated area and one living in a busy locality within easy reach of public institutions. Chief Justice Koka Subbarao explained:

*"Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralize the public morals, but, what is worse, to spread diseases not only affecting the present generation but also the future ones."*<sup>20</sup>

*"Even a depraved women cannot be deprived of her rights except for good reasons."*<sup>21</sup>

Although the Supreme Court of India settled the legal preposition by upholding the SITA, but the Immoral Trafficking (Prevention) Act, 1956 has been implemented in a highly moralistic sense which has resulted in further victimization of trafficked women. The objective of the Act, i.e. the punishment of those involved in trafficking has not been met.<sup>22</sup>

In a study commissioned by the Government of India and UNICEF, in 1998, researchers found that 83% of sex workers came from regions with "low developmental indicators, limited economic opportunities and ineffective developmental interventions".<sup>23</sup>

In a recent *Gaurav Jain v. Union of India*,<sup>24</sup> the Supreme Court has said that women in the flesh trade are victims of adverse social-economic circumstances rather than offenders in the society. The children of prostitutes do have the right to equality, dignity, care, protection and rehabilitation so as to be a part of the mainstream of social life without any pre-stigma attached on them.

It is difficult to determine whether there is a need of a stronger ardent legislation or the requirement is to create mechanisms where the attitude or mind-set improves, in order to curb

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Nishant Anand, Women in India: The Problem of Missing Girl Child, p. 47.

<sup>23</sup> Available at: [https://www.ebc-india.com/lawyer/articles/2005\\_plw\\_1.html](https://www.ebc-india.com/lawyer/articles/2005_plw_1.html); (Accessed on:15.11.2019)

<sup>24</sup> (1997) 8 SCC 114: AIR 1997 SC 3021

prostitution. In *Dimple Singla v. Union of India*<sup>25</sup> the Delhi High Court expressed its concern that until the attitude changes, elimination of discrimination against women cannot be achieved.

The government established National Commission for Women on 31<sup>st</sup> January, 1992 under the National Commission for Women Act, 1990 to deal with issues regarding the female exploitation and disparities. The Commission has undertaken steps to raise the bar for women, but social system is too complex that negative motivation towards ill deeds grows at a faster rate before the preventive steps are taken.

The Mission statement of the National Commission for Women reads as: "To strive towards enabling women to achieve equality and equal participation in all spheres of life by securing her due rights and entitlements through suitable policy formulation, legislative measures, effective enforcement of laws, implementation of schemes/policies and devising strategies for solution of specific problems/situations arising out of discrimination and atrocities against women."<sup>26</sup>

The Vision statement of the National Commission for Women reads as: "The Indian Woman, secure in her home and outside, fully empowered to access all her rights and entitlements, with opportunity to contribute equally in all walks of life."<sup>27</sup>

## **CONCLUSION: THE UPSETTING CONDITION OF WOMEN**

It is incontrovertible that problems of unfair treatment and personal bias exist for every individual, even within the males. The substantive question is whether we have solution to curb ill deeds followed from time immemorial?

In ancient India education had a different meaning; it was based on the principles of morality and spirituality. If those were the golden days then what made the business of prostitution evolve at this pace. There is a phase of history which the scholars and publicists have not touched because the unrevealed history is better to guess than the written documents proving the reality. The reality is yet unknown, like why the women are considered impure during menstruation, whether there is some logic or a myth, due to lack of resources during those days, have evolved into a practice?

<sup>25</sup> (2002) 2 SLJ 161

<sup>26</sup> Available at: <http://ncw.nic.in/mission-and-vision/vision> (Accessed on: 30.09.2019)

<sup>27</sup> ibid

The biggest reason, as mentioned earlier, is the passing of fettered mind-set to future generations without allowing them to think. Therefore, liberalism in physical sense may be evident because it is ensured by the Constitution but the cynical and parochial view towards any-thing is dangerous like it is said half knowledge is a dangerous thing, similarly predetermined and prejudiced mind fails to form and evolve in a novel manner.

Lately there have been questions rising with the growing importance of the mandate of legalizing prostitution in India. While that is certainly not a great solution for the given problems which require more of a paradigm shift in the mindset of people, but given the clandestine nature and no regulation of industry, it would certainly be a step towards damage control. Legalizing would pave way for licenses and registration, whereby workers would have their own identity, access to public facilities, and other services. A serious check on the spread of HIV/AIDS will help in controlling the other related activities which have associated with the prostitution etc.

## **CORPORATE CRIMINAL LIABILITY AND PUNISHMENT**

Nitin Agarwal\* & Prof. (Dr.) Ajay Bhatt\*\*

### ***Abstract***

*In India, Companies are incorporated as per the Companies Act, 2013. As of now and as per Law, Companies are legal entities and have different identity altogether separate from the management who is running the Company. We however know that Companies don't have their own brain and are run by the management personnel who think about the activities of the Company and do all activities whether legal or illegal. So, it is believed that out of two main ingredients of a crime i.e. actus reus and mens rea, mens rea is not present in case of Corporate Crimes on part of the Company. Then the question arises who is responsible for the acts done by the Company or we can say done on behalf of the Company by the management. In the eyes of law, Company being separate legal entity, should be held liable for the acts done by it but practically it cannot be done all the time. As we know that a Company has no body or soul or brain of its own, hence it cannot be put behind the bars nor can't it be bodily punished; so the management behind the show is held liable and is punished. In this Paper, we will discuss the Doctrine of Strict Liability or Vicarious Liability which talks about the methods to make the Corporates liable for the crimes done by them. We will also discuss the Doctrine of Alter Ego which invoked the personal liability of management and shareholders for the acts done by the Corporates. In nutshell, we can say that although all crimes are the outcome of human brain and is responsible for such crimes but Corporates are also held liable for some crimes and we shall try to discuss different aspects of the existing Laws under which Corporates can or cannot be held liable or in other words we shall discuss the aspects of Corporate Criminal Liability through application of prevailing Laws.*

**Keywords:** Corporate, Criminal Liability of Corporates, Company as Legal Person, Companies Act.

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## INTRODUCTION

Criminal Liability in general is said to exist when following conditions are fulfilled:

1. **actus reus** i.e. the guilty act; and
2. **mens rea** i.e. the guilty mind

As a general rule, there should be a criminal mind behind any criminal act to prove the person guilty. Always all criminal offences need the concurrence of both the elements in any criminal act done i.e. mens rea and actus reus and without the existence of both, the same is not proved. This was derived from the doctrine of “*actus non facit reum nisi mens sit rea*”, which means that “*only criminal act shall not make the person guilty unless there is guilty mind behind it.*”

Even though Companies or Corporations are legal entities but cannot do any act nor can perform any criminal act by themselves except through Director or any other authorized person/s only. At the same time, they cannot have any mens rea i.e. any guilty mind. Only human being can perform any action and only human beings can have a guilty mind. Corporates are treated as a separate legal entity for all acts done by it.<sup>1</sup> As a separate legal entity, Corporates can enter into contract, own assets and liabilities. Corporates even have Constitutional Rights.<sup>2</sup> Since many years Corporates have been prosecuted for criminal offences done by it and the same has been in practice.<sup>3</sup> The Parliament has also made many Acts and provisions so that a Company can be held liable for such offences. The Interpretation Act, 1978 says that the word person in any Law has to be read as “a body of person Corporate or incorporate” unless there is any contrary intention. Companies may rightly be held accountable for statutory as well as Corporate Law Crimes. A Corporation to be held responsible for criminal state of mind as well as strict liability<sup>4</sup> needs an evidence to be attached. Company has no mind of its own and therefore cannot commit guilt; it has no body, therefore, cannot perform in propria persona; punishing it would violate the fundamental principle that punishment must be imposed only on the actual offender; the regime of penalties does not contemplate possible Corporate offenders; and, finally,

<sup>1</sup> Daniel R. Fischel and Alan O. Sykes Corporate Crime; The Journal of Legal Studies Vol. 25, No. 2 (Jun., 1996), pp. 319-349

<sup>2</sup> Ibid

<sup>3</sup> Corporate criminal Liability; Amanda Pinto QC & Martin Evans; Sweet & Maxwell; 3rd Edition; page no 3

<sup>4</sup> Ibid

procedures such as instruction (or rehabilitation) are not well adapted toward dealing with Corporate entities.<sup>5</sup> In general, Corporations are held answerable for crimes that are closely related to their business activities.<sup>6</sup> The presupposition of Corporate Liability lies on the presumption that a body Corporate is a different legal person distinct from its owners, officers, or members. There is no single broadly accepted theory of criminal liability and blaming a Company for an offence. “There can be no effective means to dissuade an exercise of unjust power for the purpose of making a profit, except the remedy against the individual against those who really do, that is, the Company that acts by a majority, and there is no principle formed that locate them outside the scope of the Law for such procedures.” Earlier there were many problems to punish a body Corporate or Corporation for such criminal activities or offences. A Corporation cannot be arrested physically or forced to remain physically present in Court during criminal proceedings. It is not physically present and because of absence of mind, the mental element gets negated. There can be no physical or bodily punishment imposed on it. All the usual crime punishments cannot be inflicted on a body that is devoid of mind and body. The very fact of the absence of both makes it difficult to impose ordinary criminal punishment. They are bodies without soul that prevents them from being condemned or hanged. Punishing the members on behalf with no contribution will be unjustified for the very basis of Law that is to deliver justice and treating the alleged to be innocent until proven guilty. Someone else should not be punished for the fault of others, diminishing the very objective of delivering justice. Any person can be held liable for commission of certain illegal acts and omission of legal acts. If a statutory duty is cast upon a Corporation and is not performed, the corporate body is very much liable for the statutory offence. Viscount Haldane LC in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Co. Ltd.*,<sup>7</sup> it was laid that with relation to the concept of Alter Ego also known as Organic Theory of Corporate Criminal Liability “A Corporation is an abstraction.” There must be a person or agent who directs the Corporation, for it doesn’t have a mind of its own to carry on an activity. The Agent or Director must be the very mind and ego on behalf of Corporation. The Board of Directors is the brains of the Company and helping the Company to work through them.

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<sup>5</sup> L. H. Leigh; “The Criminal Liability of Corporations and Other Groups: A Comparative View”; Michigan Law Review; Vol. 80, No. 7, Articles on Corporate and Organizational Crime (Jun., 1982), pp. 1508-1528

<sup>6</sup> Ibid 5

<sup>7</sup> [1915] AC705

In India, we know that the current status of Doctrine of Corporate Criminal Liability is not as clear as it should be. We can see the recent landmark judgment of Apex Court in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*<sup>8</sup> which had made the scenario crystal clear. This case overrules all the previous laws and views in respect to the Criminal Liability of the Corporates and gave a new aspect to this doctrine.

The question that arises for consideration was whether a Company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment? In *Velliappa Textiles' case*<sup>9</sup>, by a majority decision it was held that the Company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is imprisonment and fine, the Court cannot impose only a fine. The majority was of the view that the legislative mandate is to prohibit the Courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the Court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty.

In *State of Maharashtra v. Syndicate Transport*<sup>10</sup> it was held that the Company cannot be prosecuted for offences which necessarily entail consequences of a corporal punishment or imprisonment and prosecuting a Company for such offences would only result in the Court stultifying itself by embarking on a trial in which the verdict of guilty is returned and no effective order by way of sentence can be made. A similar view was taken by Calcutta High Court in *Kusum Products Limited v. S.K. Sinha*, ITO, Central Circle-X, Calcutta,<sup>11</sup> where it was clearly stated that: "...a Company being a juristic person cannot possibly be sent to prison and it is not open to court to impose a sentence of fine or allow to award any punishment if the court finds the Company guilty, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function." The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, it suggested amendment to Section 62 of the Indian Penal Code by adding the following lines: 'In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a Company or other body Corporate or an

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<sup>8</sup> AIR 2005 SC 2622

<sup>9</sup> *The Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.*; AIR 2004 SC 86

<sup>10</sup> 1963 Bom. L.R. 197

<sup>11</sup> [ 1980 ] 126 ITR 804 ( Cal-HC )

association of individuals, it shall be competent to the court to sentence such offender to fine only.'

This recommendation got no response from the Parliament and again in its 47th Report, the Law Commission in paragraph 8(3) made the following recommendation: In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. However the Bill, prepared on the basis of the recommendations of the Law Commission, lapsed and it did not become Law but a few of the recommendations were accepted by the Parliament and by suitable amendment some of the provisions in the taxation statutes were amended.

A similar approach was taken by the Allahbad High Court in 1993, in case of *Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh*<sup>12</sup>, where an entirely distinctive observation was given by the Judges.

After the 2005 judgment of the Apex Court in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*<sup>13</sup>, the law has taken a settled position and it is basically much more logical and good judgment. It was expressly stated in this case that the Company is liable to be prosecuted even if the offence is punishable both with a term of imprisonment and fine. In case the Company is found guilty, the sentence of imprisonment cannot be imposed on and the sentence of fine is to be imposed, the Court has got the judicial discretion to do so. This course is open only in the case where the Company is found guilty but if a natural person is so found guilty, both sentence of imprisonment and fine are to be imposed on such person. There is no dispute that a Company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that Corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a Corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a Corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

If a Corporate body is found guilty of the offence committed, the Court, though bound to impose the sentence prescribed under Law, has the discretion to impose the sentence of

<sup>12</sup> [1992] 75 Comp Cas 770(All)

<sup>13</sup> AIR 2005 SC 2622

imprisonment or fine as in the case of a Company or corporate body, the sentence of imprisonment cannot be imposed on it and as the Law never compels to do anything which is impossible, the Court has to follow the alternative and impose the sentence of fine. This discretion could be exercised only in respect of juristic persons and not in respect of natural persons. There is no blanket immunity for any Company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The Corporate bodies, such as a Firm or Company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various Corporations. The Corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the Corporation to a Criminal Law is essential to have a peaceful society.

## **DOCTRINE OF ALTER-EGO AND ESTABLISHMENT THROUGH JUDICIAL PRONOUNCEMENTS**

The Doctrine of **Alter Ego** sets that the management of the Corporation worked as the brain giving it an exception to hold the Corporation liable. The intent of managers and agents of corporation is attributed to it.<sup>14</sup> A Corporation, therefore, can be held criminally responsible for committing offence by a “person” who, at the relevant time, was the directing mind and will of the Corporation.<sup>15</sup>

This formulation, the Alter Ego Doctrine, underlies the English rule concerning the attribution of mental state to the Corporation as a mental state personal to it. In this process, the English Courts treat the Alter Ego notion as if it asserted that a Corporation has a mind and can will, whereas it originally served only as the basis on which a state of mind could be imputed to a Corporation for the purposes of limiting civil liability. The alter ego notion has not been restricted to officers enjoying power by virtue of corporate character or by delegation from the primary managerial organ. Rather, Courts have adapted the Doctrine to take account of the realities of power in large, decentralized Corporations.<sup>16</sup>

Lord Reid in *Tesco Supermarkets Ltd. v. Nattrass*<sup>17</sup> and dictum being followed in *Meridian*

<sup>14</sup> KI Vibhute; Criminal Law; PSA Pillai’s; tenth edition; Lexis Nexis Butterworths; page number 77

<sup>15</sup> Ibid 15

<sup>16</sup> L. H. Leigh; “The Criminal Liability of Corporations and Other Groups: A Comparative View”; Michigan Law Review; Vol. 80, No. 7, Articles on Corporate and Organizational Crime (Jun., 1982), pp. 1508-1528

<sup>17</sup> [1971] 2 All ER 127 (HL)

*Global Funda Management Asia Ltd. v. Securities Commission*<sup>18</sup>, held “A living person or human being has knowledge, intention, capacity to think, be negligent, cautious, frame the situation, create conspiracies, intention to constitute an act of criminal nature, unlike the corporation who are not of the same nature. The corporation must act like a living person, or through a living person. The person who is acting on behalf of the Company must think like the Company, he has to act keeping the mind of the Company. He is acting as the Company and the mind which directs it to work will be considered as mind of the Company. There is no question of the Company for being vicariously liable. He is an embodiment of the Company and not being just a delegate, agent, representative and a servant of the Company. If it is a guilty act, the guilty mind will be considered of the Company not of the person acting. The question to be seen is whether the person doing that particular thing is to be regarded as Company or merely as the Company’s servant or agent?

The Corporate body wasn’t exempted from criminal liability for crime committed by its Directors, Agents or Servants while acting for or on behalf of the Company as laid down in *State of Maharashtra v. Syndicate Transport Company Limited*<sup>19</sup>. It is a generally accepted modern rule that except for acts that involve personal malicious intent, and making the Company incapable of such act, a Corporation may be subjected to indictment or other criminal process even if the criminal act is done by its agents or others.<sup>20</sup> It was held that a Company can be prosecuted for an offence for which mandatory punishment is imprisonment and fine.

In *Assistant Commisioner v. Velliappa Textiles Ltd.*<sup>21</sup>, it was held by majority holding that the Company cannot be prosecuted for offences which requires imposition of mandatory term of imprisonment coupled with fine. It was further held that where punishment is expressly mentioned that will be fine and imprisonment both, fine alone cannot be imposed. There is no discretion on the part of the Court to impose only fine. The court interprets statutes and creates lacunas in them.<sup>22</sup> The Company can be very well being held liable and can be prosecuted for criminal acts and offences.

<sup>18</sup> [1995] 3 WLR 413 (PC)

<sup>19</sup> AIR 1964 Bombay 195

<sup>20</sup> K.N Chandrasekharan Pillai; General principles of Criminal Law; 2nd Edition; Eastern Book Company; page number 248

<sup>21</sup> (2003) 11 SCC 405

<sup>22</sup> *State of Maharastra v. Jugamender Lal*; AIR 1966 SC 940

The leading case of *Rex v. Huggins*<sup>23</sup> decided that the principal is not answerable criminally for the act of his agent without the principal's authorization, consent or knowledge.

In *C. I. T. Corp. v. United States*,<sup>24</sup> a Corporation was convicted of conspiracy to defraud the United States by presenting documents known to be false for the purpose of securing insurance of loans under the National Housing Act.<sup>25</sup>

Corporations or body Corporate commit crimes or criminal activities to further their business enterprises by increasing profits and enhancing their competitive position and power. The Companies are not just limited to crimes related to finance rather also get indulged in price-fixing, stock-misrepresentation and fraud.<sup>26</sup> Fixing the responsibility for a dispersed Corporation is complicated task. Establishing *mens rea*<sup>27</sup> for a Corporation is a difficult task. For establishing the guilty mind, the intention of the office holders, agents etc are considered to measure the attribution.

Imposition of Criminal Responsibility is done in two ways<sup>28</sup>:

- Imposition of Strict Liability eliminating the requirement of *Mens rea*.
- Imposition of Vicarious Liability dispensing with the *Actus reus*.

Corporate Liability arises out of business relationship in circumstances like<sup>29</sup>:

- Involvement of strict liability statutes.
- Difficulty arising for proving involvement of an employer's Corporate official.
- Difficulty on the prosecutors to gather evidence to convict.
- Prohibited Conduct causing public harm.

The dogma of *respondeat superior* and *qui facit per alium facit per se* is now found to be quite as usefully vague as the dogma of *actus non facit reum, nisi mens rea*.<sup>30</sup>

<sup>23</sup> 2 Strange 882, 93 Eng. Rep. 915 (K. B. 1730)

<sup>24</sup> 150 F.(2d) 85 (C. C. A. 9th, 1945)

<sup>25</sup> Criminal Liability of Corporations for Acts of Their Agents; Harvard Law Review Vol. 60, No. 2 (Dec., 1946), pp. 283-289

<sup>26</sup> Supra note 4

<sup>27</sup> Supra note 4

<sup>28</sup> Supra note 4

<sup>29</sup> K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

<sup>30</sup> K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

The belief long obtained that since a Company is only a fictitious person created and invested with certain functions by the State, it was capable of doing only acts expressly permitted in its charter; that anything further, being *ultra vires*, was not the act of the Corporation; and hence, that there could be no Corporate.<sup>31</sup> In case of torts, the Corporation can be held criminally liable for the act of the agent. This is a derivation from the assumption that any act done by him during exercising of powers is with approval of the Corporation. In statutes defining crimes and the acts by persons who commit the prohibited act, includes Corporations, therefore, there is no doubt that a Corporation can be punished for a criminal act.

The difficulty of being *ultra vires* is removed by the doctrine of *respondeat superior* a corporation becomes liable civilly for even the malicious acts of its officers and other agents, if done in the discharge of their official duty or in the scope of their employment. Thus it has been held that a Corporation may be liable for deceit, fraud, libel, conspiracy, malicious prosecution, and other torts where wrongful motive is the gist of the action.

Indeed, a Corporation is so far treated as a natural person that exemplary damages are allowed just as against an individual, provided the wrongful act is authorized or ratified. The difficulty is in determining to what extent the analogy of civil liability shall be applied to crimes. It was soon felt reasonable to punish by fine for the criminal neglect of officers or agents. Corporate business is necessarily transacted through agents, and if the Corporation, as principal, is held criminally liable for the omissions of its agents, there seems good reason to punish it also for their affirmative acts. It is pertinent to note that in the decisions which first took this step there were strong dicta that Corporate Criminal Liability extended only to those misfeasance's the simple doing of which was prohibited regardless of motive, intending thereby to exclude all crimes in which *mens rea* is essential.<sup>32</sup>

## CONCLUSION

A Company being an artificial person cannot act by itself and only the directors or agents of the Company do all acts on its behalf. That is why the directors or other authorised persons are punished on behalf of the Company whenever it is convicted as they are the guilty mind behind those acts; hence Corporate Criminal Liability is necessarily vicarious liability of

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<sup>31</sup> K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2<sup>nd</sup> Edition; Page number 232

<sup>32</sup> The Criminal Liability of Corporations; Harvard Law Review; Vol. 20, No. 4 (Feb., 1907), pp. 321-323

shareholders for acts of their agent. Where criminal intent is immaterial, Corporate Criminal Liability for the physical acts of agents has long been clear. It is very clear fact that the difference between physical acts and mental state of agents presents no logical barrier to imposing vicarious responsibility. Instead of regarding the problem as one of vicarious liability, however, the courts have stumbled over the theoretical difficulties of ascribing criminal intent to a corporation. This is also the established fact that corporations itself cannot commit crimes like bigamy, perjury, rape or murder. But courts have now progressed to the position of recognizing that corporations can be guilty of crimes involving criminal intent.<sup>33</sup> There have been an increase in the number of prosecutions on the Companies and this shows that corporate crimes are increasing very speedy. Lawyers study new danger zones as prosecutions increase with related to corporate criminal acts and fixing their liabilities.<sup>34</sup>

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<sup>33</sup> The Criminal Liability of Corporations; Harvard Law Review; Vol. 20, No. 4 (Feb., 1907), pp. 321-323

<sup>34</sup> Gary A. Hengstler; CORPORATIONS UNDER THE GUN: Lawyers study new danger zones as prosecutions increase; ABA Journal; Vol. 73, No. 8 (JUNE 1, 1987), pp. 32-33

## **WITNESS PROTECTION: A FUNDAMENTAL NEED IN CRIMINAL JUSTICE SYSTEM**

Prashant Rahangdale\*

### ***Abstract***

*The witness is considered to be one of the most indispensable parts of the criminal justice system. They assist the court by submitting their testimony without any personal gain. While doing so they sustain lots of pain and grief but never stagger from their path. The service rendered by the Witness in the justice administration system cannot be ignored. Whittaker Chambers said, "In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion."<sup>1</sup> Therefore, the witness should be kept in the highest place of honour. However, it has been found that the witness faces lots of troubles during the course of the trial process. The allowances which are paid to the witness are not feasible, the facilities which are offered to the witnesses during court stay are inadequate and apart from these issues they face unjustified adjournments. Often, witnesses are ill-treated by the court officials, harassed and threatened by the accused and sometimes even lose their life during the trial. These all incidences happen due to lack of effective witness protection mechanism in our country. This, in turn, battered the faith of witnesses in the Criminal Justice System and due to which they hesitate to come forward to lend their testimony or often turn hostile. Therefore, witnesses should be provided with adequate protection. Hon'ble Supreme Court of India and Law commission in various instance highlighted the need for a comprehensive policy on witness protection. In this research paper, the researcher shall underline the trouble faced by the witnesses in the criminal justice system and elaborate on the issue of witness protection in India.*

**Keywords:** *Criminal Justice System, Witness, threatened, Hostile, Witness protection program.*

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<sup>1</sup> Available at: <https://www.scconline.com/blog/post/tag/witness-protection-scheme-2018/>

## INTRODUCTION

Fair trial is an essence of the Criminal Justice Administration. The magistrate decides the guilt or innocence of the accused beyond a reasonable doubt basing upon the versions of witnesses. They assist the court in the truth-finding process. English writer Edward G Bulwer-Lytton said, “Whenever man commits a crime heaven finds witnesses”<sup>2</sup>. Therefore, witnesses play a crucial role in the criminal justice system. They act as a friend of the court and laid the foundation of the criminal trials. Hence, Bentham called witnesses as the “eyes and ears of justice”.<sup>3</sup> Moreover, the testimony submitted by the witness has magical strength which can change the course of the trial process. Justice Wadhwa in *Swaran Singh v. State of Punjab* observed that “A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence.”<sup>4</sup> Committee on Reforms of Criminal Justice System headed by Justice V.S Malimath observed that “By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross-examination and cannot refuse to answer questions on the ground the answer will incriminate him”<sup>5</sup>. Therefore, the witness should be kept at the highest place of honour.

However, the witness in criminal justice administration experiences lots of pain and agony. It has been found that eyes and ears of justice ( i.e. witnesses) are threatened and harassed during the course of the trial. They are tortured and ill-treated by the accused or his family member to give testimony in his favour. This has, in turn, paralysed the trial process which sometimes resulted in the incidences of witness turning hostile. All these mishaps occur due to the lack of effective witness protection regime available in our country. Many a time, the concern was raised by the Hon’ble Supreme Court and Law commission to incorporate a

<sup>2</sup> Available at: <https://indianexpress.com/article/explained/from-jessica-lals-case-to-sohrabuddin-sheikhs-why-witness-protection-in-india-remains-vexed-5069143/>

<sup>3</sup> Bajpai G. S., ‘Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness’ Bureau of Police Research and Development Ministry of Home Affairs, New Delhi

<sup>4</sup> *Swaran Singh v. State of Punjab* AIR (2000) 5 SCC 68

<sup>5</sup> Malimath V.S. (2003), Report of the Committee on Reforms of the Criminal Justice System. Delhi: Ministry of Home Affairs, Government of India.

comprehensive policy on witness protection but same was ignored.

## **DEFINITION OF WITNESS**

The term witness is not defined under the Criminal procedure Code, 1973 but its meaning can be adduced from the definition of the expression 'evidence' under section 3 of the Indian Evidence Act, 1872. As per Section – 3 of describes "Evidence" as—"Evidence" means and includes:

- 1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- 2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

Clause (1) of Section 3 of the Act though not clearly covered the term witness but states that all the all statements which are made by the witnesses with the Court's permission in relation to the material fact under inquiry are called oral evidence.

- ❖ According to Black's Law Dictionary;'s definition of witness: "In the primary sense of the word, a witness is a person who has knowledge of an event. As the most direct mode of acquiring knowledge of an event is by seeing it, "witness" has acquired the sense of a person who is present at and observes a transaction."<sup>6</sup>
- ❖ The Witness Protection Scheme, 2018 defined the term 'witness' under Section – 2 (k) - which means witness is — "any person, who posses information or document about any offence".<sup>7</sup>

Therefore, in general terms, the witness is a person who is called by the parties with the permission of the court to furnish certain information of which he has some knowledge.

## **PROBLEMS FACED BY WITNESS:**

A witness is an incredible element of the criminal justice system. Though they are not a part of the incidence of crime but are always available to cooperate in the court process. However, instead of welcoming approach they sustain lots of hardships and faces troubles during the course of the trial. They travel a long way from their home to comply with the court's order

<sup>6</sup> Black's Law Dictionary, Available at: <http://thelawdictionary.org/witness-n/#ixzz2cm686Dz8>

<sup>7</sup> Section – 2 (k) - Witness Protection Scheme, 2018

when they are summoned for examination. Hon'ble Supreme Court in case of *State of U.P v. Shambhu Nath Singh & Ors* observed that, “Witnesses tremble on getting summons from courts, in India, not because they fear examination or cross-examination in courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the courts in India so far as witnesses are concerned. It is high time that trial courts should regard witnesses as guests invited (through summons) for helping such courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves.”<sup>8</sup> Moreover, the witness also faces the situation of unwarranted adjournments due to the nonappearance of the parties or lawyers. The allowances which are remunerated to the witness for attending court is very low and obsolete. The infrastructural facilities which are provided to the witness in courts are very poor. They are not provided with the proper place to seat, drinking water and canteen facilities. Sometimes they need to remain in courtyards to wait for their turn to get testified. Witnesses not only undergo through these problems but even get threatened, harassed, bribed and induced or even killed by the accused to submit testimony in their favour. Supreme Court in *Swaran Singh v. State of Punjab* opines that “A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the court many times and at what cost to his own self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter is adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation”.<sup>9</sup> Due to these hardships witness

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<sup>8</sup> (2001) 4 SCC 667

<sup>9</sup> Supra note 5

hesitate to come forward to lend their testimony in the court of law and sometimes forced him to turn hostile. All these scenarios frustrate the very purpose of criminal justice administration.

## **NEED FOR LAW ON WITNESS PROTECTION**

The witness undergoes lots of troubles and suffers pain during the course of the trial in the justice delivery system. This not only dilutes the purpose of trial but also violates the fundamental right of the witness for fair trial which is guaranteed under Article 21 of the Constitution of India. BMW hit and run case, Aasaram Bapu's case, Naroda Patia's case and VYPAM case are the few examples wherein the prime witnesses were threatened and harassed to give false testimony in the court. All the incidence of threat, intimidation and enticement happened due to the lack of effective witness protection mechanism available in our country. Hon'ble Supreme Court in *Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others* observed that "The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation."<sup>10</sup> Therefore, the state shall take the entire endeavor to protect the rights of witnesses.

## **WITNESS PROTECTION UNDER INDIAN LEGISLATIONS**

### ♦ The Unlawful Activities (Prevention) Act, 1967:

The Unlawful Activities (Prevention) Act, 1967 provide for two provisions in relation to the protection of the witnesses. Section 22 of the Act prescribes for punishment for intimidating a witness. It states that any person who threatens a witness by any act of violence or puts any restraints or confines the witness or does any unlawful act to threaten him shall be punished

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<sup>10</sup> (2004) 4 SCALE 375

with imprisonment.<sup>11</sup> Moreover, Section – 44 of the Act grants the protection of witnesses by holding the proceedings in camera. The two types of protection available to the witness are identity protection and maintaining the address of witness secret. Moreover, the person who contravenes the provisions of this section shall be punished with imprisonment.<sup>12</sup>

♦ The Terrorist and Disruptive Activities (Prevention) Act, 1987:

The Terrorist & Disruptive Activities (Prevention) Act 1987 was passed to criminalise terrorist acts in India. Section 16 of the Act provides for the protection of witnesses by holding the proceedings in camera. Further, the Designated Court under the Act is empowered to take measures to protect the identity of the witness and keep the address of any witness secret. In addition, if any person contravenes the provisions of this section then he shall be punishable with imprisonment.<sup>13</sup>

♦ The Maharashtra Control of Organised Crime Act, 1999 (MCOCA):

The Maharashtra Control of Organised Crime Act, 1999 was incorporated to combat organized crime in the State of Maharashtra. Section 19 of the Act offers protection to the witnesses primarily by holding in-camera proceedings. The two types of protection available under the Act is identity protection of the witness and keeping the address of any witness undisclosed. Moreover, if any person contravenes the provisions of this section then he shall be punishable with imprisonment.<sup>14</sup>

♦ Prevention of Terrorism Act, 2002:

The Prevention of Terrorism Act, 2002 (POTA, 2002) was enacted to counter-terrorist activities. Section 3(7) of the Act provides for punishment to a person who threatens the witness by any act of violence or by wrongful restrain or confining the witness with imprisonment.<sup>15</sup> Further, Section 30 of the Act provides for protection to the witness by holding proceedings in camera. Moreover, the Special Court may take appropriate measures like witness identity protection and keeping the address of any witness secret.<sup>16</sup> However, if any person contravenes the provisions of this section then he shall be punishable with

<sup>11</sup> See Section – 22 of The Unlawful Activities (Prevention) Act, 1967

<sup>12</sup> See Section – 44 of The Unlawful Activities (Prevention) Act, 1967

<sup>13</sup> See Section – 16 of The Terrorist & Disruptive Activities (Prevention) Act 1987

<sup>14</sup> See Section – 19 of The Maharashtra Control of Organised Crime Act, 1999

<sup>15</sup> See Section – 3 (7) of The Prevention of Terrorism Act, 2002

<sup>16</sup> See Section – 30 of The Prevention of Terrorism Act, 2002

imprisonment.

♦ The National Investigation Agency Act, 2008:

The National Investigation Agency Act, 2008 is a special Act to combat terrorist act in India. National Investigation Agency Act also provides provision for the protection of witnesses. Section 17 of the Act, empowers the Special Court to hold proceedings *in camera*.<sup>17</sup> The protection which is offered to witness under the Act is ‘protection of identity’ and ‘address of witness secrete’. Moreover, the person who contravenes the provision of this section shall be punished with imprisonment.

♦ Delhi Witness Protection Scheme, 2015:

National Capital Territory of Delhi is the first state to bring policy on witness protection. Section – 3 of the Scheme the witness is categorized into three different categories i.e. according to the threat perception.<sup>18</sup> The Competent Authority is empowered under the Scheme to pass the order of witness protection basing upon the Threat Analysis Report (TAR). The Scheme provides for different types of protection which may include: non meeting of witness and accused during trial, concealing of identity of the witness, close protection, regular patrolling around the witness’s house, temporary change of residence, holding of *in-camera* proceedings, awarding financial assistance to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession etc.<sup>19</sup>

♦ Maharashtra Witness Protection and Security Act, 2017:

The State of Maharashtra incorporated Maharashtra Witness Protection and Security Act, 2017. Section – 6 of the Act deals with the aspect of protection to witnesses in serious offences.<sup>20</sup> Section – 7 of the Act provides for the procedure for providing protection to the witness.<sup>21</sup> The District Committee may take action to protect witness whose life is in danger. Section – 8<sup>22</sup> and Section - 9<sup>23</sup> of the Act offers protection during investigation and trial

<sup>17</sup> See Section – 17 of The National Investigation Agency, 2008

<sup>18</sup> See Section – 3 of The Delhi Witness Protection Scheme, 2015

<sup>19</sup> See Section – 7 of The Delhi Witness Protection Scheme, 2015

<sup>20</sup> See Section – 6 of The Maharashtra Witness Protection and Security Act, 2017

<sup>21</sup> See Section – 7 of The Maharashtra Witness Protection and Security Act, 2017

<sup>22</sup> See Section – 8 of The Maharashtra Witness Protection and Security Act, 2017

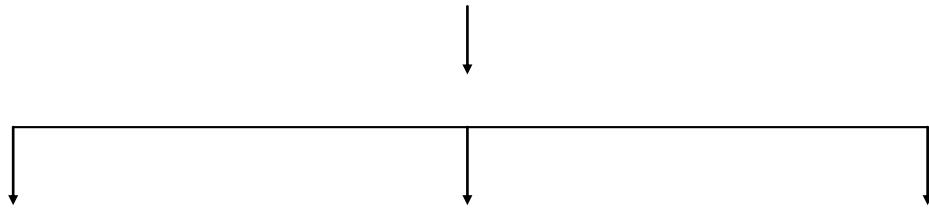
<sup>23</sup> See Section – 9 of The Maharashtra Witness Protection and Security Act, 2017

which shall be directed by the committee. Section 11<sup>24</sup> mandates that the investigating officer shall not disclose the names and addresses of the witnesses till the disposal of the case and if they contravene the provision they shall be punished under Section 13<sup>25</sup> with imprisonment.

♦ Witness Protection Scheme, 2018:

As there was no Central legislation on witness protection, therefore, Hon'ble Supreme Court in *Mahender Chawla & Ors. v. Union of India & Ors*<sup>26</sup> approved a Scheme called as The Witness Protection Scheme, 2018. The Scheme provides for various measures for witness protection. The Scheme defined the term 'witness' as "any person, who possess information or document about any offence".<sup>27</sup> Section – 3 of the Scheme classified witness into three different categories. Under Category 'A' witness are categorized according to the threat which is extending to cause harm not only to the witness. Further, Category 'B' specified the threats which affect the safety, reputation or property of the witness. Category 'C' includes the threats which are ordinary in nature and covers the offence of harassment and intimidation of the witness or his family member's, reputation or property, during the investigation process.<sup>28</sup>

**Witness**



**Category 'A'**

(Threat extends to life of witness)

**Category 'B'**

(Threat extends to safety of witness)

**Category 'C'**

(Threat is moderate)

Section - 7 of the Scheme provides for a variety of protective measures available to the witness including concealment of identity of the witness, close protection, regular patrolling around the witness's house, temporary change of residence, holding proceedings *in-camera*, awarding time to time periodical financial aids to the witness from Witness Protection Fund etc. The order for witness protection under this section shall be in proportion to the threat

<sup>24</sup> See Section – 11 of The Maharashtra Witness Protection and Security Act, 2017

<sup>25</sup> See Section – 13 of The Maharashtra Witness Protection and Security Act, 2017

<sup>26</sup> *Mahender Chawla & Ors. v. Union of India & Ors* Writ Petition (Criminal) No. 156 Of 2016

<sup>27</sup> Section – 2 (k) of The Witness Protection Scheme, 2018

<sup>28</sup> See Section – 3 of The Witness Protection Scheme, 2018

acuity which shall be limited to not exceeding three months at a time.<sup>29</sup> Section – 9 of the Scheme offers protection of the identity of witnesses during the course of investigation or trial based on Threat Analysis Report.<sup>30</sup> Moreover, Part IV of the Scheme, section - 10 provides for change of identity of a witness by granting new identities<sup>31</sup> and Part V of the Scheme section - 11 for the relocation of witness to a safe place in any State and Union Territory of India.<sup>32</sup>

Hon'ble Supreme Court approve the Scheme to fill the gap to fight against the troubles faced by the witness during the course of a trial. However, there are few drawbacks of the Scheme, but the same can be overcome by making amendments. The fruits of the Scheme shall fetch only if it is implemented in its true letter and spirit.

### **JUDICIAL PRONOUNCEMENTS ON WITNESS PROTECTION:**

- ◆ *Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and ors. (The Best Bakery Case)* – In this milestone decision, the Hon'ble Supreme Court highlighted that the fair trial is an essential ingredient Article 21 of the Constitution of India which the witness also possess. If the witnesses are forced to give testimony then their right to fair trial shall be violated. Therefore, it is the duty of the state to protect the rights of the witness to ensure a fair trial.<sup>33</sup>
- ◆ *Neelam Katara v. Union of India* – This landmark decision of Delhi High Court opens the new avenues of witness protection. In this case, the High Court highlighted the need for a law on witness protection. The Court analyses various laws on witness protection of foreign countries, previous judgements of the Supreme Court and the reports of law commission and frame guidelines till any suitable legislation incorporated by the state of Delhi.<sup>34</sup>
- ◆ *Swaran Singh v. The State of Punjab* – Supreme Court of India in this significant decision highlighted the importance of witness and elaborated the troubles faced by them during the course of the trial. The witness being the necessary ingredient criminal trial suffers lots of injustice. However, they are ill-treated, harassed and intimidated by the accused

<sup>29</sup> See Section - 7 of The Witness Protection Scheme, 2018

<sup>30</sup> See Section – 9 of The Witness Protection Scheme, 2018

<sup>31</sup> See Section – 10 of The Witness Protection Scheme, 2018

<sup>32</sup> See Section – 11 of The Witness Protection Scheme, 2018

<sup>33</sup> Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others (2004) 4 SCALE 375

<sup>34</sup> Neelam Katara v. Union of India ILR (2003) II Del 377 260

during the process of trial. Instead of all these adversity, they assist in the cause of justice administration system. Therefore, it is imperative that the rights of the witness should be protected.<sup>35</sup>

- ◆ *National Human Rights Commission v. State of Gujarat and Ors.* – Apex Court in this decision highlighted the facet of a fair trial. The Court observed that if the witnesses are not provided with a favourable environment then they would not be able to depose freely. Therefore, it is the duty of the court to make sure that the witness should submit his testimony without fear and favour.<sup>36</sup>
- ◆ *The State of Maharashtra v. Bandu @ Daulat* – In this landmark judgement Supreme Court ordered that all the state government in India shall incorporate special centres for the examination of vulnerable witnesses. These vulnerable witness centres shall give an opportunity to the victim/witness to depose in a free and fearless environment.<sup>37</sup>
- ◆ *State of Maharashtra v. Praful Desai* – In this case, the Supreme Court of India affirm the argument of the Appellant for recording the evidence of witness by the modern method of video-conferencing as the witness was in a foreign country. The Supreme Court elaborated the scope of section 3 of the Indian Evidence Act, 1872 and observed that the definition of ‘evidence’ also includes evidence in electronic form. Therefore, the courts may adopt the modern method of recording of evidence video-conferencing.<sup>38</sup>
- ◆ *Mahender Chawla v. Union of India* – In this landmark decision Hon'ble Supreme Court of India made an attempt to bring the aspect of protection of the witness within the purview of legislation and made a duty of the state to provide safeguard to the witness during the course of the trial. Before this landmark judgement, there was no comprehensive policy on witness protection in India, however, few states like Maharashtra<sup>39</sup> and National Capital Territory of Delhi<sup>40</sup> incorporates witness protection laws in their states. Moreover, few legislations like TADA, POTA, UAPA also provided for protection of the witnesses by they were special Acts. The Law Commission of India in various of its reports and Hon'ble Supreme Court of India in its previous decisions

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<sup>35</sup> Supra note 4

<sup>36</sup> National Human Rights Commission v/s State of Gujarat and Ors.(2009) 6 SCC 767

<sup>37</sup> The State of Maharashtra vs. Bandu @ Daulat (2018) 11 SCC 163

<sup>38</sup> State of Maharashtra vs Praful Desai (2003) 4 SCC 601)

<sup>39</sup> Maharashtra Witness Protection and Security Act, 2017

<sup>40</sup> Delhi Witness Protection Scheme, 2015

*highlighted the necessity of witness protection programme in our country but the same was ignored. Therefore, Hon'ble Supreme Court in *Mahender Chawla v. Union of India* approved a Scheme called Witness Protection Scheme, 2018. As per the verdict, the Scheme shall be deemed as 'Law' within the ambit of Article 141 and 142 of the Constitution of India till any suitable law is incorporated by the Parliament.*

*The Scheme was framed with an objective to endow with adequate protection to the witness who is in need during the process of trial. The Scheme provides for the provision of witness protection by categorising the threat into three different categories. The witness shall be provided witness protections like witness identity protection, relocation, change of identity, financial assistance under the Scheme. The expenditure for providing protection under the Scheme shall be bear from the Witness Protection Fund' incorporated by the state governments.<sup>41</sup>*

Hon'ble Supreme Court in its decision mandate that the Center, States and Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and spirit. Moreover, the witness deposition centres shall be incorporated by the State governments and the Union Territories in each and every district and the plan of the Scheme shall be followed rigorously.<sup>42</sup>

## **CONCLUSION**

The purpose of the Criminal Justice System is to administer peace and harmony in society by maintaining the rule of law. This could be possible only when the justice is imparted to the victim and the wrongdoer is punished by following the due process of law. During the process of administering justice, the witness plays an imperative role. The witness cooperates with the courts by furnishing their testimony during the trial process. However, if the witness is threatened and forced to depose in favour of one of the party then it would not be termed as a fair trial followed by the due process. Therefore, it is the duty of the State to protect the rights of witnesses during the course of the trial so that they could depose their version in a free and fearless environment. Prior to the *Mahender Chawla's case*, there was no comprehensive policy on the protection of witness in India. Looking upon the gravity of the situation Hon'ble Supreme Court approved a Scheme called as Witness Protection Scheme, 2018 to provide protection to the witness during the trial. The Scheme is the first attempt in this regard and it shall be treated as Law till any appropriate law is framed by the Parliament.

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<sup>41</sup> *Mahender Chawla v. Union of India*, 2018 SCC OnLine SC 2679

<sup>42</sup> *ibid*

The purpose of law shall be fulfilled only when it is implemented in its true sense. Therefore, Hon'ble Apex Court mandates the State government and Union territories to implement the Scheme in its true letter and spirit.

# **EXIGENCY FOR EXPANDING THE CONTOURS OF RAPE: A JUXTAPOSITION OF INDIVIDUAL'S RIGHT TO PRIVACY AND THE INSTITUTION OF MARRIAGE**

Pranjal Sharma\* & Hemendra Singh Sever\*\*

## **INTRODUCTION**

Criminal Law of a country, in its legitimate pursuit to preserve social or solidarity, not only prescribes a set of norms of human behaviour but also outlaws the human conduct that exhibits impudence to these norms and stipulates punitive ‘sanction’ for the perilous outlawed.<sup>1</sup>

However, the kind of conduct to be ‘forbidden and of the formal penal ‘sanction’ considered as best calculated to prevent the officially outlawed conduct depends upon the ‘social setting’ and ‘socio-moral-legal ethos’ of a community. In this sense, the Penal law of a country, therefore, needs to be appreciated and comprehended in the backdrop of its prevailing social, moral & cultural values and political ideologies.

The Indian Penal Code, 1860 (hereinafter IPC), drafted by T. B. Macaulay and his colleague law commissioners is still operative in India by virtue of Article 372 of the Constitution of India. The IPC, like any other criminal law, reflecting the then prevailing sexual mores in India, *inter alia*, criminalizes ‘rape’.

As per the observations of Hon’ble Supreme Court of India in *Bodhisattwa Gautam v. Subhra Chakraborty*,<sup>2</sup> “Rape is a crime against basic human rights and a violation of victim’s most cherished of fundamental rights, namely, the right contained in Article 21.” The question being considered in this paper is whether legislative provisions and criminal delivery system are reflective of the above grave concern.

Perusal and analysis show that rape is condemned in the most eloquent of word far from

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<sup>1</sup> K.I. Vibhute, *Rape And The Indian Penal Code , At The Crossroads Of The New Millennium: Between Patriarchist And Gender Neutralist Approach*, 43:1 JOURNAL OF ILI, 25 (2001).

<sup>2</sup> (1999) 1 SCC 490

recognizing rape as a heinous assault against married women's right their own bodily autonomy and sexuality. Marital rape refers to rape committed when the perpetrator is the victim's spouse. The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent.<sup>3</sup>

It is worth highlighting that at present; only fifty two countries have laws recognising marital rape as a crime.<sup>4</sup> In many jurisdictions across the world, including India, marital rape is not recognised as a crime by law and society. Even though these countries recognise and criminalise rape and prescribe penalties for the same, however, they exempt the application of the rape law when a marital relationship exists between victim and perpetrator. This is often referred to as 'marital rape exception clause'.

The aim of this paper is to examine rape and physical violence together by analyzing the case of marital rape. Part I of the paper traces the history of this marital rape exemption in England in addition to law and debates in the Parliament of India ('Parliament') pertaining to the criminalisation of marital rape. Further, in Part II, we have analysed the lack of criminalisation of marital rape *vis-a-vis* violation of fundamental rights of married women. Part III of the paper highlights the International conventions which India has signed and ratified and is thereby under an obligation fulfil its international commitments. Lastly, in the final section of the paper, after having built a case for criminalisation of marital rape, we have provided some of the suggestions to facilitate the same.

## **STATEMENT OF PROBLEM**

Rape traditionally describes the act of male forcing a female to have sexual intercourse with him. However, this position has substantially changed with the efflux of time. The problem under investigation is how law manages to differentiate symbolically between a woman raped by her husband and raped by some other man. Law has not proved to be an efficient mechanism to control such violence.

## **A HISTORY OF HUSBAND'S IMMUNITY FROM MARITAL RAPE**

The foundation of the marital rape exemption rule is generally attributed to Sir Matthew Hale. Writing extra-judicially, it was stated by him that: "the husband cannot be guilty of a

<sup>3</sup> Indian Penal Code, 1860, No. 45, India Code, § 376, 1860 (India)

<sup>4</sup> UN Women, 2011-2012 *Progress of the World's Women*, 17, (2011)

rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract.”<sup>5</sup>

Despite the dearth of authority, it was not until 1888 that Hale’s doctrine was judicially considered in the English case of *R. v. Clarence*.<sup>6</sup> Still later came the first recorded prosecution of a husband for the rape of his wife in the 1949 decision of *R v. Clarke*.<sup>7</sup> The majority of the judges were of the view that there was no unlawful act occasioning grievous bodily harm and that consent negated what would otherwise have been an assault.

In *Clarke*, Byrne J. accepted Hale’s proposition of the law as generally correct. No authority was cited but it is clear the judge relied on the dicta of Hawkins J. in *Clarence*. The only direct authority on the marital rape exemption rule is *R. v. Miller*.<sup>8</sup> Lynskey J., after an examination of the authorities, came to the conclusion that Hale’s proposition of the law was correct. Accordingly, he held that the husband had no case to answer on the charge of rape. Lynskey J. indicated that his decision would have been different had there been an agreement to separate, particularly if it contained a non-molestation clause as that, in his view, would also have revoked the wife’s consent.

However, it is equally pertinent to recall that recently in 1991 the Court of Appeal<sup>9</sup> and the House of Lords<sup>10</sup>, doubting propriety in the 20th century of the marital rape exemption premised on the Justice Hale’s proposition that a wife cannot retract the consent to intercourse which she gave upon marriage, have ruled that marital rape is an offence. The common law rule of marital rape exemption, according to their Lordships, was based on an absurd, anachronistic and offensive fiction. The English law, thus, through judicial interpretation, has completely abolished the doctrine of husband’s immunity for marital rape.<sup>11</sup>

### ***A History of the Marital Rape Exception in the Indian Context***

The Indian Penal Code (‘IPC’) in §375 criminalises the offence of rape. It is an expansive

<sup>5</sup> Tan Cheng Han, *Marital Rape - Removing The Husband's Legal Immunity*, MALAYA LAW REVIEW, 31:1, 112 (1989).

<sup>6</sup> (1888) 22 Q.B.D. 23.

<sup>7</sup> (1949) 2 All E.R. 448.

<sup>8</sup> (1954) 2 All E.R. 529.

<sup>9</sup> R v. R, (1991) 2 All E.R. 257.

<sup>10</sup> R v. R, (1991) 4 All E.R. 481.

<sup>11</sup> *Supra* note 1, at 41.

definition which includes both sexual intercourse and other sexual penetration such as oral sex within the definition of ‘rape’.

However, in Exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and wife. Thus, a wife under Indian law does not have recourse under criminal law if a husband rapes her.

Without wishing in any manner to overstate the case, it is pointed out that Exception 2 of §375 of the IPC ('exception clause') unreservedly fails to state any reason for the exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape.<sup>12</sup> While the law does not criminalise marital rape, a specific form of marital rape is criminalised, *i.e.* non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise.<sup>13</sup>

This is open for speculation and an analysis of the trajectory of legislative debates and reports of the Law Commission of India ('Law Commission') surrounding marital rape aids us in understanding the reasons behind the exception clause in India.

The first report to deal with this issue was the 42<sup>nd</sup> Law Commission Report.<sup>14</sup> This report highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape, where the former is appallingly viewed as less serious. This report, however, failed to comment on the exception clause itself, *i.e.* whether the exception clause must be retained or deleted.<sup>15</sup>

The Law Commission was directly confronted the question regarding the validity of the exception clause in the 172<sup>nd</sup> Law Commission Report.<sup>16</sup> Here, in the course of consultation rounds, resilient arguments were advanced regarding the validity of the exception clause itself. It was urged that when other instances of violence by a husband toward wife were criminalised, there was no reason for rape alone to be shielded from the operation of law.<sup>17</sup> The Law Commission rejected this argument since it feared that criminalisation of marital rape would lead to “*excessive interference with the institution of marriage*”. In general terms,

<sup>12</sup> *Independent Thought v. Union of India*, AIR 2017 SC 4904

<sup>13</sup> Indian Penal Code, 1860, No. 45, India Code, § 376 B, 1860 (India)

<sup>14</sup> Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971)

<sup>15</sup> *Id.*, ¶16.115

<sup>16</sup> Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000)

<sup>17</sup> *Id.*, ¶3.3.

this report sheds light on the interplay between marital rape and the sanctity of the institution of marriage.<sup>18</sup>

Later in 2012, marking a stern departure from the tone of previous discussions, a committee constituted under Justice J.S. Verma (Retd.) advocated for the criminalisation of marital rape. The committee published the ‘Report of the Committee on Amendments to Criminal Law’ (‘J.S. Verma Report’) in 2012.<sup>19</sup> One of the suggestions given in this report was that marital rape ought to be criminalised.<sup>20</sup> One of the preliminary recommendations was simply that the exception clause must be deleted. The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defence for the accused, or is not relevant while determining existence of consent and that it was not be considered a mitigating factor for the purpose of sentencing.<sup>21</sup>

In *lumen* of this, the Criminal Law Amendment Bill, 2012 (‘Amendment Bill, 2012’) was drafted.<sup>22</sup> The Amendment Bill, 2012 did not take into account the suggestions laid down in the J.S. Verma Report. The Parliament Standing Committee on Home Affairs in its 167<sup>th</sup> Report (‘Standing Committee Report’) reviewed this Amendment Bill, 2012 and also organised public consultations.<sup>23</sup> In this report, it was proposed that §375 must be appositely amended to delete the exception clause. However, the Standing Committee refused to accept this recommendation. The Standing Committee Report argued that, first, if they did so, the “entire family system will be under greater stress and the committee may perhaps be doing more injustice”.<sup>24</sup> Second, the Committee reasoned that sufficient remedies already existed since the family could itself deal with such issues and that there existed a remedy in criminal law, through the concept of cruelty as under §498A of the IPC.

Looking at the reasons advanced by the Government and the holistic evaluation undertaken by various Law Commission reports, upon the final analysis, there are three broad themes in the arguments against criminalisation of marital rape. The first is with regard to the objective of protecting the institution of marriage and as an extension, not interfering with it to ensure

<sup>18</sup> *Id.*, ¶ 3.1.2.1.

<sup>19</sup> Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013).

<sup>20</sup> *Id.*, 113-117.

<sup>21</sup> *Id.*, ¶79 (ii).

<sup>22</sup> The Criminal Law Amendment Bill, 130 of 2012.

<sup>23</sup> Standing Committee On Home Affairs, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, (December 2015).

<sup>24</sup> *Id.*, 47.

that the institution remains sacred. The above line of thought is manifest in the IPC as well as the Law Commission reports. The second deals with the alternative remedies that already exist for a woman to seek recourse through, within the family and in the law itself such as §498A of the IPC, the Protection of Women from Domestic Violence Act, 2005 ('PWDVA, 2005') and various other personal laws dealing with marriage and divorce.

### **MARITAL RAPE EXCEPTION CLAUSE: CONSTITUTIONAL PERSPECTIVE**

Marriage is considered to be a sacred institution that forms the bedrock of our society. It is viewed as deeply personal and the State is seemingly hesitant to disturb this delicate space. Marital rape is a violation of the fundamental rights of a woman, specifically under Articles 14 and 21 of the Constitution of India ('Constitution'). In this Part, we argue that the lack of criminalisation of marital rape infringes the fundamental rights of a woman.

#### ***Marital Rape Exemption Clause Violates Art. 14***

Perusing the anatomy of Exception II to Section 375 of IPC reveals that it like any other criminal law, reflects, through the eyes of T. B. Macaulay and his fellow colleagues, the then prevailing sexual mores in India. It assumes that a woman, through marriage, forgoes forever her right to refuse sexual intercourse with her husband and the husband, thereby, acquires an unconditional & unqualified licence to force sex upon his wife.<sup>25</sup>

However, the idea of marriage has witnessed numerous changes with the efflux of time. Lord Keith, in the landmark judgement of *R v. R*<sup>26</sup> succinctly summarises the above line of thought:

*"Marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband."*

Further, the same proposition is outlined under various provisions of codified matrimonial laws. The codified legislations such as Hindu Marriage Act, 1955<sup>27</sup> (HMA), Hindu Adoption and Maintenance Act, 1956<sup>28</sup> (HAMA), Dissolution of Muslim Marriage Act, 1939<sup>29</sup>, Indian

<sup>25</sup> *Id.* at 28.

<sup>26</sup> (1991) 4 All ER 481.

<sup>27</sup> Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).

<sup>28</sup> Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

<sup>29</sup> Dissolution of Muslim Marriage Act, 1939, No. 08, Acts of Parliament, 1939 (India).

Divorce Act, 1869<sup>30</sup> and Special Marriage Act, 1954<sup>31</sup> (SMA) confer equal rights upon both husband and wife.

The Hon'ble Apex Court of our country has reiterated the same principle in various landmark judgements *inter alia*, *Shayara Bano v. Union of India*<sup>32</sup>, *Joseph Shine v. Union Of India*<sup>33</sup>, *Independent Thought v. Union of India*<sup>34</sup>.

In *Joseph Shine v. Union of India*<sup>35</sup>, the Apex Court declared Section 497<sup>36</sup> of the IPC as ultra vires to Article 14 of the Constitution as it was premised on the belief that women were subservient chattel of the husband. The court opined:

*“...The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or property of their husbands. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.”*

Thus, the presumption of inequality of women before men in marriage fails to withstand the requirements of Article 14.

#### ***Presumption of Irrevocable consent: Unreasonable and arbitrary***

Exception II to Section 375 is premised on the presumption of irrevocable consent of wife for sexual intercourse in marriage. This presumption it is argued, is unreasonable and manifestly arbitrary.

The test of manifest arbitrariness is rooted in Indian jurisprudence. In *E P Royappa v. State of Tamil Nadu*<sup>37</sup>, Bhagwati J. characterised equality as a “dynamic construct” which is contrary to arbitrariness and observed as follows:

*“Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a*

<sup>30</sup> Indian Divorce Act, 1869, No. 4, Acts of Parliament, 1869 (India).

<sup>31</sup> Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

<sup>32</sup> AIR 2017 SC 4609.

<sup>33</sup> AIR 2018 SC 4898.

<sup>34</sup> AIR 2017 SC 4904.

<sup>35</sup> AIR 2018 SC 4898.

<sup>36</sup> Indian Penal Code, 1860, No. 45, India Code, § 497, 1860 (India).

<sup>37</sup> AIR 1974 SC 555.

*positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.”*

It is worth emphasizing that the State itself has recognized the revocable nature of consent for sexual intercourse in the institution of marriage and the same can be substantiated by virtue of Protection of Women from Domestic Violence Act, 2005<sup>38</sup> wherein the wife can obtain a decree for judicial separation, in case of non-consensual sexual intercourse by her husband as the same constitutes sexual abuse within the meaning of Section 3.<sup>39</sup> Similarly, Section 376-B of IPC, 1860 stipulates the significance of consent for intercourse between spouses when the wife lives separately, whether under a decree of separation or otherwise. Thus, the presumption that a woman upon marriage gives an irrevocable consent to sexual intercourse is bad in law.

#### ***Differentia between a married and unmarried woman is not reasonable***

State has power to positively discriminate on the basis of reasonable classification which inherently separates such person from others.<sup>40</sup> However, Exception II to Section 375 of IPC, 1860 is not intelligible, and antithetical to the judgment of Hon’ble SC in *Anwar Ali Sarkar v. State of W.B.*,<sup>41</sup> as marital status of the women does not form a reasonable basis for classification, underlined in Article 14.

More recently in *Independent Thought v. Union Of India*<sup>42</sup> the SC while partially reading down Exception II to Section 375 to the extent that it granted immunity to marital rape committed on wife being a girl between 15 to 18 years of age, on page 4904 of the reports held thus:

“In our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory.”

<sup>38</sup> Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

<sup>39</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, R/Criminal Misc. Application Nos. 26957, 24342 of 2017 and R/Special Criminal Application No. 7083 of 2017.

<sup>40</sup> *State of Rajasthan v. Shankar Lal Parmar*, AIR 2012 SC 1913.

<sup>41</sup> AIR 1952 SC 75.

<sup>42</sup> *Supra* note 34.

Relying upon the reasonable classification doctrine the SC in *Independent Thought*, justly observed that differential treatment to the girl on the basis of marriage is unconstitutional as marriage is no basis of reasonable classification. Therefore, we argue that the exception clause in §375 of the IPC stands in violation of Article 14 of the Constitution.

### ***Marital Rape Exemption Clause Violates Art. 21***

#### *Personal Autonomy is intrinsic to Right to Life under Article 21*

An individual is entitled to sexual autonomy, notwithstanding the marital status, and the same is an integral part of right to privacy protected under Art. 21 of the Constitution which guarantees protection of personal autonomy of an individual.

The Supreme Court has adjudicated upon the jurisprudence of the right to individual autonomy on numerous occasions. A nine judge Bench of the Supreme Court in the case of *K.S. Puttaswamy v. Union of India*<sup>43</sup>, opined that the Right to Privacy in the Indian context includes “the privacy of choice, which protects an individual autonomy over fundamental personal choices.” In *Navtej Singh Johar and Ors. v. Union of India*<sup>44</sup>, the Court held that personal autonomy encompasses the domain of Sexual autonomy.

The authors argue that self-determination of sexual desire is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual.<sup>45</sup> Therefore, any interference in the exercise of sexual autonomy amounts to a violation of Article 21.

#### *Marital Rape Amounts To Violation Of The Right To Privacy*

The view that constitutional rights are inapplicable to the marital sphere as the same constitutes an interference in the “private sphere” is merely use of privacy as a veneer for patriarchal domination and abuse of women. Further, it is submitted that the distinction between “public and private sphere” for the purpose of application of fundamental rights is a farce.

<sup>43</sup> (2017) 10 SCC 1.

<sup>44</sup> AIR 2018 SC 4321.

<sup>45</sup> David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 1000, 1003.

Addressing the argument, a Constitution bench of the Hon'ble Supreme Court in *Joseph Shine v. Union of India*<sup>46</sup>, remarked:

*“Constitutional protections and freedoms permeate every aspect of a citizen’s life - the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.”*

Elucidating upon the supremacy of Personal Autonomy as is guaranteed under Article 21 of the Constitution of India, over the “private and public spaces”, Chandrachud J. in the authority of *K.S. Puttaswamy v. Union of India*<sup>47</sup> propounded that:

*“While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”*

Thus, sexual autonomy of an individual is a constituent of Right to Privacy guaranteed under Article 21 of the Constitution of India and Exception II to Section 375 of the Indian Penal Code, 1860 is violative of the said constitutional guarantee and is subject to constitutional scrutiny.

## **MARITAL RAPE EXEMPTION VIS-À-VIS INDIA’S INTERNATIONAL OBLIGATIONS**

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). India is also a signatory of the Universal Declaration of Human Rights (“UDHR”).<sup>48</sup> The CEDAW

<sup>46</sup> *Supra* note 34.

<sup>47</sup> (2017) 10 SCC 1

<sup>48</sup> *Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, IN NAT'L HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION* 22-25 (2012),

Committee has identified that gender-based violence nullifies various other rights guaranteed under international treaties, including the right to be free from discrimination, the right to life, right to liberty and security, right to equality in the family, and right to health and well-being.

The due diligence requirement under international law treaties, specifically under CEDAW, requires states to “take all appropriate measures” to eliminate all forms of discrimination against women. Furthermore, Article 2(b) of CEDAW mandates states to adopt all legislation necessary to eliminate all forms of discrimination against women. Under the international obligation regarding prevention of violence against women, states are required to prevent, investigate, prosecute, and compensate with due diligence. As such, it has been established that the due diligence requirement under CEDAW requires the criminalization of marital rape under national law.<sup>49</sup>

Marital rape is an infringement on the right to life. The right to life is an essential right guaranteed by all human rights treaties and customary international law. Specific guarantees to the right to life can be found in the ICCPT and the UDHR.<sup>50</sup> Marital rape also violates the right to liberty and security of person. The right to liberty is again guaranteed by the ICCPR and UDHR.<sup>51</sup> Additionally, gender-based violence infringes on the right to equality in the family guaranteed under international obligations.<sup>52</sup> Under the CEDAW, States are required to change social and cultural patterns in order to eliminate prejudices that perpetuate stereotypes between men and women. Maintaining an exception for marital rape perpetuates stereotypes that a woman is the sexual property of her husband negating any semblance of equality within the family.<sup>53</sup>

Criminalizing marital rape refutes the idea that women are the sexual property of their husbands and indicates that marriage should be built on equal grounds between both spouses. As such, eradicating the exception to marital rape is necessary to uphold India’s obligation to

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<sup>49</sup> Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 FORDHAM INT'L L.J. 1519 (2019).

<sup>50</sup> Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 BROOK. J. INT'L L. 153, 194 (2015).

<sup>51</sup> *Id.* at 186.

<sup>52</sup> *Id.* at 192.

<sup>53</sup> *Id.* at 193.

promote equality within the family.<sup>54</sup>

Lastly, criminalizing marital rape is tantamount in upholding India's international obligation to protect the right to health and well-being. Protection of health and well-being is mandated by the UDHR and ICESCR.<sup>55</sup> The Committee on Economic, Social, and Cultural are required to diminish women's health risks by protecting them from domestic violence.<sup>56</sup> Intimate partner sexual violence can cause a number of health consequences physically and psychologically.<sup>57</sup> Maintaining an exception to marital rape jocularly infringes on a state's obligation to protect the health and well-being of women.

## **CONTINUING EFFORTS TO COMBAT MARITAL RAPE: SUGGESTIONS**

It is legitimate to state, clearly and without false pathos that marital rape is a prevalent issue faced by India and there are several actions that need to be taken in order to properly combat its pervasiveness. After arguing for criminalization of marital rape, in this section of the paper, we have proposed certain amendments in the criminal law of the country so as to give legitimate and legislative recognition to marital rape in India. In addition to this, we have presented a number of suggestions which would inevitably aid the State's efforts to constructively combat this indefensible and horrendous crime.

### ***Repealing the Marital Rape Exemption***

At the very least, the marital rape exception, not to put too fine a point on it, needs to be eliminated making rape within a marriage a criminal offense and effectively removing marriage as a defense to rape. It is imperative that the marital rape exception be entirely eradicated from the Indian Penal Code.<sup>58</sup> Similarly, the Code should affirmatively define marital rape as a criminal offense, which would also effectively prevent marriage from being used as a defense to rape claims.<sup>59</sup> Laws are enacted in order to punish unsocial behaviors, provide deterrent against the socially unacceptable actions and generally educate society

<sup>54</sup> *Supra* note 51, at 1542.

<sup>55</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-10, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, art. 12

<sup>56</sup> *Supra* note 52, at 194.

<sup>57</sup> WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 7 (2012).

<sup>58</sup> SHALU NIGAM, THE SOCIAL AND LEGAL PARADOX RELATING TO MARITAL RAPE IN INDIA: ADDRESSING STRUCTURAL INEQUALITIES 18 (2015).

<sup>59</sup> Pranesh Prasad, *A Strategy For Criminalizing Marital Rape in India*, HUFFINGTON POST (Sept. 25, 2016),

regarding the overarching consensus on moral and social conduct.<sup>60</sup> By not criminalizing such conduct and providing marriage as an affirmative defense to rape allegations, the State effectively relates to society that forced conjugal relations, even violent encounters, are socially acceptable behaviors.<sup>61</sup>

### ***A shift from General Evidentiary rules***

Owing to its private nature, proof of marital rape could require a review of the existing rules of evidence and criminal law. For instance, the general rule that force is not a relevant factor might not practically work in cases of marital rape. Statistically speaking, most cases of marital rape are in sync with signs of physical injury or other forms of cruelty, including mental cruelty. Thus, the general rule of lack of force nor being relevant in rape cases will face a shift in cases of marital rape. In the United States of America, thirty-three states have some qualifications regarding the amount of force required to prove marital rape.<sup>62</sup>

Due to the private nature of the crime, very often, the only proof is that of the wife's testimony. In such instances, it becomes pertinent to corroborate charges of rape with other forms of evidence. For example, if the husband has had patterns of cruelty, domestic violence, it will be relevant while determining whether the husband has committed rape, and the Court would look upon it as a contributing factor. This will be in conflict with §§53 and 54 of the Indian Evidence Act, 1872 as past bad character is not relevant. However, in cases of marital rape, this might sometimes be the only significant source of corroborative evidence to prove a history of assault. For example, if a wife applies for protection under the PWDVA, 2005 on the basis of being a victim of 'sexual assault', this must be treated as admissible evidence.

### ***Sentencing Policy***

Thirdly, we agree that there must be no difference in the sentencing policy. §376 of the IPC lays down the sentencing policy. The punishment for rape is between seven years to life imprisonment. However, §376B deals specifically with husband and wife living separately has a different sentencing policy with the punishment between two years and seven years.

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<sup>60</sup> Melanie Randall & Vasanthi Venkatesh, *Symposium on the International Legal Obligation to Criminalize Marital Rape Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AMER. J. INT'L L. 189, 195 (2015)

<sup>61</sup> *Supra* note 59, at 7

<sup>62</sup> Encyclopaedia of Rape, 169 (Merril D. Smith, 1<sup>st</sup> ed., 2004)

This clearly shows that the intention was to bring about a lesser standard for punishing rape when the husband was the convict. However, on grounds of equality as given in Article 14, we argue that this is unconstitutional. There is no justification for having a lesser punishment policy because of the relationship of existence of marriage. In light of this, we propose that §376B be repealed and the sentencing policy work as it does.

## **CONCLUSION**

Thus, we have come at crossroads with the socially, politically and legally tainted discourse on rape in marriage, and the vehement need to safeguard a married woman's fundamental right to equality and individual autonomy. The time is ripe, when the State must shred the cloak of prejudice and bigotry, whilst relieving Constitution from its state of inertia.

Having continually advocated for the criminalisation of rape in marriage, we have clearly established how Exception 2 to Section 375 of the IPC, fails to qualify the test of reasonable classification under Article 14 and trespasses upon an individual's autonomy and right to privacy, which form the *raison d'être* of Article 21.

A symbolic law, embodying certain values and expressing the consensus of the society to adhere to these values, nevertheless, undeniably generates a process of creating social consensus and consequential conditions that are conducive to mobilize such a change. The proposed reforms in the substantive rape law, therefore, would undeniably give a further momentum to the untiring efforts of women's organizations to do away with the 'pro-male', 'male-oriented' and 'gender biased' sexual morals reflected in the Indian law relating to rape. It, if favorably responded to by the legislature, would not only undeniably make the substantive rape law free from the century and a half old 'gender bias' assumptions and the familial colonial hangover but would also take the rape law in a new progressive direction in the new millennial.

## **CORPORATE CRIMINAL LIABILITY: AN ANALYTICAL STUDY**

Monica Yadav\* & Aalamjit Singh Thethi\*\*

### ***Abstract***

*“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.”*

*The development of an economy is largely dependent on the corporate sector, though its stability must not depend on it. Corporate criminality seriously threatens the welfare of the society, considering its presence and impact in most aspects of social and community life, and the number of people it affects. India is not an unknown territory as far as Corporate Crimes are considered. In fact, it is a serious contemporary concern due to multidimensional aspects involved in nature of such kind of crimes, given the number of corporate scams emerging every day and threatening the overall economy and welfare of the State. Corporate Entities are in a position of causing massive physical and economic harm, thus, Corporate Liability in the present context must be strengthened.*

*The traditional perspective towards crime did not include corporate criminality and it was only during the 20<sup>th</sup> Century that the phenomenon of Corporate Criminality and consequently Corporate Criminal Liability emerged. In India, Laws pertaining to Corporate Criminal Liability are being strengthened, particularly after the Bhopal Gas tragedy. However, they are still in a nascent stage. Considering the penetrative reach of Corporates in the various spheres of social existence, and the commercial outlook in our value systems, it becomes even more important to ascertain the Criminal Liability of Corporates.*

**Keywords:** *Corporate Criminality, Corporate Criminal Liability, Corporate Crimes*

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## INTRODUCTION

Due to the nonstop advancements and breakthroughs in science and technology, the world has become borderless which has made dealings and transactions global. This has resulted in the development of sophisticated ways to commit crimes. Large Corporations dominate the global business and are present in every sphere of our life. However, a corollary of this dominance is that large companies have started indulging in criminal activities, and since they are not natural human entities, their activities, and criminal or otherwise, are also not ordinary. Therefore, the concept of Corporate Crime must be clearly defined to enable the ascertainment and affixation of liability to be imposed on them.

According to sociologist David Friedrichs, Corporate Crimes are “illegal and harmful acts committed by officers and employees of corporations to promote corporate and personal interests” (Friedrichs, 2010). Similarly, sociologist David Simon refers to Corporate Crime as “acts of economic domination” (Simon, 2002). According to most definitions, Corporate Crimes victimize the general public, consumers, a corporation’s employees, or a corporation’s competitors. Offences often include acts like corporate stealing, corruption, or fraud and have broad domestic or, in some cases, international implications.

India is not an unknown territory as far as Corporate Crimes are considered. “It is a serious contemporary concern due to multidimensional aspects involved in nature of such kinds of crime, given the number of corporate scams emerging every day and threatening the overall economy and welfare of the state” (GOEL, 2015).

According to Salmond, *“he who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of wrong.”* The word ‘liability’ means the *“quality or state or condition of being legally obligated or accountable.”* In other words, it connotes the legal responsibility or obligation of one person to another or to society, enforceable by civil remedy or criminal punishment. However, the Latin maxim *Actus non facit reum nisi mens sit rea* (the act does not constitute guilt unless done with a guilty mind) implies, there must be a guilty intention or knowledge, *mens rea* behind the act or omission, *actus reus*. But, when it comes to corporate entities, who are recognized by Law as an entity on their own, apart from their individual members in every respect, it becomes difficult to ascertain and affix criminal liability as *mens rea* is not affixable on any one person for the acts of the corporate.

Corporate Criminal Liability<sup>1</sup> has been a subject of great relevance in the contemporary legal world. It is significant to note that in the common law jurisdictions as well as in India, the law governing CCL has been mainly, Judge made law. Therefore, the evolution of the concept of CCL in India can be classified as a long processing effort from the judiciary to fix responsibilities on non-fictitious persons and hold them accountable. The doctrine of CCL is primarily based on the doctrine of *responsible superior* which was brought into Criminal Law from Law of Torts. The doctrine states that a corporation can be made liable criminally, prosecuted and convicted for any act or omission, which can be termed unlawful, of any of its agents, provided agents were acting within the scope of their authority, actual or apparent.

## **EVOLUTION OF CCL**

The history of corporate liability is haphazard and incoherent. Legal thinkers did not believe that corporations could possess the moral blameworthiness necessary to commit crimes of intent.(Elkins J, 1976).

It was the common intent of the people that a corporation has no soul; hence, it cannot have “actual wicked intent”(Brickley, 1981). It cannot, therefore, be guilty of crimes requiring “malus animus”.<sup>2</sup>

Doctrine of CCL became important among doctrinal discussions in the end of 19<sup>th</sup> century. The introduction of a separate juristic personality for a body corporate shows a legal sophistication unmatched in the later developments of CCL. In the early stages for this liability, from around late 1860s to early 1930s, the Courts were not aware of the distinction between strict liability and *mens rea* offence. *Mens rea* was not regarded as particularly problematic so long as the offence did not fit the perceived category of real crime.<sup>3</sup>

The laws, history, politics and economics unique to different countries have had a phenomenal influence on the development and adoption of the doctrine of CCL. This influence has further resulted in different models of CCL. The doctrine has been developed in a different way to reflect the socio economic and historical realities of different nations of the

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<sup>1</sup> hereinafter referred to as CCL

<sup>2</sup> *State v. Morris & Essex R.R.*, 1852

<sup>3</sup> *Mousell v. London and North Western Railway*, 1917

world. The evolution of CCL shows that it is consistent with the principles of criminal law and the nature of corporations. (Pop, 2006)

Furthermore, the development of theories of CCL reveals that criminal liability of corporations is part of an important public policies bargain. The bargain balances privileges granted upon the legal recognition of a corporation, such as limited liability of corporate shareholders and the capability of a group of investors to act through a single corporate form, with law compliance and crime prevention pressures on the managers of the resulting corporate entity (Gruner, 2004).

The Courts in early 20<sup>th</sup> century began to strip the corporations from the immunity provided by the criminal law by questioning and interpreting the fact that words like “everyone” mentioned in various criminal statutes can possibly include corporations as well. However, the most challenging problem to imposing CCL on corporations was of attributing *mens rea* to a juristic person i.e. the corporation. The breakthrough came in 1915 when the English House of Lords laid down the principle of identification theory<sup>4</sup> wherein it was held that “corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will, must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation”.

Under the principles of civil as well as criminal laws, a corporation can be held directly as well as vicariously liable for the offensive acts or omissions done by agents if they are within the scope of employment even if they are by subordinate agents for example truck drivers, clerical workers and salesmen etc. even when those agents violate express instructions given by the corporation.<sup>5</sup> The general rule is that a corporation will be criminally liable for the illegal acts of its employees if the employees are acting within the scope of their authority and their conduct benefits the corporation.<sup>6</sup>

“A corporation may be held criminally responsible for the illegal conduct of its employees if:

- (1) the illegal act was committed while the employee was acting within the scope of

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<sup>4</sup> *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co.*, 1915

<sup>5</sup> *USA v. Basic Construction Co.*, 1983

<sup>6</sup> *USA v. MacDonald & Watson Waste Oil Co.* , 1991

employment, and (2) the employee's conduct was undertaken, at least in part, for the benefit of the corporation.”<sup>7</sup>

In India, the history of formation of Laws governing the conduct of companies began with the passing of the Joint Stock Companies Act, 1850 (hereinafter known as ‘JSCA’). The continuous process of amending and consolidating of JSCA to improve the provisions in order to keep the companies in check resulted in the passing of the Companies Act, 1956. However, it was still not competent enough to deal with all the possible business concerns and effectively cover all modes of incorporation and regulate the conduct of companies. The 1956 Act was further amended several times and was successfully succeeded by the Companies Act, 2013.

Section 11 of IPC, 1860 defines the term “person” which includes any company or association of people whether incorporated or unincorporated. Thus, penalties under IPC are equally applicable to wrongful acts committed by corporations, however, difficulty surfaces in attributing crimes to the company and in determining the guilty mind.

In *Oswal Vanaspati & Allied Industries v. State of U.P.*<sup>8</sup>, it was held that “a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. It was further held that a company cannot enjoy immunity from prosecution on the ground that mandatory punishment of imprisonment cannot be awarded to it and, if found guilty, a sentence of fine alone can be awarded. It is observed by the Hon’ble Court that a sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal.”

## **THEORIES OF CORPORATE CRIMINAL LIABILITY**

Some theories which have been developed through Judicial interpretations and by Scholars exploring the concept of Corporate Criminal Liability are briefly discussed below:

### **1. Theory of Vicarious Liability/ *Respondent superior*:**

Courts in England were the pioneers and explorers in setting up this concept. They developed and applied the theory of vicarious liability through their case laws. The

<sup>7</sup> *USA v. Sun-Diamond Growers of Cal.*, 1998

<sup>8</sup> (1993), 1 Comp LJ 172

American legislation later developed a similar concept and gave it the name of the doctrine of *respondeat superior*. England was the first to establish that the companies can be vicariously liable for the criminal acts committed by the employees, employer and agents of that company. It is pertinent to note that *respondeat superior* as a principle has a wider scope among these doctrines. “It derives from a mixture of law of torts and contractual law outlining that; a corporation may be held criminally liable for the acts of any of its agents who (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation.”<sup>9</sup> The English Courts focus on the harm done to society whereas the US Courts consider the benefits in order to find liability.

## **2. Theory of Identification:**

The doctrine of identification is different from the general rules for finding liability as it “effectively merges for legal purposes the individual and the company into one entity. There is thus only ever a bipartite relationship: the company and the third party” (Grantham, 2000). The doctrine of identification developed in the case *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co.*<sup>10</sup> where it was held that the fault or wrongdoing of the managing officer of the conduct of the corporation was wrongdoing of the corporation and, therefore, the corporation shall be held liable for such wrongdoing. It was also held that identification theory is based on a person who is the “directing mind and will” of the corporation.

## **3. Theory of Aggregation:**

In the late 1980s, in the case of *USA v. Bank of New England*<sup>11</sup>, the Court developed and undertook the Aggregate Theory where it was established that a corporation can still be liable for a criminal act even when not a single agent could be particularly made responsible for complete knowledge and info about such act. The Court held that “the knowledge of the corporation, in this case the bank, is the cumulative knowledge of every employee combined.”

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<sup>9</sup> *USA v. A & P Trucking Co.*, 1958

<sup>10</sup> (1915 AC 705 at 713)

<sup>11</sup> (821) F. 2nd 844 1987

#### 4. Corporate Fault Theory

According to this theory, only those types of fault which are the product of corporate mens rea can result in corporate liability (Quaid, 1998). Fault is attributed to any person based on four factors namely, fair opportunity, answerability, accountability and justification. These principles underlie the doctrine of *mens rea* (Ashworth, 1991). The most radical conception of *mens rea*, however, is that which Fisse calls strategic.<sup>12</sup> This is *mens rea* manifested through policies and corporate structures. Corporate decisions are a result of bargaining processes and procedures which are very difficult to be traced back to the individuals who contributed to them. According to Fisse, corporate fault is not dependent on any single person, but is distinct from any individual (Fisse, 1991). Strategic mens rea thus reflects the true corporate nature of the acts of the corporation.

### ESTABLISHING CORPORATE CRIMINAL LIABILITY

For the purpose of establishing CCL, two requirements must be fulfilled:

1. The act of the person shall be in the scope of his employment: i.e. the employee, agent or manager committing the wrongful act shall be performing such act in the scope of his employment. In other words, he must be carrying on the official tasks which have been designated to him by the corporation.
2. Benefit to the Corporation: that the employee's or agent's act must, in one or the other way, benefit the corporation. The corporation shouldn't reap the benefits directly nor the benefits should be received or enjoyed completely by the corporation alone; it's just that the illegal act which is performed must not be contrary to the interests of the said corporation.

### LEGAL PROVISIONS RELATING TO CORPORATE CRIMINAL LIABILITY

The need and necessity of the criminal liability of corporations in India has been questioned very often. Another thing that has been asked frequently is that when we refer to CCL, are we talking about criminal organizations or corporate criminals and there is no fixed answer to

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<sup>12</sup> (Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 1983)

these questions. Each case must be judged and examined differently as no two cases are the same.

There are numerous Statutes that have been enacted to legislate specific areas which include provisions for offences committed by corporations, for example, Transplantation of Human Organs Act, 1994, The Food and Safety Standard Act, 2006, The Narcotic Drugs and Psychotropic Substances Act, 1985, The Income Tax Act, 1961, Code of Criminal Procedure, 1973, The Prevention of Money Laundering Act, 2002, the Prevention of Corruption Act, 2018 etc.

Besides these specific Statutes, there are various provisions in the Companies Act, 2013 which deal with criminal offences of corporations and their liabilities. These provisions include the offences namely, Section 53 i.e. Prohibition on issue of shares on discount, Section 57 i.e. Punishment for personation of shareholder, Section 58 i.e. Refusal of Registration and Appeal Against Refusal, Section 118 i.e. Minutes of proceedings of General Meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot, Section 128 i.e. Books of account, etc., to be kept by Company, Section 129 i.e. Financial Statement, Section 134 i.e. Financial statement, Board's report, etc, Section 182 i.e. Prohibitions and restrictions regarding political contributions, Section 184 i.e. Disclosure of interest by the director, Section 187 i.e. Investments of Company to be held in its own name, Section 188 i.e. Related party transactions, Section 447 i.e. Punishment for fraud, Section 449 i.e. Punishment for false evidence etc

Furthermore, IPC also prescribes for punishment of certain offences by corporate entities. For example, Section 2 of the IPC states that "Every person shall be liable to punishment under this code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India." Section 11 of the IPC states that "the word person includes any Company or Association or body of persons, whether incorporated or not."

The use of the phrase "every person" in section 2 as contrasted with the use of the phrase "any person" in section 3 as well as section 4(2) of the IPC is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code.<sup>13</sup>

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<sup>13</sup> *Mobarik Ali Ahmed v. State of Bombay*, AIR 1957 SC 857

By reading section 2 and section 11 together, the concept of CCL can be derived. A corporation can be liable for committing any criminal act which has been mentioned in the IPC. The problem arises with the punishment of these criminal acts. As it has been mentioned time and again, a corporation is a juristic person which has no physical presence and therefore cannot be imprisoned. Some of these criminal offences have imprisonment as punishment and some offences have imprisonment as well as fine. Corporations can only be punished where fine is available as an option of punishment.

## **EVOLUTION OF CCL THROUGH JUDICIAL PRONOUNCEMENTS**

In India, the Bhopal Gas leak tragedy in 1984 was one of the most terrible industrial calamities in the whole world. This tragedy raised various issues about the liability of MNCs, both civil as well as criminal, when these MNCs are engaged in intrinsically harmful activities. The Apex Court of India in the case *M.C. Mehta v. Union of India*<sup>14</sup> laid down that Absolute Liability is an extension of the principle of strict liability which was given in the case of *Rylands v. Fletcher*<sup>15</sup>. The Court stated that when a corporation is carrying on an intrinsically harmful activity, then, in the event of any damage, it shall have absolute liability and it shall not come under any exceptions which are provided in the case of *Rylands v. Fletcher*.<sup>16</sup>

The Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement*<sup>17</sup>, considered the question as to whether a corporation, being a juristic entity, could be prosecuted for a wrongful act which is punishable with mandatory imprisonment and fine and if such corporation is found guilty of the wrongful act, can the Court impose a punishment which comprises of fine only. The Apex Court stated that there is no doubt that a corporation can be prosecuted, and punishment can be imposed for such wrongful acts which may be deemed criminal. The Court observed that, “Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted rule is that except for such crimes, as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents. “The Apex Court

<sup>14</sup> AIR 1987 SC 1086

<sup>15</sup> (1868) UKHL 1

<sup>16</sup> Ibid.

<sup>17</sup> (2006) 4 SCC 278

further observed that just like in the Law of Torts, the general principle exists that a corporation shall be liable for the wrongful acts or omission of an employee or agent, done by him while exercising powers authorized to him by the corporation, and without proof that his act was expressly authorized by the corporation.

Various decisions of the Supreme Court reflect the view that the Court should punish a body corporate with such a punishment, which it would have given to a person if the person had committed such offence as the body corporate. Even if corporations cannot be punished for certain criminal acts, the authorities acting on behalf of it shall be punished. For example, in the case of *U.P Pollution Control Board v. Modi Distillery & Others*<sup>18</sup> an industry discharged its toxic wastes in the nearby drain. This act was in breach of the Water (Prevention and Control of Pollution) Act, 1974. Thus, the Court held that the authority responsible for this act of the company shall be prosecuted and punished, even if the company cannot be prosecuted. This decision of the Court was reinforced in the case of *Anil Hada v. Indian Acrylic Ltd.*<sup>19</sup>

In the landmark case of *Iridium India Telecom Ltd. v. Motorola Inc.*<sup>20</sup> the Supreme Court laid down the law that a company may be indicted even in respect of the offences where *mens rea* is essential. By stating this, the Supreme Court changed the prevalent view of the High Courts and said that it was erroneous.

Later in the case of *Sunil Bharti Mittal v. Central Bureau of Investigation and Others*<sup>21</sup>, the Supreme Court brought the concept of alter ego and held that “the principle of alter ego can only be applied to make the company liable for an act committed by a person or group of persons who control the affairs of the company as they represent the alter ego of the company.”

## **CONCLUSION AND SUGGESTIONS**

Even though the legislations governing CCL in India have come a long way from where these used to be, these still have a long way to go. Many corporations get acquitted from liability because of technical doubts and uncertainties. Even if a corporation is convicted of criminal

<sup>18</sup> 1988 AIR 1128

<sup>19</sup> 1999 Supp(5) SCR 6

<sup>20</sup> (2011) 1 SCC 74

<sup>21</sup> (2015) 4 SCC 609

offence the only punishment which can be awarded is of fine as it cannot be imprisoned. The corporations are of the mind frame that they can commit or omit any activity which is a criminal offence and get away with it by paying the fine prescribed to them.

There are a number of suggestions which can be implemented by the legislature of India so as to make the concept of CCL more effective:

- As it was stated in the 47<sup>th</sup> Report of the Law Commission, the Courts in India shall be given some authority as to give penalties as it deems appropriate based on the facts of the case.
- The concept of Corporate Culture should be introduced by the Legislature in India. Corporate culture includes amalgam of policies, standing orders, regulations and institutionalized practices of the corporation. The Corporate Culture reflects the pervasive values, beliefs and attitudes that characterize the corporation and reflects its practices.
- A legislation which is similar to the “The Corporate Manslaughter and Corporate Homicide Act, 2007” of the United Kingdom should be introduced in India which states that a corporation can be held liable for the offence of manslaughter.
- The range of penalties should be expanded and it should be inclusive of dissolution of company, judicial supervision, closing premises which were used for wrongful acts, disqualification from public tenders and confiscation of assets, orders for corrective action by the corporation, community service and publication of such offence committed.

## HANDCUFFS ON COMPANIES FOR A GREENER FUTURE

Sunidhi Hegde\*

### INTRODUCTION

“At the advent of steam and electricity the muse of history holds her nose and shuts her eyes.” – H.G. Wells, 1918<sup>1</sup>

History is witness to the fascinating evolution of humans from mere cave dwellers to modern suit wearing men. With rapid developments in various fields, the world continues to grow into a complex amalgamation of people and their interests. None of it would have been possible were we not blessed with a planet with habitable conditions. The Earth is at just the right distance from the Sun to provide the most apt conditions for life to thrive. The probability of such an event occurring in a universe, so vast that the human mind is yet to comprehend the expanse of, is an extremely rare occurrence. Given the near improbable circumstances on which our existences were conceived, we should be grateful of the resources that enable us to lead lives of tranquillity, luxury, and comfort. Instead, we squander and lay waste to the very land we build our abodes on and the very elixir of life that we consume.

Large multinational companies exploit and damage the environment. The wastes generated by industries are poorly managed and released into the ecosystem potentially harming the water, the land, and the air in their vicinity. A 2017 study by the CDP and the Climate Accountability Institute (CAI) listed out 100 companies that were responsible for 71% of greenhouse emissions.<sup>2</sup> The study segregates the emissions into two parts – Scope 1, which is the resultant of direct operational emissions; and Scope 3, which is the emission from the use of sold products. The increased extraction of fossil fuels by the companies is at the core of the disastrous statistics.<sup>3</sup> After the establishment of the International Panel on Climate Change in

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<sup>1</sup> H.G. WELLS, IN THE FOURTH YEAR: ANTICIPATION OF A WORLD PEACE (1918).

<sup>2</sup> Tess Riley, *Just 100 companies responsible for 71% of global emissions, study says* (July 10, 2017), Available at: <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> (Accessed on: 30<sup>th</sup> October, 2019).

<sup>3</sup> PAUL GRIFFIN, DR., *Carbon Majors Database* (July, 2017), Available at: <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf> (Accessed on: 30<sup>th</sup> October, 2019).

1988, it has been found that the burning of coal and other fossil fuels has contributed to global warming doubly so.<sup>4</sup> The study revealed ExxonMobil, Shell, BP, Chevron, Peabody, Total and BHP Billiton to be the highest emitting investor-owned companies, and Saudi Aramco, National Iranian Oil, Coal India, Permex, and PetroChina to be the highest emitting state-owned companies.<sup>5</sup>

The Centre for Public Integrity published a report in 2017 on how industrial waste was responsible for the contamination of drinking water in the USA. In the 1960s and the 1970s, Ford Motor Co. dumped over 350,000 tonnes of toxic sludge in Ringwood, New Jersey contaminating their groundwater with arsenic, lead, and other harmful chemicals. Traces of these contaminants are still found after four long decades. Companies like Anaconda Aluminium (Montana), Gulf State Utilities (Louisiana), and Conklin Dumps (New York) have contaminated water with lead, chromium, benzene, and other volatile organic chemicals.<sup>6</sup>

Corporate giants like Coca-Cola, Nestle, PepsiCo, and Mondelez in the food production industry are the most plastic polluting companies in the world. Coca-Cola was named the top global polluter twice in a row in the global audit of Break Free from Plastic Movement.<sup>7</sup>

In India, Mumbai's river Mithi was a victim of unprecedented effluents released by industries, clashing governments and poor enforcement by pollution control agencies.<sup>8</sup> A study by SRM University revealed that India had twice the amount of global average of polychlorinated biphenyls (PCBs). PCBs are synthetic organic chemicals found in electrical equipment, paints, adhesives, etc.<sup>9</sup>

A team from the Indian Institute of Soil has revealed that small-scale industries proved to be

<sup>4</sup> *Ibid.*

<sup>5</sup> *Supra* note 3.

<sup>6</sup> Clair Caulfield, Bryan Anderson, *Industrial Waste Pollutes America's Drinking Water* (August 17, 2017), Available at: <https://publicintegrity.org/environment/industrial-waste-pollutes-americas-drinking-water/> (Accessed on: 30<sup>th</sup> October, 2019)

<sup>7</sup> Sally Ho, *Coca-Cola Named Most Polluting Brand on Earth for Second Year in a Row* (October 29, 2019), Available at: <https://www.greenqueen.com.hk/coca-cola-most-polluting-brand-on-earth-for-second-year-in-a-row/> (Accessed on: 30<sup>th</sup> October, 2019)

<sup>8</sup> Vaishnavi Chandrashekhar, *Dying Waters: India Struggles to Clean Up its Polluted Urban Rivers* (February 15, 2018), Available at: <https://e360.yale.edu/features/dying-waters-india-struggles-to-clean-up-its-polluted-urban-rivers> (Accessed on: 30<sup>th</sup> October, 2019)

<sup>9</sup> Subhojit Goswami, *Chennai's soil, Delhi's air most contaminated due to high PCB concentration: Study* (February 26, 2017), Available at: <https://www.downtoearth.org.in/news/environment/chennai-s-soil-and-delhi-s-air-most-contaminated-due-to-pcb-concentration-study-57217> (Accessed on: 30<sup>th</sup> October, 2019).

more hazardous than big industries as they made no efforts to install effluent treatment plants.<sup>10</sup> Nagda, a town in Madhya Pradesh is home to several textile industries. The industries generate huge amounts of wastewater, which percolates to the river Chambal. The water utilised for irrigation of agricultural crops is severely polluted with sodium, chlorine, and sulphates. Prolonged application resulted in the increase of salinity in the soil and was responsible for accumulation of salts in the root zone level.<sup>11</sup>

Companies repeatedly avoid complying with environmental regulations. One such example is of the Benma Beer Factory located in Tianshiu, Gansu province of China, in association with Carlsberg Beer Company of Denmark, failed to construct a waste-water treatment facility and discharged industrial waste across the water source area of the eastern city for ten years. This severely contaminated the water meant for consumption. Despite several governmental interventions, Benma found a way to work around this inconvenience by paying a fine of 5000 Yuan twice a year than to construct a treatment plant, which would cost it 3.9 million Yuan.<sup>12</sup> As Mr. Robert White remarked, it is easier and cheaper to pollute than to do the right thing.

## **CRIME AND LIABILITY**

Attempts at defining crime have not been so fruitful because of the changing notions. It has to factor in parameters like the values of a particular group and society, its ideals, faith, religious attitudes, customs, traditions and taboos, the form of government, political and economic fabric of the society, and others.<sup>13</sup> Blackstone said, 'a crime is a violation of public rights and duties due to the whole community, considered as a community.'<sup>14</sup> The criminologist Edwin Sutherland enumerated the characteristics of a crime, rather than defining the term. He postulated that crime is a violation of the criminal law, that it gets a political and penal sanction.<sup>15</sup>

The concept of crime emerged back in the days when communities were small and an

<sup>10</sup> J.K. SAHA ET AL., *Soil Pollution – An Emerging Threat to Agriculture*, ENVIRONMENTAL CHEMISTRY FOR A SUSTAINABLE WORLD 10, DOI 10.1007/978-981-10-4274-4\_11271.

<sup>11</sup> *Ibid*, at p. 281

<sup>12</sup> WACHHOLZ, SANDRA. (2012). *Global Environmental Harm. Criminological Perspectives* EDITED BY ROB WHITE 2010. *Environmental Conservation*. 39. 95-96. 10.1017/S0376892911000348.

<sup>13</sup> K.D. GAUR, CRIMINAL LAW: CASES AND MATERIALS 33 (2009), ISBN: 978-81-8038-584-1.

<sup>14</sup> 4 B1 Comm 5.

<sup>15</sup> EDWIN H SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 4 (1965).

individual did something unforgivable. In communities where religion and duty mingled with each other, a wrong would both be a crime and apostasy. The punishment was severe as the intention was to induce deterrence towards such acts, like banishment, lashes, public hanging, beheading etc. In the Anglo-Saxon period, a tariff known as wite was introduced which was paid for the infringement of the king's peace. This was reportedly the first time a wrong was not simply the affair of the injured individual.<sup>16</sup> It brought in the responsibility of the State. The money was paid to the victim or his family, evidence that strict or absolute liability had existed then.

## **CRIMES AGAINST THE ENVIRONMENT**

Environmental crime is a new threat that is dredging the world of its resources that we rely on for our livelihoods.<sup>17</sup> It is the criminal exploitation of the world's natural resources<sup>18</sup>, constituting acts or activities in violation of environmental legislations, which cause significant harm to the environment and human health.<sup>19</sup> The definition largely remains ambiguous, posing further problems for law enforcement.

The monetary value of revenue generated by environmental crime estimated at USD 91-259 billion annually.<sup>20</sup> It is considered as one of the most profitable areas of international crime. A combined study by the UNEP and the INTERPOL found that it is the fourth largest sector of crime.<sup>21</sup> The comprehensive study by the UNEP – 'The State of Knowledge of Crimes that have Serious Impacts on the Environment'<sup>22</sup> revealed that the benefits arising out of the crime and the regulatory lapses are highly responsible for the persisting problem.<sup>23</sup>

Individuals, companies, governments, and informal criminal networks may commit the offences.<sup>24</sup> The UN Environment Organisation in their study listed five types of environmental crime – a) Wildlife Crime, b) Illegal Logging, c) Illegal Fishing, d) Pollution Crime, and e) Illegal Mining. For the purposes of this research paper, the study pertains to

<sup>16</sup> WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW (1936).

<sup>17</sup> NELLEMANN ET AL., *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development and Security. A UNEP-INTERPOL Rapid Response Assessment* (2016), ISBN 978-82-690434-1-9.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Environmental Crime*, Available at: <http://www.grida.no/activities/9> (Accessed on: 30<sup>th</sup> October, 2019)

<sup>20</sup> NELLEMANN ET AL., *The State of Knowledge of Crimes that have Serious Impact on the Environment* 1 (2018).

<sup>21</sup> *Supra* note 17.

<sup>22</sup> *Supra* note 20.

<sup>23</sup> *Supra* note 20, at p. 1.

<sup>24</sup> *Supra* note 20.

pollution crime.

Pollution crime is the “illegal introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity, or interference with legitimate uses of the environment”, by M.W. Holdgate.<sup>25</sup> The types are classified into air, land, and water, which is a resultant of other connected illegal activities like emission of pollutants, illegal dumping and trade of wastes. They threaten not only human health but also local ecosystems, thereby affecting defenceless animals and plants.<sup>26</sup> Companies, be it small or large, are responsible for environmental pollution because of mis-compliance of laws and regulations that govern them.

One of the major difficulties with environmental crime is the general lack of awareness among people. The UNEP attributed the lack of data, the limited use of legislations, lack of institutional will and governance, lack of enforceability, lack of national and international cooperation and information, contributing to the addition of complications.<sup>27</sup>

### ***EFFECTS OF ENVIRONMENTAL CRIME***

*On the environment:* Accelerated degradation of natural resources, continued pollution and habitat loss are rampant. Ecological consequences include degradation of soil, water, and air quality, and disruption of local climate systems.<sup>28</sup> The illegal and uncontrolled production of chlorofluorocarbons (CFCs), hydro-chlorofluorocarbons (HCFCs) contribute to ozone depletion, which in turn weakens animal immune systems and reduces productivity in plants and phytoplanktons.<sup>29</sup>

*On the human health:* Pollution results in death and extreme disability in the poorest of countries.<sup>30</sup> Prolonged consumption of CFCs, HCFCs and other ozone depleting substances has led to skin cancers, photo aging of skin, cataracts and has weakened the human immune

<sup>25</sup> M.W. HOLDGATE, A PERSPECTIVE OF ENVIRONMENTAL POLLUTION (1980).

<sup>26</sup> Allan Meso, *Environmental Crimes are on the rise, so are efforts to prevent them* (September 21, 2018), Available at: <https://www.unenvironment.org/news-and-stories/story/environmental-crimes-are-rise-so-are-efforts-prevent-them> (Accessed on: 30<sup>th</sup> October, 2019).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 20, at p. 4.

<sup>29</sup> L. ELLIOTT, W.H. SCHÄDLE, HANDBOOK OF TRANSNATIONAL ENVIRONMENTAL CRIME 6 (2016), ISBN 978-17-8347-623-7.

<sup>30</sup> *Supra* note 20, at p. 5.

system.<sup>31</sup>

*Socio-economic development:* Poverty-ridden parts of the world have higher number of environmental crimes. They erode legal markets by undermining industries and threatening the employment of people across multiple sectors.<sup>32</sup> They are known to promote tax evasion, which directly creates a deficit in the collection of tax revenue. Loss of tax revenue by the government was estimated atleast at USD 9-26 billion annually.<sup>33</sup> To add to the woes, it also brings in money laundering and fraud, furthering stressing the flimsy fabric of economies of poor countries.

## **LIABILITY OF COMPANIES**

The term corporation is a body of human beings united for forwarding certain of their interests and must have an organ through which it acts.<sup>34</sup> The attachment of a juristic personality to a company may be traced back to the Roman law. English Common law did not recognise this until the fifteenth century.<sup>35</sup> The existence of liability of companies was a matter of doubt due to technical difficulties of procedure and the theoretical difficulty of imputing wrongful acts or intentions to fictitious persons.<sup>36</sup> One of the grounds was the lack of logic to prove intent as a “corporation has no mind”.<sup>37</sup> This dilemma was put to rest by the alter ego doctrine that attributed to the corporation the mind and will of the natural person or persons who have management and control of the actions of the corporation in relation to the act or omission in point.<sup>38</sup>

### **TORTIOUS LIABILITY**

The liability of companies on torts is based on the doctrine of vicarious liability for the acts of the employees or agents. The company is liable when the employees or the officers commit the torts within the scope of their employment. The extent is the same as a principal is liable for the torts of his agent or a master for the torts of his servant.<sup>39</sup> A company may

<sup>31</sup> *Supra* note 29.

<sup>32</sup> *Supra* note 20, at p. 5.

<sup>33</sup> *Supra* note 17, at p. 7.

<sup>34</sup> R.C. NIGAM, LAW OF CRIMES IN INDIA(1964).

<sup>35</sup> GOWER, PRINCIPLES OF MODERN COMPANY LAW 948 (1992).

<sup>36</sup> *Abrah v. North Eastern Railway Co.*, (1883) 11 App. Cas 247.

<sup>37</sup> *Stevens v. Midland Counties Ry. Co.*, (1854) 10 Ex. 352.

<sup>38</sup> *Lennard's Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd.*, (1915) AC 705, at 713.

<sup>39</sup> RATANLAL & DHIRAJLAL, LAW OF TORTS 37 (2016).

thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence. The Judicial Committee of the Privy Council in *Meridian Global Funds Management Asia Ltd. v. Securities Commission*<sup>40</sup> held that the company is responsible in tort and under a system of government regulation for the acts of the employee in performing that function, those acts are later repudiated or reversed by a director of the company.

### ***CRIMINAL LIABILITY***

It determines the criminal liability of corporate bodies and the criminal acts of its employees under such a capacity. The US Department of Justice Guidance laid down that corporations be treated no differently because of their artificial nature. Certain crimes carry a substantial risk of great public harm, like environmental crimes; hence, there may be a federal interest in the indictment of such a company.<sup>41</sup> Some factors must be considered to reach a decision:

- The nature and the seriousness of the offence, including the risk of harm to the public and applicable policies and priorities;
- The pervasiveness of wrongdoings within the corporation;
- The company's history of similar conduct in prior civil, criminal, and regulatory enforcement actions against it;<sup>42</sup>

The liability of companies arises from the principle of *respondeat superior*, which establishes that the principal is responsible for the acts of its agents. The essentials of establishing such a liability include –

*Act must be within the scope of employment:* The common law structure and the civil law structure have slightly different standings here. The common law system mandates that the company be held liable for the acts of its employees. The civil law system in the US states that an illegal act must be “authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”<sup>43</sup> However, in the case of *The*

<sup>40</sup> [1995] AC 423, at 427

<sup>41</sup> U.S. Department of Justice Guidance, Federal Prosecution of Corporations (June 16, 1999).

<sup>42</sup> *Ibid.*

<sup>43</sup> MPC § 2.07 (1) (c).

*President Coolidge*<sup>44</sup>, the court upheld the criminal liability of a steamship company for polluting the waters even though the employee dumping refuse overboard was a mere kitchen worker.

*Act must have been done for the benefit of the corporation:* It is pertinent that the behaviour of the agent be beneficial to the corporation. However, it has also been established that the company may not directly benefit or not everybody in the company may receive the benefits of the act but it is enough that the illegal act is not against the corporate interests of the body.<sup>45</sup>

In addition to this, the Doctrine of Wilful Blindness and the Doctrine of Collective Blindness are also utilised to establish criminal liability. The Doctrine of Wilful Blindness states that companies shall be criminally liable if they knowingly ignore the ongoing criminal activities.<sup>46</sup> The Doctrine of Collective Blindness is applicable when it is not the fault of a single employee but several others too. The sum of knowledge of the employees is also taken into consideration.<sup>47</sup>

Sweden, in the 1960s, was a pioneer in using criminal law to develop the controlled potentiality in environmental law. Empirical findings showed that the risk of criminal responsibility for environmental crimes and pollutions on an industrial level did not exist in many countries.<sup>48</sup> Legislators, as a result, lowered the prerequisites for individual responsibility and the standards of mens rea while dealing with industrial perpetration.

## **THE STOCKHOLM DECLARATION, 1972**

The Stockholm Declaration brought out environmental issues out before the international community. It enlightened the world about the essentiality of preservation of the environment and implored the countries to establish social and legal frameworks ensuring the protection of the environment from mindless exploitation. It perpetuated that the natural resources must be safeguarded for the present and future generations. Principle 6 of the Declaration propagated

<sup>44</sup> 101 F.2d 638 (9th Cir. 101).

<sup>45</sup> AKHIL MAHESH, CORPORATE CRIMINAL LIABILITY (February 4, 2015), Available at: <https://www.lawctopus.com/academike/corporate-criminal-liability/ISSN 2349-9796> (Accessed on: 30<sup>th</sup> October, 2019)

<sup>46</sup> *Ibid.*

<sup>47</sup> *Supra* note 45.

<sup>48</sup> INDRAJIT DUBE, ENVIRONMENTAL JURISPRUDENCE – POLLUTER’S LIABILITY 45 (2007) ISBN 978-81-8038-152-2.

that “the discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems.”

## **THE RIO DECLARATION, 1992**

The Earth Summit reaffirmed its predecessor while adding its own elements to the treaty. It was declared as per Principle 11 that States shall effect environmental legislation in such a manner that it should reflect the developmental standards they wish to see. It also vested the States with the duty to enact a national law establishing liability and compensation for victims of pollution and environmental damage. Further, it also encouraged the States to engage International law to develop liability and compensation for environmental damage. It stated that the principle of the polluter bearing the cost of pollution must be followed.

## **OTHER TREATIES**

The Vienna Convention dealt with steps to curb ozone depletion. Additionally, the Rotterdam Convention and the Basel Convention deal with consent procedure for international trade of pesticides and hazardous, and transboundary movements of hazardous wastes and their disposal respectively chemicals. Despite numerous conventions and covenants on the international scale for the protection of the environment and prevention of pollution, there are next to none for holding companies accountable for crimes against the environment.

## **INDIAN LAWS**

The Indian environmental jurisprudence heavily draws from the Article 21 of the Constitution of India, 1950, where the right to life and personal liberty were upheld by several landmark judgments. Indian environmental legislation took its tangible form after India was signatory to the Stockholm Declaration. India has nearly 200 legislations that deal directly or indirectly with environmental pollution and degradation, which can be segregated into two broad categories – supportive legislation and environmental Lex specialis.

## **THE INDIAN PENAL CODE, 1860**

Provisions under the Code may be classified under supportive legislation. Section 11 of the Code includes a company within the purview of the word ‘person’. Crimes against the

environment may be classified as offences of public nuisance, which may be any act which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.<sup>49</sup> Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.<sup>50</sup> Whoever voluntarily vitiates the atmosphere in any place to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine, which may extend to five hundred rupees.<sup>51</sup>

#### ***THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974,***

The Water Act was passed post the recommendations of the 1962 Committee to arrest the problem of pollution of river and streams due to massive industrialization and urbanization. The objective discouraged the discharge of untreated industrial effluents. It deals with offences by companies. It states that every person in charge for the conduct and business of the company shall be deemed to be guilty of the offence provided he proves that all due diligence was undertaken to prevent the offence.<sup>52</sup> If it is brought to light that the offence was given due consent, or was a result of negligence on the part of any director, manager, secretary or other officer of the company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.<sup>53</sup> The Act also elaborates on the cognizance of the offences. Section 49 empowers only complaints from the State Pollution Control Board or the Central Pollution Control Board submitted to the Metropolitan or the Judicial Magistrate. The severest of penalties under this Act does not exceed a fine of Rs. 10,000/- and an imprisonment period upto seven years.

#### ***THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981***

This enactment provides for the prevention, control and abatement of air pollution and the

<sup>49</sup> §268, The Indian Penal Code, 1860.

<sup>50</sup> §277, The Indian Penal Code, 1860.

<sup>51</sup> §278, the Indian Penal Code, 1860.

<sup>52</sup> §47(1), the Water (Prevention and Control of Pollution) Act, 1971.

<sup>53</sup> §47(2), the Water (Prevention and Control of Pollution) Act, 1971.

preservation of the quality of air. The provision for offences by companies<sup>54</sup> and the cognizance of offences<sup>55</sup> is very similar to that of the Water Act. The penalties levied are fines that do not exceed Rs. 10,000/- the first time of non-compliance and do not exceed more than Rs. 5000/- of fine levied each day in case of continuance of the offence. Despite the efforts, further non-compliance attracts two to seven years of imprisonment.

### **THE ENVIRONMENT (PROTECTION) ACT, 1986**

The objective was to achieve effective combat against environmental degradation. The Act provides for improvement and protection of the environment. It prohibits emission or discharge of effluents from industries.<sup>56</sup> Contravention of statutory regulations attracts a fine extending upto Rs. 1 lakh, an imprisonment period of five years, or with both. On the continuation of failure to comply, an additional fine of upto Rs. 5000/- is levied each day. Even in such a scenario, if the contraventions are not rectified until the completion of one year, the offender shall be punishable upto seven years of imprisonment. The liability of offences by companies<sup>57</sup> and their cognizance<sup>58</sup> is set up similar to the aforementioned enactments.

### **CRIMINAL PROSECUTION IN THE FOUR MOST POLLUTING AREAS**

#### **U.S.A.**

The major regulatory environmental enactments include the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Toxic Substances Control Act.<sup>59</sup> All of these enactments contain criminal penalties. Criminal prosecution of environmental crimes began in the USA in the early 1980s. *United States v. Frezzo Brothers, Inc.*<sup>60</sup> was the first instance where the Federal Water Pollution Control Act were applied against a corporate offender and its officers were charged with crimes, where the defendants had been discharging pollutants without having obtained a permit from the Government.

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<sup>54</sup> §40, the Air(Prevention and Control of Pollution) Act, 1981.

<sup>55</sup> §43, the Air(Prevention and Control of Pollution) Act, 1981.

<sup>56</sup> §7, the Environment (Protection) Act, 1986.

<sup>57</sup> §16, the Environment (Protection) Act, 1986.

<sup>58</sup> §19, the Environment (Protection) Act, 1986.

<sup>59</sup> BRICKEY, CORPORATE AND WHITE COLLAR CRIME603 (2010) ISBN 978-81-8473-375-4.

<sup>60</sup> 602 F.2d 1123 (3d Cir. 1979).

## **RUSSIA**

A 2018 study showed that Russia is the largest polluting industry in the world with the presence of its natural gas and oil mining industries. At present, Russia does not incorporate the principles of corporate criminal liability for crimes against the environment. However, it has its own branch of environmental law, which is closely similar to ecological law. The Russian Code of Law, 1016 was one of its earliest documents for the protection of nature. In the 1960s, the Soviet regime promulgated its first systematic and specific enactment - the Law on the Protection of Nature of the Socialist Republic of the Russian Soviet Federation.<sup>61</sup>

## **EUROPE**

In the UK, especially England and Wales and Northern Ireland, there exist no special courts for the adjudication of environmental crimes. The proceedings begin at the magistrate's courts, where there is only the magistrate and no jury. Serious offences are tried by the Crown Court, where there is the presence of a judge and a jury.<sup>62</sup> In Scotland, the Crown Office and Procurator Fiscal Service (COPFS) bring the prosecution.<sup>63</sup> Jurisprudentially, the UK follows the principle of strict liability, where the proof of mens rea need not to be established. There is substantive criminal liability brought in by environmental legislation, which are found in the Environmental Protection Act, 1990, Water Industry Act, 1991, Clean Air Act, 1991, the Water Resources Act, 1991, the Merchant Shipping (Prevention of Oil Pollution) Regulations, 1996, and the Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations, 1996.

## **CHINA**

The People's Republic of China follows a model where there corporate criminal liability in terms of violation of environmental regulations would at most amount to levy of fines. The directors or the managers do not have explicit liability as per the law; however, the discretion of the judge may impose criminal liability in cases of intentional or negligent omission of

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<sup>61</sup> L.N. FA, *Environmental Legislation of Criminal Responsibility of International Comparison and Reference – Based on the Perspective of Law and Economic*, IOP Conference Series: Earth and Environmental Science 188 (2018).

<sup>62</sup> V. MITSILEGAS ET AL., *Fighting Environmental Crime in the UK: A Country Report. Study in the framework of the EFFACE research project*, London 60 (2015).

<sup>63</sup> *Supra* note 63, at p. 62.

preventive measures.<sup>64</sup>

The 2002 Johannesburg Principles on the Role of Law and Sustainable Development agreed towards a full commitment to contributing towards the realization of the goals of sustainable development through judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law. It was recognized that there was an urgent need for concerted and sustained programme of work in the field of environmental law. It was proposed that there must be made improvements in implementation, development, and enforcement of environmental law through judges, prosecutors, legislators and others. The UNEP-INTERPOL study recommended that the environmental rule of law must be strengthened to combat environmental crimes. It also recommended that countries must take active part in fulfilling leadership roles. They must facilitate coordination and cross-national plans.<sup>65</sup> The prosecution must take on a strong forefront as it follows investigation. The prosecutors must have deep knowledge about environmental crime and must be willing to see the matters reach their justified end.<sup>66</sup>

## ENVIRONMENTALLY CONSCIOUS COUNTRIES

Germany has the most severe punishment for environmental crimes. The country woke up as long ago as 1871 and established herself as the first environmental criminal responsible State. The legislation is highly systematic and scientific.<sup>67</sup> It is a leading contemporary international society. Germany has taken active efforts into amending its environmental legislation every couple of years.<sup>68</sup> Germany was one of the first to volunteer to shut down 84 of its coal-fired power plants by 2038 and to switch to renewable energy.<sup>69</sup> Ireland was the first country to have declared a climate emergency. In 2018, it also became the first country to have divested from fossil fuels.<sup>70</sup>

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<sup>64</sup> Vivian Wu, Simon Hui, *Corporate Liability in China*, Available at: <https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-china/> (Accessed on: 30<sup>th</sup> October, 2019).

<sup>65</sup> *Supra* note 17, at p. 93.

<sup>66</sup> *Supra* note 20, at p. 25.

<sup>67</sup> *Supra* note 62, at p. 1.

<sup>68</sup> *Supra* note 62, at p. 2.

<sup>69</sup> Erik Kirschbaum, *Germany to close all 84 of its coal-fired power plants*, will rely primarily on renewable energy (January 26, 2019), Available at: <https://www.latimes.com/world/europe/la-fg-germany-coal-power-20190126-story.html> (Accessed on: 30<sup>th</sup> October, 2019).

<sup>70</sup> Zhang Hua Qiang, *The World's Most Environmentally Friendly Countries in 2019* (July 10, 2019), Available at: <https://healthyhumanlife.com/blogs/news/most-environmentally-friendly-countries> (Accessed on: 30<sup>th</sup> October, 2019)

## **ENVIRONMENTALLY CONSCIOUS COMPANIES**

Ikea, the Swedish origin furniture making company, invested heavily in sustainability. The manufacture of its products are mandated by reduced usage of water, energy, chemical fertilizers and pesticides. Unilever is also committed at increased sustainability. Three fourths of their non-hazardous waste are not dumped at landfills. Nike has taken considerable amounts of steps to manufacture sustainable products. They redesigned and reduced their packaging, eliminated their chemical discharges, and became energy efficient at their factories.<sup>71</sup>

## **CONCLUSION**

Although there are laws within a nation's jurisdiction to ensure corporate compensatory liability for environmental harm, they are not optimally effective. They lack the international recognition and consensus, and hence the gravitas of the matter becomes bleak. The recognition of environmental crime must begin with enumerating what constitutes an environmental crime.<sup>72</sup> The lack of international legislation proves to be an impediment in achieving better results at instituting corporate criminal liability in this aspect. Hefty fines and severe punishments are necessary to increase accountability of companies.

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<sup>71</sup> 10 Global Companies that are Environmentally Friendly (June 2, 2016), Available at: <https://www.virgin.com/virgin-unite/10-global-companies-are-environmentally-friendly> (Accessed on October 30<sup>th</sup>, 2019).

<sup>72</sup> *Supra* note 17.

## **APPLICABILITY OF FORENSIC SCIENCE IN CRIMINAL JUSTICE SYSTEM IN INDIA: A STUDY**

Papiya Golder\*

### ***Abstract***

*“Physical Evidence cannot be intimidated. It does not forget. It sits there and waits to be detected, preserved, evaluated and explained”*

- **Herbert Leo MacDonnell**

*The never-ending rate of crime and its complexity emphasizes the role and importance of Forensics in the current scenario. Forensics is a systematic study of evidence found at the scene of occurrence. The principle of Forensics is purely based on the famous Locard's Principle, according to which, the perpetrator of the crime always carries or leaves behind some traces at the crime scene or the place of occurrence.*

*This Paper is a deliberation on understanding the concept of Forensic Science and investigation. Further, the analysis is aimed at identifying the problem in admissibility of scientific evidence in Indian Courts in case of doubt. An evaluation in this regard, with reference to the Daubert Guidelines is discussed to present the acceptable norm as followed in USA. Subsequently, this is followed by a study of the applicable section of the Indian Evidence Act where the Daubert Guidelines can be followed. The conclusion and the suggestions would be focusing on the quality control and standards for scientific evidence that needs to be set, to avoid discrepancies in Courts of Law. The findings of the study are to understand the legal admissibility, its use and the competence of scientific evidence before the Indian Courts.*

**Keywords:** Scientific Evidence, Forensics Science, Legal Admissibility, Daubert Guidelines, Indian Evidence Act.

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## INTRODUCTION

Scientific Evidence is to act as an educator and stimulator of public opinion. Scientific Evidence ought to be seen as a watch dog on behalf of the community against all hazards and abuses that may threaten. In Ancient India, the process of investigation of crime and admissibility of the evidence were based on Dharma and Science. The wicked people or the criminals of the society were considered as ‘Kantakas’ or thorns of the society. Criminal is a person who commits or omits in violation of law forbidding or commanding it. Manu and especially Kautilya have dealt in depth with Kantakas. It is a fact that, prevention is always better than cure. This idea is appropriate in the process of prevention and investigation of crime. In modern world, the investigations of such types are coming under Forensic Science.

## MEANING OF FORENSIC SCIENCE

The word ‘Forensic’ has been derived from the Latin word *Forensis*, meaning ‘belonging to the market place or forum’. In ancient Rome, the ‘forum’ or public meeting place was where legal cases were tried and pleaded. *The term Forensic Science means the application of the knowledge of science for the purposes of law and justice.* The term includes the application of all sciences such as Physics, Chemistry, and Biology. It may appear odd at the first instance, but almost all branches of science can help in the administration of justice.

Modern Forensic Science has different branches such as Forensic Psychiatry, Forensic Toxicology and Forensic Pathology. Forensic Psychiatry means where the psychiatrist examines persons suspected of a crime to determine if they are legally sane; Forensic Toxicology identifies drugs and poisons in body tissues and determines their effects. Forensic Pathologist performs autopsies on victims to know the cause of death. For instance, in a vehicular accident, glass fragments may be found at the scene of crime. Since the refractive indices of all glasses differ minutely, comparison of the refractive indices of glass pieces found at the accident site with the glass of the suspect car may offer a useful clue. This is an example of the application of Physics in the administration of justice (*Forensic Physics*). Similarly chemical analysis of an unknown poison found in the stomach of a dead person is an example of the application of Chemistry in the administration of justice (*Forensic Chemistry*). Analyses of blood stains found at the scene of crime require the application of Biology (*Forensic Biology*). Forensic Science is a very vast subject and comprises of the application of any branch of scientific knowledge for the administration of

justice.

## **ROLE OF FORENSICS IN INQUIRY AND INVESTIGATION**

In Forensic Jurisprudence, ‘inquest’<sup>1</sup> is there. So inquest is an enquiry into the cause of particular wretchedness which is apparently not due to natural cause. This inquest differs from country to country. One of the first instances when science was used for the detection of crime was when the Greek scientist Archimedes (287-212 B.C.) found out an interesting way to detect the amount of silver used as an adulterant in a gold crown. The King of Syracuse, Hieron II was suspicious about the purity of gold in his crown, and he instructed his court scientist Archimedes to find out a way to detect the adulteration without in any way destroying the crown. Archimedes while taking his bath discovered quite serendipitously that all substances on immersion displace an amount of water equal to their volume, and the weight of the immersed object consequently decreases by that amount. This is known even today as “the principle of buoyancy” or the “Archimedes’ Principle”. By cleverly applying that principle, Archimedes could show that the gold crown indeed had been adulterated with silver, and consequently the goldsmith was executed. This is perhaps the first instance when Forensic Science was used resulting in the execution of a criminal.

In ancient India too, medical opinion was frequently applied to the requirements of law. By law the minimum age for the marriage of girls was fixed at 12 years; the duration of pregnancy was recognized as being between 9 and 12 lunar months with an average of 10 months and there is evidence that doctors had to opine on such cases.

The first medico-legal autopsy in history is said to have been conducted by the ancient Roman physician Antistius, who examined the body of Julius Caesar after his assassination in 44 BC. He found twenty-three stab wounds over his body. After the post-mortem examination, he concluded that only one wound, the one in the chest between, 1st and 2nd ribs, had been fatal.

The first real evidence that a special branch of medicine, devoted to the support of judicial work, was indeed taking shape, dates from the thirteenth century AD, comes from China. A bulky book entitled Hsi Yüan Lu was published in that country in 1248. It was actually meant as a handbook for applying medical knowledge to the solving of crimes and to the

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<sup>1</sup> Etymologically in = in; quest = to seek means legal or judicial inquiry to ascertain a matter of fact.

work of the courts. In keeping with the highly speculative character of early Chinese medicine, many of the procedures were utterly fantastic. The book however, does contain valuable instructions for the examination of corpses. It deals with the various kinds of wounds delivered by different weapons of different degrees of sharpness. It tells how to ascertain whether a person had been killed by strangulation or drowning. It discusses the problem of whether dead bodies found in water have been actually drowned, or killed beforehand, as well as the question of whether a body was burned before or after death-in other words, whether a fire had been set in order to cover up a preceding murder. It stresses the need for careful examination of the scene of the crime. Its basic attitude may be summed up in the proverb: "Everything may depend on the difference between two hairs".

In contrast, in Europe a similar book appeared much later. In 1507, *Constitutio Bambergensis Criminalis* appeared which acknowledged the usefulness of physicians in legal cases involving infanticide and bodily injury. This book was published in the Diocese (the circuit or extent of a bishop's jurisdiction) of the Bishop of Bamberg. It became the model for a far more extensive penal code, the *Constitutio Criminalis Carolina*, also known as The Criminal Jurisdiction of Emperor Charles V and the Holy Roman Empire, issued by Charles V in 1532 for all the lands included within his mighty empire. To be sure, it made no mention of careful medical examinations or of autopsies where the cause of death was doubtful. At best, wounds were "widened" to determine their approximate depth or direction of penetration. One of the physician's principal functions was to decide whether a defendant was strong enough to be put to torture.

In the eighteenth century, the Italian anatomist Giovanni Battista Morgagni (1682-1771) had begun dissecting the bodies of the dead and comparing the alterations in their organs with the symptoms of the diseases that had caused death. In 1761 (i.e. in the eightieth year of his life!), he published a book on the 640 post-mortem dissections he had conducted. He thus was the founder of Pathology. The three great pioneers of Forensic Medicine to be born in the eighteenth century were Johann Ludwig Casper (1796-1864) born in Berlin, Mathieu Joseph Bonaventure Orfila (1787-1853) born in Minorca and Marie Guillaume Alphonse Devergie (1798-1879) born in Paris. They devoted their life to the study and development of Forensic Medicine as we understand it today, but they were all disgraced by their colleagues. Most medical professionals regarded them as intruders, exploiters of the true art of medicine, or representatives of a second-rate science tainted by crime and the ugliness of slums. In

1835, Devergie published the influential *Médecine légale, théorique et pratique*, (Legal medicine in theory and practice). Casper, who was looked down upon and driven from place to place by such influential persons of his time as Rudolf Virchow, ultimately proved his worth by publishing *Gerichtliche Leichenöffnung* (Forensic Dissection) in 1850, and *Praktisches Handbuch der gerichtlichen Medizin* (Practical Manual of Forensic Medicine) in 1856. These three books brought out a revolution of sorts in the world of Forensic Medicine. They covered a wide range of subjects, and gave details of thousands of cases, these courageous men had solved, by applying rigorous observation, accurate and detailed autopsy, and microscopic and chemical examination.

Forensic Medicine made rapid advances in the 19th and the 20th centuries. Newer discoveries were regularly being made. The latest Forensic technique to be invented is the technique of DNA profiling (commonly known as DNA fingerprinting) perfected in 1985, by a Leicester University Professor, Alec Jeffreys. It enables the Forensic Scientists to identify an individual positively among millions of suspects. The technique is very useful in solving cases of rape, disputed paternity, and putrefied bodies and so on.<sup>2</sup>

## **ROLE OF FORENSIC SCIENCE IN ADMISSIBILITY OF EVIDENCE**

It is the evidence which the trial judge finds it useful in helping the trier of fact which can be a jury, if there is a jury, or otherwise the judge. It cannot be objected to on the basis that it is irrelevant, immaterial, or violates the rules against evidence which a person tries to introduce. It has little relevant value, usually called probative value in determining some fact, or prejudice from the jury's shock at gory details may outweigh that probative value. In criminal cases, the courts tend to be more restrictive on letting the jury hear such details for fear they will result in "undue prejudice." Thus, the jury may only hear a sanitized version of the facts in prosecutions involving violence.

### ***The Daubert Guidelines***

The Daubert Guidelines were laid down in a remarkable judgment of the United States

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<sup>2</sup> Aggrawal Anil, "*Introduction To Forensic Medicine And Legal Procedures Prevalent In India*" - Part I. (2001); Vol. II, No. 1 (January-June 2001); Available at: [http://www.anilagrawal.com/ij/vol\\_002\\_no\\_001/ug002\\_001\\_1.html](http://www.anilagrawal.com/ij/vol_002_no_001/ug002_001_1.html) (Accessed on: September 21, 2014)

Supreme Court in the case *Daubert v. Merrell- Dow Pharmaceuticals, Inc.*<sup>3</sup>. The court concluded that the Federal Rules of Evidence superseded the Frye Rule and that the rigid general acceptance rule should not come on the way of a reasonable minority scientific opinion in the form of new and emerging research based on reliable studies. It also laid down factors for the basis of Scientific Evidence which are also known as *The Daubert Guidelines*. These are:

- The content of the testimony can be and has been tested using the scientific method;
- The technique has been subject to peer review, preferably in the form of publication in peer review literature;
- There are consistently and reliably applied professional standards and known or potential error rates for the technique;
- Considers general acceptance within the relevant scientific community.

The United States of America amended the Federal Rules of Evidence in 2000. Rule 702 reads as : “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if; the testimony is based upon sufficient facts or data ; the test is the product of reliable principles and methods, and; the witness has applied the principles and hearsay and other objections.”<sup>4</sup>. Thus, if there are shortcomings in the tests (DNA), these do not affect the admissibility of the test result, only the weight a judge should accord it.

## **ROLE OF FORENSICS IN CRIMINAL JUSTICE SYSTEM**

The usage of Forensics has been versatile and pragmatic in the field of Criminal Justice. Initially, the traces found at the scene of occurrence are collected. Later, it is sent for analysis to detect, discover evidence that is useful in providing the following information;

- Directing towards the criminal who committed the crime;
- The reasons that led to the cause of death;

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<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

<sup>4</sup> Federal Rules of Evidence.1975; 2000

- Can be used to test whether it is in corroboration with the eyewitness (if any)

## **CO-RELATION BETWEEN FORENSICS, PSYCHOLOGY AND LAW**

The trio relationship between Forensics, Psychology, and Law variegates the way of detecting and solving crimes. Forensics serves as a medium for analyzing, detecting from the scene of occurrence. This is done scientifically and systematically. It provides the rough roadmap as to how and in which direction the investigation may proceed.

On the other hand, Psychology is connected with reading of minds. Applying the practical usage of psychology in the Criminal Justice System, it helps us to understand in depth about the mental state of the accused or the suspect who has committed the crime. If on one hand, we say it helps in establishing Mens Rea which is one of the essential elements of committing any crime, on the other it establishes the absence of Mens Rea due to lack of cognitive instability. Under section 84 of IPC<sup>3</sup>, a person who is of unsound sound will not be punished even if he had committed crime as it comes within the general exceptions. In cases of brutal murders done by serial killers, the combination of Psychology and Forensics helps in determining the pattern or the nature of injury caused by the killer.

Law collects evidence that is required by the court to convict criminals with the help of Forensics and Psychology. Our criminal jurisprudence is based on the principle that:

*“May thousands of criminals escape but even a single innocent shouldn’t be punished.”*

With such a principle, the burden on the prosecution still increases to prove beyond a reasonable doubt to convict the accused. Henceforth, to provide solid evidence, both Forensics and Psychology play a very crucial role.

## **IMPORTANCE OF FORENSICS IN INDIAN CRIMINAL JUSTICE SYSTEM**

Several convictions have occurred in India where the Scientific Evidence (DNA) has been accepted under Section 45 of the Indian Evidence Act. It is the section dealing with the opinion of an expert. It states, that, when the court has to form an opinion upon a point of foreign law, or science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity of handwriting or finger impressions are relevant facts. The Courts have opined that Medical Evidence is only an evidence of opinion and is hardly

decisive. It is not substantive evidence. But they say that that the opinion of the doctor who has held the Post-mortem examination and of the Forensic Science Laboratory is reliable. The Supreme Court of India has further stated that unless there is something inherently defective in the Medical Report, the Court cannot substitute its own opinion for that of the doctor.

*Section 293 of the Cr.P.C.* deals with reports of certain Government Scientific Experts. Section 293(2) says that the Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report. The underlying principles of the technique cannot be questioned; legal scrutiny can only revolve around questions related to the collection, forwarding and authentication of samples.<sup>5</sup> On the other hand, there are no proper international as well as national guidelines and that each laboratory has its own control and standardization methods. But the fact remains that the court is unlikely to understand in any detail the principles of the process. The expert's opinion is taken by the Courts on trust and faith. Some Courts may still be reluctant to admit some type of Scientific Evidence (like DNA typing) as they may feel that it does not follow the Frye Rule. However, of late, it is generally held that unless there is some special circumstance, all relevant evidence is admissible.

The Supreme Court of India has held that, "A medical witness called in as an expert and the evidence given by the medical officer is really of an advisory character based on the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the date which induced him to come to the conclusion and enlighten the Court on the technical aspects of the case by explaining the terms of science so that the Court although not an expert, may form its own judgment on these materials after giving due regard to the expert's opinion because once the expert's opinion is accepted it is not the opinion of the medical officer but that of the Court"<sup>6</sup>. Thus, it can be said that the laws and Courts in India are still not clear on the matter on the criteria of admissibility of scientific matters and confusion still prevails.

## **CONCLUSIONS AND SUGGESTIONS**

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<sup>5</sup> VV Pillay, "Textbook of Forensic Medicine and Toxicology". 14th ed. Hyderabad: Paras Publishing, (2004) p.89.

<sup>6</sup> *Madan Gopal Kakkad v. Naval Dubey & Another*, (1992) 3 SSC 204

The police are a disciplined force trained to uphold the law. Police powers are confined by the provisions of the Constitution, the Police Act, the Criminal Procedure Code, the Evidence Act and many other local and special laws which impose restrictions on the scope and method of exercise of that power. Forensic Scientists should inspire the Police with their scientific methods not to violate the norms. They will be accused of conspiring with them if they are a party in using the above psychological coercive methods. Though there is general acceptance of admissibility of Scientific Evidence and expert's opinion in Indian Courts, there is no special law with respect to this and enable democratic institutions to function lawfully. Section 45 of the Indian Evidence Act is insufficient in this regard. In case of doubt, the Daubert Guidelines can be adhered to. Proper National Protocol should be formulated and extensive studies carried out with respect to quality control, interpretation of results and understanding the potential error rates of Scientific Evidence matter.

It is thus imperative to understand the admissibility of findings, methods and opinion of Forensic Medicine Specialists to legal matters. Formerly, for the reason that of lack of sophistication in Chemistry, Physics, Biology and Medicine, investigation was largely subjective, this leads to great controversy and legal challenges during court trials. Hence, a special test of competence is required for Scientific Evidence. The major issues are: whether the subject matter of the expert's opinion is appropriate to the case; whether the expert is sufficiently qualified to render the opinion; the type of information on which the expert bases his opinion; the role of general consensus in the scientific community in evaluating the admissibility of expert testimony; and limitations other than the above pertaining to the type of opinion an expert can express. There are a host of criminal cases and situations where the problem can only be solved through an intelligent application of medical principles. In fact, this is what Forensic Medicine is all about. A law providing for statistical probability of evidence is essential. Thus it is for the court with the use of scientific and legal principles to decide upon the amount of reliability that should be given to the Scientific Evidence and to the expert's opinion.

## CONCEPTUAL DIMENSIONS OF INTERNATIONAL TERRORISM UNDER INTERNATIONAL LAW

Prof. (Dr.) Komal Audichya\*

### *Abstract*

*International terrorism has become a grave threat to almost every State's peace and security. It also threatens global prosperity as well as innocent lives and dignity of human beings. After 9/11 attack on U.S.A., the United Nations has become a much stronger body to combat international terrorism. Although many resolutions and conventions have been passed by United Nations pertaining to international terrorism but it leaves on member states to define it which has both political and legal implications. Since every State has been defining the term 'terrorism' as per its national interpretation, the lack of uniformity has hindered the international cooperation required to fight international terrorism. This research paper will try to explore the possibility of arriving at a definition of International terrorism built on global consensus; i.e. the adoption of a Comprehensive Convention on International Terrorism (CCIT), originally initiated by India in 1996 at the UN General Assembly. From investigation to prosecution, the cooperation among states is imperative which would only be possible if a generally accepted opinion jurisor legal principle is recognized by all states.*

**Keywords:** International terrorism, definition, United Nations, CCIT

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## INTRODUCTION

We can no longer stand by and watch as this phenomenon spreads. With their message of hate violent extremists directly assault the legitimacy of the U.N. Charter and values of peace, justice and human dignity on which the document and international relations are based.<sup>1</sup>

The international terrorism has become a grave and serious threat to maintenance of international peace and security and violation against human rights. The United Nations' Security Council is the most potent body to combat this threat. There has not been any consensus amongst the nations to define terrorism hence the UN has pursued more pragmatic approach and has put forth more importance to mutual cooperation amongst states to fight terrorism. It has also counter-terrorism mechanism but the lack of consistent definition of the term has hampered its fight against this growing threat as it causes technical hitches when terrorism is pronounced as a threat to international peace and security. Through resolutions and the conventions, the UN has included certain acts in the offence of terrorism but avoids particularly defining this political and notorious term. The States should have tenacity to find the universal definition of terrorism as this menace is spreading to more countries and becoming more horrendous.

All over the world the terrorist activities are on rise from West Asia to Africa to Europe to U.S.A. India also has long been battling against Pakistan-sponsored terrorist groups. This growing global terrorism requires a coordinated international response. Since the states are still giving priority to their own national interests and not agreeing to define this brutal phenomenon, it has become a big challenge to the global security now.

## COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM

To augment the quality of cooperation amongst the states in their battle against terrorism, there must be a uniform definition; otherwise the terrorist groups are taking advantage of this indistinctness. And the best way to tackle this threat would be to define the reprehensible act by adopting Comprehensive Convention on International Terrorism (CCIT). UNGA resolution 55/158 was adopted on 12 December 2000 and mandated the Ad Hoc Committee

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<sup>1</sup> Jeffrey Feltman, UN Under-Secretary-General for Political Affairs, Delivering the keynote address to the Arab League event organized event on 3 June, 2015.

to start work on drafting a Comprehensive Convention on International Terrorism, “both to include terrorist crimes not covered under existing conventions (such as serious attacks on the environment and a serious and credible threat to commit a terrorist act) and to adopt enhanced measures of co-operation and assistance between States. Unlike the sectoral conventions, it does not limit the means by which a terrorist act may be carried out”.<sup>2</sup> Rather than having different conventions defining different acts in the list of offences ascribing to the concept terrorism, the single act defining the concept terrorism will be more operative to restrain it rather than having different acts describing the term under different conventions. It will become more practical for the different states to prosecute the accused guilty of committing terrorist act with judicial as well as police cooperation. As there is no international police, prosecutor or tribunal or police to investigate such a crime, the burden to investigate and prosecute terrorist is on the individual state. The perpetrators and the targets in this case may be foreigners, the funds might be from third country, the evidence and the witnesses could belong to outside the territorial limits of the State. So the concerned nations require cooperating with each other for all this. But the States like Israel and some Arab States who are not having formal diplomatic relations with each other, this cooperation is implausible. To increase the cooperation amongst these States in their fight against terrorism, they can opt for adoption of CCIT to enhance their cooperation. In general such an accepted *opinion jurisor* legal principle by all states could have more legal, moral, and political force. Moreover to take action in another state, there may be legal hurdles in foreign investigations and prosecutions. Extradition also requisites the act to be crime and punishable in the requested state as well as in the requesting state. The countries won’t be able to support each other in case there is any inconsistency between these two matters. In fact Although UN Security Council (SC Res.1373 of Sep. 2001) imposes on every member state to cooperate yet the States have always been reliant on bilateral treaties to make the assistance essential and swift.

*“The conclusion of a convention will not only provide a U.N.-inspired umbrella to our efforts to counter terrorism, it will also send a clear message of the common will of the international*

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<sup>2</sup> Narinder Singh, The United Nations’ Efforts at Combatting International Terrorism, FICHL Policy Brief Series, No. 81 (2017), p.4.

*community as it strives to contain and control terrorism.”<sup>3</sup>*

The adoption of CCIT would make each State rely on single negotiation and single set of rules to apprehend, prosecute and punish the accused. This has the potential to enhance mutual assistance between different states. There is need to provide terrorism with legal definition so that there is homogeneity and uniformity in its application by the States in their domestic legislation in accordance with their human rights' commitments. The inconsistency in the understanding of terrorism is not only problematic for the court, for the prosecution and for the police but it can also become dangerous for the individual. To adequately address and defeat terrorism, the gaps in fragmented sectoral approach should be filled by adoption of Comprehensive Convention against Terrorism. H. E. Kamlesh Sharma, Permanent Representative of India to UN, explained the need to adopt CCIT when he remarked “...planes were hijacked but the cluster of conventions on hijacking provides for action against the hijackers; on September 11 they killed themselves with their victims. Similarly, planes were used as bombs, whereas Conventions have a precise definition of an explosive. No action is envisaged against those who supported, instigated or harboured the terrorists”.<sup>4</sup> None of the conventions; the Terrorist Bombing<sup>5</sup>, the Terrorist Financing<sup>6</sup> and the Nuclear Convention<sup>7</sup> defines terrorism but refers it in their titles and preambles only. So the States must resolve their differences and adopt CCIT to formulate a comprehensive definition of the crime “International Terrorism”. To be effective the legal definition must be precise enough and in accordance with Criminal Law principles and Human Rights law. It will be useful if the definition is able to comprise core elements of the crime, although it is a complex task.

## **OBJECTIVE OF CCIT**

The aim of the CCIT is not limited to improving cooperation and assistance between states but also to create comprehensive frame to those terrorist crimes which are not being covered

<sup>3</sup> Palitha Kohona, Ambassador, chair of the Legal Committee pursuing the CCIT, also described it as the mother of all anti-terrorism conventions, stated to Inter Press Service on 8 Jan. 2014. Available at: <http://www.ipsnews.net/2014/01/despite-13-year-deadlock-u-n-makes-headway-fighting-terrorism/> (Accessed on 15Oct. 2016)

<sup>4</sup> Arpita Anant, India and international terrorism in David Scott, Handbook of India International Relations, (Routledge, 9th May 2011), p. 269.

<sup>5</sup> U.N. Doc. A/RES/52/152 Annex 15 December 1997.

<sup>6</sup> U.N. Doc. A/54/109 Annex 9 December 1999.

<sup>7</sup> U.N. Doc. A/59/290 Annex 13 April 2005.

under present conventions. The genesis of the CCIT lies in the 1996 UN General Assembly session that created an Ad Hoc Committee to develop a comprehensive legal framework for combating international terrorism.<sup>8</sup> The Ad Hoc Committee worked along with Working Group of the Sixth Committee on different aspects of the treaty negotiations. India presented the first draft of CCIT<sup>9</sup> in the same year with the following objectives:

- To criminalize all forms of terrorism and specify a comprehensive mechanism to eliminate terrorism.
- To have a legal framework requiring all states to cut off supply of funds and deny arms and safe haven to terrorist organizations.
- To call for agreement on a universal definition of terrorism which all the 193 members of the UNGA would adopt into their domestic legal systems and wants to do away with the distinction between ‘good terrorism’ and ‘bad terrorism’.
- This agreement would result in ban on all terrorist groups irrespective of their objectives or country of operation and prosecution of all terrorists including cross-border groups under special laws. It would have the provision to amend domestic laws to make cross-border terrorism an extraditable offence.
- To require states to expand jurisdiction over *Draft Comprehensive Convention* offences which are committed (a) in the territory of the state; (b) on board a vessel or aircraft registered by the state; or (c) by a national of the state
- To require states to cooperate in thwarting terrorist offences from being committed through the exchange of information and coordinating in law enforcement
- To require state in whose territory an alleged offender is present and which has jurisdiction to either extradite or defer the case to its competent authorities for the purposes of prosecution
- To include the offences, prohibited by the Convention, as extraditable offences in any existing extradition treaty between states parties to the Convention. The requested state may consider the Convention as a legal basis for extradition in case the state only allows extradition on the basis of a treaty and there is no treaty with a requesting state. The state shall recognize the offences as extraditable offences where a state does

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<sup>8</sup> UN Doc. G.A. Resolution 51/210, 17 December 1996.

<sup>9</sup> Ibid. at CCIT, Article 3 provides that the Convention does not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that state and no other state has a basis for exercising jurisdiction.

not make extradition provisional on the existence of a treaty. Depending upon the territorial principle of jurisdiction, to make sure the broadest possible basis for extradition, the offences are to be considered in the territory of those states that have exercised jurisdiction over them and also wherever they were in fact committed as if they were committed not only in the place they were committed.

Under Article 2 of the Convention different offences have been included but without calling them terrorism, having wide and all-encompassing language:

1. *Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:*
  - a) *Death or serious bodily injury to any person; or*
  - b) *Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility, or the environment; or*
  - c) *Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss. When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing act.*

Article 2 also specify that it is an offence to make a plausible and serious threat to commit any of these acts, or to attempt to commit any of these acts. An additional provision renders criminal the participation in, organisation of, or contribution to, the commission of any of these acts. The convention defines an offence, acts by any person without differentiating between Government actors and non-State groups, including national liberation movement &without concerning whether the act is committed during times of peace or in armed conflict. The offence is not confined to attacks against civilians but also includes attacks against military personnel. Also includes serious damage to property, infrastructure, and the environment within the definition.

According to Article 6, it is required that each State party adopts legislation to confirm that the acts within the scope of convention are ‘under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic or other similar nature’.

As per the convention no request for extradition or mutual legal assistance may be declined only on the ground that the offence was driven by political motives.

The other elements like jurisdiction, extradite or prosecute principle, criminalization etc. were taken from the essential elements of the sectoral treaties. There have been deliberations, modifications but the general impediments have always prevented the efforts to conclude CCIT. The disputatious issues were of freedom fighters and state terrorism at that time. The consensus could not be reached so the CCIT could not become a binding and enforceable instrument of international criminal law.<sup>10</sup> In this Convention also the nationalistic approach versus the foremost military power approach could be observed as it happened in 1907 Hague Regulations, 1949 Geneva Conventions and 1977 Additional Protocol to Geneva Conventions.

The Group of the Sixth Committee and Ad Hoc Committee has been confronted by two divergent tendencies between different political and regional groups. The Organization of the Islamic Conference wants to make a clear difference between acts committed in the system of an armed struggle in the application of the right of peoples to self-determination and acts of terrorism, specifically by people under alien domination, colonial or foreign occupation (constrain the rights of self-determination groups in Kashmir, Palestine etc.).

Most of the Western- European states had not accepted this general definition as they wanted an operational or criminal law definition, accentuating that the Draft CCIT was a law-enforcement mechanism not dealing with extensive political issues such as self-determination,

But with individual criminal responsibility, some members of the Non- Aligned Movement, mainly those in Latin America, had apprehension of addressing ‘State terrorism’ in a convention intended to be ‘comprehensive’ in nature. Some other States, mainly US and the United Kingdom, were concerned regarding the activities of military forces of a State in peacetime which otherwise would be subject to national military laws.

On September 11, 2001 Al-Qaeda attacked World Centre and the Pentagon which left everyone staggered but the ghastly attack could not be defined as crime of terrorism. Although the significant Security Council Resolution 1373 of December 2001 in its preamble

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<sup>10</sup> See Measures to Eliminate International Terrorism, Report of the Working Group, UN Doc. A/C.6/55/L.2, 19<sup>th</sup> October 2000, Annex II

stated "...that such acts, like any act of international terrorism, constitute a threat to international peace and security' yet never defined the term terrorism. To offset the burden of specific conduct and treaty obligations, States negotiated vehemently during session of Working Group in October 2001 and not so formally with sixth committee." Ultimately the important provision of the Convention; i.e. *Art. 18 related to scope of convention and protection of exercise of the right to self-determination*, was the only bone of contention left by the representatives of European Union, the major world powers and the interest delegations.

### ***Elements of the Compromise Package and its Underlying Rationale***

The dissenting opinions over the period of time shifted from the issues of definition to the extent of application of CCIT and the negotiations then were followed on the compromise package presented by the Coordinator of the CCIT drafting process at 65<sup>th</sup> session of the General Assembly in 2002. The main text of the draft<sup>11</sup> having compromise was:

#### ***Preamble***

*Noteing that activities of the military States are governed by rules of International Law outside the framework of this Convention, and the exclusion of certain actions from the coverage of the present Convention does not condone or make otherwise unlawful acts or preclude prosecution under any other laws....*

#### ***Article 3 (18)***

- 1) *Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law;*
- 2) *The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention;*

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<sup>11</sup> See "Text circulated by the coordinator for Discussion" in *Report of the Ad. Hoc. Committee established by General Assembly Res. 51/120 of 17<sup>th</sup> December 1996*, UN Doc A/57/37 (28<sup>th</sup> Jan.-1Feb. 2002) Annex IV, 18.

- 3) *The activities undertaken by military forces of a State in the exercise of their official duties, in as much as they are governed by other rules of international law are not governed by the present Convention;*
- 4) *Nothing in the present article condones or makes lawful exercise unlawful acts, nor precludes prosecution under other laws; acts which would amount to an offence as defined in Article 2 of the present Convention remain punishable under such laws;*
- 5) *The present Convention is without prejudice to the rules of international law applicable in armed conflict, in particular those rules applicable to acts lawful under international humanitarian law.*

The above compromise package for the CCIT assures that it does not supersede or interfere but work along with and preserves the integrity of other legal regimes applicable in particular situations. The States must make sure that any steps taken to fight terrorism are in compliance with their obligations under international law and in particularly IHL, international human rights law, international refugee law, reiterating significance of these laws.

Article 18(2) of the original draft stated above mentions that ‘the activities of armed forces during an armed conflict...are not governed by this Convention’. The Organization of the Islamic Conference, seemingly referring to the Palestinian situation, has offered in ‘the activities of the *parties* during an armed conflict, *including in situations of foreign occupation* ... are not governed by this Convention’.<sup>12</sup>

As per the coordinators of informal consultations on the CCIT, Art.18 which attempts to resolve the relations between the Convention and international humanitarian law, has now appeared as the ‘sole remaining outstanding issue on which the adoption of the draft convention hinge[s]’.<sup>13</sup> The term “the *parties* during an armed conflict” is general and wider than “armed forces during an armed conflict” and would cover the activities of any party to an armed conflict, including all civilians on the side of any such party, not essentially governed by international humanitarian law. So it would exclude ‘terrorism,’ suicide bombings, missile attacks, and other acts of violence against civilians and civilian objects by any group or individual combating to support people’s right to self-determination, from the

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<sup>12</sup> Ibid. CCIT, Annex IV (emphasis added).

<sup>13</sup> Supra Note 121, Annex II (*Reports of the Coordinators on the Results of the Informal Bilateral Consultations*), UN Doc A/58/37 (2003).

domain of definition of crime. Under Art.3 of Geneva Conventions the term ‘armed forces’, in its scope of application, applies to all parties of an internal conflict.<sup>14</sup> Besides, the exceptions in Art.18 state firstly the term “armed forces” and then secondly “military forces of a State.” Between the two distinct terms, the former can be construed as more comprehensive i.e. including recognized national liberation movements, non-governmental forces which are parties to a non-international armed conflict and organized opposition groups that are established along military lines, subject to a system of military discipline, and conceivably operating in accordance with international humanitarian law.

The international cooperation is essentially required under the mandate of UN to fight international terrorism and the first important step is to adopt CCIT with consensus.

As per the definition under the CCIT no terrorist organization can be called ‘freedom fighters’ even if they are fighting for national liberation or some other declared legitimate goals, if it intentionally targets civilians. Such targeting is against mankind and the ends can’t justify the means. The States should not back such terrorist organizations and must give up their own national interests or change their priorities otherwise the war against this ever growing monster, without defining the term, becomes futile.

The Consensus must reach the negotiation process on the CCIT and the countries should give up their political preferences and accept the compromise proposal. The CCIT would most significantly criminalise terrorist activities generally, and not only in the specific situations as covered by the existing counter-terrorism treaties. Such a general counter-terrorism convention would also assist to integrate and strengthen existing conventions by reviewing facets of these earlier instruments. The CCIT could be a useful means for bringing the entire framework of international counter-terrorism law up-to-date with existing standards. At present the informal text of Art 2 *bis* stipulates that where the *Draft Comprehensive Convention* and a treaty dealing with a specific category of terrorist offence are both applicable in relation to the same act, the provisions of the specific instrument will prevail. To obtain consistency, it would perhaps be required that the *Draft Comprehensive Convention* be amended and replace the earlier Conventions by establishing that those acts

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<sup>14</sup> Art.3, common to all four Geneva Conventions, covers situations of non-international armed conflicts. It calls on the parties to the conflict to bring all or parts of the Geneva Conventions into force through so-called special agreements. It recognizes that the application of these rules does not affect the legal status of the parties to the conflict. Application of common Article 3 is important as that most armed conflicts today are non-international.

prohibited by previous treaties are criminal offences under the *Draft Comprehensive Convention*.

## **THE INTERNATIONAL CRIMINAL COURT TO HAVE JURISDICTION**

As mentioned above, the CCIT gave a wide definition of terrorism and particularly punished the crime of association; besides contemplating the usual provisions on judicial cooperation. However, there are several impediments that affect the efficacy of the present international measures to get terrorist offenders prosecuted. The *Draft Comprehensive Convention* depends primarily on an obligation to prosecute or extradite terrorist suspects. Regarding the relevant offences, if the State does not extradite then it is ‘obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution’.<sup>15</sup> The bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988, showed the loopholes in this mechanism as it could not be operated effectively. One could infer that it doesn’t ensure the capacity to secure prompt and effective prosecution of terrorist suspects. A distinguished feature of the United Nations’ counter-terrorism treaties is their inclusion of compulsory dispute settlement provisions which require submitting unresolved disputes between contracting parties to arbitration or to the International Court of Justice.<sup>16</sup> As it happened in the Lockerbie case<sup>17</sup> when Libya, the arresting state, exhibited a disposition to prosecute the two suspects seemingly consistent with the terms of the *Montreal Convention*<sup>18</sup>, so both arbitration and judicial settlement are not expected to be of major assistance in such conditions. It is essential to look beyond the relevant counter-terrorism mechanisms.

A point reiterated earlier, in the aftermath 11 September 2001, the Security Council has assumed wide-ranging responsibilities in combating international terrorism and has shown

<sup>15</sup> CCIT, Art.11.

<sup>16</sup> CCIT, Art 23. According to Article 23(1), “Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.” Article 23(2) provides that on becoming a party to the *Draft Comprehensive Convention* a state party may include a reservation stating that it does not consider itself bound by art 23(1).

<sup>17</sup> Libyan Arab Jamahiriya v United Kingdom, Order, provisional measures, ICJ GL No 88, [1992] ICJ Rep 3, ICGJ 75 (ICJ 1992), 14<sup>th</sup> April 1992, United Nations [UN]; International Court of Justice [ICJ]

<sup>18</sup> *Convention for the Unification of Certain Rules for International Carriage by Air* (“Montreal Convention”) was opened to signature in Montreal by the states participating in the “International Conference on Air Law” held in Montreal during May 10th to 28th 1999 for the purpose of harmonizing of the Warsaw Convention to today’s conditions.

willingness to become more engaged in monitoring the compliance by states with their obligations to tackle terrorism. However, the *Lockerbie* case depicts that the Security Council offers a narrow scope for measures in case there are disputes between states. It was an ad hoc approach of referring the prosecution of the suspects to trial and a decision by the Scottish court, sitting in the Netherlands, which brought two Libyan nationals before an institution that got the confidence of all Member States. This process was onerous that is likely to not be repeated. There is possibility of more perdurable solution to this specific problem, especially with the recent establishment of the International Criminal Court.

As stated earlier, since the 11 September 2001 attacks on the United States, the Security Council has presumed wide-ranging responsibilities in combating international terrorism and has shown willingness to become more preoccupied in monitoring the compliance by states with their obligations to combat terrorism. To have the most suitable forum for prosecuting terrorist offences, the *Lockerbie* case depicts that the Security Council offers only a restricted range of measures in case there are disputes between states. It was an ad hoc approach of referring the prosecution of the suspects to trial and a decision by the Scottish court, sitting in the Netherlands which brought two Libyan nationals before an institution that got the confidence of all Member States. This process was very difficult and burdensome which is not likely to be repeated. There might be a more permanent solution to this specific problem with the recent establishment of the International Criminal Court.

It is suggested that the ICC can assume jurisdiction,<sup>19</sup> the inclusion of a clearly defined crime of terrorism would be a helpful addition to the ICC's jurisdiction, over terrorism offences, once a general offence of terrorism under CCIT is satisfactorily defined and incorporated in the *Rome Statute*<sup>20</sup> It will also strengthen domestic anti-terrorism laws in light of the role of

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<sup>19</sup> The ICC is a permanent judicial body that has attracted widespread support. It is an independent and impartial international institution that incorporates significant due process guarantees for suspects and includes a right of appeal. Hence, prosecutions by the ICC may be widely perceived to be fairer and more legitimate than prosecutions by domestic courts in highly contentious cases, and may thereby 'enhance worldwide assurance of the justice of the conviction of terrorists'. Available at: <http://www.icc-cpi.int> (Accessed on: 15 November 2015)

<sup>20</sup> The ICC's competence is currently 'limited to the most serious crimes of concern to the international community as a whole', namely genocide, crimes against humanity, war crimes and, when (and if) defined, the crime of aggression. (Rome Statute opened for signature 17 July 1998, 2187 UNTS 90, art 5(1) (entered into force 1 July 2002). Arts 6, 7, 8 define genocide, crimes against humanity and war crimes respectively.) Nonetheless, the ICC may have an opportunity to deal with terrorist offences under its existing jurisdiction, as very serious terrorist offences could potentially be characterized as 'crimes against humanity' within the definition provided by art 7 of the Rome Statute and art 7 of the Elements of Crimes adopted by the Assembly of States Parties in September 2002.

the ICC as body that has been designed with the objective of supplementing national criminal jurisdictions.<sup>21</sup> To maintain its balancing characteristic, instead of opting for a leading role in prosecuting terrorist offences in limited circumstances, it can serve to supplement the procedures already in existence for investigating and prosecuting crimes through domestic courts. There are numerous ways to through which this can be achieved. First, the ICC may step in to assure effective investigation and prosecution of terrorist offences where domestic courts are not willing or are unable to exercise jurisdiction over terrorist crimes that could also be classified as crimes against humanity.<sup>22</sup> Second, in subsequent high-profile cases, the ICC could potentially be used to avoid the issues encountered in the Lockerbie case wherein several states, each competent to assert its jurisdiction, made competing claims. In similar situations in the future, the referral of prosecution to the ICC could help break the political stalemate in negotiations between states, and probably provide a neutral forum for prosecution.

## CONCLUSION

The successful offensive against ‘International Terrorism’ and its curtailment require that there ought to be perspicuous-single definition of it in international law. The paper argues that it is only through CCIT that the nation-states will be able to act in collective and meaningful manner, translating the consequent global co-operation into cohesive and effective ways to combat the scourge of international terrorism. Thus, it is of utmost importance to secure an agreement on adoption of the draft comprehensive convention as soon as possible. The UN should use its capacity, global political clout and institutional mechanisms to create the requisite political will for finalization of negotiations on the Comprehensive Convention on International Terrorism.

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<sup>21</sup> The jurisdiction of the ICC is ‘complementary’ to national criminal jurisdictions (*Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, Preamble (entered into force 1 July 2002)) in the sense that a case can only be brought before the ICC if a state with jurisdiction is unwilling or unable genuinely to investigate or prosecute the case (*Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, art 17 (entered into force 1 July 2002)).

<sup>22</sup> See, *Policy Working Group on the United Nations and Terrorism*, UN Doc A/57/273-S/2002/875 (2002).

## GENOCIDE LAW IN INDIA: AN ANALYSIS

Neha Mishra\*

“We too will find ourselves unable to look our own children in the eye, for the shame of what we did and didn’t do. For the shame of what we allowed to happen.”

- Arundhati Roy<sup>1</sup>

### ***Abstract***

*Within the secular trough of the largest democracy there exists a not so tolerant history among the religious and racial communities. In absence of a law on Genocide, such grave offences against humanity have been hushed off in India time and again. India has failed to fulfil its obligation to enact a National Law on Genocide to prevent and protect its citizens, religious minorities and vulnerable groups against the crimes of Genocide. What has been more shocking is that the acts have gone unpunished due to lack of evidence demanded by the National Law, as it treats acts of Genocide as mere individual acts, punishable under various sections of the Indian Penal Code. Today, we continue to live in a polarized country, where the bomb of holocaust is to explode time and again and the rest of the humanity except the offenders shall be put to shame again and again. This Paper basically throws light on the instances of Genocide committed and the response of the Indian legal regime towards such grotesque crime against humanity. In the end, this Paper wants to convey that it is not too late to correct the mistake and start enacting the laws for the prevention and punishment of genocidal acts.*

**Keywords:** Genocides, Conventions, International Criminal Court, Indian Penal Code, Riot, Crime

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<sup>1</sup> The Algebra of Infinite Justice, (2002)

## INTRODUCTION

The word Genocide is the combination of the two Greek words prefix ‘Geno’ which means Race or People and ‘caedo’ which, means an act of killing<sup>2</sup>. As a whole it means act of killing of a particular race of people. The term is coined by Raphael Lemkin in his 1944 book, Axis Rule in occupied Europe. After the Holocaust, which had been perpetrated by Nazi Germany and prior to and during World War II, Raphael Lemkin campaigned for the universal acceptance of the laws and forbidding Genocide. After he campaigned, the UN General Assembly met for several times and finally, in 1948 adopted a Convention on Prevention and Punishment of the Crime of Genocide, which for the first time defined the term Genocide in a specific manner.

## MEANING

Before 1944 the term ‘Genocide’ did not exist. It is a very specific term which refers to violent crimes committed against groups with the intent to destroy the existence of the group. Human rights, as laid out in the *United States Bill of Rights* or the *United Nations Universal Declaration of Human Rights*, 1948 the rights of individuals.

In 1948 the United Nations approved the *Convention on the Prevention and Punishment of the Crime of Genocide*. This Convention establishes ‘genocide’ as an international crime, which signatory nations “undertake to prevent and punish.” Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group and
- Forcibly transferring children of the group to another group.<sup>3</sup>

According to Article 3(a) of the Convention Genocide was made a punishable offence.

<sup>2</sup> Available at: <https://en.wikipedia.org/wiki/Genocide>; (Accessed on: 21.02.2020)

<sup>3</sup> The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.

Thus it can be seen from the above definition that there are two essentials to the act of Genocide, firstly, the mental element, meaning the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, and secondly, the physical element which includes five acts described in Article 2 of the convention. A crime must include both elements to be called ‘Genocide’.

## **CRIMES AGAINST HUMANITY**

Among the crimes listed in the ICC Statute, “crimes against humanity” are among the most serious crimes of concern to the international community as a whole.<sup>4</sup> “Crimes against humanity” is of specific importance, as this is a set of crimes which can be committed not only during war time but also during “peace” time. Crimes listed under this include murder, extermination, enslavement, torture, sexual violence, enforced disappearances and other inhuman acts of similar gravity. It includes the heinous crimes like those committed during Gujarat riots. This category of crimes under the ICC is distinguished from ordinary crimes defined under national penal laws in three ways:

- The acts constituting the crimes must have been committed as part of a widespread or systematic attack;
- They must be knowingly directed against a civilian population and
- They must have been committed pursuant to a “state or organizational policy”.

## **INTERNATIONAL COMMUNITIES’ COMMITMENT TO COMBAT GENOCIDE AND INDIA’S EFFORTS**

The International Communities’ efforts with regards to combating the grotesque tragedies that take place on account of Genocides in various parts of the world include the Genocide Convention<sup>5</sup> that has already been discussed before, followed by the *Geneva Conventions of 1949*<sup>6</sup>, *Additional Protocols to the Geneva Conventions, 1977*<sup>7</sup>, *Rome Statute of the*

<sup>4</sup> Article 7, Rome Statute of International Criminal Court, 1998

<sup>5</sup> The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war).

<sup>6</sup> In 1949, an international conference of diplomats built on the earlier treaties for the protection of war victims, revising and updating them into four new conventions comprising 429 articles of law. These treaties, known as the Geneva Conventions of August 12, 1949, have been signed by almost every nation in the world. The

*International Criminal Court*<sup>8</sup>.

*Genocide Convention* defines genocide under Article II and Article V thereof lays down how the convention has to be implemented into domestic laws of a country, ratifying and making laws at the domestic level in accordance with the convention.

India ratified the *Genocide Convention* on August 27, 1959.<sup>9</sup> It also ratified the *Geneva Conventions of 1949 on November 9, 1950*<sup>10</sup>, but did not sign and has not yet become a party to *Additional Geneva Protocols of 1977*. It has also not signed and has not yet become a party to the *Rome Statute of the International Criminal Court*.

The Government of India is committed to enact a law for the prevention and punishment of Genocide under Article V of the *Genocide Convention 1948*<sup>11</sup> to which the country acceded in August 1959. Article 51(c) of the Indian Constitution, 1950 directs the state, *to foster respect for international law and treaty obligations*. Article 253 empowers the parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Moreover, Article 20 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>12</sup>, which has been acceded to by India in 1979, binds the Indian State to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” However India has made no efforts to enact a national legislation in the form of a *Genocide Act* which would effectively criminalize

Additional Protocols of 1977 supplement the Geneva Conventions, Available at: <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> (Accessed on: 22.02.2020).

<sup>7</sup> The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998 and it entered into force on 1 July 2002. As of October 2009, 110 states are party to the statute, and a further 38 states have signed but not ratified the treaty. Among other things, the statute establishes the court's functions, jurisdiction and structure, Available at: [www.un.org/icc/](http://www.un.org/icc/) (Accessed on: 22.02.2020)

<sup>8</sup> India ratified the Genocide Convention on August 27, 1959, Available at: [www.un.org/documents/ga/docs/51/plenary/a51-422.html](http://www.un.org/documents/ga/docs/51/plenary/a51-422.html); (Accessed on: 22.02.2020)

<sup>9</sup> The *Geneva Conventions* entered into force on 21 October 1950. Ratification grew steadily through the decades, Available at: [www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions](http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions); (Accessed on 22.02.2020)

<sup>10</sup> Article V of the Genocide Convention – The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III

<sup>11</sup> Article 20 of ICCPR

<sup>12</sup> *India- Genocide- Ideology and Policy Result in Gujarat Massacre*, Concerned Citizens Tribunal-Gujarat 2002, Available at: <http://www.hrsolidarity.net/mainfile.php/2002vol12no05/2237/> (Accessed on 20.02.2020)

the offence of Genocide. This willful abdication of state responsibility for more than four decades has seen the 1983 Nellie Massacre, the 1984 Anti-Sikh Riots and the 2002 Gujarat Massacre and the continuing struggle for justice within the inadequate conceptual frame of Indian law. Considering these facts it is a grave lapse on the part of the Government of India, which has, to date, not enacted any law in compliance with Article V of the *International Convention on the Prevention and Punishment of the Crime of Genocide, 1948*. India has signed the Genocide Convention in 1948 and ratified it in 1958. Under the Convention, a State that is signatory is bound to effectively act upon and legislate upon the intents of the legislation. So far, India has not enacted any law in compliance with the Convention.<sup>13</sup>

Since it acceded to the Convention in 1959, India has taken no steps to comply with the Convention's obligations by implementation of necessary changes in its domestic law. Prudence would demand that India should enact the necessary enabling legislation before it becomes party to a treaty, so that there is no time lag between undertaking of international treaty obligations and their domestic implementation where called for.<sup>14</sup>

## NEED FOR GENOCIDE LAWS IN INDIA

In absence of specific legislation to punish Genocide lot of atrocities have been committed in India. There are eight stages of Genocide identified by G.H Stanton to understand and prevent its occurrence. The first and second stages are that of Classification and Symbolization. The Indian Society itself is marred by various religious, cultural and ethnical differentiations. The most highlighted of all are the religious and ethnical differences. Our societies and life styles are easily identifiable by our religion which has strong bearing on our social lives. Hindus, Muslims, Christians and Sikhs are distinctly classified religious groups in India and time and again there have been reported communal clashes between these groups.<sup>15</sup> The Genocide Watch in its Report on India states that India is a diverse country with polarization based upon religious, regional, caste and economic background.<sup>16</sup> Dehumanization which is third stage of Genocide is prevalent among religious groups in

<sup>13</sup> V. S. Mani, *Needed, A Law on Genocide*, The Hindu, 10.04.2002, Available at: <http://indianterrorism.bravepages.com/anti-muslim%20riots%209.html>; (Accessed on 20.02.2020)

<sup>14</sup> *Ibid.*

<sup>15</sup> Communal riots between Hindus and Muslims at time of partition in 1947, the killing of Sikhs in 1984, 2002 killings of Muslims in Gujarat.: Available at: <http://www.genocidewatch.org/india.html>; (Accessed on 25.02.2020)

<sup>16</sup> *Ibid.*

India, for political reasons. Hate speeches by leaders of RSS, VHP, Majlis-e-Ittehadul Muslimeen etc. has been a common phenomenon in India, further pushing us towards a polarized society with hatred brewing among religious groups.<sup>17</sup> Further, attack on sacred centers of one religious community by the other is seen as polarizing India into two distinct religious groups of Hindus and Muslims. Like the 1992 demolition of Babri Masjid to proclaim the birth place of Lord Rama by Hindus and the celebration of the Kar Sevaks after the demolition, fired communal riots in Bombay in 1992-93 between Muslims and Hindus. India has a list of communal violence like that of the 2002 Hindu Muslim riots in Gujarat, the 2012 killings of Assamese Muslims, Killing of Christians in Orissa and the ethnic cleansing of the Kashmiri Pandits from the Valley. Due to these existing differences, the Genocide Watch classifies India in the fifth category of Genocide Polarization.

## **INDIAN PENAL LAWS AND GENOCIDE AS A CRIME**

### *Genocide under Indian Penal Laws*

There is a need for specific laws on genocide as the Indian Penal Code, 1860 is insufficient to deal with such acts of genocide. Section 300 of IPC says “*death is to be caused by an act of the accused with such intent or knowledge so as to cause such bodily injury which would likely cause death.*” Genocide, on the other hand, is not mere murder or mass murder. An accused of genocide can be made liable for the actual commission of the acts amounting to genocide under Article III of the 1948 Convention.

### *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989*

The only possible exception in terms of conceptualizing crimes against a collectivity is the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* which provides a brilliant ethnography of crimes against members of a specific community by actually fifteen different ways in which SC/ ST are deprived of their rights. The listing of the *SC/ST (Prevention of Atrocities) Act, 1989* is a fairly accurate description of the kinds of

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<sup>17</sup> Latest of such speeches came from Pravin Togadia inciting Hindu mobs to forcefully take over Muslim land as these cases shall go unpunished and also to use various force against them if necessary. Pravin Togadia under fire for hate-speech, RSS says he didn't say that, The Indian Express (21/04/2014), Available at: <http://indianexpress.com/article/india/india-others/prevent-sale-of-property-to-muslims-pravin-togadia/>; (Accessed on 25.02.2020)

offences to which SC/ST communities are subject to in independent India. It describes what the *Rome Statute* might have called persecution.<sup>18</sup>

The history of the Scheduled *Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* can be traced back to Article 17 of the Constitution through which untouchability was abolished and its practice in any form forbidden.<sup>19</sup>

#### *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill*

The one opportunity to take the question of mass crime seriously was the promise of the UPA Government to ‘enact a model comprehensive law to deal with communal violence’.<sup>20</sup> This promise was made in the Common Minimum Programme (CMP). The reason for this provision finding a place in the CMP was clearly the horrific communal violence in Gujarat in 2002 under the former National Democratic Alliance (NDA). To implement this promise, the United Progressive Alliance (UPA) introduced the *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005*. Even prior to the introduction of the 2005 Bill, there were a series of Bills circulated by both the State and civil society which sought to deal with aspects of mass crimes.<sup>21</sup> The Bill does not seriously consider any of the points made above and makes a mockery of any serious efforts to tackle State impunity for mass crimes.

#### *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2009*

The Government’s final version of the communal violence law empowers the Centre to take charge of an area where riots have broken out once it sends in Central Forces, if it finds the State Government concerned reluctant to act against the rioters. The new law still does not allow the Centre to send Armed Forces on its own to a riot-hit spot.<sup>22</sup> But once a state has

<sup>18</sup> People’s Union of Civil Liberties - Karnataka, *A study of kothi and hijra sex workers in Bangalore*, September 2003, Available at: <http://sangama.org/files/PUCL%20Report.pdf>; (Accessed on 20.02.2020).

<sup>19</sup> The purpose of this Act is to prevent crimes against members of scheduled castes and scheduled tribes; and to provide for relief and rehabilitation of victims of such offences. Available at: [www.hrw.org/reports/1999/india/India994-16.html](http://www.hrw.org/reports/1999/india/India994-16.html); (Accessed on 22.02.2020).

<sup>20</sup> National Common Minimum Programme of the Government of India, May 2004.

<sup>21</sup> Draft-The Communal Crimes Act, 2004 By Human Rights Law Network, Anhad, Jansangharsh Manch, Centre For Study Of Society And Secularism, The Prevention and Punishment of Genocide and Crimes against Humanity (Draft) Bill, 2004; The Prevention and Punishment of Genocide and Crimes against Humanity Bill 2004, Justices PB Sawant and Hosbet Suresh.

<sup>22</sup> Alok Tikku, *Amended Law to Let Centre Take Charge in Riot-Hit States*, Hindustan Times New Delhi,

asked for Central Forces to quell violence, the Centre will have the right under certain circumstances of setting up a unified command, comprising these forces and the local police.

The *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill*, however, says the Centre can declare an area “communally disturbed” and take direct charge only if the State concerned refuses to act against the violence being perpetrated to such an extent that the secular fabric of the country, or internal security, is endangered. To guard against political misuse, the law stipulates that the Centre must first draw the attention of the State Government to the deteriorating state of affairs, and set a deadline for it to take necessary steps to suppress the violence. Until now, Central Forces deployed in a state worked under the control of the local district administration. But henceforth, in special circumstances, it will work under the unified command, which will report to the Centre.

## **CONCLUSION**

Genocide is considered as an international crime, for which the UN enacted the Convention on the Prevention and Punishment of the Crime of Genocide. This Convention has performed dual purposes, first to prevent Genocide and secondly, punish the group or individual who commits it. The second part is performing its duties well by punishing the State or group which commits Genocide. But the prevention of Genocide is not happening in a proper manner which leads to increase in genocidal incidents rapidly. To make it more effective, we have to make it stricter regulation.

International Court of Justice is restricted in its jurisdiction as without the consent of the State, it cannot start the proceedings against them. This sometimes causes hindrance in providing justice to the victims. Till today, 149 countries are the Members of the Convention but most of the countries have not made domestic laws for providing justice to their citizen. Genocide is a different kind of crime for which there is a need for separate legislation.

India ratified the Genocide Convention in the year 1959 but till today its legislators have enacted separate legislation for the same. If we see the heinous crimes committed in India got when it independence then there are a numbers of crimes committed therefore that can befall

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17.03.2013, Available at: <http://www.hindustantimes.com/india-news/newdelhi/Amended-law-to-let-Centre-take-charge-in-riot-hit-states/Article1-519963.aspx>, (Accessed on 26.02.2020)

under the Genocide, but due to the non-presence of legislation all such crimes are treated under the regular provision, which mostly leave the accused free due to lack of evidence.

At the crux of it all, for an act to qualify as Genocide evidence needs to point to an intention to destroy and harm; it is a crime not computed in numbers of dead or harmed but in the intention and desire to commit it-, pre-planning, extent and thoroughness of the killings. India, like another country, is restricted by international law obligations to prevent and punish acts of Genocide. India's obligations are further strengthened by its participation in the Genocide Convention, in the drafting of which it had made a worthwhile contribution. The biggest problem with India is even thereafter is legislation on Genocide made, its implementation will still remain a concern due to corruption and our slow judicial system. This needs to be solved out as soon as possible.

## HUMAN RIGHTS & INDIAN CRIMINAL SYSTEM: CRITICAL ANALYSIS

Atul Jain\*

### *Abstract*

*Human Rights have become the socio-political normative language of the new era. Human Rights are those minimal rights, which every individual must have by virtue of his being a member of human family, irrespective of any other consideration. They are based on mankind's demand for a life in which the inherent dignity of human being will receive respect and consideration. The Universal Declaration of Human Rights clearly states that respect to Human Rights and human dignity is "the foundation of freedom, peace and Justice in the world." Indeed, denial of Human Rights and Fundamental Freedom is not only an individual and personal tragedy, but also creates conditions of chaos in the society. The Criminal Justice System consisting of Police, Judiciary and Correctional Institutions play a major role in implementing Human Rights and thereby protect and safeguard the Rights of the citizens of a country. The extent to which Human Rights are respected and protected within the context of its Criminal proceedings is an important measure of society's civilization. What are the Human Rights which are to be protected within our Criminal procedure, And more importantly, to what extent should the Human Rights of the suspect and the accused be protected when other important interests of society are under attack and in possible conflict with the interest of the accused? These are difficult questions to answer, because there is a perpetual conflict between the interest of the accused and the fundamental interest of the society.*

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## INTRODUCTION

We now live in a world which thinks through the legislative implications of Criminal Justice with one eye on Human Rights. The Administration of Justice is a broad term that includes the norms, institutions, and frameworks by which States seek to achieve fairness and efficiency in dispensing Justice: Criminal, Administrative, and Civil. The rules applicable to the Administration of Justice are extensive and refer to, *inter alia*, fair trial, presumption of innocence, independence and impartiality of the tribunal, and the right to a remedy. The integrity with which the State conducts criminal investigation, arrest, pre-trial detention, trial proceedings, and sentencing all fall within the domain of Administration of Justice. Consequently, various actors, such as judges, Lawyers, court clerks, police, penitentiary officials, and policy makers play various roles in achieving fairness in the Administration of Justice.<sup>1</sup>

International protections of Human Rights have increased dramatically in the last century,<sup>2</sup> due in part to the increased recognition that a number of nations share many fundamental legal values and expectations.<sup>3</sup> One crucial commonality is the acknowledgement that individuals must be protected from certain depredations against their person, and that international Laws are needed to protect people from policies which ultimately affect the global community.<sup>3</sup>

Human Rights are those rights which every human being possesses by virtue of his birth. These are inherent and inalienable. In a country like India, we come across various instances in which the individual is threatened with the possibility of violation of his Human Rights in every walk of life. These are based on mankind's demand for a life in which the inherent dignity of human being will receive respect and consideration. The Universal Declaration of Human Rights clearly states that respect to Human Rights and human dignity is "the foundation of freedom, peace, and Justice in the world".<sup>4</sup> After the two World Wars, the

<sup>1</sup> The Administration of Justice and Human Rights, David Weissbrodt, (2009) 1 City University of Hong Kong Law Review 23-47.

<sup>2</sup> Karen Parker & Lyn B. Neylonjus Cogens: Compelling the Law of Human Rights, 12 HASTINGS INT'L & COMP. L. Rev. 411, 414-16 (1989).

<sup>3</sup> LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 204-05 (1989)

<sup>4</sup> "Universal Declaration of Human Rights" United Nations, United Nations, Available at: [www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/)

UN's concern for Human Rights has also become a major issue of International agenda. This evoked response for International Law and the concept of "International Human Rights Law" has also developed. Human Rights not only stand for individuals' rights rather they are a backbone for providing social Justice in a country. India is a signatory to the Universal Declaration of Human Rights and thus, has adopted similar provisions and framework to protect these Rights. The extent to which the Human Rights are respected and protected within the context of its criminal proceedings is an important measure of society's civilization.<sup>5</sup>

Criminal Justice System of any country is the basis of establishing, Peace and tranquillity, includes not only the judicial system but investigating machinery also. To tame the over flooding of crimes, a strong criminal Justice system is required. Administration of Justice, through the instrumentality of Law, is an essential component of governance. Rule of Law is the bedrock of democracy, which is acknowledged as the best system of governance to ensure respect for Human Rights. The dignity and worth of an individual being at the core of a democracy, constitutional governance in a democratic set up is the safest guarantee for the protection of Human Rights and assurance of human resource development. Equal respect for the rights of all sections of the society is necessary to obtain full human resource development, respecting the basic Human Right of non-discrimination.<sup>6</sup>

The impact of the Administration of Justice within a State has practical significance on the affairs of ordinary individuals and groups. First, the fair Administration of Justice is important for the Rule of Law, in that, it ensures State practice and policies protect against the 'infringement of the fundamental Human Rights to life, liberty, personal security and physical integrity of the person.'<sup>7</sup>

## **HISTORICAL BACKGROUND**

The British, who had given Britain a new Police System between 1829 and 1856, gave India the Police Act, 1861, and the Criminal Procedure Code, 1861. The Indian Evidence Act came

<sup>5</sup> P.N. Bhagwati, "*Human Rights in Criminal Justice System*" in Noorjahan Bava, ed, *Human Rights and Criminal Justice Administration in India*, Uppal Publishing House New Delhi,2000, p11

<sup>6</sup> Essay Sauce, CRIMINAL JUSTICE SYSTEM AND HUMAN RIGHTS. Available at: <https://www.essay sauce.com/law-essays/criminal-justice-system-and-human-rights/>; (Accessed on: 20.02.2020)

<sup>7</sup> C Bassiouni(ed), *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards*.

a little later. These three Acts gave India the present police system. Efforts were made later at the provincial level to review and reform the system. A major effort was, however, made at the central level to reform the system when Lord Curzon appointed the Police Commission, 1920. The Commission studied the work of police stations and said; There can be no doubt that the police force throughout the country is in a most unsatisfactory condition, that abuses are common everywhere, that this involves great injury to the people and discredit to the government and that radical reforms are necessary.<sup>8</sup>

Articles 9 to 12 of Universal Declaration of Human Rights and Article 10 of the International Covenant on Civil and Political Rights<sup>9</sup> lay down a basic minimum standard of treatment to which system of criminal justice of every country must conform. From these provisions, the following conclusions emerge:

1. Everybody who is deprived of his liberty should be treated with humanity, i.e. with respect for the inherent dignity of human person. Article 21 of Indian Constitution guarantees Right to Life and Personal Liberty. Supreme Court of India has held repeatedly that 'life' in Article 21 means life with human dignity,<sup>10</sup>
2. No one should be subjected to arbitrary arrest, detention or exile. Article 21 of the Constitution of India provides that no person shall be deprived of life and personal liberty except according to procedure prescribed by Law. Since the decision of the Supreme Court in case *Maneka Gandhi v. Union of India*<sup>11</sup> it is mandated that the procedure under Article 21 must be fair, just and reasonable and cannot be arbitrary, unfair or unreasonable,
3. Everyone charged with a penal offence has a right to be presumed innocent until proved guilty in a public trial at which he has had all the guarantees necessary for his defence. Indian criminal jurisprudence is based on this cardinal principle,<sup>12</sup>

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<sup>8</sup> Essay Sauce, CRIMINAL JUSTICE SYSTEM AND HUMAN RIGHTS. Available at: <https://www.essaysausage.com/law-essays/criminal-justice-system-and-human-rights/>; (Accessed 20.02.2020)

<sup>9</sup> Art. 10: All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person: (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

<sup>10</sup> *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC

<sup>11</sup> AIR 1978 SC 597

<sup>12</sup> Section 101, Indian Evidence Act

4. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute penal offence at the time, when it was committed. Indian Constitution also provides that no person shall be convicted of any offence except for violation of Law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the Law in force at the time of the commission of the offence,<sup>13</sup>
5. No one should be subjected to arbitrary interference with his privacy, family, home or correspondence. Such a right was recognized by the Supreme Court under Article 21 of the Constitution in *Kharak Singh v. State of U.P.*<sup>14</sup> and after Maneka Gandhi's case it is firmly established that procedure must be fair and reasonable which by implication prohibits such arbitrary interference,
6. Accused person, save in exceptional circumstances, be segregated from those who have been convicted and be treated separately. Similarly, juvenile persons should be separated from adults and accorded treatment appropriate to their age and status. In *Sunil Batra v. Delhi Administration*<sup>15</sup>, the Supreme Court held that keeping of under trial prisoners, who are presumed to be innocent, with convicts offends test of reasonableness under Article 19 or fairness under Article 21. In *Sheela Barse v. Union of India*,<sup>16</sup> Supreme Court emphasized that children should not be confined to jails because it has dehumanizing effect and is harmful to growth and development of children. The Court also ordered that where a complaint is filed or a First Information Report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7, years the investigation should be completed within 3 months and if that does not happen, the case against the child should be treated as closed,
7. The aim of Penitentiary System is primarily reformation and rehabilitation of Criminal s. In recent years, efforts have been made in this direction also. However, still much needs to be done in this regard,

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<sup>13</sup> Article 20(1) of Indian Constitution

<sup>14</sup> AIR 1963 SC 1295

<sup>15</sup> AIR 1980 SC 1579

<sup>16</sup> AIR 1986 SC 1773

Thus, Indian Constitution as illustrated by a number of decisions of the Supreme Court, provides for protection of Human Rights in conformity with the international standards.<sup>17</sup> The Human Rights Commission Act, 1993 provides for constitution of National and State Human Rights Commissions to enquire into complaints of violations of Human Rights and inefficiency on the part of the Government machinery in preventing such violations and to suggest measures for effective implementation of guarantees provided by the Constitution and various Laws of the country.<sup>18</sup>

## **INDIAN CONSTITUTIONAL FRAMEWORK AND HUMAN RIGHTS**

Through the Preamble of our Constitution of India the people of India have resolved to secure to all citizens the following four objectives:<sup>19</sup> Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity and to promote among them all and Fraternity assuring the dignity of the individual and the unity and the integrity of the nation. Indian Criminal Justice System has two primary responsibilities i.e., prevention and control of crime and the protection of rights. The most important factor in preventing and determining crime is the certainty of punishment; the efficiency with which who commits crime is arrested, prosecuted, convicted and punished. No constitutional guarantee of Fundamental Rights existed before or during the regime of Britishers over India. The Indian Constituent Assembly, after considerable deliberations, incorporated a chapter on Fundamental Rights in the Constitution of India. The Supreme Court of India has interpreted that the Indian Constitution guarantees Fundamental Rights expansively.<sup>20</sup> The Constitution protects ‘equality before the Law’ and ‘equal protection of the Laws’ under provisions which embody a broad guarantee against arbitrary or irrational State action more generally. Indian citizens are guaranteed the rights to speech and expression, peaceable assembly, association, free movement, and residence, although Parliament may legislate ‘reasonable restrictions’ on some of these rights in the interests of the ‘sovereignty and integrity of India,’ ‘security of the state,’ or ‘public order.’ The Constitution also authorizes suspension of judicial enforcement of these rights during

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<sup>17</sup> *Saheli Women's Resource Centre v. Commissioner of Police*, Delhi, AIR 1990 SC 513; *Nilbati Behera v. State of Orissa* (1993) 2 SCC 746.

<sup>18</sup> *Tukaram v. State of Maharashtra*, AIR 1979 SC 185 which led to amendments of Criminal Procedure Code, 1973, Indian Penal Code, 1860 and Evidence Act, 1972.

<sup>19</sup> Available at: <https://www.constitution.org/cons/india/preamble.html>.

<sup>20</sup> *Pathumma v. State of Kerala*, A.I.R. 1978 S.C. 771

emergency. In the criminal Justice context, the Constitution prohibits ex post facto Laws, double jeopardy, and compelled self-incrimination. Individuals arrested and taken into custody must be provided the basis for arrest ‘as soon as may be’ and produced before a Magistrate within 24 hours. In its landmark case of *D.K. Basu v. State of West Bengal*<sup>21</sup>, the Supreme Court extended the Constitution’s procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation.<sup>22</sup> The Constitution also guarantees the right to Counsel of the Defendant’s choice, and the Supreme Court has held that legal assistance must be provided to indigent Defendants at Government expense, a right that attaches at the first appearance before a Magistrate. These guarantees do not apply to Laws authorizing preventive detention, which, as discussed below, the Constitution subjects to a more limited set of protection. While the Constitution does not explicitly protect ‘due process of Law,’ it does prohibit deprivation of life or personal liberty from any person except according to ‘procedure established by Law,’ and the Supreme Court has broadly interpreted this guarantee to encompass a range of procedural and substantive rights that approximate the concept of ‘due process.’<sup>23</sup> Procedures must be ‘right, just and fair,’ and not arbitrary, fanciful or oppressive.<sup>24</sup> The Court has held, based on its broad understanding of the right to life and liberty, that the Constitution guarantees the right to privacy<sup>25</sup> and freedom from torture or cruel, inhuman, or degrading treatment.<sup>26</sup> The Court also has recognized a Constitutional Right to a fair criminal trial, including among other elements the presumption of innocence; independence, impartiality, and competence of the judge; adjudication at a convenient and non-prejudicial venue; knowledge by the accused of the accusations; trial of the accused and taking of evidence in his or her presence; cross-examination of Prosecution Witnesses; and presentation of evidence in defence.<sup>27</sup> The Constitution also requires a speedy trial, extending from the outset of an investigation through all stages of the Criminal process.<sup>28</sup>

## INDIAN JUDICIARY AND HUMAN RIGHTS

<sup>21</sup> (1997) 1 SCC 416

<sup>22</sup> Available at: <http://nhrc.nic.in/Documents/sec-3.pdf>.

<sup>23</sup> *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597

<sup>24</sup> *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994, Indlaw SC 525, para. 216

<sup>25</sup> *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 898

<sup>26</sup> *Francis Coralie Mullin v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746.

<sup>27</sup> *State of Punjab v. Baldev Singh*, A.I.R. 1999 S.C. 2378

<sup>28</sup> *Antulay v. R.S. Naik*, A.I.R. 1992 S.C. 1701

The Judiciary has been assigned supervisory role it but cannot take over the investigation process. The Constitution of India, Criminal Procedure Code, Indian Penal Code, Indian Evidence Act and the Police Acts are Important Statutes for Criminal Justice System. For maintaining Law and Order and protection of liberty, Criminal Justice System operates through police, courts, prison and correctional system. Illegal detentions, Custodial violence, torture, lock up deaths being Human Rights violations are matters of concern. Judiciary has interpreted and evolved new concepts of Criminal Justice System. A fair Criminal trial protects accuser's right along with social security, human dignity and personal liberty. It is necessary to publicise through vernacular languages, print and electronic media, NGO's political parties, Academicians, judiciary, Human Rights Organizations etc., to increase awareness of the Human Rights. Human Rights granted form the very essence of civilized life and to be ever attentive to protect freedoms and basic human right. Indian Constitution and other international documents, Universal Declaration of Human Rights (UDHR) 1948 says, 'Everyone is entitled in full equality to a fair and public hearing by any independent and impartial tribunal in the determination of his rights and obligations. The right to life and personal liberty enshrined in Article 21 of the Constitution is of widest amplitude and several un-enumerated rights fall within this Article.

The Supreme Court of India has itself recognised this expanded conception of Access to Justice.<sup>29</sup> It has also recognised that securing Access to Justice is not limited to removing barriers to accessing courts, though of course, this is an important element.<sup>30</sup> However, as I argue below, the focus of Access to Justice Measures has largely been on access to courts. Within this framework, barriers to Access to Justice are viewed as a problem of lack of resources which causes a mismatch between demand and supply - there is too much demand for judicial services, but its supply is limited. The solution is to provide the resources to resolve the mismatch by constricting demand, or by increasing supply. I will argue that not only is this approach partial and incomplete, but also it can often be counter-productive to the broader vision of Access to Justice set out above.

Courts are not only spaces where rights are protected or enforced but as institutions of the State charged with coercive power, they may also be spaces where rights are violated. Access to Justice, therefore, cannot be limited to access to the courts themselves, in the sense of

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<sup>29</sup> *Bihar Legal Support Society v. Chief Justice of India*, (1986) 4 SCC 767

<sup>30</sup> *Imtiyaz Ahmad v. State of U.P.*, (2012) 2 SCC 688

being able to enter court to air and resolve grievances, but should also be understood as including access to just treatment in courts, and access to just outcomes from courts.<sup>31</sup> As such, the common tendency to conflate Access to Justice with access to courts, is misplaced. Access to Justice requires, first and foremost, the creation of substantive rights, and second, all that is required to effectively remedy any violation of the right in a manner that is itself just. Access to *courts* is an essential but not the only component of Access to *Justice*.

Rights and entitlements not only help in securing basic needs, but can also signal to society as a whole, what is acceptable behaviour and what behaviour is subject of legitimate criticism.<sup>32</sup> Take, for example, the *Vishaka case*.<sup>33</sup> This decision did not end the practice of sexual harassment. But, by understanding sexual harassment as a violation of the right to life with dignity, it served the expressive function of de-normalising and de-legitimating sexual harassment, and provided women, individually and collectively, with a powerful vocabulary to understand and challenge the status quo in public discourse. Further, it enabled women who face sexual harassment to call upon the state to recognize such behaviour as wrong and remedy the same.<sup>34</sup>

## CONCLUSION

The Administration of Justice Standards relates to civil rights and obligations as well as criminal charges. The standards deal with the right to be informed promptly of charges, trial within a reasonable time, the right to counsel, adequate facilities for the defense, the right to an interpreter, the independence and impartiality of the decision maker, the right to hear witnesses, the right not to incriminate oneself, the presumption of innocence, the public and fair hearing, and public pronouncement of the judgment. The international, regional, and national jurisprudence of the Administration of Justice is remarkably consistent and has gradually created a unified worldwide definition of procedural fairness.

The Human Rights guarantee investigated in this Article were derived by the concordance of protected rights in national constitutions and international instruments, which is a valid

<sup>31</sup> UNDP. 2004. *Access to Justice Practice Note*, p. 6.

<sup>32</sup> Cass R. Sunstein. 1996. ‘On the Expressive Function of Law’, *University of Pennsylvania Law Review*, 144: 2021-2053

<sup>33</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241

<sup>34</sup> *Apparel Export Promotion Council v. A.K. Chopra* (1999) 1 SCC 759; *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297; (2012) 9 SCR 895

method of demonstrating the existence of ‘general principles of Law’ in International Law. National Laws and Codes of Criminal Procedure, as well as court decisions, further expand upon these rights. There are, however, divergences between the enunciation of principles and their application. Nonetheless, the principle purpose of this Article is to establish the existence of certain general principles of Human Rights protection for persons in national Criminal Justice processes. Human Rights activists should not shrink from asserting Fundamental Human Rights protection as “general principles of Law,” and should carry out further inductive investigations of national Law to strengthen the validity of this contention.

All Criminal Justice Systems in Democratic World have three separately organized parts; The Police as Law enforcement agency; The Courts; which, serve to establish the guilt or innocence of the apprehended person and, if his guilt is established, pass sentence upon him as provided by the sanctity of the code violated; and The prison and correctional system. Each one of the components of the Criminal Justice System shares certain common goals. They collectively exist to protect society, maintain Law and Order and protect crime. The Indian Criminal Justice System has incorporated Human Rights friendly provisions of the international instruments, particularly the judiciary have responded to the new situation in a positive manner and sincerely hoped that in the long run we will have international standards enforced in the Criminal Justice Administration in India, Malimath Committee recommendations are implemented immediately.

The challenge before India is to develop Human Rights in its domestic Criminal Administration by upgrading its Law-enforcement machinery, and on the other hand not to be swayed away at the cost of social development and nation’s unity. The establishment of National Human Rights Commission can contribute if, instead of becoming a face-saving device against international criticism of Human Rights conditions, it dedicates itself sincerely to the detection of Human Rights violations in crime control activity and activates itself towards corrective and remedial steps. Reconciliation lies in improving the domestic culture of Human Rights which in turn will replenish our image in the international platform also. Thus, it can be concluded that in order to protect Human Rights and fundamental freedoms of accused, we must generate awareness for Human Rights in people’s mind, otherwise, the concept of Human Right will zigzag one step forward, and two steps back.

# **THE RADIO FREQUENCY IDENTIFICATION TECHNOLOGY AS A NEW WEAPON TO REDUCE CRIME AND MODERN JURISPRUDENCE**

Kapil Bissa\* & Kamayani Tripathi\*\*

### ***Abstract***

*This paper gives an overview of the current state of radio frequency identification (RFID) technology. Radio frequency identification technology is a new identification card, if we implant a micro-chip as identification tool in human body. Modernization of crime as well modernization of policies is requirement of time. If we implant a micro-chip into human body, that microchip will work with help of satellite or mobile technology. It will help in investigation process and it will also helpful to reduce crime before happening. It will work as a technical pressure on human being. In recent years, radio frequency identification technology has moved from obscurity into mainstream applications that help to reduce crime rate. RFID enables identification from a distance, and unlike earlier bar-code technology, it does so without requiring a line of sight. In this paper, the author introduces the principles of RFID, discusses its primary technologies and applications, and advantages of this technology. In this new dimension science can be used to reduce crime.*

***Keywords:*** *RFID, Microchip, Modernization of Crime, Crime and Technology, Use Of Technology, Modernization Of Policies, Satellite And Mobile Technology, Effect Of Radio Frequency And Its Solution, Issues And Challenges.*

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## INTRODUCTION

Crime is a bolt on society not only our nation but whole world is suffering from the same. Along with many types of crime like violence, property, organized and many other forms. In many countries crime is increasing. The main reason behind this is growth of unemployment. The cost of living is rising and some people commit crimes to fulfil their desires. People in India and around the world are becoming more vigilant in reporting crime. In earlier days, people preferred not to report crime, so increased perception of crime is in parts increased reporting of crime. Movies, TV shows and Internet gives people new ideas, new ways to commit crime. Before internet, no one would have done hacking but as internet is growing so is the crime of hacking. In earlier days there were harsher punishments for crime. Your hands may be cut off, you may be crushed under an elephant or skinned alive. Now those kinds of punishments are gone. People know they can commit crime and even if they are caught they will be locked up in Jail for few months only.

## RADIO FREQUENCY IDENTIFICATION

The term **RFID**<sup>1</sup> refers to Radio Frequency Identification, a technology which uses radio waves to automatically identify items or people. Most commonly this involves the use of an RFID tag and a reader device. In general terms, Radio Frequency Identification systems consist of an RFID tag (typically many tags) and an interrogator or reader. The interrogator emits a field of electromagnetic waves from an antenna, which are absorbed by the tag. The absorbed energy is used to power the tag's microchip and a signal that includes the tag identification number is sent back to the interrogator. **Radio Frequency** identification is a new and emerging technology that helps humans identifies other humans or machines remotely.

This technology can be embedded within smart devices so they can identify and communicate with each other autonomously. In addition, this new electronic and wireless identification technique is an embedded hardware software approach that does not require much space for implementing it. **RFID** comprises a small chip including a tiny antenna and a small-scale integrated circuit. These chips that we will call **tags** can seamlessly be attached to merchandise, animals or humans without affecting them. What makes the use of an **RFID tag**

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<sup>1</sup> Radio Frequency Identification is a technology which uses radio waves to automatically identify items or people. Most commonly this involves the use of an RFID tag and a reader device.

even more appealing is its capacity to receive power from a remotely located emitter and hence, there is no need for constantly providing it with power; all is done wirelessly. Furthermore, the size of a tag is application-dependent but is usually less than few centimetres which make it compliant with any targeted object. In order to recognize and treat data, a handheld or stationary scanning device is used. These high-speed computing devices are capable of receiving and treating data issued by hundreds of tags per second. Therefore, long-lasting tasks can now be simply replaced with simple and prompt steps.<sup>2</sup>

## **ARTIFICIAL INTELLIGENCE**

Artificial Intelligence<sup>3</sup> refers to the intelligence of machines. This is in contrast to the natural intelligence of humans and animals. With Artificial Intelligence, machines perform functions such as learning, planning, reasoning and problem-solving. Most noteworthy, Artificial Intelligence is the simulation of human intelligence by machines. It is probably the fastest-growing development in the World of technology and innovation. Furthermore, many experts believe AI could solve major challenges and crisis situations.

Artificial Intelligence Computers are everywhere today. It would be impossible to go your entire life without using a computer. Cars, ATMs, and TVs we use every day, and all contain computers. It is for this reason that computers and their software have to become more intelligent to make our lives easier and computers more accessible. Intelligent computer systems can and do benefits us all; however people have constantly warned that making computers too intelligent can be to our disadvantage. Artificial intelligence is a field of computer science that attempts to simulate characteristics of human intelligence or senses. These include learning, reasoning, and adapting

Expert systems are also known as knowledge based systems. These systems rely on a basic set of rules for solving specific problems and are capable of learning. The laws are defined for the system by experts and then implemented using if-then rules. These systems basically imitate the expert's thoughts in solving the problem. An example of this is a system that diagnosis medical conditions. The doctor would input the symptoms to the computer system and it would then ask more questions if need or give diagnoses. Other examples include banking

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<sup>2</sup> Available at: <http://www.tracking.com/about-rfid-2/>

<sup>3</sup> Artificial Intelligence refers to the intelligence of machines. This is in contrast to the natural intelligence of humans and animals.

systems for acceptance of loans, advanced calculators, and weather predictions. Natural languages systems interact allow computers to interact with the user in their usual language. They accept, interpret, and execute the commands in this language. The attempt is to allow a more natural interaction between the computer and user. Language is sometimes thought to be the foundation of intelligence in humans. Therefore, it is reasonable for intelligent systems to be able to understand language. Some of these systems are advanced enough to hold conversations. A system that emulates human senses uses human sensory simulation. These can include methods of sight, sound, and touch. A very common implementation of this intelligence is in voice recognition software. It listens to what the user says, interprets the sounds, and displays the information on the screen <sup>4</sup>A recent study led by Northumbria University<sup>5</sup> highlights how Artificial Intelligence can help to crack unsolved crimes, especially by providing insights into the weapons used.

The use of Artificial Intelligence in policing to date has largely been in areas such as facial recognition and helping to deploy resources in the most effective ways, but a recent study led by North Umbria University highlights how it can also help to crack unsolved crimes, especially by providing insights into the weapons used in committing the crime.

*"Machine learning uses a series of algorithms to model complex data relationships,"* the authors say. *"Through careful fine-tuning, these can be applied to predict important characteristics of the ammunition used in a particular shooting event from those of the respective gunshot residue (GSR) deposited on surrounding surfaces or items, such as spent cases, wounds, and, potentially, also the shooter's hands."*

The team believes their approach represents a marked improvement from current methods of GSR analysis, with the new approach affording unprecedented accuracy. It's an approach that the team believes could bring fresh insights to some high profile, unsolved crimes of the past such as the Bloody Sunday killings of 1972.

"After Bloody Sunday, the problem was to determine if gunshots were fired by civilians or military staff," they explain. "The investigators found large amounts of GSR all over victims and concluded that these resulted from shooting activities. It was later established, however, that these were likely due to the secondary, post-event transfer of contaminations from

<sup>4</sup> Available at: <https://www.bartleby.com/essay/Artificial-Intelligence-FKCTUKOZTC>

<sup>5</sup> North Umbria University is a university located in Newcastle upon Tyne in the North East of England

military staff – whose hands were rich with GSRs – to dead bodies. Small amounts of GSR, indeed, may be transferred by prolonged contacts with contaminated surfaces, such as those that took place when soldiers helped transport victims to the hospital after the event.”<sup>6</sup>

The team has extensive knowledge of utilizing Machine Learning for forensic applications, with data collected from firing a range of ammunition, including the gun cartridges and the smokeless powders to determine a relationship between the ammunition and the residue. Their initial success has prompted the team to believe their work could be applied more widely in forensic science, and potentially even in analytical chemistry more generally. The path from laboratory to market is seldom an easy one, but the results from this study are certainly interesting enough to suggest that police officers will soon have additional help when it comes to solving murders.<sup>6</sup>

What's more, as the study of 3 year olds and other research have shown, many of these brain differences can be measured early on in life, long before a person might develop into actual psychopathic tendencies or commit a crime.

Criminologist Nathalie Fontaine of Indiana University studies the tendency toward being callous and unemotional (CU) in children between 7 and 12 years old. Children with these traits have been shown to have a higher risk of becoming psychopaths as adults.

*“We’re not suggesting that some children are psychopaths, but CU traits can be used to identify a subgroup of children who are at risk,”* Fontaine said.

Yet her research showed that these traits aren't fixed, and can change in children as they grow. So if psychologists identify children with these risk factors early on, it may not be too late.

Fontaine said, “*We can still help them,*” “*We can implement intervention to support and help children and their families, and we should.*” Neuroscientists' understanding of the plasticity, or flexibility, of the brain called neurogenesis supports the idea that many of these brain differences are not fixed.

“Brain research is showing us that neurogenesis can occur even into adulthood,” said

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<sup>6</sup> Available at: <https://dzone.com/articles/how-ai-can-help-solve-unsolved-crimes>

psychologist Patricia Brennan of Emory University in Atlanta. Biology isn't destiny. There are many, many places you can intervene along that developmental pathway to change what's happening in these children. Furthermore, criminal behavior is certainly not a fixed behavior. Psychologist Dustin Pardini of the University of Pittsburgh Medical Center found that about four out of five kids who are delinquents as children do not continue to offend in adulthood. Pardini has been researching the potential brain differences between people with a past criminal record who have stopped committing crimes, and those who continue criminal behavior. While both groups showed brain differences compared with non-criminals in the study, Pardini and his colleagues uncovered few brain differences between chronic offenders and so-called remitting offenders. "Both groups showed similar results," Pardini said. "None of these brain regions distinguish chronic and remitting offenders."

Yet even the idea of intervening to help children at risk of becoming criminals is ethically fraught. "Do we put children in compulsory treatment when we've uncovered the risk factors?" asked Raine. "Well, who decides that? Will the state mandate compulsory residential treatment?"

What if surgical treatment methods are advanced, and there is an option to operate on children or adults with these brain risk factors? Many experts are extremely hesitant to advocate such an invasive and risky brain intervention — especially in children and in individuals who have not yet committed any crime.

Yet psychologists say such solutions are not the only way to intervene. "You don't have to do direct brain surgery to change the way the brain functions," Brennan said. "You can do social interventions to change that."

Fontaine's studies, for example, suggest that kids who display callous and unemotional traits don't respond as well to traditional parenting and punishment methods such as time-outs. Instead of punishing bad behavior, programs that emphasize rewarding good behavior with positive reinforcement seem to work better.

Raine and his colleagues are also testing whether children who take supplemental pills of omega-3 fatty acids - also known as fish oil - can show improvement. Because this nutrient is thought to be used in cell growth, neuroscientists suspect it can help brain cells grow larger, increase the size of axons (the part of neurons that conducts electrical impulses), and regulate

brain cell function.

"We are brain scanning children before and after treatment with omega-3," Raine said. "We are studying kids to see if it can reduce aggressive behavior and improve impaired brain areas. It's a biological treatment, but it's a relatively benign treatment that most people would accept."

The field of neuro-criminology also raises other philosophical quandaries, such as the question of whether revealing the role of brain abnormalities in crime reduces a person's responsibility for his or her own actions.

"Psychopaths know right and wrong cognitively, but don't have a feeling for what's right and wrong," Raine said. "Did they ask to have an amygdala that wasn't as well functioning as other individuals? Should we be punishing psychopaths as harshly as we do?"

Because the brain of a psychopath is compromised, Raine said, one could argue that they don't have full responsibility for their actions. That - in effect - it's not their fault.

In fact, that reasoning has been argued in a court of law. Raine recounted a case he consulted on, of a man named Herbert Weinstein who had killed his wife. Brain scans subsequently revealed a large cyst in the frontal cortex of Weinstein's brain, showing that his cognitive abilities were significantly compromised.

The scans were used to strike a plea bargain in which Weinstein's sentence was reduced to only 11 years in prison. "Imaging was used to reduce his culpability, to reduce his responsibility," Raine said. "Yet is that not a slippery slope to Armageddon where there's no responsibility in society?"<sup>7</sup>

It is described by the father of modern criminology Cesare Lombroso<sup>8</sup>, according to the theory of the Cesare Lombroso. He believing essentially that criminality was inherited and that criminals could be identified by physical attributes such as hawk-like noses and bloodshot eyes, Lombroso was one of the first people in history to use scientific methods to study crime.

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<sup>7</sup> Available at: <https://www.livescience.com/13083-criminals-brain-neuroscience-ethics.html>

<sup>8</sup> Cesare Lombroso, was an Italian criminologist, physician, and founder of the Italian School of Positivist Criminology.

Lombroso is the subject of a historical novel by former criminal barrister Diana Bretherick. Here, writing for *History Extra*, Bretherick tells you everything you need to know about him, and explains why his influence on today's study of crime cannot be ignored...

It began in Italy in 1871 with a meeting between a criminal and a scientist. The criminal was a man named Giuseppe Villella, a notorious Calabrian thief and arsonist. The scientist was an army doctor called Cesare Lombroso, who had begun his career working in lunatic asylums and had then become interested in crime and criminals while studying Italian soldiers. Now he was trying to pinpoint the differences between lunatics, criminals and normal individuals by examining inmates in Italian prisons.

Lombroso found Villella interesting, given his extraordinary agility and cynicism as well as his tendency to boast of his escapades and abilities. After Villella's death, Lombroso conducted a post-mortem and discovered that his subject had an indentation at the back of his skull, which resembled that found in apes. Lombroso concluded from this evidence, as well as that from other criminals he had studied, that some were born with a propensity to offend and were also savage throwbacks to early man. This discovery was the beginning of Lombroso's work as a criminal anthropologist.

Lombroso wrote: "At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal – an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals.

*Lombroso concluded from this evidence... that some were born with a propensity to offend and were also savage throwbacks to early man*

"Thus were explained anatomically the enormous jaws, high cheek bones, prominent super ciliary arches, solitary lines in the palms, extreme size of the orbits, handle shaped or sessile ears found in criminals, savages and apes, insensibility to pain, extremely acute sight, tattooing, excessive idleness, love of orgies and the irresistible craving for evil for its own sake, the desire not only to extinguish

Essentially, Lombroso believed that criminality was inherited and that criminals could be

identified by physical defects that confirmed them as being atavistic or savage. A thief, for example, could be identified by his expressive face, manual dexterity, and small, wandering eyes. Habitual murderers meanwhile had cold, glassy stares, bloodshot eyes and big hawk-like noses, and rapists had ‘jug ears’. Lombroso did not, however, confine his views to male criminals - he co-wrote his first book to examine the causes of female crime, and concluded, among other things, that female criminals were far more ruthless than male; tended to be lustful and immodest; were shorter and more wrinkled; and had darker hair and smaller skulls than ‘normal’ women. They did, however, suffer from less baldness, said Lombroso. Women who committed crimes of passion had prominent lower jaws and were wicked than their male counterparts, he concluded.

*Essentially, Lombroso believed that criminality was inherited and that criminals could be identified by physical defects that confirmed them as being atavistic or savage.*

Inspired by his discovery, Lombroso continued his work and produced the first of five editions of *Criminal Man* in 1876. As a result Lombroso became known as the father of modern criminology. One of the first to realise that crime and criminals could be studied scientifically, Lombroso’s theory of the born criminal dominated thinking about criminal behaviour in the late 19th and early 20th century.<sup>9</sup>

### **RFID set to reduce crime**

MSNBC news reports that Kestrel Wireless is still in talks with Hollywood studios and expect to announce deals this summer. Kestrel Wireless’s ‘Radio Frequency Activation’ or RFA for short is set to protect optical media such as DVD’s, audio CD’s and video games from theft both in store and in transit.

The principle is pretty simple: a tiny UHF RFID chip controls a digital shutter which covers the optical media’s surface. If the surface is darkened then the media is rendered useless as the optical drive cannot read data stored on the disc. The chip and shutter are incorporated in the optical disc during manufacture; the disc’s are shipped in a dormant state and only enabled at the point of sale. Working on the principle that people don’t steal things that have no value this would mean there is no need for the awkward to remove film packaging, alarm

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<sup>9</sup> Available at: <https://www.historyextra.com/period/victorian/the-born-criminal-lombroso-and-the-origins-of-modern-criminology/>

tags or secured glass display cabinets. It's also predicted that this technology could be used to protect electrical and electronic items in much the same way with a UHF RFID tag used internally to enable/disable the device.

In the case of optical media I'm not sure how effective this would be—while the protocol used to activate the disc is said to be encrypted it may not prevent cruder methods of circumvention. If an electrical charge is required to clear the shutter layer then could it be activated by other means? Failing that could this layer simply be ground off of the discs using a rotary scratch remover? The protective film is said to be 1/50th the thickness of a human hair. What happens to this layer if it's scratched/damaged?<sup>10</sup>

After prisoners serve prison sentences, they often repeat violent and harmful crimes after being released. Examining a person's previous actions is the best way to form a solution to prevent future actions. Do nothing, hoping that a lesson was learned in prison.

## **WHO WILL CARRY THE CHIP?**

- Any person who has been convicted of a violent crime, rape/sexual assault, and/or murder. Convicts will still serve their sentence in prison,
- The degree of the crime and length of prison sentence will determine the amount of time for which the ex-felon is tracked and
- Ex-felons could be tracked for a period of time ranging from a month to their entire lifetime.

### ***Tracking***

- On a monitor in their cars, law enforcement officers would have access to the positions of every tracked ex-felon,
- There would be local stations, as well as a federal station that would track the felons as well.

### ***The Database***

- The database would contain personal data of the ex-criminal as well as the criminal history,

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<sup>10</sup> Available at: <https://www.techrepublic.com/blog/data-center/rfid-set-to-reduce-crime/>

- It would also contain the exact location of the ex-felon at all times throughout the tracking period.

Tracking periods would be one day intervals and backed up monthly to prevent excessive storage build-up

### ***Additional Technology***

- Along with the database, a program would be written to direct law enforcement officers through areas highly concentrated in chip carriers,
- If a convicted bank robber was spending a lot of time around a bank, the police with jurisdiction for the district would be warned, as well as the bank.

### ***Chip Removal***

- Special polyethylene sheath would help the skin bond to the chip, holding it in place,
- This makes it difficult and extremely painful for the ex-felon to remove the chip,
- At the end of the tracking period, the chip would expire, and the ex-felon would have the option of having the chip painlessly removed,
- With or without removal, the ex-felon will no longer be tracked.

Australia Becomes First Country To Begin Microchipping Its Population. RFID Implants in the Human Body.<sup>11</sup>

## **CONCLUSION**

Crime have ever been a problem for human civilization .There are thousands of religion, million billion rules and regulations all over the world but these are only words and words can note change the society if words has ability to change the society there were only need of quotations somehow given by the great personalities of this universe likewise Gita by lord Krishna, Bible, Quran and many more books .Twenty first century is the world of practical phenomena there is no need of any sin , curse and just and unjust only the power of punishment can miracle to reduce crime or the criminal mind nevertheless technology can become a greatest tool to cure human behaviour by extra effort .RFID is one of the tool which can make human life easier few countries like Australia, Sweden are using this

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<sup>11</sup> Global Research, October 04, 2016

technology to reduce crime. Artificial intelligence is helping people as lifesaving equipment human being are using artificial intelligence in their daily life but no one is thinking about RFID which could be a better tool to investigate crime and to solve crime.

### **Suggestion**

- Government should pay attention to RFID technology,
- RFID technology must be compulsory implant in every citizen body,
- Our scientist must improve RFID technology as human friendly,
- This technology has loop hole that be a reason of cancer but how far it is right or wrong and
- RFID can also be used as a unique identification of citizen.

## **CAPITAL PUNISHMENT v/s. HUMAN RIGHTS**

Sanjay Pandey\*

***“I think life is sacred whether it is abortion or death penalty”***

***-Tim Kaine***

### ***Abstract***

*The sentence of Death Penalty is a denial of the most basic Human Rights; it violates one of the most fundamental principles under widely accepted Human Rights Law—that States must recognize the Right to Life. The UN General Assembly, the representative body of recognized States, has called for an end to Death Penalty and Human Rights Organizations agree that its imposition breaches enshrined fundamental Human Rights norms. Convention is quickly moving towards a position in support of worldwide abolition. The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the Universal Declaration of Human Right (UDHR), which the U.S. helped draft in the aftermath of World War II and adopted in 1948. Under Article 3 of the UDHR, life is a Human Right. This makes the Death Penalty our most fundamental Human Rights violation. As long as Governments have the right to extinguish lives, they maintain the power to deny access to every other right enumerated in the Declaration. This first most central right provides the foundation upon which all other rights rest.*

***Keywords:*** Death Penalty, Human Rights, Conventions, UDHR, Constitution.

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## INTRODUCTION

Capital Punishment, also called Death Penalty is execution of an offender sentenced to death after conviction by a Court of Law for a criminal offense. Capital Punishment should be distinguished from extra judicial executions carried out without due process of law. The term Death Penalty is sometimes used interchangeably with Capital Punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on Appeal), because of the possibility of commutation to life imprisonment.

The morality of killing a person is also subjective for each person. Throughout the life of an individual, his beliefs and morality can and most likely change. The question whether Death Penalty is a moral or an immoral act in a cultured society, does not have a definite answer. Whether to give death penalty to a criminal or not, may depend on his earlier criminal records and the seriousness of the crime he has committed. The question is, do we really have the right to take the life of our fellow human beings?

The prevalence of capital punishment in ancient times is difficult to ascertain precisely, but it seems likely that it was often avoided, sometimes by the alternative of banishment and sometimes by payment of compensation. For example, it was customary during Japan's peaceful Heian Period (794–1185) for the Emperor to commute every death sentence and replace it with deportation to a remote area, though executions were reinstated once civil war broke out in the mid-11th century.

## CAPITAL PUNISHMENT AND INTERNATIONAL CONVENTIONS

A number of regional Conventions prohibit the Death Penalty, most notably, the Sixth Protocol (abolition in time of peace) and the 13th Protocol (abolition in all circumstances) to the European Convention on Human Rights. The same is also stated under the Second Protocol in the American Convention on Human Rights, which, however, has not been ratified by all countries, most notably Canada and the United States. Most relevant operative International Treaties do not require its prohibition for cases of serious crime, most notably, the International Covenant on Civil and Political Rights. This instead has, in common with several other treaties, an optional protocol prohibiting Capital Punishment and promoting its wider abolition.

Several international organizations have made the abolition of the Death Penalty (during time

of peace) a requirement of membership, most notably the European Union (EU) and the Council of Europe. The EU and the Council of Europe are willing to accept a moratorium as an interim measure. Thus, while Russia is a member of the Council of Europe, and the death penalty remains codified in its law, it has not made use of it since becoming a member of the Council – Russia has not executed anyone since 1996. With the exception of Russia (abolitionist in practice), Kazakhstan (abolitionist for ordinary crimes only) and Belarus (retentionist), all European countries are classified as abolitionist.

The Protocol no.13 calls for the abolition of the Death Penalty in all circumstances (including for war crimes). The majority of European countries have signed and ratified it. Some European countries have not done this, but all of them except Belarus and Kazakhstan have now abolished the Death Penalty in all circumstances (*de jure*, and Russia *de facto*). Poland is the most recent country to ratify the Protocol, on 28 August 2013. The Protocol No.6 which prohibits the Death Penalty during peacetime has been ratified by all members of the European Council, except Russia (which has signed, but not ratified). There are also other international abolitionist instruments, such as the Second Optional Protocol to the International Covenant on Civil and Political Rights, which has 81 Parties, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

Death Penalty or Capital Punishment is a legal process wherein a person is put to death by a state in accordance to a crime committed. The word ‘capital’ comes from the Latin word ‘capitalis’ (of the head). Crimes that result in Death Penalty are known as ‘capital offences’ or ‘capital crimes’.

Capital punishment has been used over the years by almost every society in order to punish the guilty for some particular crimes such as punishment for premeditated murder, espionage, treason, or as part of military justice. In some countries, sexual crimes such as rape, adultery and sodomy carry the Death Penalty, so does religious crimes such as apostasy (the formal renunciation of the State religion). In many retentionist countries (countries that use Death Penalty), drug trafficking is also a capital offense. In China, human trafficking and serious cases of corruption are also punished by Death Penalty.

## **CAPITAL PUNISHMENT IN INDIA**

Capital Punishment is a legal penalty in India. It has been carried out in five instances since

1995, while a total of twenty-six executions have taken place in India since 1991, the most recent of which was in 2015. India is one of 78 countries including the USA, China, Iran and Vietnam which have not banned the Death Penalty. 86 countries and territories have abolished the death penalty for all crimes, and a total of 121 countries have abolished the death penalty in law or practice. Over 40 countries have abolished Death Penalty for all crimes since 1990. 10 December 2005, the International Human Right Day, is observed as Anti-Capital Punishment. Some are systematic some; some procedural and some are ideological.

Back in 1947, India retained the 1860 Penal Code which provides Death Penalty for murder. It has been estimated that 1422 executions have taken place in 16 Indian States between 1953 and 1963 and it is hard to measure the rate of death sentence execution between 1980 and 1990. It is estimated that 2 to 3 persons were hung to death every year.

In the Judgment of *Bachan Singh v. State of Punjab*,<sup>1</sup> the Supreme Court ruled that Death Penalty should only be used in the ‘rarest of rare’ cases, but does not give a definition as to what ‘rarest of rare’ means.

There has been a huge debate around the world over the use of Death Penalty whether it should exist or not. Every man has a right to live. Article 21 of the Indian Constitution provides to its citizens ‘protection of life and personal liberty’- “no person shall be deprived of his life or personal liberty except according to procedure established by law”. This exception to life has created a dilemma across the world.

Is the judiciary valuing innocent lives which have perished to that of a person committing a heinous crime such as murder? Do criminals who commit a heinous crime such as murder lose the right to live on this earth? Are innocent convicts being executed? Does Death Penalty take away the right for future appeal that would have been filed by the convict? What is the remedy to wrong executions? Does Death Penalty to a convict provide proper remedy to the family that has lost its member and gone through the horror and pain of losing its loved one? These are just a few questions that are being debated across the world in every society over the legality or legitimacy of death penalty whether it must exist or be eradicated.

Crime rates have not decreased in spite of Death Penalty or Capital Punishment in India or

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<sup>1</sup> (1980) 2 SCC 684

any other country with such practices. The death rate in India per 1000 people was reported at 8.04% in 2010 where half of it were criminal homicide, the inclusion of Death Penalty hasn't provided any Midas Touch to bring down the death rates.

People who commit murders do not think of the consequences or the punishment that they might go through. The reason behind this is that the act done is mostly spontaneous or an emotional outburst and is at the spur of the moment, it is very unlikely that they are mentally stable.

According to recent studies, life imprisonment costs 10 times lesser than when a person is executed after a long process or the bureaucratic process that has to be undergone for a person to be executed.

There is a speculation that Death Penalty is the worst way of violating Human Rights, because right to live is the most important right. A few believe that judicial hanging is one of the forms of legal murder. The mental torture that a person goes through while being executed is far beyond imagination. It is inhuman and a monster within the society some believe.

*"I think capital punishment works great. Every killer you kill never kills again"*

- Bill Mayer

## **PROS AND CONS OF DEATH PENALTY**

Debates on whether Capital Punishment is morally correct in civilized society have been going for ages. People have different opinions on the issue of death penalty given to a convict. While some think that Death Penalty is necessary for those who have committed a terrible crime, there are others who consider it as an immoral act that goes against the values of humanity.

## **CONCLUSION**

As we can plainly see, there are several good reasons to support and oppose Capital Punishment. Also, there are several bad reasons to be for and against the Death Penalty too. Furthermore the general population has a wide range of beliefs concerning Capital Punishment. Even these beliefs of the general population are subject to change. In the end, it

is what the majority of society currently believes to be moral that should be reflected by the actions of their Government.

# **ROLE OF INVESTIGATING AGENCIES IN CRIMINAL JUSTICE SYSTEM: A CRITICAL STUDY WITH REFERENCE TO INDIAN PERSPECTIVE**

Anusree Telfy.C\*

***“Everything can be sacrificed for Truth, But Truth cannot be sacrificed for Anything”***

- ***Swami Vivekananda***

## **INTRODUCTION**

Criminal justice administration is one of the areas for academic research and study and it continues to be the sub depiction of justice administration. Except for developed countries, the research and study on criminal justice have not got any attention to crime and criminal activities going around the world. Crime is considered as one of the most complex problems of modern civilization so it's difficult to build criminal justice administration using theoretical knowledge.<sup>1</sup> Since the beginning of human civilization, the hunt for peace, prosperity, and development has become common to all human beings. Generally, man is living in a society of more values. Self-preservation is one of the important rights that man prizes. Man will enjoy certain natural and inalienable rights on this earth.<sup>2</sup>

Davis Mc Entire and Joseph E. Weckler's article “The Role of Police” has been taken too know the attitude of the police in the investigation process. Ved Marwah specifies the violation of human rights by police in his article “Human Rights and Role of Police”. R. Deb describes the role of police in the investigation process in his article “Police Investigation: A Critical Review”. Indian Penal code, Code of Criminal Procedure and Indian Evidence Act have been referred for the role of police in the criminal justice system. The object of this research is to study the role of police in the Criminal Justice administration and to understand the role of the Indian investigating agency in the investigating process.

Police play an important role in the criminal justice administration. The investigating process

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<sup>1</sup> Available at: [https://shodhganga.inflibnet.ac.in/bitstream/10603/150175/6/06\\_introduction.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/150175/6/06_introduction.pdf)

<sup>2</sup> K. I.Vibhute. Criminal Justice, [1st Edition], 2004, Eastern Book Company, Lucknow, P.109

is the main role of the police which directly influencing the criminal justice system. The major duty of the police is to protect life, liberty, and property of citizens. The criminal justice system has been constituted to give important responsibilities to the police. They have several duties to perform but the maintenance of Law and order and investigation of offenses were one of the important duties. They have also charged with farm duties to protect the Human Rights of the citizens. If there is an attack or threat of attack of one's Human rights, the citizens run towards the police for help. Tactlessly, the contribution of the police in this behalf is not appreciated, only the irregularities of the police have been observed, stressed and complained. The police play a difficult role while protecting the life of the individual even without looking at their own lives so that above-mentioned irregularities should get protected.<sup>3</sup>

## **HISTORICAL PROSPECTIVE**

Indian police system has been made from British rule. The origin of police can be drawn from the earliest Vedic period of Indian History. Rig Veda and Atharva Veda mention certain kinds of crimes known to Vedic India. During the Harappan Civilisation, there is a piece of evidence which indicates the existence of security forces.<sup>4</sup>

### ***Police: Ancient India***

During this period, the criminal justice system was developed and it was continued for five to six hundred years with only one difference in Mauryan and Gupta period. During the Mauryan period, the administration system was centralized while in the Gupta period it was more decentralized. So it can be noticed that the basic structure of the police was nearly the same. The basic systems like the village police, the city police, and the palace police were developed or changed by various kings (Srivastava 1999).<sup>5</sup>

### ***Police: Medieval India***

During the medieval period, the sultan was the central power of political activity. At the provincial level, Faujdar was the head of the criminal justice administration. At the district

<sup>3</sup> Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs Report Volume-I, March, India

<sup>4</sup> Available at: [https://shodhganga.inflibnet.ac.in/bitstream/10603/21078/10/11\\_chapter%202.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/21078/10/11_chapter%202.pdf)

<sup>5</sup> *ibid*

level, Kotwal was the administrative owner of the criminal justice system and at the village level, Chowkidar has the duty of prevention and detention of crimes. The government of Mughals was always military. In the Mughal period, justice and police were the two weak points.<sup>6</sup>

### ***Police: Under East India Company***

Till in the middle of the nineteenth century, there is no adequate police system. This is due to Britisher's inexperience and lack of knowledge about the country. Till 1792, policing was not taken away from the zamindars. Cornwallis has been sent to India by East Indian Company's Governor-General. He abolished the Zamindari system and appointed thanedars for the maintenance of law and order. He introduced reform measures also, but his reforms create a lack of faith among the natives of the land and their institutions. <sup>7</sup>

### ***Police: Background to the Indian Police Act of 1861***

After the invasion of Sindh to the British Indian Empire in 1843, Sir Charles Napier was made a duty for the administration of the criminal justice system. Then he realized that there is a need for an organization that functions properly. He found that there is a need for a native police system which is in the form of a colonial model of police, namely Royal Irish Constabulary. This system was based on two basic principles: firstly, the police should be completely separated from the military and secondly, they can act as an independent body and the assistant collector can discharge the responsibilities for law and order. Napier's system provided Inspector General of Police and superintendents in each district. Then the system soon spread all over the country under the control of the East India Company. Police commission of 1860 didn't alter the main principles of the model and it designed the present police force of India.<sup>8</sup>

### ***Indian Police Act, 1861***

After the revolt of 1857, the British right has been legislated the Indian Police Act of 1861 to bring in powerful administration of police in the country and to prevent any future revolts. This act has continued even though Indians being transformed from a British colony to the

<sup>6</sup> *ibid*

<sup>7</sup> *Supra note 5*

<sup>8</sup> *Supra note 6*

Sovereign Republic. The National Police Commission, 1979-1981 (NPC) felt that they need to be reform and then they drafted a Model Police Act in its Eighth Report which was submitted in 1981. The police powers were misused for political purposes during the emergency (1975-1977). The problem of political interference was also mentioned in the National Police Commission in its 1979 report. The National Police Commissions in 2000 found that police have been arresting indiscriminately as a source of corruption. The report says that power of arrest has been used in rarest of rare cases and such an allegation of commission of an offense cannot constitute as a ground for arrest.<sup>9</sup>

By the lack of effective accountability mechanisms and periodic review of performance, which caused police to lose their confidence in the public? Another problem is that extensive indiscipline and arrogant attitude towards law and procedures are corroding the faith of people in the police. The police Act, 1861 vests the superintendence of the police is always in the hands of the state government. At this time, the Head of the police (Director General/Inspector General) enjoys his/her terms at the pleasure of the Chief Minister. Without giving any reasons the head of the police can be removed. Such a state of affairs has been ruled by the political elite. The present legislation is having another problem is that only independent authority is having the capacity to investigate and direct police extremes is the National Human Rights Commission (NHRC). The commission is having only one power that is to advise the government. If any government failed to accept NHRC's advice, there is no provision in law to compel the government to implement its advice but they can approach higher courts and seek directions. In the last eight months, NHRC issued four summons to the Director-General of Police, Bihar for the two wrongful arrests of the activists. Then the government has been set up a Soli Sorabjee committee to suggest police reforms so they came up with a draft bill which was passed by the parliament for unknown reasons. After the Nirbhaya Rape case, J.S. Verma Committee was set up and this committee also suggested police reforms. Police reforms are needed then only police can be made accountable by the citizens. Police are having many powers but more powers in the police will not help. The Police Act, 1861 needs to be replaced with legislation then it will reflect the democratic nature of India's polity. In all parameters, the Act is very weak so it may govern democratic police

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<sup>9</sup> Available at: <https://blog.ipleaders.in/the-indian-police-act-and-police-reform-in-india/>

legislation.<sup>10</sup>

## **STATUTORY PROVISIONS RELATING TO THE CRIMINAL JUSTICE ADMINISTRATION OF POLICE**

Understanding of police includes the understanding of the criminal justice system. Few characteristics of the system are the following:

### ***Criminal law***

The criminal law consists of both substantive as well as procedure law. The substantive law contained the Indian Penal Code as well as the special and local laws enacted by both central and state governments. The procedure law mainly laid down the Code of Criminal Procedure, 1973 (CrPC) and the Indian Evidence Act, 1872. During the second half of the 19th century, the British enacted three major Acts, i.e., IPC, CrPC and Indian evidence Act. On the recommendation made by the Law Commission of India, in the other two acts, some are remained unchanged and except for certain minor amendments.<sup>11</sup>

### ***Substantive Law***

The IPC defines various types of crimes and their punishments. The offenses are classified into different categories i.e. offense against the state, armed forces, public order, property, etc. At present consists of 511 sections. Other local and special laws also contain in penal provisions. These provisions have been enacted relating to current crimes to save the interests of weaker sections of society. Most of the criminal offenses are registered under these laws only. Some of the criminal offenses like smuggling, excise, and prohibition of Food adulteration etc.<sup>12</sup>

### ***Procedural law***

Procedural law means it is a law that contains certain procedures that shall be followed in criminal cases. From registration, investigation and after a proper trial to its final disposal by a court of law. In all penal offenses, the police are not empowered to take cognizance.

<sup>10</sup> *Supra* note 6

<sup>11</sup> J. C. Chaturvedi, Police Administration and Investigation of Crime 195 (Isha Books, Delhi, 2006).

<sup>12</sup> *Supra* note 13

Criminal law consists of two types of offenses- cognizable and non-cognizable.<sup>13</sup>

### ***Criminal Justice process***

The process of criminal justice system contains the following steps:

**Step 1** – First Information Report (FIR) shall be registered. Registration of the First Information Report is the first stage of the process of criminal justice. When police receive information regarding a commission of a cognizable offense, he will prepare a written document which was known as FIR.<sup>14</sup>

**Step 2** – The police officer continues to the scene of the crime and investigates the facts of the case. Mainly includes in the criminal investigation by the police are an examination of a crime scene, examination of witnesses and suspects, recording the statements of witnesses, conducting searches, seizing the property, collecting various scientific shreds of evidence, making entries in various records, arresting and detaining the accused, interrogation of the accused.<sup>15</sup>

**Step 3-** The officer in charge of a police station after completing the investigation, he will send a report to the nearby magistrate. The report sends in the form of a charge sheet if there are sufficient grounds. If the report does not contain any sufficient grounds, then such report is called the final report.<sup>16</sup>

**Step 4**-The court will take cognizance and initiates the trial after receiving the charge sheet.

**Step 5-** when the charges are framed, the procedure involves the prosecution to prove the charges beyond the doubt. The accused has been allowed to defend himself.

**Step 6** – if the trials end in conviction, the court may give various punishments like fine, forfeiture of property, simple imprisonment, rigorous imprisonment, imprisonment for life and death sentence.<sup>17</sup>

<sup>13</sup> Indian penal code, 1860

<sup>14</sup> Available at: <https://www.lawteacher.net/free-law-essays/criminal-law/registration-of-fir.php>

<sup>15</sup> <http://docs.manupatra.in/newsline/articles/Upload/D3233B26-CBD0-4ACB-BFE7-205443A06DE8.pdf>

<sup>16</sup> Available at: <http://www.mondaq.com/india/x/807764/Crime/Can+A+Person+Be+Charged+In+A+Criminal+Case+Before+Filing+Of+The+Charge+Sheet>

<sup>17</sup> *Supra* note 16

## **ROLE, FUNCTIONS AND DUTIES OF THE POLICE IN GENERAL**

The role and functions of the police in general are:

- To protect life, liberty, human rights, and dignity and to uphold and enforce the law impartially.
- To preserve and uphold public order;
- To protect from internal security, terrorist activists and other militants activists;
- To protect public properties including roads, railways, bridges, etc
- To protect against acts of vandalism, violence.
- To prevent crimes and implementing various agencies to prevent crimes;
- All complaints shall be registered brought by the complainant or his representative, in person or received by post, e-mail or other means, after duly acknowledging the receipt of the complaint;
- To register and investigate all cognizable offenses coming to their notice through such complaints, duly supplying a copy of the First Information Report to the complainant and where appropriate, to apprehend offenders, and extend requisite assistance in the prosecution of offenders;
- To maintain security in the community,
- All possible help should be given to the situations arising out of natural or man-made disasters and also assist other agencies in relief and rehabilitation measures.
- To provide aid to the individual who is facing physical damages;
- To collect intelligence relating to matters affecting public peace, and all other crimes include social offenses, communalism. Extremism, terrorism, etc
- A police officer on duty take charge on unclaimed property and take action for safe custody which was prescribed by law;
- To train, motivate and ensure police personnel.<sup>18</sup>

## **POLICE AS AGENT OF LAW AND NOT OF PARTY IN POWER**

At the stage of an investigation, political interference has become a repetitive manner. What all manners coming from press and public and even in Punjab Police Commission (1961-62), the Delhi Police Commission (1968), the Gorey Committee on Police Training (1972), the

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<sup>18</sup> Available at: <http://www.bprd.nic.in/WriteReadData/userfiles/file/6798203243-Volume%202.pdf>

National Police Commission (1977-80), all these are headed by eminent judges, educationists or civil servants, they have in one voice judged political interference with the working of the police. According to the National Police Commission, political parties used their power to give promotions to the police officers when they act on their interests. A police officer having the authority given by law so that he should act accordingly with honest, he should not act for any personal interests or any executive authority. The statute has been given discretionary powers to the police (section 36 and 158, Crpc) subject to the supervisory control of department superiors or even the ministers in charge of police “has no power to direct the police how they should exercise their statutory powers, duties or discretion”.<sup>19</sup>

### ***Malimath Committee***

This committee recommended the separation of investigation agency from the law and order wing while referring to the 154th report of the Law Commission. Following are the reasons :

1. The investigating agency gets protection from the judiciary and also reduces external influences.
2. Reduce the possibility of unjustified and unwarranted prosecution.
3. It will help in speedier investigations and disposal of cases.
4. There will increase the expertise of investigation officers.

Investigating police in plain clothes will have greater rapport with police.<sup>20</sup>

### ***Separate law police from order police***

In most of the countries, the investigating police work under the protection of the Ministry of justice. Chapter XI of the CrPC shows that an investigating officer is investigating the case under the supervision of the judiciary. Under section 156 of CrPC, the judicial magistrates direct an officer to investigate a case. Under section 157, the officer should send intimation to the magistrate if it is a cognizable case. Under sections 158 and 159, if the officer refused to investigate a certain case, the magistrate can order to investigate. Under section 164 CrPC, the officer should get the confession or statement which is recorded by the magistrate. Under section 165 CrPC, the officer should send the grounds on which he arrested the accused

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<sup>19</sup> R. Deb, ”Police investigation : A Review”, Journal of the Indian Law Institute, Vol 39, No.2/4, pp.260-271 (1997)

<sup>20</sup> Available at: <https://www.legal-tools.org/doc/70d1c6/pdf/>

without warrant. Under section 167 CrPC, the investigating officer should present the accused before the magistrate for seeking the extension of custody for further investigation and also for remanding the accused to judicial or police custody. Under section 169,170 and 173, CrPC, the officer should present the report based on what circumstances on which investigation has been carried on before the magistrate and also present the exhibits of the case and in section 174 of CrPC, in all unnatural deaths the officer should send the intimation and inquiry report to the magistrate. These provisions are maintained to prevent the interference of other bodies from the investigation process doing by police.<sup>21</sup>

## **HUMAN RIGHTS AND ROLE OF POLICE**

Police are one of the largest laws enforcing agency and they have a special duty for the protection of human rights. The main cause of human rights violations by police only in the matter of the functioning of the criminal justice system. Police are not violated by any individual or group of the state. They can use their power and take action to know that no one violates them. It mainly includes the weaker sections of the society: women, children, aged, poor, physically and economically weak, minorities who needed protection from the police. From the laws and procedures, only issues of criminal law enforcement arise. Police are responsible for the investigation of crimes and they share their duty with other agencies including the judiciary. After the amendment of the criminal procedure code, 1973 prevention of crime passed to the police. So that the extra-legal role of police becomes inevitable. Police are failed to get police remand of the suspect and he attempts to arrest him illegally. Human rights violations take place mostly during the arrest and interrogation of suspects.<sup>22</sup>

### ***Manipulation in First Information Report***

First Information Report is a document that contains a full version of information regarding a crime. In *Arumugam v. Ponnalaga*,<sup>23</sup> the court held that the First Information report is not meant to be an encyclopedia. The FIR containing the details of prosecution, but still police officers having a belief that absence of details like names of accused, names of the witness, list of stolen properties, etc will ruin the prosecution case, then they try to add and interpolate

<sup>21</sup> *Supra* note 26

<sup>22</sup> Ved Marwah, "Human rights and role of police", Journal of the Indian Law Institute, Vol.40, No.1/4, pp.138-142 (1998)

<sup>23</sup> 1958 Cri LJ 385 (Mad)

information collected at the stage of investigation in to the body of FIR. So this will create a bonafide doubt to the court of law. Instead of doing malpractices, Under section 161, CrPC the investigating officer should examine the witnesses in their course of an examination, so the prosecution will examine them during the examination in court.

### ***Manipulation in case diary and police statements***

Case diary and police statements are the two important documents. If they are manipulated then it will affect the credibility of the prosecution case. Investigation officers should try to enter day to day investigating procedures to the case diary so that it will not make any confusion in the future. If they are postponing to enter certain details sometimes it will go away from the officer's mind. If the investigating officer making any delay or gap in the investigation, he should explain in the case diary. So it will not become under the suspicion.<sup>24</sup>

## **PRESENT SCENARIO OF POLICE IN INDIA**

After Independence, the transformation of India from a police state to a welfare state made so many drastic changes in police activities.

Today, India is going through the era of political, economic and social modernization, so these factors lead to an increase in the rate of crimes. A new level of crimes is very dangerous and harmful to the individuals as well as to society.so, there is a need for police to work with the people, the society's expectations are very much high in those circumstances. As a result, the police must work for the maintenance of peace and public order for the smooth working of the society. Police act as a functionary of the whole criminal system of the state. Police should have honesty, integrity, and impartiality towards society. But today people are looking at the police with fear, suspicion, and distrust. Nowadays, the people having a general impression that police are inefficient, brutal, corrupt and lawless. The police department is considered as the most corrupt department where bribes are taken from constable towards the highest officers. So the police are having law trust towards this noble department. It is a fact that every police officer is not corrupt, there are honest police officers also. But nowadays it is difficult to find out because it is too rare. Most of them are doing illegal activities and collecting money to satisfy their greed. Such officers don't have any ethics towards their duty. Police brutality towards poor people is increasing. The police are having power for

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<sup>24</sup> *Supra* note 21

exploiting people regarding tackling criminals and use that power of interrogation to harass the poor people.<sup>25</sup>

The investigation is the part and parcel of the duties of police but they are not using in proper ways and means. They compel innocent offenders to obey them. It is common in today's beating of police in the cases. The suspected persons or innocent persons are caught by the police by they will not use third-degree method for finding the truth nowadays, they will blow with the hands and kick them and arrest the innocent person without any reason, all these methods are common to get a confession from the suspected person or innocent persons. Some of the persons cannot tolerate these atrocities so they will be compelled to suicide in the lockups. This was very common in south India.<sup>26</sup>

Article 20 and 21 of the Indian constitution prohibits any person including police officers from using force or a third-degree method for obtaining a confession from an accused person.

In *Kishore Singh v. State of Rajasthan*, the court held that the use of "third degree" method by police is violative of Article 21 and directed the government to take necessary steps to educate the police as to indicate a respect for the human person.<sup>27</sup>

In *Niranjan Singh v. Probhakar Rajaram*, the Supreme court while dealing with the cases of custodial torture and use of third-degree method observed that "the police instead of being a protector of law has become the engineer of terror and putting people into fear".<sup>28</sup>

In *Vineet Narain v. Union of India*, Supreme Court deals with CBI and revenue officials who face an inability to perform their duty due to some external pressures. Judgment throws light in the ample light on the difficulties facing by police in the present situation in India.<sup>29</sup>

In *B. Prakash Singh v. Union of India*, Supreme court directed the central government to deal with state government and set up a mechanism for appointment, tenure, transfer, and posting of not merely the chief of the state police but also all police officers of the rank of

<sup>25</sup> Available at: <http://www.shareyouressays.com/knowledge/essay-on-present-scenario-of-police-in-india/116802>

<sup>26</sup> *Supra* note 24

<sup>27</sup> AIR 1981 SC 625

<sup>28</sup> AIR 1980 SC 785

<sup>29</sup> (1998) 1 SCC 226

Superintendents of police and above.<sup>30</sup>

## LAW ENFORCEMENT AGENCIES

Various law enforcement agencies are conducting law enforcement in India. At the union (federal) level, the agencies support the states in their duties and also it is a part of the Union Ministry of Home Affairs. Various policing lies in respective states and territories of India. Metropolitan police controlling cities are also under the control of the state government. All state police officers and federal agencies are the members of the Indian Police Services.<sup>31</sup>

### *Types of Law Enforcement Agencies*

#### 1. Local Law enforcement Agencies

These agencies don't have jurisdiction outside the city e.g, police force.

#### 2. State Law Enforcement Agencies

These agencies are having jurisdiction in the entire state e.g, water police, marine and harbour control officers.

#### 3. The Border Patrol

They provide surveillance and enforce various immigration laws of the border states.

Enforcement agencies have the power to prevent various criminal activities, help citizens for the need and also investigate crimes. Every state is having its enforcement agencies likewise each nation is also having thereon enforcement agencies. Nation or state having one or more enforcement agencies for dealing with various crimes such as economic offenses, drug-related crimes, etc. law enforcement is a part of the wide concept of policing.<sup>32</sup>

Central Bureau of Investigation (CBI), Border Security Force (BSF), Indian Income Tax Department, Central Industrial Security Force, Central Reserve Police Force, Directorate of Revenue Intelligence, Indo-Tibetan Border Police (ITBP), National Security Guards (NSG), National Investigation Agency (NIA), Narcotics Control Bureau (Interpol), New Delhi etc are the federal law enforcement agencies under the control of central government which is also known as Central agencies. Law enforcement agencies are classified based on security, investigation and armed police forces. Internal security includes the Intelligence Bureau,

<sup>30</sup> (2006) 8 SCC 1

<sup>31</sup> Available at: [https://shodhganga.inflibnet.ac.in/bitstream/10603/9696/9/09\\_chapter%203.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/9696/9/09_chapter%203.pdf)

<sup>32</sup> *Supra note 31*

Joint Intelligence Committee, Central Bureau of Investigation, etc. External Security includes Research and Analysis Wing, Aviation Research Centre, National Technical Research Organisation, etc.<sup>33</sup>

In recent *walayar rape death case*, two minor girls who were siblings at walayar in Palakkad district of Kerala in 2017. On January 13, 2017, elder sister, aged 13 were found hanging in her house. Within two months, the younger girl also found to be hanged in the same place.i.e, on March 4, 2017. Both of them belonging to a Scheduled caste community. Postmortem reports say that two girls were sexually assaulted and the autopsy report also suggesting that there is a possibility of homicidal hanging. But the police did not try to look further and arrested the four accused persons under the offenses of abetment of suicide, rape and unnatural sex under the Indian Penal Code and penetrative sexual assault under the POCSO Act. The Palakkad Session court acquitted the four witnesses by stating that "*I have no hesitation to hold that the prosecution has miserably failed to prove the alleged offenses against the accused beyond a reasonable doubt*". The case was mainly based only on circumstantial evidence. The court observed that neither the prosecution nor the defense having the evidence to say that the girls are not died by committing suicide.in this case, the prosecution failed to give sufficient evidence. Police failed to collect evidence and also failed to prove before the court. The public prosecutor said that the accused were acquitted only because of lapses on the part of the police investigation. This case has become a debated subject all over the state. So the public will against the criminal justice system and they will lack faith in them.<sup>34</sup>

## CONCLUSION

In an investigation process, the investigating officer should not compromise to the conscience whether he succeeds or not. He should try to collect evidence as far as possible and also travels from evidence to accused, not from accused of evidence. He should always uphold their oath "*Satyameva Jayate*". Criminal justice administration is regulated by the Indian Penal Code 1860, the Code of Criminal Procedure 1973 and the Indian Evidence Act 1972. Police used the laws in the cases as there on way. Sometimes there is a contradiction of the

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<sup>33</sup> *ibid*

<sup>34</sup> Available at: <https://english.mathrubhumi.com/news/kerala/walayar-rape-case-culprits-escaped-due-to-lapses-in-police-investigation-alleges-public-prosecutor--1.4238750>

law as the interpretation of various provisions of the Indian Penal Code depends upon how the police officer acting in that situation. The Code of Criminal Procedure guides the police procedure but the police more often than not act contrary to the provisions of the code. Then also police often resort practices such as no registration of FIRs, arriving late at the crime scene, carrying illegal arrests, forcing witnesses, obtaining forceful confessions by torturing suspects and so on. The Indian Evidence Act applies to two both civil and criminal cases. Evidence is to assist the court of law. Police know how the court appreciates the evidence in criminal cases so they made according to that only. Police are doing so to convict the accused and no case should not be thrown out of the court. For example, police will mistreat and harass the honest victims to present before the court as witnesses.<sup>35</sup>

## Suggestions

- Police are engaged in many duties at the same time even in the case of VIP duties, deployment at festivals and processions, duties at private events, personal security officers, etc. In such above duties, private agencies can be appointed and it will reduce the burden of the police. So the police can be involved in duties related to society;
- practices like illegal arrests, harassment in police custody and obtaining confession forcibly should be condemned and the guilty officers should be punished;
- while arresting a person should not use excessive force and there is no submission to the custody by word or action as it would be violative of CrPC;
- FIR should be countersigned by both complainants and accused and serve the copies to each of them so they can refer for there on need;
- The investigating officer should go to the crime scene without any delay, he should collect all the relevant documents which is needed, don't waste the time for collecting evidence;
- Evidence should be collected by the expert officers so that it will help the officers for investigation;
- Strict action should be taken for the officer who malpractice or manipulates the pieces of evidence/ witnesses and
- Police should catch the suspects only after getting credible information, not by mere

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<sup>35</sup> James Vadackumchery, Indian Police and Miscarriage of Justice (APH Publishing House, New Delhi 1997).

suspicion.

## INDIAN CRIMINAL JUSTICE SYSTEM: A CRITICAL STUDY

Asha Meena\*

***"Entire existence of orderly society depends upon sound and efficient functioning of criminal justice system"***

- Justice Malimath Committee

Criminal Justice System is a vital aspect of governance and it ensures that proper decorum of social conduct is maintained for each individual to enjoy his rights under Article-21. It includes three branches which are the Police, Prisons and Courts. All three are indispensable for any democratic nation. It guarantees that Rule of Law is supreme and everyone is subjected to same laws and punishments. Foundation of our system has been laid by Britishers with Charles Cornwallis (Setting up Indian Civil Services), Thomas Macaulay (Indian Penal Code draft 1834) and others. With time, the motive of this system has transformed from imperialism to public welfare.

Over the years, Indian Criminal Justice System has seen some great feats of success like bringing Naxal areas down to 90 districts as per Ministry of Home Affairs signalling the impact of proper policing, filling in legislative gaps by Courts (like Vishaka Guidelines), free legal aid under Article 39A, recent decision to revamp entire Indian Penal Code. On the contrary, the recent rise in crime rate and backlog in Courts indicate that the system has some clogs hampering its efficiency.

Let's shine some light on the ground realities of Police System. Presently there are only 137 personnel per lakh, vis-à-vis 222 UN recommended level. This inadvertently increases the workload on officers making them use aggressive methods which not only violate Human Rights but are unethical also. Even 2<sup>nd</sup> Administrative Reforms Commission, reported that due to these practices "*citizens now perceive Police as corrupt and inefficient*". This is not completely unjustified as conviction rate is nearly 47% (Law Commission 2012), crime against women have increased by 6% (National Crime Records Bureau 2017), 60% arrest are unnecessary (268<sup>th</sup> Law Commission Report). These all create a negative image in eyes of the people who are supposed to be their 'eyes and ears'.

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Despite Supreme Court ruling against custodial violence in *Sheela Barse v. State of Maharashtra*<sup>1</sup> and *D. K. Basu v. State of West Bengal*,<sup>2</sup> NCRB reported 1300 custodial deaths from 2001 to 2013 and of these only 50% were registered. In the domain of emerging issues, Police isn't fairing as good as indicated by the NCRB 2017 report, which stated that cybercrimes in 2017 rose by 77% with respect to 2016. Even one of the most fundamental parts of governance which is data collection is opaque in terms of method used to collect and compile data. In 2019 itself, Ministry of Home Affairs said that the NCRB data on lynching and attack on journalist is "unreliable".

On a related subject, the Prisons of India are in abysmal state. In Delhi, Prisons are filled to 151% capacity with only 50% staff. This is not a regional issue but pan India as UP has 165% and Chhattisgarh has 157% occupancy in prisons (NCRB 2017). 'Prisons' being a State subject, there exist different Prison Manuals resulting in differentiated view towards Prisons. Paucity of Public Prosecutors has had huge ramifications on this area as 65% inmates are under trial compared to about 11% in UK and about 20% in USA.

In spite of being a Welfare State, India is not a member of UN Convention against Torture (which is in force since 1987). This has been a major impediment in extradition of Kim Davy (Purulia Arms Case), Vijay Mallya (Fugitive Economic Offender) as Sections of IPC and CrPC are inadequate as stated in this regard by 273<sup>rd</sup> Law Commission Report. Criminals have a 'debt to society' and once it is repaid it is the duty of the State to rehabilitate them, to lead a dignified life and not indulge in illegal activities. However, there are only a handful of such schemes which leaves the prisoners with very less options after they are released from jail.

Moving onto Judiciary, which is the guardian of Fundamental Rights, has played a proactive role with PIL powers under Articles 32 and 226 in cases like Union Carbide (Bhopal Gas Tragedy)<sup>3</sup>. There is still a long way from its true potential because India has only 13 Judges per 10 lakh persons vis-à-vis, 50-100 in developed Nations which has led to nearly 3 crore case pendency. 'Justice delayed is justice denied' this line is very suitable to Indian Judicial System because there is a huge pendency of cases in courts in addition to this the Law

<sup>1</sup> AIR 1983 SC 378

<sup>2</sup> (1997) 1 SCC 416

<sup>3</sup> (1989) 2 SCC 540

Commission in 2009 suggested that with current strength of Courts, it would take 485 years to clear the backlog, delineating grim conditions of our Courts with such a huge vacancy. Corruption among Judges can't be ruled out, with cases like Soumitra Sen and the dominance of Collegium System giving rise to 'Uncle Judge Syndrome'.

With rise in proxy litigants for instance in '2G Spectrum Case' and judicial overreach like regulating height of Dahi Handi, our Courts have to deal with all this at a pittance of 0.2% budget allocation. Many of the measures like setting up of Tribunals and Fast Track Courts have not yielded the desired results as noted by a recent study by National Law University, Delhi.

These ground realities put a question mark on how our Criminal Justice System and society have failed to protect the Human Rights of individuals. Hence, it is imperative for the Government to take proactive steps because 'a stich in time saves nine'. Below are few of the remedies to make this whole system more transparent and citizen friendly.

Starting with the Police, 'SMART' Policing should be the goal i.e. S= Strict and Sensitive, M= Modern and Mobile, A= Alert and Accountable, R= Reliable and Responsive, T= Tech Savvy and trained. Prakash Singh vs Union of India recommendations can be applied which state that DGP to have fixed tenure of 2years, Police Complaint Authority (dealingwith misconduct) and Police Establishment Board (dealing with Posting, Transfer, and Promotion below DGP rank) should be established.

Police can learn from the successful models like that of Gujarat for Forensics, Community Policing- Maitri (Andhra Pradesh). Modernization in terms of NATGRID (National Intelligence Grid) is also a step in the right direction.

Prisons also need a dedicated approach as stated in Ramamurthy vs State of Karnataka to at least meet the 'Mandela Rules' on treatment of prisoners. The Government should also provide for witness protection to ensure speedy delivery of justice as stated in Zahira Habibulla H Sheikh & Anr. v. State of Gujarat & Ors<sup>4</sup>. Delhi Model of Witness Protection can be the guiding light for rest of the nation (14<sup>th</sup> Law Commission). Prevention of Torture Bill, 2010 which was supported by National Human Rights Commission needs to be presented again to prevent any more custodial deaths.

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<sup>4</sup> (2006) 3 SCC 374

As the majority of the inmates are under trial, those who have served more than half of their sentence can be released and the concept of ‘Open Prison’ can be adopted like that of Rajasthan. Poor are ordinarily unaware of their rights hence, National Legal Services Authority (NALSA) should play a bigger role to ensure that Prisons are not crowded with innocent people. As technology has penetrated in normal governance, it should also be adopted in Prisons for surveillance and management as done in Bihar.

Released Prisoners face a tough time after their sentence and should be helped with post release integration policy on lines of ‘Parivartan’ in Andhra Pradesh. This process of reform has to be continuous and not a onetime exercise and this can be ensured by National Prison Commission (Mulla Committee). Also, all States must adopt the 2016 Prison Manual instead of having an individual Manual to bring in uniformity in the system.

Lastly, Courts need to decrease judicial delay to maintain constitutional democracy. Steps like Legal Information Management and Briefing System (LIMBS Portal 2015) (track government cases), National Legal Mission (decrease pendency from 15 to 3years) are positive signs of improvement. Further, promotion to Alternate Dispute Resolution and establishment of All India Judicial Service (11<sup>th</sup> Law Commission), like in France, can increase the rate of adjudication and also make justice affordable. Full digitization of Courts would ensure that ‘justice is not only done but seen as being done’.

Courts need to shift from the present Adversarial System to Inquisitorial System to ensure that entire process of legal case is transparent. Government needs to change its attitude from ‘compulsive litigant’ as 46% cases in Courts have Government as a part. Even the recent Economic Survey stated that Income Tax Department has less than 30% success rate but still the biggest litigant. A National Litigation Policy, as per 126<sup>th</sup> Law Commission Report, is a viable solution.

Expedited disposal of cases can be attained by establishing ‘Social Justice Bench’ to deal with pendency of cases having social issues which are on the rise and require special expertise. Along with this, 4 National Court of Appeal in (North, South, East, West) to act as final body to hear Appeals against High Court and Tribunal Judgements can leave Supreme Court free to deal with Constitutional Matters with more scrutiny.

A sound system would have huge repercussion not only on the delivery of justice but also on

India's Soft Power (Would be seen as protector of rights on global scale), Ease of Doing Business ('Resolution of Insolvency' one of the parameters), more successful extradition (present success rate is approximately 33% as Prison conditions are poor and fear of torture) are only some of its positive effects.

As Montesquieu said, "*There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice*" hence, the goal of the entire Indian Criminal Justice System should be to follow Principle of Natural Justice and be transparent in its functioning. The promise of 'JUSTICE'- social, economic and political as per our Preamble lies hugely on strong foundation of our Criminal Justice System.

## **CORPORATE CRIMINAL LIABILITY WITH SPECIAL REFERENCE TO N.I.A., 1881**

Rachi Singh\*

*“Corporate bodies are more corrupt than individuals, because they have more power to do mischief, and are less amenable to disgrace and punishment. They neither feel shame, remorse, gratitude nor goodwill.”*

- Hazlitt

### ***Abstract***

*This paper seeks to analyze Corporate Criminal Liability of Companies in relation to the Negotiable Instruments Act. The concept of a corporation is perhaps the most elaborate legal fiction known to legal systems around the world. In simple language, corporation means a group of individuals coming together to carry on a business. The development of the society, at various points of time, has had a direct influence on the structure and functions of the corporation. This had led to an ever-increasing demand for the law to recognize the change and suit its applications, accordingly.*

*The paper begins with the origin and history of the concept and proceeds to trace its development in India pre and post Standard Chartered Bank Case. It goes on to analyze the relationship between corporate criminal liability and Section 138 of Negotiable Instruments Act, also discussing the Apex Court’s view in various cases on the same. It ends with the author providing suggestions on better remedies and a call for tougher penalties on Corporations.*

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## INTRODUCTION

The concept of a corporation is perhaps the most elaborate legal fiction known to legal systems around the world. In simple language, corporation means a group of individuals coming together to carry on a business. Corporation is a creation of law, a business entity recognised by law. But, corporations, as we understand today, have not been same in the past. The multitude of roles the corporations play in the present day human life have been necessitated by the demands of the society, as it kept on developing. The development of the society, at various points of time, has had a direct influence on the structure and functions of the corporation. This had led to an ever increasing demand for the law to recognise the change and suit its applications, accordingly.<sup>1</sup> Today, a corporation is an artificial entity that the law treats as having its own legal personality, separate from and independent of the persons who make up the corporation.<sup>2</sup> Over the last few decades nature and form of a corporate sector has grown complex. This means, for example, that a corporation can own and sell property, sue or be sued, or commit a criminal offence because; a corporation is made up of and run by people, acting as agents of the corporation. A corporation has an existence separate from the shareholders constituting it and they cannot be held liable for the wrongs committed by the corporation. The corporations are run by natural persons and these peoples' actions can be criminal in nature and can sometimes even result in great economical as well as human loss to the society. Hence, for a better understanding of the concept of corporate criminal liability, it is necessary to trace the origin and meaning of corporation first.

## ORIGIN/HISTORY OF CORPORATE CRIMINAL LIABILITY

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable.<sup>3</sup> English law establishes the origin of Modern Corporation in the fourteenth century. Generally, the common law did not allow a corporation to be convicted of a crime. Apart from certain vicarious liability exceptions, corporations were immune from liability under the criminal law. It was the common intent of the people that a corporation has no soul; hence it cannot have "actual wicked intent". It cannot, therefore, be

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<sup>1</sup> Balakrishnan. K; "*Corporate Criminal Liability - Evolution of the concept*" (1998) Cochin University Law Review p.255

<sup>2</sup> Salomon v. Salomon (1897) AC 22

<sup>3</sup> 109 Harv. L. Rev. 1477

guilty of crimes requiring malus animus.<sup>4</sup> The courts in early twentieth century began to dismantle the corporate immunity from criminal law by holding that words like everyone in criminal statutes could include corporations. However, the most challenging obstacle to imposing criminal liability on corporations was the difficulty of attributing mens rea to an artificial person - a corporation. The breakthrough came in 1915 when the House of Lords in Lennard's Carrying Co. Limited, v. Asiatic Petroleum Co.<sup>5</sup> laid down the general principle of directing mind (identification theory). In this case Viscount Haldane stated that "corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

## **CORPORATE CRIMINAL LIABILITY IN INDIA**

Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions. The basic rule of criminal liability revolves around the basic Latin maxim *actus non facit reum, nisi mens sit rea.*

In the modern day world, the strong effect of activities of corporations is incredible on the society. In the day to day activities, not only do the corporations affect the lives of the people as a blessing but also many a times proves disastrous which then falls under the category of crimes. The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule.<sup>6</sup>

Despite so many disasters, the law was unwilling to impose criminal liability upon corporations for a long time. This was for basically two reasons that are<sup>7</sup>:

- I. That corporations cannot have the mens rea or the guilty mind to commit an offence; and
- II. That corporations cannot be imprisoned.

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<sup>4</sup> *State v. Morris & Essex R.R.*, 23 N.J.L. 360, 364 (1852)

<sup>5</sup> (1915) AC 705 at 713 (H.L.)

<sup>6</sup> Thiyagarajan, T. Sivanathan; "Corporate Criminal-concept", Available at: <http://www.manupatra.com/Articles/artlist.asp?s=Corporate/Commercial> (Accessed on: 30.09.2019)

<sup>7</sup> *Motorola Inc. v. Union of India*, 2004 Cri LJ 1576

In *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*<sup>8</sup> Lord Denning, while dealing with the liability of a company stated that in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty. MacNaghten, J. in *Director of Public Prosecutions v. Kent & Sussex Contractors Ltd*<sup>9</sup> observed that, A body corporate is a ‘person’ to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention. It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. In *Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd.*<sup>10</sup>, the court dismissed a complaint filed against Zee under Section 500 of the IPC. The complaint alleged that Zee had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that mens rea was one of the essential elements of the offense of criminal defamation and that a company could not have the requisite mens rea. These obstacles were managed to survive till late 20<sup>th</sup> and very early 21<sup>st</sup> century. In India, certain statutes like the Indian Penal Code talk about kinds of punishments that can be imposed upon the convict. In certain cases, the sections speak only of imprisonment as a punishment. Thus the problem arises as to how to apply those sections on the companies since a criminal statute needs to be strictly interpreted and in such statutes there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India had finally recognized that a corporation could have a guilty mind but still were reluctant to punish them since the criminal law in India does not allow this action.

In *Assistant Commissioner, Assessment- II, Bangalore & Ors. v. Velliappa Textiles Ltd. & Ors.*<sup>11</sup>, B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines: “*In every case in which the offence is only punishable*

<sup>8</sup> [1957] 1 WLR 454

<sup>9</sup> (1944) KB 146

<sup>10</sup> (2001) 3 Recent Criminal Reports 292

<sup>11</sup> (2003) (4) RCR (Criminal) 695

with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.” As per the jurisprudence evolved till then, under the then present Indian law it was difficult to impose fine in lieu of imprisonment though the definition of ‘person’ in the Indian Penal Code included ‘company’. However, the Bill was not passed but lapsed.

The Supreme Court in *Standard Chartered Bank & Others v. Directorate of Enforcement & Others*<sup>12</sup>, incorporated this when it considered the issue as to whether a company, or a corporation, being a juristic person, could be prosecuted for an offence for which mandatory sentence of imprisonment and fine is provided; and when found guilty, whether the court has the discretion to impose a sentence of fine only. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. If an enactment requires what is legally impossible it will be presumed that Parliament intended, it to be modified so as to remove the impossibility element. The Court applied the doctrine of *Lex non cogit ad impossibilia* (impossibility of performance) and decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment, the court can impose the punishment of fine which could be enforced against the company. This appears to be the intention of the legislature and there must be no difficulty in construing the statute in such a way. There is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

Corporate criminal liability or corporate crime is very difficult to be defined because this phrase in present day scenario covers wide range of offences. But the concept can be said to include “*the conduct of a corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law*”.<sup>13</sup> The need for proper law relating to corporate criminal liability in a legal system, especially in the developing countries like India was observed by the Supreme Court in the following terms, In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic

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<sup>12</sup> (2005) 4 SCC 530

<sup>13</sup> 2 Braithwaite, John ; Corporate Crime in the Pharmaceutical Industry, 1st Edition, Routledge and Kegan Paul, London, 1984, p.6

companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a 614 number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident.<sup>14</sup>

The major law relating to Corporations in India is codified in The Company Act, 1956 and the definition of “Corporation” as given in the Act under Section 2 (7) includes a company. Hence under Indian law the liability of the corporation is essentially liability of the company only. On incorporation, the company acquires a separate legal entity distinct from and independent of its members. The separate personality of the company is, however, a statutory privilege; it must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use is made of the legal entity, the concerned individual will not be allowed to take shelter behind the corporate personality. Thus, the protection of separate legal entity cannot be claimed in these cases and the limited liability of the shareholder becomes unlimited if he is engaged in such activities. The concept of “limited liability” restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he cannot be held liable for the debts of the company, even if he holds almost the entire share capital of the company. This rule, however, does not apply if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act.<sup>15</sup> Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof.<sup>16</sup> The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest. The court will break through the corporate shell and apply the principle of “Lifting of the corporate veil”. The court will look behind the corporate entity and take action as though no entity separate from the members existed. In other words, the benefit of separate legal entity will not be available and the court

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<sup>14</sup> Singh.K.N.J, in *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480

<sup>15</sup> *Kapila Hingorani v. State of Bihar*, [2005] RD-SC 35

<sup>16</sup> 2003 (4) SCALE 712

will presume the absence of such separate existence.<sup>17</sup>

At one point of time, ‘corporations’ were viewed as a convenient shield to evade liability. However, under our present penal structure, for an offence by the corporation, both the corporation and its officer can be made liable. The law on corporate criminal liability is however, not confined to the general criminal law in the penal code but it is, in fact, scattered over a plethora of statutes with specific provisions for the same.

### **CORPORATE CRIMINAL LIABILITY IN RELATION WITH THE NEGOTIABLE INSTRUMENTS ACT, 1881**

Proper and smooth functioning of all business transactions, particularly of cheques as instruments primarily depends upon the integrity and honesty of the parties. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. A company is an artificial person created by law acts and acts through its directors and officers who are responsible for the conduct of the business of the company. A criminal liability on account of dishonour of cheque primarily falls on the drawer company and is extended to officers of the Company. Section 138 of the Act creates statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker. The actual offence should be committed by the company and then alone the other two categories would also become liable for the offence.<sup>18</sup> Now the question to be determined is who is responsible to the company for the conduct of its business, and who could be said to be in-charge thereof. The examination of the provisions of section 141 of the Negotiable Instruments Act is necessary for this purpose. It reads as follows: (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without

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<sup>17</sup> Dalal Praveen, “*Corporate Entity in existing legal system-Its rights and liabilities under the Constitution and other enactments*”, (2004) 61 CLA 96 (Mag).

<sup>18</sup> *Anil Hada v. Indian Acrylic Ltd.* (2000) 1 Comp LJ 7 (SC); *Mohd. Isaq Gulsani v. J. Rajamouli* (2001) 2 Comp LJ 341 (AP) : (2001) 105 Comp Cas 230 (AP) in Criminal Petition No. 3464 of 2000

his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (i), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

## **ANALYSIS**

Section 141 contains conditions, which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In the case of *S.M.S. Pharmaceuticals Limited v. Neeta Bhalla*<sup>19</sup>, the Apex Court observed, the key words which occur in the Section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words “who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc.” What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company, who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a

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<sup>19</sup> (2005) 8 SCC 89

company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of “every person” the section would have said “every Director, Manager or Secretary in a Company is liable”.... etc. The legislature is aware that it is a case of criminal liability which means a serious consequence so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.” In *National Small Industries Corp. Ltd. v. Harmeet Singh Paintal*<sup>20</sup>, the Court held that: if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in-charge of the business of the company” or by stating that “he was in-charge of the day-to-day management of the company” or by stating that “he was in-charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act. Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. The Supreme Court in various cases held that the words “was in-charge of, and was responsible to the company for the conduct of the business of the company” refer to a person who is in overall control of the day-to-day business of the company. The Court pointed out that, though a person may be a director and, thus, belongs to the group of persons making the policy followed by the company, yet may not be in-charge of the business of the company; that a person may be a manager who is in-charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in-charge of only some part of the business. It is, however, observed by the

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<sup>20</sup> Criminal Appeal no. 320-336 OF 2010

Supreme Court that the words in section 141(1) of the Act need not be incorporated in a complaint as magic words. But, at the same time, the substance of the allegations read as a whole, should answer and fulfil the requirements of the ingredients of the said provision.<sup>21</sup>

In *K.K. Ahuja v. V.K. Vora*<sup>22</sup>, it was propounded that if a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer / employee of a company without exception could be impeded as on accused by merely making an averment that at the time when the offence was committed he was in-charge of and was responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in-charge of and were responsible to the company for the conduct of the business of the company. That would be an absurd thing and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases can be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138, read and section 141, are not fulfilled.

In *Aneeta Hada v. M/s. Godfather Travels & Tours Pvt. Ltd*<sup>23</sup>, the question that arose was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being charged as an accused. The Court referred to *Anil Hada v. Indian Acrylic Ltd*<sup>24</sup> and expressed that a company has to be made an accused but applying the principle *lex non cogit ad impossibilia*, i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against

<sup>21</sup> K. P. G. Nair v. Jindal Menthol India Ltd, [2001] 104 Comp Cas 290

<sup>22</sup> [2001] 104 Comp Case 290

<sup>23</sup> Criminal Appeal No. 838 of 2008

<sup>24</sup> AIR 2000 SC 145

because of a legal bar. The language of Section 141 of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.

In *Iridium India Telecom Ltd. v. Motorola Inc & Ors.*<sup>25</sup> it was held that companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary mens rea for commission of criminal offences. The word ‘deemed’ used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It primarily falls on the drawer company and is extended to officers of the company. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself.

## SUGGESTIONS & CONCLUSION

Companies in India have been accused of everything from corrupt practices and fraud to causing environmental damage and loss of lives. There is a lack of clarity over how companies should be held accountable for their wrongdoings and such ambiguity has sometimes created sufficient wiggle-room for offending entities to get off scot-free. Corporate criminal liability is recognized by Indian law but the issue which is yet to be effectively settled is how a company should be penalized for malpractice.

*Call for tougher penalties*

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<sup>25</sup> 2004 (1) BomCR 479

There is a need to evolve new forms of punishment which could effectively deter the corporate from engaging in any criminal activity. Economic and social sanctions should be encouraged against corporate houses, such as winding up of the company, temporary closure of the corporation and heavy compensation to the victims; depending on the gravity of the offence companies could be blacklisted and barred from participating in government sponsored projects or their operations should be temporarily suspended. Better remedies Aside from the absence of effective laws to deal with corporate criminal liability, there is a worrying tendency of courts to impose liability solely on the board of directors or officers of a company. Today, judiciary has to take the pain of looking into the facts and circumstances of each case independently rather than considering laid down fluctuating judicial principles on this topic. But the impediment then involves is in the corporate menace, where uncertainty can lead into high instability in the market. In order to avoid the situation, question still remains whether the judiciary can lay down certain broad principles on the issue of corporate veil which can be treated as that of universal character and which can bring some consistency and uniformity within the corporate world. The author is of the view that in cases involving community interest where there arise human rights and environmental hazards issues of public nature, the legislature has to lay down flexible test and factors and judiciary to take a stern action against such conglomerates on the facts and circumstances of each case. Courts should be more flexible in such cases while ascertaining the corporate veil issue. While in all other cases, author is of the view that the fundamental of a separate legal personality has to be considered vital in every case except for special circumstances. The legislation through its statutory application ought to mention these special circumstances which should to be viewed as universal in nature. Hence, any case which comes for the determination before judiciary has to by-pass the special circumstances laid down by the legislature and subsequently narrow down the observation of that case on its facts and circumstances. Thus, legislature with the aid of aforesaid two important issues should develop a test along with factors (to satisfy the test) in order to come within the ambit of an exception rule i.e. special circumstances to the general fundamental principle of separate legal personality. The principle of equity and interest of justice can ruin legislative intent and hence the discretionary power of judiciary under the garb of equitable remedy can lead to a discourse of unending solution. Hence, courts ought to restrain itself from stretching its arms and focus only on the legislative laid down test and factors to pierce the corporate veil in exceptional

circumstances.

Our country has several hazardous activities going on as part of the development process and often these are being conducted in residential areas which can be termed as ‘potential high risk areas’. However even in this state of affairs the government seems to be in deep slumber and is not reacting as it should be. The government is concentrating only on the financial aspect of development. What it has forgotten is that, alongside financial development socio-legal development is also a major factor. Both these areas go hand in hand and if they do not then the development remains only partly fulfilled. So it is high time the government attends to the wakeup call that has been ringing for years now. The author sincerely hopes and prays that the government does not get a rude awakening like the Bhopal tragedy and then gets on with its job of actually doing something about the liability of the company. In the meantime, the general public of this country has only one option, that is to hope that another tragedy of such magnitude does not hit them because there won’t be any laws in the country that will actually prosecute the culprits for the crime they have really done, though there will be other legislations which will definitely punish them but at a much smaller scale.

## **UNDERSTANDING TERRORISM: A NEED OF EFFECTIVE INTERNATIONAL LAWS**

Govind Kumar Saxena\*

### ***Abstract***

*Terrorism and terrorist attacks can inflict deep wounds on humanity. The most recent terror incident was Pulwama terror attack that affected the entire nation and the whole country was in shivers. There are hundreds of terror incidents every year in India and the number has increased in the last few years. The rising number of terrorist attacks appears like a growing trend that must be dealt with and this trend can be seen across the seven continents. Nearly 100 countries across the world face at least one terror attack every year. Some countries even face over 100 terror attacks every year which includes Afghanistan, Pakistan, Syria, Iraq, and Nigeria. Every terrorist attack has a certain motive which could either be political or social or religious. Thousands of people lose their lives because of terror incidents and we have not been able to address this issue properly at the global level.*

*Terrorism is a menace as innocents are killed. At times, fundamentalists brain-wash people to commit suicide bombings and other times, State funded terror groups use weapons and explosives to rule over a country forcefully or throw its government out of power. Whatever the case may be, it is the people who suffer its consequences.*

*In this article, we will talk about the internationally accepted definition of terrorism, global aspect of terrorism, and a brief history of terrorism. In the second part of the article, the focus shifts to the international conventions and acts by United Nations. Moreover, we will take a look at UN global counter-terrorism strategy and its four pillars. At the end, we will examine ways to combat terrorism at a global level with the help of peace education and enforceable world laws. The focus of the article is terrorism as a global phenomenon and how it can be tackled through collective efforts and powerful world governance.*

**Keywords:** Jurisprudential trends, Terrorism, Global Terrorism Database, International Extremists, Religious objectives.

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## INTRODUCTION

It will be wrong to say that there are international laws regarding terrorism because there is no enforceable world law that is universally applicable to all the countries and people of the world. Instead, there are some common guidelines that outlines what constitutes terrorism and what does not. Countries have their own laws and acts on terrorism depending on various internal factors. A law that is not legally enforceable or has no legal sanctity and does not carry a penalty for its violation cannot be considered a law. Indeed, there is no international law on terrorism today, in that sense. Therefore, there is a need for enforceable international laws to counter international terrorism.

International lawlessness contributes to international terrorism. Terrorism is a global phenomenon and every year thousands of terrorist attacks take place around the world. People opt for violent destructive acts and violence to draw attention to their grievances, for which they feel the government does not offer any solution or remedy. Even though, they do so to highlight their own grievances, it is not acceptable to resort to violent means. On the other hand, there is state sponsored terrorism which involves attacking another country on false and propagated pretext while encouraging and assisting terrorists to cross borders and kill innocent civilians. As the popular quote goes, “one man’s terrorist is another’s freedom fighter”, it clearly indicates that terrorism can be interpreted in various ways which makes it more dangerous and infectious.

In the last six decades, an unimaginable number of people have lost their lives due to terrorism. Countries have built up massive reserve of nuclear weapons, which is over 20,000 warheads that is more than sufficient to destroy the world multiple times. Nearly 80 countries have chemical and biological weapons that can result to millions of deaths. Which is why, there is an urgent need of enforcing international laws that deals with all kinds of terrorism. What we need right now is a World Government that deals with World's issues that are not confined to one region.

### ***Terrorism – Definition***

Terrorism by definition refers to the systematic use of violence that is aimed to create a general climate of fear in the minds and hearts of the people and it may be linked to a particular political or social objective.

Terrorism is practised by certain social groups of the society which includes revolutionaries, political organizations with both leftist and rightist objectives, religious and nationalistic groups, and sometimes even by state institutions such as police, intelligence services, and armies.

In terms of the legal definition of terrorism, there is no Comprehensive Convention which outlines a universally accepted definition of the term ‘terrorism’. The concept of terrorism is such that it defies a common and straightforward legal definition. However, the statutes of various countries on Terrorism in various jurisdictions share some common elements.

According to those statutes, terrorism involves:

- Use or threat of violence
- Use of explosives and firearms
- Serious damage to property
- Serious risk to the safety or health of the public or even a section of the population
- Seeking to create fear among the population and create anxiety about the security of the state and its people
- Threat to not just direct victims of violence but also a wide audience
- It involves engaging in dramatic, violent, planned and high-profile attacks which includes suicide bombings, hijacking, kidnappings, car bombings, hostage-takings, etc.

### ***Terrorism - A Global Phenomenon***

Terrorism is a highly pervasive global problem which continues to be a serious threat to the international community. It defies police, courts, democratically elected governments, intelligence agencies, and even the United Nations. Terrorism is an infectious disease that exists across the globe and it is not confined to one region. Countries agree that international cooperation and efforts are vital to combating international terrorism. The processes of internationalization and globalization are key facets of the vexing challenge of anti-terrorist enforcement laws.

Terrorism is a global phenomenon and several factors contribute to its global nature. First, it is not restricted to any one region or State. Also, the force of its impact goes beyond any one particular region, the entire humankind faces its repercussions. Moreover, the increased mobility access to terrorists to cross borders and access communication systems like the internet or acquire resources and hide them at different places, all of this creates a global setting. At last, every terror attack is an attack on humanity and it becomes a global problem when its reoccurrences grow at a high pace.

In terms of statistics on global terror index, there is a Global Terrorism Database that provides data on the number of terrorist incidents in a year in every country. According to that report, there were 10,900 terrorist incidents in a total of 100 countries in 2017 and 13,488 terrorist incidents in a total of 104 countries in 2016. Thousands of people die every year and many get injured in these attacks.

## **HISTORY OF TERRORISM**

Throughout history, terror has been practised by state and non-state actors across the world. It dates back to 350 BCE when Greek historian Xenophon wrote about the effectiveness of psychological warfare against enemy populations. However, the term ‘terrorism’ was first used in the 1790s during the French Revolution. Since then the definition has been altered and changed as per the need of the hour.

In times of colonial rule, terror has been used by both colonies and their colonial masters in anti-colonial conflicts. In recent times, some of the most destructive organizations that engaged in terrorism had a fundamentalist religious ideology, especially in the late 20th century and early 21st century. In short, use and practice of terrorism have witnessed several changes in the past.

## **EXISTING INTERNATIONAL GUIDELINES AND CONVENTIONS ON TERRORISM: 19 INTERNATIONAL LEGAL INSTRUMENTS**

The international community has elaborated a total of 19 international legal instruments to counter terrorism and prevent terrorist acts. These 19 legal instruments were developed under the auspices of the International Atomic Energy Agency (IAEA) and the United Nations.

Here is a list of 19 international legal instruments that deals with terrorism, each of them consists of various acts, laws, and conventions that deal with terrorism at a global level.

- **Instruments regarding civil aviation**

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft
3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
4. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
5. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation
6. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft
7. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft

- **Instruments regarding the protection of international staff**

8. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons

- **Instruments regarding the taking of hostages**

9. 1979 International Convention against the Taking of Hostages

- **Instruments regarding the nuclear material**

10. 1980 Convention on the Physical Protection of Nuclear Material
11. 2005 Amendments to the Convention on the Physical Protection of Nuclear Material

- **Instruments regarding the maritime navigation**

12. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

13. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

14. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

15. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf

- **Instrument regarding explosive materials**

16. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection

- **Instrument regarding terrorist bombings**

17. 1997 International Convention for the Suppression of Terrorist Bombings

- **Instrument regarding the financing of terrorism**

18. 1999 International Convention for the Suppression of the Financing of Terrorism

- **Instrument regarding nuclear terrorism**

19. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism

## **UN GLOBAL COUNTER-TERRORISM STRATEGY**

On September 8, 2006, the Global Counter-Terrorism Strategy was adopted by the United Nations General Assembly. This strategy is a global instrument to enhance regional, national, and international efforts to fight terrorism. This strategy is reviewed every 2 years and it has been 13 years since its inception.

The strategy involves four stages and they are mentioned below:

Stage 1 - Address conditions conducive to terrorism's growth and spread

Stage 2 - Combat and prevent terrorism

Stage 3 - Strengthening the role of the UN and building States' ability and capacity

Stage 4 - Ensuring that the rule of law prevails and human rights are protected

## **WAYS TO COMBAT TERRORISM AT AN INTERNATIONAL LEVEL**

Today, the world has become a global village due to rapid developments in technology, science, and communications. People from different countries have to live in close cooperation for mutual progress inevitably, for both development and survival. The old mind set has become redundant in the current scenario and a new mind set is required for this millennium. Unity of humankind and worldwide peace is the crying need of the new age. If we look closely, there is an urgent need for a legally constituted law-making body so that they can enact enforceable World Law or International Law which will apply to all the countries and its citizens. This can be done in either of the two ways. First, by strengthening the United Nations system. Second, by creating a new body altogether to enforce international laws. Other than that, we also have to create awareness about world peace and reducing violence of all kinds. Finally, a good global governance system can bring real change in the current scenario of increasing bloodshed due to terrorism of all kinds.

## **NEED FOR ENFORCEABLE WORLD LAW TO CURB TERRORISM**

Recent revolutionary changes in the technology of communication and transport have turned our world into a global village. Today, people who live on opposite sides of the world have become virtual neighbours and new terms like 'netizens' have emerged, thanks to the internet. We live in a close-knit world today and there is a need for the formation of a new world order that applies to everybody and anybody.

As per the current scenario in the 21st century, the unification of humankind is necessary and we must not let boundaries of countries divide humanity. The boundaries need to fade as we become a global community. New enforceable international or world law must be enacted by a duly constituted and properly represented World body to ensure world peace, conserve the environment, counter-terrorism, and eliminate all weapons of mass destruction. This is the only way to safeguard the future of this world and its children. All we need is a powerful executive authority that can ensure and enforce compliance of all countries.

In order to ensure obedience and compliance to international laws, the executive body must

have the support of all the countries and nations so that the executive body can compel any state to surrender to international law and provide effective global governance. We will be able to address important problems of terrorism, human rights violations, lawlessness, and environmental degradation, drug trafficking and other global problems with the help of this executive body.

## **NEED FOR PEACE EDUCATION TO CURB TERRORISM**

In order to counter the deadly threat of international terrorism, we need unprecedented levels of global efforts and international cooperation. All the superpowers of the world need to come together alongside small countries and nations to fight international terrorism. To ensure that there is effective international cooperation in the coming years, there must be widespread effort to inculcate globalism and global cooperation in the minds of children across the world. To inculcate such morals and ethics, we need to educate our children and make them aware of concepts that encourage world peace and humanity. As only education can shape their mindset towards globalism. Only then we will be able to see a true generation of world citizens.

In order to make this happen, the schools must incorporate concepts of world peace into their syllabus. Educational institutions can help cultivate tolerance and co-existence in children. They should be taught to love the earth and all of its humans equally. Terrorism begins in the minds of the people and we can only counter it by changing their minds and bringing them closer to reality through education. A mind has to be rational and it can only be rational through education and knowledge.

Education has the ability to develop analytical abilities, release capacities, increase confidence in oneself, improve will-power and it can strengthen a vision that enables one to be a self-motivated agent of social change that serves in the best interests of the community. Social transformation is gained through education and awareness.

## **CONCLUSION**

Terrorism is a global problem and it requires concerted response from the entire international community. Besides, adopting an integrated and holistic approach at national level, we must also take a holistic approach at international level. International cooperation is required to tackle radicalization and terrorism.

International community must condemn all forms of terrorism and measures should be taken by every country to combat terrorist attacks and increase safety for citizens. Human rights and international humanitarian law must be respected at all times, to combat terrorism. Another important aspect in counter-terrorism strategy is peace education which starts by educating children and adults about peace, non-violence, and love for humanity.

Boundaries lead to differentiation and differentiation leads to conflict. Therefore, we should avoid concepts of nationalism and adopt concepts of humanity. There is a need to turn the world into a united global village where people live in peace and harmony. As we know that this is quite impossible to do as we have so much diversity in the world that countries are required to deal with regional issues. However, as an alternative, we can establish an enforceable world law that deals with terrorism of all kinds.

There should be a common definition of law and all sorts of violence should be punished under the law. Terrorism should not be seen as a freedom struggle where people are killed ruthlessly instead they should be condemned. Condemnation is key to counter terrorism. With unprecedented mutual effort from all sections of the international community, we can uproot terrorism and bring worldwide peace.

## **ADMISSIBILITY OF DEVICE RECORDED EVIDENCE IN INDIA**

Dr. Deepak Miglani\* & Divyansh Mahajan\*\*

### ***Abstract***

*The Law of Evidence is a branch of procedural law, which encompasses the rules, and legal principles of the law regulating the admissibility of Evidence in Indian courts of both civil and criminal judicature. The tools of modern technology like tape records, video films, DNA tests, Polygraph test (lie detection), etc. make the probability of arriving at the most accurate version of truth highly certain. It is a general rule in evidentiary jurisprudence that all such material shall be made admissible to make the adjudication equitable and just. Thus, device recordings can be used as evidence in a court to corroborate the statements of a person who deposes that he had specifically carried on a conversation with a particular person. A previous statement of a person who has been device-recorded can also be used to test the veracity of a witness and to impeach his impartiality. The advent of computers and the development of electronic recording technology in human lives have necessitated the need for admission of digital evidence in judicial proceedings. In this paper, we will discuss the admissibility of the device-recorded evidence in courts. We shall also discuss the various prerequisites, which need to be satisfied before making any device-recorded evidence admissible in a court of law in the eyes of civilised jurisprudence in order to prevent such evidentiary material from being negated in the process.*

**Keywords:** Device Recorded Evidence, Electronic Evidence and Admissibility etc.

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## INTRODUCTION

The Law of Evidence is a branch of procedural law, which encompasses the rules, and legal principles of the law regulating the admissibility of Evidence in Indian courts of both civil and criminal judicature. The tools of modern technology like tape records; video films, DNA tests, Polygraph test (lie detection), etc. make the probability of arriving at the most accurate version of truth highly certain. It is a general rule in evidentiary jurisprudence that all such material shall be made admissible to make the adjudication equitable and just.

Thus, device recordings can be used as evidence in a court to corroborate the statements of person who deposes that he had carried on a conversation with a particular person. A previous statement of a person which has been device-recorded can also be used to test the veracity of a witness and to impeach his impartiality. Similarly, if the court is satisfied that there is no ‘trick photography’ and the photograph is above suspicion, it may allow the photograph to be received in evidence. Evidence of ‘dog-tracking’, even if admissible, is not of much weight.<sup>1</sup>

If a statement is relevant, an accurate tape-recorded of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified. One of the features of the magnetic tape-recording is the ability to erase and re-use the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with.”<sup>2</sup>

In *Mahabir Prasad v. Surinder Kaur*<sup>3</sup>, the court held that tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposited by any of the parties to the conversation. In the absence of any such evidence, the tape cannot be used as evidence in itself.

*R. M. Malkani v. State of Maharashtra*<sup>4</sup>, in this case, the prosecution case was based solely on the tape recorded conversation, which clearly proved the appellant’s intention to obtain a bribe. The appellant’s contention was that such conversation cannot be admitted under the

<sup>1</sup> *Abdul Razak v. State of Maharashtra* AIR 1970 SC 283

<sup>2</sup> *Yusufalli v. State of Maharashtra* (1967) Bom L.R. 76 (76) (SC)

<sup>3</sup> AIR 1982 SC 1043

<sup>4</sup> AIR 1973 SC 157

provisions of Indian Evidence Act, moreover as it was ‘unlawful’. The Supreme Court held such conversation to be relevant.

The Madras High Court has in *R. Venkatesan v. State*<sup>5</sup>, considered the evidentiary value of a tape-recorded conversation,. In that case, the conversation was not audible throughout, and was broken at a very crucial place. The accused alleged that the same has not been tampered with. The accuracy of recording was not proved, and the voices were also not properly identified. In the circumstances, the court concluded that it would not be safe to rely on the tape recorded conversation as corroborating the evidence of the prosecution witness.

As regards admissibility of tape-recordings, the Bombay High Court in *C.R. Mehta v. State of Maharashtra*<sup>6</sup> has observed: “The law is quite clear that tape-recorded evidence if is to be acceptable, must be sealed at the earliest point of time, and not opened except under orders of the court.”

In *Ram Singh v. Co. Ram Singh*<sup>7</sup>, the Supreme Court has tightened the rule as to relevance of tape to this extent that it must be shown that after the recording the tape was kept in proper custody. In that case the Deputy Commissioner had left the tape with the stenographer. The Supreme Court has laid down conditions for admissibility of voice recording of a conversation in following terms:

- 1) The voice of the speaker must be identified by the maker of the record or by others who recognise his voice. Where the voice is denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker,

<sup>5</sup> 1980 Cr LJ 41

<sup>6</sup> 1993 Cr LJ 2863

<sup>7</sup> 1985 SCALE (2)1142, In this Case general election to the State Assembly held in 1982, the appellants and the respondents were the candidates. The respondent was declared elected to the Assembly. In their election petition, the appellants alleged that the respondent was guilty of corrupt practice and booth capturing in that he went to two polling booths along with 50 to 60 persons, armed with guns, sticks and swords, threatened and pressurized the voters and as a result of the serious threats held out by the respondent and his men the voters ran away without exercising their franchise; that the respondent and his companions entered the polling booths and terrorized the Polling Officer and polling agents, assaulted the polling agents at gun point, snatched away the ballot papers and marking them in the respondent’s favour, cast the votes in the ballot boxes and thumb marked the counter foil of ballot papers. They sought a declaration that the respondent’s election was void under section 100 of the Representation of the People Act 1951. A large number of witnesses were examined by both sides. The Deputy Commissioner who was the Returning Officer of the constituency recorded on a tape recorder the statements of same persons including the polling agents, the Polling Officer and the respondent and of himself.

- 2) The voice of the speaker should be audible and not distorted by other sounds or disturbances,
- 3) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence,
- 4) Every possibility of tampering with or erasure of a part of the tape recorded statement must be ruled out,
- 5) The statement must be relevant according to the rules of evidence and
- 6) The recorded cassette must be carefully sealed and kept in safe custody.

In *R.K. Anand v. Delhi High Court*<sup>8</sup> the Supreme Court was considering the admissibility of recordings on some microchips and CDs. The court found in that case that the authenticity and integrity of the Sting Operation had never been doubted or disputed. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with.

## **REQUIREMENT FOR ACCEPTANCE OF ELECTRONIC EVIDENCE**

Every piece of electronic evidence sought to be relied upon has to be accompanied by a certificate given in the manner prescribed in Section 65-B<sup>9</sup>. For admitting a statement contained in electronic record in evidence, a certificate doing any of the following things should be given:

- a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

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<sup>8</sup> (2009) 8 SCC 106

<sup>9</sup> Section 65-A of the Indian Evidence Act requires that electronic evidence may be proved in accordance with the provisions of Section 65-B.

- c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

The Certificate identifies the electronic record containing the statement and describes the manner in which it was produced. The certificate signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities whichever is appropriate shall be evidence of any matter stated in the certificate. The deponent must swear to the best of his knowledge and belief.

Objections regarding admissibility of documents which are per se inadmissible can be taken even at appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at appellate stage because it is a fundamental issue. However, mode or method of proof is procedural and objections, if not taken at trial, cannot be permitted at appellate stage. If objections to mode of proof are permitted to be taken at appellate stage by a party, the other side does not have an opportunity of rectifying deficiencies.<sup>10</sup>

In *State of (NCT of Delhi) v. Navjot Sandhu*<sup>11</sup>, one of the important pieces of evidence relied upon by the prosecution against the accused persons was the call records of the accused. The Court held that the cellular phone records of the accused were admissible in law and they would be in the nature of secondary evidence since primary evidence would be the call servers maintained by the telecom operators which would be difficult to move and produce in court. However, the Court proceeded to hold that even if the requirements of certification under Section 65-B(4) were not complied with, it would not be a bar for production of secondary electronic evidence if the evidence is otherwise admissible under the provisions of Sections 63 and 65 of the Indian Evidence Act, 1872.

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<sup>10</sup> *Sonu v. State of Haryana*, (2017) 8 SCC 570

<sup>11</sup> (2005) 11 SCC 600, This case is popularly known as Parliament Attack case which led to the conviction of the accused under the various provisions of IPC and POTA, 2002.

In *Anwar P.V. v. P.K. Basheer*<sup>12</sup> the appellant challenged the election of R-1 on the ground of corrupt practice under Section 123(4) of the Representation of the People Act in view of the publication in relation to the personal character and conduct of the petitioner or in relation to the candidature, the and announcement as part of the election propaganda of R-1. The appellant did not adduce primary evidence, by making available in evidence, the CDs used for announcement and songs. The speeches, songs and announcements were recorded using other instruments and by feeding them into computer, CDs were made therefrom which were produced in Court, without certification.

The Court held that Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as ‘Evidence Act’). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record, the purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).<sup>13</sup>

The Court also held that the evidence relating to electronic record, as noted herein before,

<sup>12</sup> (2014) 10 SCC 473: (2014) 4 KLT 104, It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

<sup>13</sup> Ibid

being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu case*<sup>14</sup>, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. The Court further said that Safeguards provided under Section 65-B are to ensure the source and authenticity of electronic records. As electronic records are more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, whole trial based on proof of electronic records can lead to travesty of justice.<sup>15</sup>

In *Shafhi Mohammad v. State of Himachal Pradesh*<sup>16</sup> the Court held that Sections 65-A and 65-B of the Evidence Act, 1872, cannot be a complete code on the subject. Threshold admissibility of electronic evidence cannot be ruled out on any technicality if same is relevant. Its authenticity and procedure for its admissibility may depend on fact situation such as whether person producing such evidence is in a position to furnish certificate under Section 65-B(4). If party producing electronic evidence is not in possession of device from which electronic document was produced, then such party, held, cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. Requirement of certificate under Section 65-B(4) being procedural, can be relaxed by court wherever interest of justice so justifies. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

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<sup>14</sup> Supra note 11

<sup>15</sup> Supra note 12

<sup>16</sup> *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of electronic evidence cannot be ruled out on any technicality if the same was relevant.

It will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same.

In *Paras Jain v. State of Rajasthan*<sup>17</sup>, the Rajasthan High Court held that : when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form.

In *Kundan Singh v. State*<sup>18</sup>, the Section 65-B certificate pertaining to the call detail records of the accused was not submitted along with the charge-sheet and was produced by the nodal officer of the telecom agency concerned during the course of his re-examination. The Division Bench of the Delhi High Court was called upon to decide as to whether under Section 65-B, the certificate was to be submitted along with the charge-sheet or if it could be produced during the course of examination. Hon'ble Supreme Court while placing reliance of *Anvar P.V. case*<sup>19</sup> held that Section 65-B does not require simultaneous certification of electronic record.

<sup>17</sup> 2015 SCC OnLine Raj 8331

<sup>18</sup> 2015 SCC OnLine Del 13647, the expression used in the said paragraph is when the electronic record is “produced in evidence”. Earlier portion of the same sentence emphasises the importance of certificate under Section 65-B and the ratio mandates that the said certificate must accompany the electronic record when the same is “produced in evidence”. To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper printout or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65-B. This is not so stated in Section 65-B or sub-section (4) thereof. Of Course, it is necessary that the person giving the certificate under sub-section (4) to Section 65-B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which “computer output” was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer.

<sup>19</sup> Supra note 12

## CONCLUSION

With the progress in the field of technology, the admissibility of secondary electronic evidence has to be looked into in the light of the principles laid down in Section 65B of the Indian Evidence Act and the proposition of law settled in the judgement of the Supreme Court in the Anwar Case which was further clarified by the judgements of the Rajasthan and Delhi High Courts as discussed above. The law now seems to be settled. If the secondary electronic device recorded evidence is not accompanied by a certificate issued in terms of Section 65-B of the Evidence Act, it is not admissible as a piece of reliable evidence. Data stored or encrypted in CDs/DVDs/Pen Drives or similar data storing devices are not admissible without a certificate under Section 65B(4) of the Indian Evidence Act. In case of computer output without such certificate, neither there can be oral evidence to prove the contents of the electronic evidence nor could the opinion of the expert under Section 45A be resorted to prove the *genuineness of the electronic evidence*. This proposition shall have serious repercussions for all those cases where the prosecution relies on the electronic data and particularly in anti-corruption cases of bribery etc. where audio-video recordings are being presented before the courts as evidence. In all such cases where the CDs/DVDs etc. are being forwarded to the courts without a certificate under Section 65B(4) of the Indian Evidence Act, such CDs/DVDs etc. shall not be admissible in evidence and further the expert opinion as to their genuineness cannot be looked into by the court. Thus, genuineness, veracity or reliability of the electronic evidence shall be seen by the court only after the stage of relevancy and admissibility. Electronic records being more susceptible to tampering, altering, transposition and excision and detection of the same being difficult, without such safeguards, the whole trial shall be antithetical to the idea of procedural fairness and justice per se.

## **EXTRADITION TREATIES IN THE LIGHT OF CONTEMPORARY SCENARIO**

Pranshul Pathak\*

### **INTRODUCTION**

Default Rule of International Extradition provides that, when an extradition treaty allows for two interpretations, one enlarging the rights of the parties under it, and the other reducing them, the construction that allows the greater rights should be preferred over the other.<sup>1</sup> But this principle was emerged during those days when those subject to extradition were not recognized to have due process rights, and at a time when extradition treaties had not evolved into the current-modern agreements that focus on protecting human rights as well as facilitating the extradition process. Because the main conditions that gave rise to the default rule have ceased to exist, it should be discarded.

The rule of Extradition originates from two sources bilateral-extradition treaties and multilateral treaties. Majority of the countries makes extradition requests through bilateral extradition treaties with foreign countries, which contain a plethora of human rights and due process protections for the individuals involved in it, commonly known as *Relators*.<sup>2</sup> The number and pervasiveness of these protections prove that the sole purpose of extradition treaties is not simply to facilitate extraditions.

Unlike regular treaties, extradition treaties are self-executing. After ratification, they are readily enforceable without the need for additional legislation.<sup>3</sup> This means that the rights afforded to relators in extradition treaties, such as the requirement of probable cause, are enforceable as if they are the part of Municipal Law.

Despite the substantial citation of the default rule by the lower courts, courts often rely on the

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<sup>1</sup> *Factory v. Laubenheimer*, 290 U.S. 276, 293-94 (1933)

<sup>2</sup> M. CHERIF Bassiouni, *International Extradition: United States Law And Practice*, (6th ed. 2014), p. 91

<sup>3</sup> (2nd Cir. 2000); see also BASSIOUNT, *supra* note 3, at 119 (“Extradition treaties are deemed self-executing and therefore do not need legislation.”). See also *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (“The Extradition Treaty has the force of law, and if as respondent asserts, it is selfexecuting, it would appear that the court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.”).

general doctrines of treaty construction to reach their conclusions. Recently, two federal courts of appeal in *Patterson v. Wagner*<sup>4</sup>, and in *Martinez v. United States*<sup>5</sup>, supported their decisions on general doctrines of treaty interpretation and a thorough consideration of the facts, rather than the default rule. These cases are particular in their substantial analysis of treaty text, the history of negotiations, and other factors such as the subsequent practice of the parties. The contrast between cases such as Patterson and Martinez, in which the courts engage in in-depth treaty construction, and those that categorically apply the default rule, show that the default rule is no longer applicable to modern extradition treaties, and that its simple application runs counter to current doctrines of treaty construction.

## LEGAL BASIS FOR INTERNATIONAL EXTRADITION

Treaty is an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.<sup>6</sup> Even though extradition treaties and the extradition statute are both legal bases for international extradition, treaties contribute more to the process as most conditions are negotiated by the party-states. When conflict-arise between an extradition treaty and the extradition statute, the later of the two must prevail as per the “last in time” doctrine. Since many of the provisions of the extradition statute are more than 150 years old, the applicable treaty will usually prevail in case of conflict. In any case, the power to extradite requires that there be a treaty or statute authorizing it.<sup>7</sup>

Extradition treaties may be “bilateral” between the countries or entity- or among various states, in which case it is called “multilateral.” The extradition statute does not specify what type of treaty is proper for extradition, so it is believed that in addition to bilateral treaties, multilateral treaties may constitute a valid basis<sup>8</sup>. Despite such flexibility, nations conduct their extradition requests mostly through bilateral extradition treaties, as they consider the bilateral treaty to be a better tool for the process.

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<sup>4</sup> 785 F.3d 1277 (9th Cir. 2014)

<sup>5</sup> 828 F.3d 451, 454 (6th Cir. 2016)

<sup>6</sup> Restatement (Third) of the Foreign Relations Law Of The United States § 301. Treaties are also commonly known as conventions, agreements, protocols, covenants, charters, statutes, acts, and declarations.

<sup>7</sup> *Valentine v. United States*, 299 U.S. 5, 8 (1936); *Terliden v. Ames*, 184 U.S. 270, 289 (1902) (“In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.”)

<sup>8</sup> Basslouni, (“In the instance where the basis for the extradition request is a multilateral international criminal law convention, the provisions of the Act would be applicable.”).

## BILATERAL EXTRADITION TREATIES CREATE INDIVIDUAL RIGHTS

Because extradition treaties do not require separate legislation for judicial enforcement in the many nations, they have been traditionally understood as self-executing. Extradition treaties' constitutional ranking is the same as statutes and thus the rights extradition treaties afford relators should be enforced by the courts with the same zealousness, they enforce the rights afforded by statutes. Unlike regular-non-self-executing treaties, extradition treaties do not constitute mere political documents subject to the whims of the Executive. Whereas the courts afford the executive branch substantial discretion in its interpretation and enforcement of international treaties, the individual rights created by extradition treaties should be strictly applied by the courts in consonance with due process and the Constitution.

According to the Supremacy Clause, the United States' Constitution, federal statutes, and treaties are "the supreme law of the land"<sup>9</sup>. Treaties and federal statutes enjoy the same ranking as law, but a lower one than the Constitution<sup>10</sup>. Despite having the same constitutional standing as federal statutes, treaties normally do not create rights that are readily enforceable. Legislation by Congress is required to enforce them, unless the treaty's language indicates the parties' intention for the treaty to have immediate domestic effect. When the treaty's language reflects such intention, the treaty is considered "self-executing" and thus requires no further legislation to be enforced in courts. The parties' intention that the treaty be self-executing, however, does not need to be stated literally.

Treaties that are not self-executing, on the other hand, are regularly construed as contracts between nations and thus mostly subject to interpretation and consideration by the political branches, not the courts.<sup>11</sup> Unless the provisions of a non-self-executing treaty are further adopted in national legislation, in compliance with the treaty's accords, its provisions will not create individual rights.

Some courts have insisted that international treaties do not create private rights: "International agreements, even those directly benefiting private persons, generally do not

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<sup>9</sup> U.S. CONST. art. VI, cl. 2

<sup>10</sup> Artemio Rivera, Probable Cause and Due Process in International Extradition, 54 AM. CRIM. L. REV. 131, 167-68 (2017).

<sup>11</sup> Foster v. Neilson, 27 U.S. 253, 314 (1829). See Alex Glashausser, What We Must Never Forget When it is a Treaty We are Expounding, 73 U. CIN. L. REV. 1243, 1255-56 (2005).

create private rights or provide for a private cause of action in domestic courts.<sup>12</sup> The Supreme Court has noted that various Courts of Appeals “*have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.*”<sup>13</sup>

But extradition treaties, as self-executing law, are not subject to the regular rules of treaty construction because they are not merely political documents. Courts have regularly recognized the private rights of relators to raise individual defenses or exceptions available in extradition treaties, and their right to be protected by due process provisions such as the requirement of probable cause.<sup>14</sup> Courts, thus, have afforded relators standing to raise treaty-based defenses or requirements, such as statutes of limitations, double jeopardy, double criminality, and political offense, against their extradition requests.<sup>14</sup>

## MULTIPLE CLAUSES PROTECTING HUMAN RIGHTS AND DUE PROCESS

Nations maintains bilateral extradition treaties with over one hundred foreign countries. Even though the extradition process is heavily weighted in favour of the requesting country, extradition treaties generally contain several clauses meant to shield relators from an unfair or arbitrary process, and to protect their human rights. The following are some of the most common clauses found in bilateral extradition treaties for the protection of relators:

1. **Dual Criminality:** Dual criminality clauses require that an offense be extraditable only “if the acts... (for which extradition is requested are) criminal (ized) by the laws of both countries.”<sup>15</sup> Dual criminality does not require countries to name their offenses the same, or that they have exactly the same elements, but rather that the charged conduct constitutes a crime in both countries. Even though there must be an analogous crime in the requested country to the crime charged in the requesting country,<sup>6</sup> ° “the elements of the analogous offenses need not be identical.
2. **Political, Military, and Fiscal Offenses:** Many treaties disallow extradition when the charged offense is related to a political, military, or fiscal issue. Some sort of political offense exception is contained in almost all extradition treaties.<sup>16</sup> Offenses that are

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<sup>12</sup> Restatement (Third) Of Foreign Relations Law Of The United States § 907 cmt. a at 395 (1986).

<sup>13</sup> *Medellin v. Texas*, 552 U.S. 491, 505-06, n.3 (2008) (citing *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001))

<sup>14</sup> *Patterson v. Wagner*, 785 F.3d 1277, 1280-83 (9th Cir. 2015); *Jhirad v. Ferrandina*, 536 F.2d 478,480 (2nd Cir. 1976)

<sup>15</sup> *Collins v. Loisel*, 259 U.S. 309, 311 (1922)

otherwise extraditable should not form the base for an extradition if they are of a political nature.<sup>16</sup> To consider whether an offense qualifies as political for the purpose of the exception, the court must first determine whether the offense constitutes a “pure” or a “relative” political offense.<sup>17</sup> “Pure” political offenses are those that are naturally related to political intercourse, such as treason, sedition, and espionage, whereas “relative” political offenses are those “common crimes that are so intertwined with a political act that the offense itself becomes a political one.” Ordinary crimes such as murder or fraud may constitute political offenses if their commission is sufficiently related to political acts such as rebellions, uprisings, and civil wars.

3. ***Statutes of Limitation:*** A statute of limitations defense may be raised against a request for extradition only if the applicable treaty provides for it,<sup>18</sup> but most current extradition treaties contain such provisions.<sup>19</sup> Their language usually allows the barring of extradition when the requesting country has not brought prosecution against the relator within the terms provided by the laws of the requesting or requested state. In such cases, the extradition magistrate is permitted to inquire into the laws of the requesting state to determine whether the statute of limitations has run or not. “Statutes of limitations are meant to “ensure due process and fundamental fairness.”<sup>20</sup> They protect the innocent from being charged at a time when they no longer have access to exculpatory evidence, and shield the public from untimely and ineffective prosecutions. The inclusion of provisions for statutes of limitations in extradition treaties is clearly meant to protect relators from untimely and potentially unfair extraditions and criminal prosecutions.
  
4. ***Double Jeopardy:*** Double jeopardy provisions are contained in most U.S. extradition treaties.<sup>21</sup> In criminal cases, the constitutional prohibition against double jeopardy is meant “to protect an individual from being subjected to the hazards of trial and

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<sup>16</sup> United Nations Model Law on Extradition.

<sup>17</sup> *Merino v. United States Marshall*, 326 F.2d 5 (9th Cir. 1963). See also *In re Patterson*, 2012 U.S. Dist. LEXIS 157843 at 8-9 (C.D. Cal. October 30, 2012) (relator is certified extraditable even though the prosecution was begun by South Korea well after the statutes of limitation for both countries had run because the wording used by the extradition treaty implied that application of the defense was optional by the requested country.).

<sup>18</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971). See also, Artemio Rivera, A Case for the Due Process Right to a Speedy Extradition, 50 CREIGHTON L. Rev. pp. 249- 255 (2017).

possible conviction more than once for an alleged offense.”<sup>19</sup> The doctrine of double jeopardy may apply in international extradition when the relator already has been prosecuted for the same facts or charges by the requesting or requested country.

Double jeopardy has been held not to apply to extradition proceedings, in terms of protecting relators from subsequent extradition requests.<sup>20</sup> This means that the denial of an extradition request does not necessarily prevent a future request for the same person by the same country. Courts reason that extradition hearings are preliminary proceedings, and thus the denial of a request for a certificate of extradition does not constitute an acquittal or a decision on the merits. But double jeopardy, or the similar civilian-doctrine of *Ne Bis in Idem*, may be used as a defense against extradition when the relator already has been prosecuted in the requesting or requested country for the same offense or facts.

**5. Remedies and Recourses Clauses:** Many treaties contain clauses that allow relators to benefit from remedies provided under the laws of the requested state. A recurrent issue with remedies and recourses clauses is whether relators can validly assert rights afforded to criminal defendants under the United States Constitution and statutes,<sup>20</sup> such as raising the Sixth Amendment Speedy Trial Clause as a defense. So far, American courts have concluded that constitutional rights afforded to criminal defendants do not accrue to relators because international extradition is not a criminal proceeding, and because the U.S. Constitution cannot be extended extraterritorially. By doing so, U.S. courts have left the purpose of these clauses undefined. Even though American courts are yet to clarify the exact purpose and meaning of remedies and recourses clauses, these clauses at least seem to recognize that relators are protected by the laws of the requested state, in addition to the protections specifically allowed by treaty. This is particularly relevant in cases where the requested country has local legislation protecting relators from unfair or inhumane treatment by requesting countries, as right and recourse clauses may be understood to integrate such rights. The inclusion of these clauses in extradition treaties also supports the

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<sup>19</sup> *Green v. United States*, 355 U.S. 184, 187 (1957)

<sup>20</sup> *Murphy v. United States*, 199 F.3d 599 (2nd Cir. 1999); *Martin v. Warden*, 993 F.2d 824 (11<sup>th</sup> Cir. 1993); *Kanrin v. United States*, 725 F.2d 1225, 1227-28 (9th Cir. 1984); *Nezirovic v. Holt*, 990 F. Supp. 2d 606, 617-19 (W.D. Va. 2014)

theory of this Article that extradition treaties are meant to protect the rights of realtors, as well as to facilitate the extradition process.

**6. Death Penalty Exception:** Bilateral extradition treaties contain at least one provision allowing the requested state to refuse extradition to a death state. These provisions are generally exercised by treaty partners whose municipal laws prohibit the death penalty, and who consider the treatment afforded in the United States to capital offenders as inhumane and torturous.

For “several decades,” European states have refused to extradite individuals to the United States without commitments by the United States that the death penalty will not be imposed.<sup>21</sup> An example of a typical death penalty clause is in the extradition treaty between the United States and the United Kingdom, which provides in Article 7, “When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.”<sup>22</sup>

**7. Extraterritorial Jurisdiction Exception:** Various extradition treaties limit the extraterritorial jurisdiction of the requesting country. Because of these treaties, requesting states are usually constrained to demand extradition only for offenses committed within their territorial boundaries unless the laws of both, the requesting and requested country, allow for the exercise of jurisdiction outside their territories under similar circumstances. The extradition treaty between Brazil and the United States is an example. It provides that “(w)hen (the) offense has been committed outside the territorial jurisdiction of the requesting state, the request for extradition need not be honored unless the laws of the requesting and requested state authorize punishment under such circumstances.”<sup>23</sup> Other treaties include language requiring the requested country to deny extradition when the alleged offense occurs outside the territory of the requesting country and the laws of the requested country would not

<sup>21</sup> Michael J. Kelley, *Aut Dedere Aut Judicare and the Death Penalty Extradition Prohibition*, 10 INT'L LEGAL THEORY 53, 59-60 (2004)

<sup>22</sup> Extradition Treaty, U.K.-U.S., art. 7, Mar. 31, 2003, 35 U.S.T. 3197, T.I.A.S. No. 10850. See also Extradition Treaty, Brazil-U.S., art. VI, Jan. 13, 1961, 15 U.S.T. 2093; United Nations General Assembly’s Model Treaty on Extradition

<sup>23</sup> Extradition Treaty, Braz.-U.S., art. IV, Jan. 13, 1961, 15 U.S.T. 2093.

confer jurisdiction under similar conditions.

**8. Humanitarian Grounds Exception:** Some extradition treaties allow the party-states discretion to refuse extradition when the age or health condition of the relator is an issue, or when there are reasonable grounds to believe the request is being made on account of the relator's race, religion, political ideas, or ethnicity. Likewise, some U.S. treaties allow the requested state to deny extradition for unspecified humanitarian reasons, and to protect the relator from unfair proceedings in the requesting country. General humanitarian grounds have been effectively raised against an extradition request in a recent British case.<sup>24</sup>

**9. Probable Cause Requirement:** Treaties generally condition extradition on a showing of probable cause that the relator committed the alleged offense. Probable cause for extradition has been defined as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." In making this determination, courts apply a 'totality of the circumstances analysis' and 'make a practical, common sense decision whether, given all the circumstances ... there is a fair probability that the defendant committed the crime.'<sup>25</sup>

## CONCLUSION

Extradition treaties are meant to facilitate the surrender of persons between nations for criminal prosecution and imprisonment while protecting those persons' human rights and right to due process. Even though extradition treaties provide a variety of individual rights, courts routinely cite the default rule for the proposition that the only purpose of extradition treaties is to facilitate extraditions, and thus treaty clauses should be read expansively in favor of extradition. The default rule should be discarded because it is grounded on false assumptions and outdated case law, and because the strong liberty interests of relators dictate that extradition treaties not be construed expansively against them. Because extradition treaties contain a variety of provisions recognizing the human and due process rights of realtors, their only purpose cannot be just facilitating extradition. These provisions, which include requirements for the establishment of probable cause, that the alleged offense

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<sup>24</sup> See Extradition Treaty, H.K.-U.S., art. 6(3)(c), Dec. 20, 1996, S. TREATY DOC. 105-3.

<sup>25</sup> In re Paberalius, 2011 U.S. Dist LEXIS 57907, at \*38 (N.D. IL May 31, 2011) (weighing evidence brought by the government against evidence presented by the relator to deny extradition request); see also United States v. Froman, 355 F.3d 882, 889 (5th Cir. 2004)

constitute a crime in the requested and requesting country, and that the offense be subject to applicable statutes of limitations, must be enforced by the courts with the same rigor of congressional statutes as extradition treaties are self-executing, requiring no separate legislation for their enforceability in the United States. The default rule should be discarded because it is based on false assumptions about its purpose and on a case that predates the development of the modern due process doctrine. The rule was adopted by the Court in 1933, at a time when the modern doctrine of due process was yet to emerge, before relators were recognized to have due process rights, and before modern extradition treaties adopted many of their current provisions meant to protect human rights and due process. Relators' strong liberty interests require that extradition treaties be either strictly construed against extradition, or at least not liberally construed in favor of extradition. Relators in international extradition face similar or greater limitations to their liberty than defendants in criminal cases. While criminal defendants face potential imprisonment and social stigma if convicted, relators face being surrendered to a foreign country for further imprisonment and criminal prosecution and losing contact with friends and family in the United States. Criminal law's rule of lenity requires that criminal statutes be construed restrictively in favor of defendants. Because of the similarity of liberty interests and potential consequences in extradition and criminal cases, treaty and statutory construction in both fields should be restrictive in favor of the individual, as the rule of lenity provides for criminal cases.

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